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E-UPDATE

August 31, 2017

RECENT DEVELOPMENTS

More Regulatory Reversals Impact Employers

This month, two more Obama-era regulatory initiatives suffered reversals – the Equal Employment Opportunity Commission's revised and expanded EEO-1 form and its wellness program regulations.

Proposed Revisions to EEO-1 Form Placed on Hold. In January 2016, the EEOC issued proposed regulations to revise the EEO-1 survey form. The original EEO-1 form sought information regarding the race, ethnicity, and sex of the workforce in 10 job categories. The proposed revisions would have added the requirement to provide aggregated data on pay and hours worked, broken down into 12 pay bands across the 10 job categories, by the same racial, ethnic, and sex groups. The proposed regulations were revised in July 2016, in part to move the annual submission period of the form from September to March. In September 2016, the EEOC issued the actual revised EEO-1 form, which was to be used beginning in March 2018.

On August 29, 2017, however, the Office of Management and Budget, which has the responsibility of reviewing all significant regulatory actions before they take effect, informed the EEOC that it was initiating an immediate stay of the pay data collection aspects of the revised EEO-1 form and would be reviewing their effectiveness. In light of this action, the EEOC stated that employers should plan to comply with the prior version of the EEO-1 form, although by the new submission deadline of March 31, 2018, rather than the traditional September 30 deadline.

EEOC Acting Chair Victoria Lipnic issued a statement, noting that she had urged the OMB to issue a decision as to the proposed regulation and form so that employers would be aware of their reporting obligations. Interestingly, she stated that she hoped the OMB's action would "prompt a discussion of other more effective solutions" to address the pay equity gap, which implies that she did not believe the proposed pay data collection would have been effective.

Wellness Program Regulations Sent Back to EEOC. In May 2016, the EEOC issued regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) regarding healthcare wellness programs that may require employees to disclose protected health information. Under these regulations, employers may provide limited incentives to employees or inducements to their spouses for answering disability-related questions or undergoing medical examinations as part of a voluntary, reasonably designed wellness program in order to earn a reward or avoid a penalty. The regulations provided that the use of a penalty or incentive of up to 30% of the cost of self-only coverage does not render "involuntary" such a program.

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The regulations were challenged by the AARP in *AARP v. EEOC*, arguing that, among other things, the EEOC had failed to sufficiently justify its reversal of its prior longstanding policy prohibiting the use of incentives and, moreover, that it failed to adequately explain how it determined that the 30% level was a reasonable measure for voluntariness.

The U.S. District Court for the District of Columbia found that the EEOC "failed to provide a reasoned explanation for its decision to adopt the 30% incentive levels in both the ADA and GINA rules." The Court noted, however, that the rules were already in effect, and that "[e]mployer health plans for the year 2017 were undoubtedly designed in reliance on these rules." Thus, the Court found that vacating the rules was not likely to restore the status quo and was, in fact, "likely to have significant disruptive consequences." Accordingly, the Court remanded the rules to the EEOC for reconsideration, while leaving them in effect for the time being.

Employers need not take any actions with regard to their wellness programs at this time, but they should be aware that changes may be forthcoming.

Third Circuit Rejects NLRB's Test for Supervisory Status of LPNs

Under the National Labor Relations Act, supervisors are not eligible to unionize and the issue of supervisory status in healthcare organizations is one that has been hotly debated over the years. The U.S. Court of Appeals for the Third Circuit handed a victory to employers by rejecting the NLRB's test for such status.

Background: In *NLRB v. New Vista Nursing and Rehabilitation*, the Director of Nursing supervised three levels of nursing staff: (1) the evening shift "nursing supervisor" and morning shift "unit manager"; (2) licensed practical nurses (LPNs) ; and (3) certified nurse aides or certified nursing assistants (CNAs). A union sought to represent a bargaining unit comprised of the LPNs, but the employer objected on the basis that the LPNs were statutory supervisors under the Act.

The U.S. Supreme Court has set forth a three-part test for establishing supervisory status: (1) the individuals hold the authority to engage in any 1 of the 12 listed supervisory functions [under the NLRA], (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." One of the twelve listed functions, and the one at issue in this case, is to "discipline other employees[] . . . or effectively to recommend such action."

The NLRB applied a four-part test to determine if the LPNs held the authority to discipline or effectively to recommend such discipline, consisting of the following: (a) whether LPNs submit actual recommendations, and not merely anecdotal reports, (b) whether their recommendations are followed on a regular basis, (c) whether the triggering disciplinary incidents are independently investigated by superiors, and (d) whether the recommendations result from the LPNs' own independent judgment. The NLRB found the LPNs did not meet these criteria, and thus were not supervisors. An election was held, in which the LPNs voted to unionize. The employer, however, refused to bargain with the union. The NLRB then issued a bargaining order, and a petition for enforcement was filed with the Third Circuit.

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The Court's Ruling: The Third Circuit found that the NLRB's test was "incompatible" with its controlling caselaw. Acknowledging that different circuits had developed different rules for addressing the question of whether LPNs in a nursing home are statutory supervisors, the Third Circuit noted that it had set forth its own guidance on this issue in the case of *NLRB v. Attleboro Associates, Ltd.* Relying on *Attleboro*, the Third Circuit identified three factors that together show supervisory status: (1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action; (2) the employee's actions "initiate" the disciplinary process; and (3) the employee's action functions like discipline because it increases severity of the consequences of a future rule violation.

The Third Circuit also specifically noted two other factors, which the NLRB had relied upon in its finding, as not disproving supervisory status: (1) whether an LPN's supervisor undertakes an independent investigation; and (2) whether the LPNs exercise their supervisory authority only a few times (or even just one time).

The Third Circuit specifically stated that it was not necessarily finding the LPNs to be statutory supervisors. Rather, it remanded the case to the Board for further determination, using the correct legal standard.

Lessons Learned: Although the Third Circuit did not issue a finding as to supervisory status of the LPNs in this case, it did offer some thoughts on the type of evidence that might be relevant in a supervisory status determination, such as if the LPN has authority to decide what "disciplinary" action to take, which could include a decision as to the level of disciplinary action, a decision that verbal counseling is the appropriate response to the employee's conduct, and even a decision to take no action in response to the employee's conduct.

Employer Not Necessarily Required to Compensate for Off-Duty Work on Mobile Devices

Addressing an employment issue of interest in an increasingly electronic world, the U.S. Court of Appeals for the Seventh Circuit found that a police department was not required to compensate police officers for performing work on their mobile Blackberry devices while off-duty.

Background: Under the Fair Labor Standards Act, employers must pay for all work that it knew or should have known was being performed. An employer is deemed to have knowledge of the work if it should have known about it through the exercise of reasonable diligence. An employer does not, however, have to compensate employees for work that it reasonably did not know about.

In *Allen v. City of Chicago*, a group of former police officers sued the police department, claiming that they were not compensated for work that they performed on their Blackberry devices while off-duty. They claimed that their supervisors knew that they sometimes performed this off-duty work, and also claimed that the employer could have known about the uncompensated work by comparing time slips to cell-phone records. The trial court dismissed their claims, and the officers appealed to the Seventh Circuit.

The Court's Ruling: The Seventh Circuit affirmed the decision of the trial court. It found that the employer had exercised diligence with regard to its knowledge of time worked by establishing a clear process by which officers could report any off-duty work performed and be paid for such work.

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Although supervisors may have known that the officers were performing off-duty work on their Blackberries, there was no evidence that they knew that the officers had not been paid for such work, given that the officers could have used the process to request pay.

In addition, the Seventh Circuit rejected the officers' argument that the employer "could" have known that the time was unpaid by comparing time slips to cell phone records. It noted that the correct standard was what the employer "should" have known and, in this case, the suggested comparison of records was not reasonable.

The Seventh Circuit also noted that a procedure to report additional time worked would not protect the employer if the employer actually prevented or discouraged such reporting – and this is a case-specific determination. In this case, however, there was no evidence that the employer had engaged in such practices.

Lessons Learned: It is important for employers to establish and educate employees on a process by which any time worked beyond the expected – including during breaks, lunchtime, or before or after work hours – can be reported and paid. It is also important that employers do not engage in any practices to discourage such reporting. Of particular note, the trial court exhibited some frustration that the employer had not implemented a clear policy on compensation of mobile device work. Employers whose employees rely on mobile devices might be well advised to address this particular subject specifically in any overtime policy.

TAKE NOTE

Reminder About Minimum Wage Increases in Maryland and D.C. As of July 1, 2017, the following jurisdictions had an increase in the minimum wage rate:

- Maryland's minimum wage increased to $9.25 per hour. With regard to tipped employees, employers must pay a base rate of $3.63 per hour and are required to make up any difference if there is a shortfall in tips up to the minimum wage rate.
- District of Columbia's minimum wage rate increased to $12.50 per hour, with a tipped wage rate of $3.33 per hour.
- Montgomery County's minimum wage rate increased to $11.50 per hour, with a tipped rate of $4.00 per hour.

On October 1, 2017, Prince George's County's minimum wage rate will increase to $11.50 per hour, with a tipped rate of $3.63 per hour.

Denial of Lateral Transfer May Be Adverse Employment Action. In order to bring a claim for discrimination under Title VII, a plaintiff must show that he was subject to a materially adverse employment action, and the U.S. Court of Appeals for the D.C. Circuit has now held that the denial of a request for a lateral transfer may constitute such materially adverse action.

Typically, courts have found that materially adverse employment actions have a direct economic impact on the employee, and the D.C. Circuit had, in fact, previously issued an opinion in this case finding that a denial of a lateral transfer, absent a change in pay and benefits, did not amount to an actionable adverse action. The D.C. Circuit, however, reconsidered its decision and in *Ortiz-Diaz v. U.S. Department of Housing & Urban Development*, found that such denial could amount to a

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materially adverse employment action. The transfers sought offered better career opportunities and would have removed the employee from the supervision by an allegedly biased manager. Thus, employers should be aware that what constitutes a materially adverse action may be broader than those with a direct economic impact.

Weingarten Right Does Not Extend to Voluntary Investigatory Interviews. The U.S. Court of Appeals for the D.C. Circuit held that a union member's Weingarten right to union representation does not extend to investigatory interviews that the employees chooses – but is not required – to attend.

Since the 1970s, the National Labor Relations Board has held that unionized employees who are required to attend an investigatory interview that they reasonably believe might result in disciplinary action are entitled to bring a union representative to the interview – this is known as their "Weingarten" right. In *Midwest Division – MMC, LLC dba Menorah Medical Center v. NLRB*, the hospital had a nursing peer review committee that examined alleged violations of the standard of care by the nursing staff and reported serious breaches to the state licensing agency. Two nurses were informed of an investigation into their conduct and were offered the opportunity to address the peer review committee. They requested but were denied union representation for their committee appearance. The D.C. Circuit found that there was no violation of their Weingarten right and clarified that this right does not apply if the employee's attendance is not mandatory, but the employee nevertheless chooses to attend the interview.

Employer May Be Liable for Harassment by Non-Employee. A recent case reminds employers that, under Title VII, they must protect their employees from harassment by outside third parties, and that their knowledge about such harassment may depend on low-level supervisors.

In *Nischan v. Stratosphere Quality, LLC*, a project supervisor was sexually harassed by the employee of one of her employer's clients, with whom she had frequent contact at the client's worksite where she was assigned. Another project supervisor observed one of the incidents of harassment and comforted the harassed employee, who had run out of the room crying. She was subsequently removed from the worksite at the request of the alleged harasser, and she filed suit. The trial court dismissed her claims, finding, in part, that the employer did not have notice of the harassment because she failed to file a formal complaint.

The U.S. Court of Appeals for the Seventh Circuit, however, found that the employer had constructive notice of the harassment because the other project manager knew of the harassment and, under the terms of the employer's harassment policy, which required those with any supervisory authority to report possible harassment, had the obligation to report the observed harassment, which she did not. Her knowledge as a supervisor – albeit a low-level one – was deemed to be the knowledge of the employer.

In addition to emphasizing employers' obligations to protect employees from outside harassment, this case emphasizes the importance of not just implementing a thorough harassment policy, but training all managers and supervisors on their obligations under the policy.

Racist Comments on Picket Line are Protected. In another decision evidencing the tension between protected activity under the National Labor Relations Act and prohibited activity under Title VII and other antidiscrimination laws, a divided U.S. Court of Appeals for the Eighth Circuit

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found that an employer violated the Act when it fired a worker on the picket line who yelled racist comments at a group of African-American replacement workers.

In *Cooper Tire & Rubber Co.*, the Eighth Circuit noted that under applicable National Labor Relations Board precedent, "a firing for picket-line misconduct is an unfair labor practice unless the alleged misconduct may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." The NLRB and courts have been reluctant to find coercive misconduct unless an individual has been singled out for mistreatment by the picketers, or where the statements contained overt or implied threats, or were accompanied by threatening behavior or physical acts of intimidation. Here, because the statements were yelled at a group of employees and were unaccompanied by threats or gestures, the Eighth Circuit found that the worker's conduct was protected.

The employer argued that it had to fire the worker in order to comply with its legal obligation under Title VII to prohibit racial harassment. The Eighth Circuit decision responded that there was no "legal obligation" to fire the worker, and suggested that the employer could have met its obligation to prevent harassment by warning the worker instead. Of particular interest, Judge Beam vehemently dissented from the majority opinion, stating that, "No employer in America is or can be required to employ a racial bigot" and he would have found racial bigotry to be unprotected by the Act. Yet, unfortunately, Judge Beam stands in the minority, and therefore employers should be aware that discriminatory conduct that seemingly warrants termination may, if it happens on a picket line, be protected.

NEWS AND EVENTS

Shawe Rosenthal Labor & Employment Conference – October 26-27, 2017. We invite you to attend our client conference at the beautiful Loews Annapolis Hotel, and to join us in celebrating our 70th anniversary at a gala dinner. Our sessions will cover a variety of labor and employment issues relevant to your workplace, including:

- State Law Trends and Update.
- Workplace Violence: Best Practices for Prevention and Response.
- The New Trump NLRB: Is There Hope for a Light At the End of This Long Dark Tunnel?
- The Potential Risks and Rewards of Cutting Edge Tech in the Workplace.
- What's in a Name? Misclassifcation Issues and How to Avoid Them.
- The "Who, What, When, Where, Why and How" of Leave under the ADA and FMLA.
- Exploring Wage and Hour Law in 2017.

We will also hold interactive small group discussions in**:**

- Best Practices for LGBT Employees in the Workplace.
- Restrictive Covenants: The Key to Protecting Valuable Business Assets.
- Internal Investigations: The Do's and Don't's of Workplace Investigations.

Our conference has been approved for 7.00 (HR (General)) recertification credit hours. We can also arrange for CLE credit.

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Attendees will also receive a complimentary copy of the 2017 Maryland Human Resources Manual, published by the Maryland Chamber of Commerce and edited by our firm, a $260.00 value.

To register or for more information, please contact Liam Preis at preis@shawe.com.

***Best Lawyers*™ Recognizes Shawe Rosenthal Attorneys**. J. Michael McGuire has been recognized by *Best Lawyers*™ as the 2018 Labor Law - Management and the 2018 Litigation - Labor and Employment "Lawyer of the Year" in the Baltimore area. In addition, nine other attorneys were also listed in *The Best Lawyers in America*© 2018: Bruce Harrison, Eric Hemmendinger, Darryl McCallum, Stephen Shawe, Gary Simpler, Mark Swerdlin, Teresa Teare, and Elizabeth Torphy-Donzella. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation.

Shawe Rosenthal Welcomes Experienced Associate. We are delighted to announce that Felix Digilov has joined us as an associate. Felix was previously an associate at Jackson Lewis, and prior to that, was an Honors Program attorney at the Internal Revenue Service, where he represented the IRS/Treasury in a variety of employment matters.

Maryland Chamber of Commerce Conference. Elizabeth Torphy-Donzella and Fiona Ong will be participating on panels at the Maryland Chamber of Commerce's annual Business Policy & Competitiveness Conference, which is taking place on September 28-29, 2017 at the Hyatt Regency in Cambridge, Maryland. Liz will be speaking about Maryland's anti-discrimination laws, while Fiona will be moderating a panel on HB1 – the paid sick leave bill. This two-day, nonpartisan conference will tackle issues that impact Maryland's economy and allow you to learn how to be a stronger advocate for your interests in Annapolis. Hear from legislators, administration representatives, business leaders and the Maryland Chamber's team. This event includes a network-building reception. For more information and to register for this conference, click here.

Webinar - *"Workplace Leave Laws: Strategies to Navigate the Changing Landscape in the US."* Our clients and other friends are invited to a free 90-minute webinar on September 14, 2017. This presentation will provide an overview of paid and unpaid leave laws governing employers in the United States. Speakers from four US jurisdictions will provide guidance and strategies to navigate the challenges of complying with varying and multifaceted laws. This is the first in a series of webinars hosted by the Employment Law Alliance (ELA), of which Shawe Rosenthal is a member, on workplace leave laws around the globe. This webinar is complimentary for ELA members, clients, and colleagues.

Local times are listed here: 2:00pm – 3:30pm EDT, 1:00pm – 2:30pm CDT, 12:00pm – 1:30pm MDT, 11:00am – 12:30am PDT. To view the complete program announcement with speaker information, please click here.

To register, please click here. Please be sure to confirm the corresponding start time in your local time zone.

If you have any questions about this webinar, please feel free to contact ELA Webinars.

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Article - "Is Setting Pay Based on Prior Salary the Same as Setting Pay Based on Sex?" Lindsey White and Parker Thoeni authored this article, which was published in the August 24, 2017 issue of The Daily Record.

Article - "Smoky Lines: Whether to accommodate employees' use of medicinal marijuana may now depend on state law." Lindsey White and Shelby Skeabeck co-authored an article that was featured as the top story in the August 23, 2017 edition of Employment Law Daily, a daily labor and employment publication issued by Wolters Kluwer.

Media – Elizabeth Torphy-Donzella Featured in Two Articles. Liz's re-appointment as General Counsel of the Maryland Chamber of Commerce was featured in articles in the August 24, 2017 editions of The Daily Record and Baltimore CityBizList.

Presentation – Darryl McCallum Was a Presenter at the Maryland Association of Counties Conference. On August 18, 2017, Darryl spoke on the topic of "The Impact of Your Hiring Practices on Your Bottom Line" at the Association's annual summer conference.

TOP TIP: Lessons from the EEOC's Lawsuit Regarding UPS' Automatic Termination Policy

UPS recently settled – for $2 million – a lawsuit brought by the Equal Employment Opportunity Commission regarding its policy that automatically terminated employees who had been on medical leave for 12 months. This case reminds employers to avoid implementation of inflexible leave policies, and the parties' consent decree further offers guidance to employers on the reasonable accommodations process. For more, click here.

The EEOC asserts that policies automatically terminating an employee after a certain period of medical leave (e.g. at the end of Family and Medical Leave, after a year on leave, etc.) violate the Americans with Disabilities Act. The EEOC states that, before terminating the employee, the employer must engage in the interactive process under the ADA to determine if there is any reasonable accommodation that can be provided to the employee – including perhaps some additional period of leave – to enable them to perform the essential functions of the job. Only if no reasonable accommodation is available may the employer then terminate the employee.

Thus, it is important for employers, prior to terminating an employee on an extended medical leave, to engage in – and to document – the reasonable accommodations process. With regard to the issue of documentation, the consent decree provides an "Accommodations Checklist" that has been approved by the EEOC. Although you may view the entire Accommodations Checklist here, we summarize the key provisions as follows:

- One section of the form, to be completed by the employee, asks for the following:
    - The employee's medical restrictions affecting the ability to perform the essential functions of the current job
    - Accommodations the employee believes would enable him to perform the essential functions of the current job
    - Other jobs at the company for which the employee believes he can perform the essential functions
    - Accommodations the employee may need to perform those other jobs

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    - Information about the employee's skills, prior work experience, training and education, which could help the company assess potential accommodations
    - How far the employee would be willing to commute for a reassignment position
    - If the employee is full-time, whether he would be willing to accept a part-time position if no other full-time reassignment or transfer positions are available
    - Limitations on the employee's ability to work particular hours or shifts
    - Whether the employee would be willing to accept a job at another of the company's facilities

- Another section of the form is to be completed by the employer, and seeks the following:
    - A listing, in chart form, of each accommodation proposed by the employee and by the company, and whether the means exist for the accommodation
    - A specific section on transfer or reassignment as an accommodation, asking for the following information, again in chart form:
        - If there are employee- or employer-identified current openings or openings that will occur within a reasonable period of time (providing 4 weeks as an example of a reasonable period)
        - Whether the employee has the requisite education, skills and experience for each opening
        - Whether the employee is capable of performing the essential functions of each opening, with or without reasonable accommodations, with an explanation of any function the employee cannot perform and why the employee cannot perform it
        - If the answers to the previous three questions is no, whether there are openings or expected vacancies at other facilities that the employee can perform

This form provides insight into what sort of information the EEOC believes to be a necessary part of the reasonable accommodations discussion. Of course, in addition to this information, the employer is entitled to seek appropriate medical information from the employee's health care provider regarding the employee's medical condition, limitations and possible accommodations.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Extraordinary Employee Excuses by Fiona Ong, August 31, 2017
- What's in a Name? Ask Robert Lee by Felix Digilov, August 24, 2017 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Workplace Lessons from Charlottesville by Fiona Ong, August 17, 2017 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Animal Subcontracting – Getting the Union's Goat! by Fiona Ong and Mark Swerdlin, August 10, 2017
- Don't Access My Emails and Tell Me It's Legal by Parker Thoeni, August 3, 2017 (Selected as a "noteworthy" blog post by the Employment Law Daily)

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