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E-UPDATE

November 30, 2017

RECENT DEVELOPMENTS

EEOC Issues "Promising Practices for Preventing Harassment"

In this climate of heightened awareness of harassment issues, the Equal Employment Opportunity Commission has issued an online resource, Promising Practices for Preventing Harassment.

The resource is based on the 2016 *Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace*. The report identifies five core principles effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.

The reports also contains various checklists to assist employers in complying with these core principles, and the promising practices now identified by the EEOC are based on those checklists. The EEOC notes that the practices are not legally required but may enhance employer's compliance efforts. The EEOC's recommendations are detailed and lengthy, but we summarize some of the more significant ones as follows, grouped by category:

Leadership and Accountability

Senior leaders should demonstrate commitment to creating and maintaining a culture in which harassment is not tolerated by:

- Clearly, frequently, and unequivocally stating that harassment is prohibited;
- Incorporating enforcement of, and compliance with, the organization's harassment and other discrimination policies and procedures into the organization's operational framework;
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks; and
- Engaging organizational leadership in harassment prevention and correction efforts.

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In addition, the EEOC recommends that senior leaders ensure that the organization has a comprehensive harassment policy that is communicated to all, has an accessible complaint system, conducts manager and employee training, and ensures proportionate discipline for violations. The EEOC further recommends that senior leaders exercise appropriate oversight of the harassment policy, complaint system, training, and any related preventive and corrective efforts, and that the leaders also seek feedback about their anti-harassment efforts.

Comprehensive and Effective Harassment Policy

The EEOC states that a policy should be regularly communicated to all employees, and should include statements such as:

- The policy applies to all levels within the organization and third parties like clients and customers;
- Descriptions and examples of prohibited conduct;
- Explanation of the complaint system, including multiple reporting avenues;
- The employer will provide a prompt, impartial and thorough investigation;
- Ensuring confidentiality to the extent possible;
- Proportionate disciplinary action will be taken; and
- Retaliation is prohibited.

The EEOC also suggests that the policy be written and communicated in clear and easily-understood language and format, be translated into all languages commonly used by employees, be provided upon hire and in trainings, be posted in various common areas and contained in the handbook, and be periodically updated.

Effective and Accessible Harassment Complaint System

The EEOC suggests that an effective harassment complaint system should include the following:

- The organization is enabled to respond promptly, thoroughly, and effectively to complaints;
- The complaint system is translated into all languages commonly used by employees;
- It provides multiple avenues of complaint;
- It provides prompt, thorough, and neutral investigations;
- It provides confidentiality, to the extent possible.
- It ensures that retaliation is prohibited and addressed.
- It includes appropriate follow up with the complainant and harasser.

The EEOC also recommends that organizations ensure, among other things, that the employees responsible for the harassment complaint system are trained, objective, and neutral, and that they have the authority to address complaints appropriately.

Effective Harassment Training

The EEOC recommends regular, interactive, comprehensive training of all employees, which should include the following aspects: support from senior leaders, easily understood and provided in languages commonly used by employees, tailored to the specific workforce,

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conducted by live and interactive trainers if possible, and evaluated by participants and revised as necessary. The EEOC suggests the actual training should cover the following:

- Descriptions of prohibited harassment and potential harassment
- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities under the law;
- Encouragement for employees to report harassing conduct;
- Explanations of the complaint process, as well as any voluntary alternative dispute resolution processes;
- Explanations of the information that may be requested during an investigation, including: the name or a description of the alleged harasser(s), alleged victim(s), and any witnesses; the date(s), the location(s), and a description of the alleged harassment;
- Assurance that employees will not be subjected to retaliation;
- Explanations of the range of possible consequences for harassment;
- Opportunities to ask questions; and
- Contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

The EEOC recommends that managers and supervisors receive additional training that includes:

- Information about how to prevent, identify, stop, report, and correct harassment;
- An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws; and
- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

Finally, the EEOC suggests that employers may consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training. This ties back to the EEOC's recent announcement that it was launching a new training program on respectful workplaces.

Montgomery County Increases Minimum Wage to $15 by 2022

Montgomery County recently passed and County Executive Ike Leggett signed a bill that will increase the minimum wage beginning July 1, 2018, and provide annual stepped-up increases to $15 by 2022 for large employers, by 2023 for mid-sized, non-profit 501(c)(3), and certain service provider employers, and by 2024 for small employers.

Currently, the minimum wage is $11.50. The first increase takes place on July 1, 2018, with large employers seeing an increase to $12.25, and mid-size and small employers seeing an increase to $12.00.

A "large employer" is an employer that employs 51 or more employees.

A "mid-sized employer" is:

- an employer that employs between eleven and 50 employees; or
- an employer that employs eleven or more employees and:

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- has tax exempt status under Section 501(c)(3) of the Internal Revenue Code; or
- provides "home health services" as defined by 42 C.F.R. § 440.70 or "home or community-based services" as defined by 42 C.F.R. § 440.180, and receives at least 75% of gross revenues through state and federal Medicaid programs.

A "small employer" is an employer that employs 10 or fewer employees.

In addition, annual increases above the $15 are tied to the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). The bill also provides for an opportunity wage equal to 85 percent of the county's minimum wage for the first six months of employment for employees under age 20.

This chart provides the schedule of increases:

Effective Date	Large Employers	Mid-Size Employers	Small Employers
July 1, 2018	$12.25	$12.00	$12.00
July 1, 2019	$13.00	$12.50	$12.50
July 1, 2020	$14.00	$13.25	$13.00
July 1, 2021	$15.00	$14.00	$13.50
July 1, 2022	$15.00 + CPI-W	$14.50	$14.00
July 1, 2023	Increased annually by CPI-W	$15.00	$14.50
July 1, 2024	Increased annually by CPI-W	$15.00 + CPI-W + 1%	$15.00
July 1, 2025	Increased annually by CPI-W	Increased annually by CPI-W + up to 1%, until equal to large employers	$15.00 + CPI-W + 1%
July 1, 2026 and after	Increased annually by CPI-W	Increased annually by CPI-W + up to 1%, until equal to large employers	Increased annually by CPI-W + up to 1%, until equal to large employers

EEOC Wins Its First-Filed Sexual Orientation Discrimination Case

A federal district court in Pennsylvania found the EEOC established that an employer had engaged in sexual orientation discrimination against a former employee in violation of Title VII. In so doing, the court added to the split among federal courts regarding whether sexual orientation discrimination is discrimination based on sex under Title VII.

On March 1, 2016, the EEOC announced that it was filing its first two sexual discrimination lawsuits based on sexual orientation discrimination. One of those lawsuits was *EEOC v. Scott Medical Health Center, P.C.*, in which the federal district court has now ruled in favor of the EEOC and awarded the maximum amount of damages permitted under Title VII. The court's ruling continues the divide among federal courts and federal agencies over the issue of whether Title VII's prohibition on sex discrimination includes sexual orientation discrimination.

At this point, the EEOC is strongly committed to the position that Title VII prohibits sexual orientation discrimination – a position that was previously supported by the Department of Justice

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under the Obama Administration. As we discussed in our August 2017 E-Update, however, in another case currently before the entire (*en banc*) U.S. Court of Appeals for the Second Circuit, *Zarda v. Altitude Express dba Skydive Long Island,* the DOJ under the Trump Administration has now reversed course and rejected the EEOC's position. Previously in that case, a panel of the Second Circuit had refused to expand Title VII coverage to include sexual orientation – a decision that is currently being reconsidered by the *en banc* court. In so holding, the Second Circuit panel joined the Eleventh Circuit, which came to the same conclusion in *Evans v. Georgia Regional Hospital*. On the other hand, in *Hively v. Ivy Tech Community College*, the *en banc* Seventh Circuit reversed an earlier panel ruling in that same case and held that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII.

Given the currently existing split among federal courts, particularly at the appellate level, it is likely that this issue is headed for the Supreme Court. Until then, employers should recognize that the approach to this issue will vary by jurisdiction – and may even change in those jurisdictions if other federal appellate courts join the Seventh Circuit in rejecting their prior position.

TAKE NOTE

OSHA Further Delays Electronic Reporting. The Occupational Safety and Health Administration is further delaying the date – now to December 15, 2017 – by which certain companies must comply with electronic reporting of injuries and illnesses.

In May 2016, OSHA issued a final rule requiring employers with 250 or more employees to submit electronically information from Forms 300 (Log of Work-Related Injuries and Illnesses), 300A (Summary of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Report). In addition, employers with 20-249 employees in specifically-identified industries with historically high rates of workplace injuries and illnesses will be required to submit electronically information from Form 300A. This electronic reporting requirement was originally to begin in July 2017, but as we mentioned in our July 2017 E-Update, OSHA pushed the implementation date to December 1, 2017. This date has now been extended to December 15, 2017. Notably, OSHA also stated that it will be submitting a proposed revision to the rule in 2018, although it did not specify which provisions of the rule will be revised.

Employers will be able to access the electronic form from a new webpage, released in August 2017, which also contains information on reporting requirements, frequently asked questions, and a link for requesting assistance.

Pay History Bans Reminder. Pay history bans in Delaware and California will soon take effect, even as other states are considering similar bills that would prohibit employers from asking about an applicant's pay history.

Delaware's law, which we discussed in further detail in our July 2017 E-Update, takes effect on December 14, 2017, while California's law takes effect on January 1, 2018. These states join Massachusetts and Oregon, which previously enacted such legislation. In addition, cities such as New York City, San Francisco, and Philadelphia have also passed similar bills (Philadelphia's ordinance is on hold pending litigation). A number of other jurisdictions are considering pay history bans, and we can expect to see more laws at the state and local level taking effect over the next

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several years. Multi-state employers in particular should carefully monitor any developments in this area.

DOT Revises Drug Testing Regulations. The Department of Transportation has issued a final rule that revises the drug-testing program for DOT-regulated employers.

DOT-regulated employers are required to drug test certain safety-sensitive transportation industry employees. Significant program changes of relevance to employers include the following:

- In order to combat the "nation-wide epidemic of opioid abuse," four semi-synthetic opioids (hydrocodone, oxycodone, hydromorphone, and oxymorphone) have been added to the drug-testing panel.
- Methylenedioxyamphetamine (MDA) has been added as an initial test analyte.
- Methylenedioxyethylamphetaime (MDEA) has been removed from the existing testing panel (the newly-added MDA is a metabolite of MDEA).
- The blind specimen requirement, under which employers and consortium/third party administrators (C/TPAs) must submit blinds to a HHS-certified laboratory for quality control purposes, has been eliminated. This requirement was deemed unnecessary and burdensome.
- Three "fatal flaws" have been added to the list of flaws that would cause a test to be canceled.
- A process for dealing with a questionable specimen in cases involving a "shy bladder" (where a second specimen cannot be obtained) has been set forth.

Wait Time Not Compensable Under Portal-to-Portal Act. The time that employees spent waiting to start work after being transported to their work site was not compensable under the Fair Labor Standards Act.

In *Bridges v. Empire Scaffold, LLC,* the employees were required to take a bus to the refinery worksite, arriving in advance of the scheduled start time (anywhere from 15 minutes to over 1½ hours). The employees could spend the waiting time in personal activities. The employees claimed that they should be paid for the waiting time. The employees argued that the court should have examined whether the time predominantly benefited the employer, and if so, such time should be deemed compensable.

The U.S. Court of Appeals for the Fifth Circuit, however, stated that this analysis did not apply in light of the Supreme Court's ruling in *Integrity Staffing Solutions, Inc v. Busk.* The Supreme Court had held that the applicable analysis is whether the activities is question were "integral and indispensable" to the employees' principal activities and therefore compensable, or whether they were non-compensable preliminary or postliminary activities. The Portal-to-Portal Act excludes compensation for activities that are preliminary or postliminary to the principal activity. In the present case, the waiting time spent in personal activities was found to be not "integral and indispensable" to the employees' principal activities of erecting and dismantling scaffolding, safety meetings, and completing safety paperwork.

OTHER NEWS AND EVENTS

U.S. News and World Report/Best Lawyers – "Best Law Firms." We are delighted to announce that Shawe Rosenthal has once again been recognized by *U.S. News and World Report* and *Best*

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Lawyers in America© in the 2018 "Best Law Firm" rankings. We were honored with a top Tier 1 ranking in the Baltimore Metropolitan Area in the areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment Law.

2017 *Maryland Human Resources Manual* Released. This year's edition of the *Maryland Human Resources Manual*, for which we serve as the editor, has been released. A joint publication of the Maryland Chamber of Commerce and the American Chamber of Commerce Resources, this practical and comprehensive legal reference can be purchased directly from the publisher here at a cost of $260.

Fiona Ong Interviewed On WBAL About Governor's Paid Leave Bill. On November 30, 2017, Fiona discussed Governor's Hogan's plan to introduce emergency legislation addressing paid sick leave in Maryland with the host of WBAL News Now, Bryan Nehman.

Elizabeth Torphy-Donzella To Serve on Board and as GC of New Maryland Chamber Foundation. Liz was voted in as a member of the Board and will also serve as General Counsel for the newly-created Maryland Chamber Foundation. The Foundation is a 501(c)(3) established to support the shared vision of a better Maryland, with priorities like research, development and education.

J. Michael McGuire and Darryl McCallum Obtain Summary Judgment in Wrongful Discharge Case. Summary judgment was granted in favor of a residential treatment center on a former employee's claims of sex discrimination. Mike and Darryl were able to get several of the claims dismissed because the employee had failed to meet the administrative prerequisite of raising those claims in a charge of discrimination before the Equal Employment Opportunity Commission. They were also able to establish that the employee was terminated for a legitimate, non-discriminatory reason, and not because of her sex.

Teresa Teare and Lindsey White Get UI Ruling Overturned. Teresa and Lindsey successfully got an adverse unemployment insurance decision vacated in Circuit Court. The court found that the UI appeals examiner had failed to consider whether the claimant was an independent contractor for the company, who would therefore not be entitled to UI benefits, and remanded the matter for a hearing on that issue. At the end of the court proceedings, however, the claimant acknowledged that she was, in fact, an independent contractor.

TOP TIP: Be Careful That Your Handbook Policies Don't Create FLSA Obligations

In drafting handbook policies, employers should be careful to ensure that they do not inadvertently create additional obligations for pay under the Fair Labor Standards Act. One employer's experience provides a cautionary tale.

In *Meadows v. NCR Corp,* the.employer's handbook created a problem for the employer, that might otherwise have escaped liability under the Portal-to-Portal Act. As discussed above, the Portal-to-Portal Act excludes compensation for activities that are preliminary or postliminary to the principal activity. The statute also provides, however, that an employer will be liable under the FLSA if it fails to compensate an employee for activities for which the employer otherwise agreed to compensate the employee through "contract, custom, or practice."

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In the present case, the handbook stated that employees would be compensated for the pre- and post-shift tasks if they took more than a minute or two. Such activities, otherwise not compensable because of the Portal-to-Portal Act, became compensable because the activities were performed under a "contract, custom, or practice."

RECENT BLOG POSTS

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

- Governor Hogan's Paid Leave Compromise Bill – What Does It Really Do? by Fiona W. Ong, November 29, 2017
- Not Liking Your Internship ≠ Compensable Work, by Shelby S. Skeabeck, November 16, 2017 (Selected as a "noteworthy" blog post by *Employment Law Daily*)
- Employee Warning – GlassDoor Posts May Not Always Be Anonymous, by Fiona W. Ong. November 9, 2017
- EEOC Highlights New Types of Race Discrimination, by Fiona W. Ong, November 2, 2017 (Selected as a "noteworthy" blog post by *Employment Law Daily*)

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