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E-UPDATE

December 29, 2017

RECENT DEVELOPMENTS

Court Vacates Incentive Provisions of EEOC's Wellness Rules, Effective 2019

The U.S. District Court for the District of Columbia, in *AARP v. EEOC*, has vacated the incentive provisions of the Equal Employment Opportunity Commission's wellness regulations, although the effective date of its order will be delayed until January 1, 2019.

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.

The regulations were challenged by the AARP, and in a prior ruling that we discussed in our August 2017 E-Update, the District Court 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 remanded the rule to the EEOC for reconsideration, but declined to vacate the incentive provisions because it believed such action would have "significant disruptive consequences" given that they had already been in effect for eight months.

Now, however, the court has reconsidered its earlier refusal to vacate the incentive provisions, but delayed the vacatur until January 1, 2019 in order to give employers time to adjust the design of their yearly wellness plans, which would not have been possible with an early 2018 effective date. The court, which clearly believes that the EEOC will revise the incentive provisions of the rules, also encouraged the EEOC to expedite its rulemaking process.

Ninth Circuit Adopts "Primary Beneficiary" Test for Intern Status Under FLSA

The U.S. Court of Appeals for the Ninth Circuit has joined the Second and Eleventh Circuits in rejecting the Department of Labor's restrictive test for intern v. employee status under the Fair Labor Standards Act, instead adopting a "primary beneficiary" test. Under this test, the economic realities of the relationship are examined in order to determine who derives the primary benefit

In *Benjamin v. B & H Education, Inc.*, the Ninth Circuit applied the seven non-exhaustive factors identified by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.* to assess whether

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cosmetology and hair design students or the beauty schools were the primary beneficiary of the relationship:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The court found that the students were not employees, even though they spent significant time performing menial and unsupervised tasks, because they were the primary beneficiaries of the educational program, at the end of which they were qualified to practice cosmetology.

Lessons Learned: The federal appellate courts have been consistent in finding that the DOL's intern test, which was articulated in a 2010 guidance under the Obama administration, does not acknowledge the realities of the business world. The current administration clearly takes a different approach, as evidenced by the actions of the DOL and the National Labor Relations Board over the past year, in rolling back some of the Obama-era pro-employee decisions and regulations. Accordingly, we would expect that the Trump DOL would not seek to apply the agency's test, and that other federal appellate courts will also adopt the *Glatt* economic realities test.

DOL Will Rescind Controversial Tip-Pooling Rule

The DOL has issued a Notice of Proposed Rulemaking to rescind a controversial 2011 regulation that, contrary to prior practice, prohibited employers from requiring tipped employees to share their tips with non-tipped employees, even where the employer does not take a tip credit against its minimum wage obligations under the Fair Labor Standards Act.

The FLSA provides that an employer may partially fulfill its minimum wage obligation to tipped employees with a "tip credit" based on tips received by the employees. The employer may also require tipped employees to participate in tip pools, by which the tips are shared among the participants. In order for the employer to take the tip credit, however, the tip pool must consist only of employees who are "customarily and regularly tipped." If the employer does not take a tip credit, the FLSA is silent on whether the tip pool may also include employees who do not customarily

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receive tips. In 2011, however, the Department of Labor issued a rule that expanded the tipped workers-only restriction for tip pools to all employers, whether or not they took a tip credit.

The DOL's regulation was the subject of considerable litigation, with federal appellate courts split on whether the DOL had the authority to issue the rule. Now, with the proposed rescission of the rule, the DOL will allow employers who do not take a tip credit towards the minimum wage to utilize tip pools that include both tipped and non-tipped employees. As before, however, employers who claim a tip credit must include only tipped employees in any tip pool.

The DOL is accepting comments from the public on the proposed rule through February 5, 2018. Comments may be submitted through the Federal Register webpage for the proposed rule. DOL will subsequently issue the final rule.

TAKE NOTE

NLRB General Counsel's Memorandum Revises Bargaining Unit Determination Standards. On December 22, 2017, the Office of the General Counsel for the National Labor Relations Board issued a Memorandum to all Regional Directors reinstating a decades-old standard for bargaining unit determinations.

As discussed in our December 18, 2017 E-lert, in *PCC Structurals, Inc*., the Board abandoned the "overwhelming community of interest" standard for determining appropriate voting units in NLRB elections that had been adopted in *Specialty Healthcare* under the Obama administration. Instead, the Board reinstated the traditional "community of interest" standard, "which permits the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an 'overwhelming' community of interests."

The GC Memorandum provides avenues for employers to have the Board "revisit" the unit determinations in any "currently active cases." It also certainly sends the message to both Regional Directors and practitioners before the Board that hearings on appropriate units will be expanded, rather than "rubber stamping" the voting units requested by unions, without the employer having a meaningful opportunity to present evidence.

Of note, this Memorandum does not undo the controversial "quickie election" procedures established by the Obama Board, which arguably was intended to facilitate unionization by speeding up the elections process, but it may be a constructive first step.

NLRB Reinstates "Reasonableness" Standard for Settlements. The National Labor Relations Board has reinstated the practice of permitting NLRB Administrative Law Judges to accept an employer's offer to settle an unfair labor practice complaint, over the objections of the NLRB General Counsel and the union, if the Board finds the proposed settlement terms to be reasonable.

In 2016, the Board under the Obama administration ruled in *United States Postal Service* that ALJs could not accept a settlement offer to which the NLRB GC and the union objected, unless the offer provided "a full remedy for all violations alleged in the complaint." This position was a rejection of the prior "reasonableness" standard articulated in the 1987 case of *Independent Stave*, to which the Board now returns in *UPMC and its subsidiary, UPMC Presbyterian Shadyside*.

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This decision was the first issued by the full five-member Board following President Trump's appointment of two Republican members, and it was quickly followed by several other decisions that overturned controversial positions taken by the Obama Board, which we addressed in our e-lerts, NLRB Overturns "Overwhelming Community of Interest" Standard and Duty to Bargain Principle (December 18, 2017) and NLRB Overturns Employee Handbook and Joint Employer Standards (December 15, 2017). These decisions followed the issuance of a Memorandum by newly-instated NLRB GC Peter Robb, in which he called into question many of the decisions and positions that had been asserted by the Obama-era Board, which we discussed in our blog post, The Light at the End of the NLRB's Tunnel? The flurry of such decisions, however, has come to a pause following Board Chair Miscimarra's departure on December 15 and pending appointment of a new Board member.

Employer Liable Under OSHA for Constructive Knowledge of Safety Hazard. The U.S. Court of Appeals for the First Circuit found that an employer had constructive knowledge of dangerous conditions in the workplace and therefore affirmed a fine imposed by the Occupational Safety and Health Administration for violations of workplace safety standards.

Under the OSH Act, employers must meet health and safety standards, and may be fined by OSHA if they violate such standards. The violations range from "de minimus," to "not serious," to "serious." In *Thomas G. Gallagher, Inc. v. Occupational Safety and Health Review Commission*, OSHA issued two serious workplace safety violations following an injury to an employee resulting from improper rigging of a pipe assembly. The employer contested the violations, arguing that it did not have knowledge of them, which is required for a finding of a "serious" violation.

As the First Circuit noted, an employer need not have actual knowledge of the violation in order for it to be "serious." Under OSHA, the employer will be liable if it had constructive knowledge of the condition – in other words, it could have known of the condition with the exercise of reasonable diligence. Moreover, for these purposes, the knowledge of a supervisor is deemed the knowledge of the employer. Thus, in the present case, the First Circuit affirmed the determination that the foreman "certainly anticipated the hazard" but "failed in his supervision" and direction of the employees responsible for the rigging. This case emphasizes the wide scope of knowledge that will be imputed to employers for purposes of OSHA liability.

Employer Liable Under Title VII for Constructive Knowledge of Co-Worker's Harassment. An employer was found by the U.S. Court of Appeals for the Second Circuit to be liable under Title VII because it had constructive knowledge of an employee's harassment by a co-worker, based in part on its knowledge of the co-worker's past inappropriate conduct.

Under Title VII, an employer is liable for co-worker harassment if it knew of the harassment and failed to exercise reasonable care to address it. In *MacCluskey v. Univ. of Conn. Health Center*, the employer argued that it should not be held liable for a dentist's harassment of a dental assistant (the dentist was not her supervisor), relying on the *Faragher/Ellerth* defense. The Supreme Court, in the *Faragher/Ellerth* cases, held that an employer would not be liable for co-worker harassment claims where it puts in place a harassment policy, the employee is informed of the policy, and the employee unreasonably fails to use the complaint procedure under the policy to notify the employer of the alleged harassment.

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The Second Circuit, however, rejected the employer's argument. Instead, it found that the employer had constructive knowledge of the harassment based upon a number of circumstances, including: the dentist had previously engaged in harassment of other employees and had been disciplined by being placed on a last chance agreement; given this background, his supervisors should have been monitoring him more closely; the assistant's supervisor knew of the dentist's inappropriate conduct towards the assistant based on the assistant's complaints to her other co-workers; the assistant's confirmation to the supervisor that there was a "situation" and the supervisor's failure to follow up.

The lesson here is that employers cannot escape Title VII liability for co-worker harassment simply because the employee fails to make a formal complaint under a harassment policy. Other circumstances may exist that obligate the employer to investigate further or take other action to ensure that harassment is not occurring.

OTHER NEWS AND EVENTS

hrsimple.com Webinar – "Marijuana in the Workplace." On Wednesday, January 17, 2018 at 1:00 p.m. EST, Fiona W. Ong and Parker E. Thoeni will present this complimentary webinar on behalf of hrsimple.com, the publisher of the Maryland Human Resources Manual and similar publications in other states. Fiona and Parker will discuss:

- The interaction of federal drug laws with state laws
- Whether reasonable accommodations are required under state medical marijuana laws, with a particular focus on recent court decisions that have changed the playing field
- How state "legal off-duty conduct" laws come into play

To register for this webinar, click here.

Shawe Rosenthal Attorneys Recognized by Super Lawyers. We are pleased to announce that ten of our individual attorneys have been recognized by Super Lawyers, a national rating service of outstanding lawyers. Our 2018 Super Lawyers honorees are Bruce S. Harrison, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, and Elizabeth Torphy-Donzella. In addition, Super Lawyers selected Parker E. Thoeni and Lindsey A. White as "Rising Stars." Shawe Rosenthal attorneys were recognized in the areas of "Employment & Labor" and "Employment Litigation: Defense." Attorneys are selected for recognition based on independent research, peer nominations, and peer evaluations. The honorees are deemed to be in the top 5% of practitioners in the state.

Harassment Prevention Toolkit. What does the "#MeToo" movement mean for your workplace? As allegations and admissions of sexual harassment by prominent men in politics, entertainment, media and other industries have surfaced over the past few months, employers are reconsidering the steps they take to prevent harassment in their workplaces. Shawe Rosenthal partners with employers to take effective steps to prevent sexual harassment and ensure compliance with applicable discrimination laws. We invite you to take advantage of our Harassment Prevention Toolkit:

1) Customized training for management (1.5 hours)
2) Review of harassment policies and procedures
3) Management desktop checklist
4) One hour of attorney time

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We are offering the Toolkit as set forth above for $2,500. Should you require additional training and/or advice, we are happy to discuss your needs further.

In addition to the Toolkit, we provide management and/or employee training on a variety of employment laws, perform investigations, advise employers on how to respond to internal complaints, and defend employers in administrative investigations and litigation. Please contact Lisa Mangus or your preferred Shawe Rosenthal attorney for more information.

Darryl McCallum Wins Summary Judgment in Federal Discrimination Case. Darryl successfully defended a concrete contractor against a claim that an employee was terminated in retaliation for complaining about an inappropriate racial remark between two other employees. Darryl was able to establish that the termination was unrelated to the employee's complint and based on legitimate performance and conduct issues.

Mark Swerdlin and Parker Thoeni Win Dismissal of Federal Discrimination Case. Mark and Parker won a Motion to Dismiss/Motion for Summary Judgment on behalf of a school bus company against a former employee alleging discrimination based on religion, national origin, and disability. The U. S. District Court for the District of Maryland found that the Plaintiff's Complaint did not state a plausible claim of discrimination and therefore dismissed the action. While the case was ongoing before the district court, the Plaintiff filed an interlocutory appeal to the Fourth Circuit, which was also dismissed.

Eric Hemmendinger Authors Article, "Do you understand the federal overtime rules? Many employers don't." Eric's article was featured in the Baltimore Business Journal on December 5, 2017.

TOP TIP: The Tax Bill – Employment-Related Highlights

The Tax Cuts and Jobs Act that was signed into law by President Trump is a massively complex piece of legislation, containing a number of employment-related provisions. While the actual implementation of these provisions has yet to be fully fleshed out through regulations, we summarize here some of the highlights.

- **Paid Family and Medical Leave Tax Credit**. Employers providing between two to twelve weeks of paid family and medical leave, at a minimum of 50% of the employee's regular wages, will be entitled to take a tax credit of between 12.5-25% of the cost of the leave, depending on the level of benefits paid. Paid leave benefits must be offered to both full- and part-time employees who have worked at least one year. This credit applies only to employees earning less than $72,000. This tax credit is available only in 2018 and 2019.
- **Nondisclosure Provisions in Sexual Harassment Settlements**. Employers will not be able to deduct, as an ordinary and necessary business expense, any settlements of payments related to sexual harassment or sexual abuse, or associated attorneys' fees, if the settlement or payment is subject to a nondisclosure agreement.
- **Repeal of the ACA Individual Mandate.** A tax penalty will not be imposed on individuals for failing to obtain health insurance coverage. This does not affect employers' existing obligations to offer health coverage and to comply with reporting obligations.

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- **Non-deductibility of Penalties for Legal Violations.** Previously, businesses were unable to deduct any amount paid directly to the government in relation to a violation of any law or investigation into a potential violation. This has been expanded to include such payments to others at the direction of the government or specified non-governmental entity. Payments made as restitution or to come into compliance with the law are excluded from this provision, however.
- **Commuting Benefits.** Employers will no longer be able to deduct for mass transit and parking benefits, except for expenses necessary to ensure the safety of an employee.
- **Achievement Awards.** Length-of-service awards, safety awards, and awards given during "meaningful presentations" are no longer deductible if they are cash, cash equivalents, gift cards, gift coupons, gift certificates, vacations, meals, lodging, theater or sports tickets, stock, bond, other securities or similar items.
- **Moving Expenses.** Employer-paid moving expenses will no longer be deductible. This provision applies from 2018 through 2025.
- **Onsite Gyms.** Payments to fund onsite gyms will no longer be deductible.
- **Other Fringe Benefit Deductions.** Employers will no longer be able to deduct as a business expense the following fringe benefits: an activity generally considered to be entertainment, amusement or recreation; membership dues with respect to any club organized for business, pleasure, recreation or other social purposes; or a facility or portion of a facility used in connection with the prior two items.
- **Executive Compensation.** Publicly-held companies may not deduct more than $1 million annually in compensation for each of their senior executive officers, and the tax bill eliminates the exemption to this limit for commission- and performance-based pay. It also adds Chief Financial Officers to the covered officers.

RECENT BLOG POSTS

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

- Some Highlights from the EEOC's Latest Strategic Plan by Lindsey A White, December 28, 2017 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- NLRB Overturns "Overwhelming Community of Interest" Standard and Duty to Bargain Principle by Fiona W. Ong, December 18, 2017
- NLRB Overturns Employee Handbook and Joint Employer Standards by Fiona W. Ong, December 18, 2017
- Be Careful Asking About Employees' (Non)Prescription Drug Use by Fiona W. Ong, December 14, 2017 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- The Light at the End of the NLRB's Tunnel? by Fiona W. Ong, December 6, 2017

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