SHAWE ROSENTHAL LLP

E-UPDATE

March 30, 2018

RECENT DEVELOPMENTS

New Tax Law Amends FLSA Tip Pooling Provision

The tip pooling provision of the Fair Labor Standards Act, which has been the subject of much controversy, was amended as part of the omnibus budget bill that was passed by Congress on March 21, 2018.

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 was silent on whether the tip pool may also include employees who do not customarily receive tips.

In 2011, 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. The DOL then announced a proposed rescission of the rule, but this announcement came under fire when it was discovered that the agency withheld an unfavorable economic analysis in its proposed rulemaking.

Now, reportedly in a deal with Secretary of Labor Acosta, Congress has amended the FLSA to state:

> An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

The FLSA's penalty provisions were also amended accordingly. It is likely that the DOL will issue further guidance on the application of this new amendment.

Sixth Circuit Holds That Title VII Prohibits Transgender Discrimination

In a development of major significance, the U.S. Court of Appeals for the Sixth Circuit found that discrimination based on transgender status constitutes sex discrimination under Title VII.

Facts of the Case: In *EEOC v. R.G & G.R. Harris Funeral Homes, Inc*, a funeral home employee, who had previously presented as a man, informed her employer that she would be living and

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working as a woman for a year in preparation for sex reassignment surgery. She was subsequently fired. The funeral home owner asserted that he could not support the idea of sex as "a changeable social construct rather than an immutable God-given gift."

The Equal Employment Opportunity Commission sued the employer. The federal trial court found that the EEOC stated a claim for sex-stereotyping under Title VII, but that transgender status is not protected by Title VII. It also found that the EEOC could not enforce Title VII against the funeral home, as doing so would substantially burden the employer's exercise of religion in violation of the Religious Freedom Restoration Act. (Of interest, the employee moved to intervene in the case for purposes of the appeal, as she was concerned that the EEOC may not fully represent her interests given the change in administration).

The Court's Ruling: On appeal, the Sixth Circuit agreed with the trial court that the employee was terminated in violation of Title VII for her failure to conform to sex-stereotypes. The Sixth Circuit expanded on its ruling and held that discrimination on the basis of transgender and transitioning status was necessarily discrimination on the basis of sex under Title VII. It further noted that discrimination on the basis of transgender status could not be disaggregated from discrimination on the basis of gender nonconformity.

In addition, the Sixth Circuit rejected the employer's RFRA argument, finding that compliance with Title VII did not substantially burden the employer's religious practice. According to the Sixth Circuit, "bare compliance with Title VII – without actually assisting or facilitating [the employee's] transition efforts – does not amount to an endorsement of [her] views."

Lessons Learned: Like recent federal appellate court decisions that have found sexual orientation to be covered by Title VII's prohibitions on sex discrimination, this case continues the expansion of the definition of "sex" under Title VII. Although it appears that the Trump administration is reversing the progressive position taken by the Obama EEOC and DOJ on this issue, courts have lately been willing to effect this change in interpretation, and employers should be prepared for other federal appellate courts to follow this lead.

DOL Announces Voluntary PAID Program to Resolve FLSA Violations

The U.S. Department of Labor announced its Payroll Audit Independent Determination pilot program, by which employers may proactively resolve potential violations of the minimum wage and overtime provisions of the Fair Labor Standards Act. News of the program has been received with some skepticism, however.

Under the program, employers may conduct a self-audit of pay practices. (Employers currently under investigation or complaint are not eligible for the program). If an employer discovers potential minimum wage or overtime violations, it may then contact the DOL to participate in the PAID program. The employer would provide certain information regarding the pay violations to the DOL, which would then calculate the back wages owed. The DOL would provide form settlement agreements for distribution to the affected employees, along with the calculated payments.

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According to the DOL, the benefit of the program is the expeditious resolution of claims without litigation and increased compliance with overtime and minimum wage obligations. The business community, however, has questions about the possible detrimental effects.

For example, the employer would be inviting the DOL to review admitted violations – and only "inadvertent" violations are protected by the program. There is no guarantee that the DOL would deem these violations to be inadvertent, and it could possibly expand the scope of an investigation beyond the self-disclosed issues.

Moreover, there is nothing that requires the employee to accept the proffered backpay. Employees could, in fact, file their own lawsuits and seek additional compensation permitted under the FLSA beyond the backpay.

In addition, the program only addresses FLSA violations, and not those under state wage laws. Conceivably, an employee could accept the payments under this program yet still be free to seek additional relief under state laws.

Whether there is an actual benefit to employers from participating in the program appears to be an issue that is yet to be resolved. We caution employers to consult with counsel before jumping into the program. More information about the program is available from the DOL's webpage.

NLRB Releases Additional Advice Memos

Following last month's release of a slew of advice memoranda, as we reported in our February 2018 E-Update, the National Labor Relations Board's Office of the General Counsel (OGC) has now released additional advice memoranda. As before, some of these memos were originally prepared years ago, but they were not released to the public until this month. Of particular interest are the following:

- *EZ Industrial Solutions, LLC* (August 30, 2017). The OGC found that the employer violated the National Labor Relations Act by discharging 18 employees for participating in the 2017 "Day Without Immigrants" national protest. The employees' protest constituted a protected strike under Section 7 of the NLRA, which protects concerted activities for employees' mutual aid or protection. Specifically, the protest was intended to improve working conditions affected by the Trump administration's immigration policies and over which the employer had some control (mainly through possible interactions with Immigration and Customs Enforcement). Alternatively, even if the protest were not a protected strike, the OGC found that the employer applied its attendance policy in a discriminatory manner to justify terminating the employees for engaging in protected concerted activity.

- *Postmates, Inc.* (February 12, 2018). The OGC stated that an employer had not been properly served with an NLRB charge. After attempted hand-delivery failed, the charge was emailed to the employer. However, under the Board's rules, service may be made by email only "with the permission of the person receiving the charge," which had not been obtained.

TAKE NOTE

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OFCCP Issues Directive on Use of Predetermination Notices. The Director of the Office of Federal Contract Compliance Programs has issued a directive that is intended to establish the consistent use of Predetermination Notices (PDNs) in compliance evaluations.

As explained by the OFCCP, a PDN is a letter that informs contractors of a preliminary finding of individual or systemic employment discrimination and, where the contractor has not provided adequate explanations, provides them with an opportunity to respond to such finding before a Notice of Violation is issued. Responses must be provided within 15 calendar days. While PDNs have been utilized sporadically in the past, the directive is "part of OFCCP's efforts to achieve consistency across regional and district offices, increase transparency about preliminary findings with contractors, and encourage communication throughout the compliance evaluation process."

No Title VII Liability Where Employer Had No Time to Address Harassment Complaint. The U.S. Court of Appeals for the Fourth Circuit found that an employer was not liable for a co-worker's hostile environment harassment of an employee where the employee resigned before the employer had the chance to address her complaint.

In *Cooper v. The Smithfield Packing Co.*, the Fourth Circuit found that the employer maintained a sexual harassment policy, conducted training, and provided a hotline for employees to report concerns anonymously. Nonetheless, the employee failed to report the harassment for years, and only reported the harassment a few days before she resigned. The Fourth Circuit found that the employer never had the chance to address her complaint, and therefore was not liable for the alleged harassment. This case emphasizes the importance, legally and practically, of developing, distributing and training employees on a comprehensive and effective harassment policy.

Participation in Leave Donation Program Would Not Have Allowed Employee to Perform Essential Function of Her Job. The U.S. Court of Appeals for the Tenth Circuit found that an employee's request to utilize donated leave would not have enabled her to perform an essential function of her job – physical attendance – and therefore it was not a reasonable accommodation under the Americans with Disabilities Act.

In *Winston v. Ross*, the employee, who suffered from several different ailments, exhausted all of her sick leave. She was granted a flexible work schedule, but her request to telecommute was denied because her position required her in-person presence. Eventually, the employee was unable to continue working and her employment was terminated, She then sued for disability discrimination under the ADA, which requires employers to provide reasonable accommodations to enable a disabled employee to perform the essential functions of her job.

The Tenth Circuit found, however, that the employee was not qualified to perform the essential functions of her job because the reasonable accommodation that she requested – to participate in the donated leave program – "would allow her to be away from work for health reasons, but it would not enable her to fulfill the essential function of physical attendance."

Employee May Not Refuse Religious Reasonable Accommodation Options. An employee who refused to consider or failed to take advantage of available accommodations for his religious need to not work on the Sabbath failed to state a claim under Title VII, according to the U.S. Court of Appeals for the Eleventh Circuit.

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In *Patterson v. Walgreen Co.*, the employer shifted the employee's regular schedule to minimize conflict with the Sabbath. But because of emergency operational needs, the employer could not guarantee that the employee would never be assigned to work on his Sabbath. The employee was permitted to swap shifts with other employees on those occasions. On one Sabbath, the employee was scheduled for emergency work. He contacted one employee, but when she could not swap with him, he failed to contact any of the others who were potentially available, and the work was not done. Afterwards, human resources suggested that the employee return to his prior position or seek another position that could better accommodate his Sabbath. He refused to do so, and after the employer determined it could not accommodate his absolute insistence to not work on the Sabbath, he was terminated.

The Eleventh Circuit found that the employer had met its obligations under Title VII by providing a regular work schedule that minimized the conflict with the employee's Sabbath and by permitting him to find other employees to cover any Sabbath assignments. According to the Eleventh Circuit, the employer was not required to ensure that the employee could always swap his shift or to order others to work in his place. The court also noted the employee's refusal to consider other options, such as a different job. As the court noted, the employer is not required to give the employee a choice of accommodations or his preferred accommodation, as long as an accommodation that is reasonable is provided.

Tardiness Is Not Notice of Need for FMLA Leave. The U.S. Court of Appeals for the Seventh Circuit rejected an employee's contention that her uncharacteristic tardiness on five occasions over eight months was notice of a serious health condition under the Family and Medical Leave Act.

The employee in *Guzman v. Brown County* was terminated for attendance violations, following a written warning. At the termination meeting, she provided a doctor's note stating that she "most probably" has sleep apnea for which she needed to be re-tested. She sued, claiming interference with her FMLA rights, specifically arguing that the employer had notice of her need for FMLA leave because of her uncharacteristic tardiness.

The Seventh Circuit noted that her incidences of tardiness were not "the sort of stark and abrupt change which is capable of providing constructive notice of a serious health condition," while also remarking upon the fact that the employee had also provided non-medical reasons for her tardiness. Moreover, the decision to terminate was made before she provided any information about her possible sleep apnea.

Under the FMLA, the employee does not actually have to reference the FMLA or state that he has a serious health condition – he only needs to provide sufficient information for the employer to recognize that he may have a condition covered by the FMLA. While the court applied a sensible approach to the present circumstances in finding that no notice had been provided, this case also reminds employers to be thoughtful about an employee's repeated absences for the same health-related reason.

OTHER NEWS AND EVENTS

The Daily Record selected Gary L. Simpler to receive the 2018 Leadership in Law Award. Leadership in Law Awards recognize Maryland's legal professionals – lawyers and judges – whose dedication to their occupation and to their communities is outstanding.

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Conference - Gary L. Simpler and Lindsey A. White will present a session on "Sexual Harassment: The "#METOO" Movement" at the Maryland Healthcare Human Resources Association Spring Conference, which takes place on April 18, 2018 at the Conference Center at the Maritime Institute in Linthicum Heights, Maryland. Registration is open to all, and you may register for the conference here.

Teresa D. Teare was interviewed by WBAL's John Patti on March 28, 2018, on the issue of sexual misconduct in the workplace.

Teresa D. Teare was quoted in a CityBizList article, "Language, Jokes Are Most Common Types of Sexual Misconduct in the Workplace" (March 22, 2018). The article discussed a #MeToo/Sexual Harassment in the Workplace Survey that was conducted by the Employment Law Alliance, an exclusive worldwide network of firms practicing labor and employment law, of which Shawe Rosenthal is the Maryland member.

Darryl G. McCallum was extensively quoted in an American Bar Association *Litigation News* article, "Trend in Medical Marijuana Suits Favors Employees," by C. Thea Pitzen (March 15, 2018). Darryl discussed the impact of recent court developments on how employers address the use of medical marijuana by employees.

Fiona W. Ong was featured in "If I Knew Then," an ongoing series by Crain's Baltimore that asks executives, entrepreneurs and business leaders about mistakes that have shaped their business philosophy.

Gary L. Simpler spoke to students at the University of Maryland School of Law on March 1, 2018 as part of a panel that discussed pathways to an employment law practice. He also served as a volunteer judge for the Fourth Round of the Maryland Regional Mock Trial Tournament held at Stevenson University on February 25, 2018. In addition, he served as a volunteer juror for a University of Maryland – Baltimore County Mock Trial Team intra-School scrimmage on March 8, 2018 to assist both teams in the next round of competition as both teams advanced from the Stevenson tournament.

TOP TIP: Guidelines for a Valid No-Solicitation/No-Distribution Policy

A recent case provides a good reminder about the parameters of a valid no-solicitation policy. In *Dish Network, LLC v. NLRB*, the U.S. Court of Appeals for the Tenth Circuit found that the employer's termination of an employee for violation of an illegal no-solicitation policy violated the National Labor Relations Act. This leads to the question – what are the rules that apply to no-solicitation and no-distribution policies?

According to the National Labor Relations Board, the following guidelines apply:

- Employees may be prohibited from distributing any materials during his or her working time;
- Regardless of whether they are on working time, employees may be prohibited from distribution of materials in working areas.

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- Employees may be prohibited from soliciting another employee during his or her working time or during the other employee's working time;

- For health care and retail employers, employees may be prohibited from soliciting another employee at any time in certain working areas (such as patient care areas or retail sales floors).

- "Working time" includes all time during which an employee is assigned to or engaged in the performance of job duties, but does not include scheduled breaks or meal periods during which time the employee is not assigned to or expected to perform any job duties. In addition, it does not include the time before and after the employee's shift.

- "Working areas" include all areas where work is actually performed, but does not include areas such as break rooms, parking lots, locker rooms, and employee cafeterias.

- Non-employees are not permitted to solicit employees or distribute written material on Company property at any time.

RECENT BLOG POSTS

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

- Recuse Me? Why the NLRB's Order Vacating the *Hy-Brand* Decision Should Not Stand, by Gary L. Simpler, March 22, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily).
- No FMLA for Pet's Death, by Fiona W. Ong, March 16, 2018 (Featured on hrsimple.com)
- Does Apple's New HQ Violate OSHA?, by Elizabeth Torphy-Donzella, March 8, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily).
- Along the Spectrum, by Elizabeth Torphy-Donzella, March 2, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily).

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