SHAWE ROSENTHAL LLP

E-UPDATE

April 30, 2018

RECENT DEVELOPMENTS

2017 Maryland General Assembly Employment Legislation Update

During the Maryland General Assembly session that ended in April 2018, Shawe Rosenthal lawyers again worked with the Maryland Chamber of Commerce to oppose or moderate legislation that would adversely affect employers. Several employment-related bills were passed by the General Assembly, and Governor Hogan either has signed or is expected to sign them.

HB 1596/SB 1010 – Disclosing Sexual Harassment in the Workplace Act of 2018

The law prohibits an employer from requiring a waiver of future sexual harassment or retaliation claims and prohibits an employer from taking adverse action against an employee for refusing to enter into an agreement with such a waiver. The law does not prohibit agreements permitted under federal law, which would include arbitration agreements under the Federal Arbitration Act. The prohibitions apply to agreements executed, extended or renewed after October 1, 2018.

The law also contains a reporting provision, by which employers with 50 or more employees must submit an electronic survey on or before July 1, 2020 and on or before July 1, 2022 that contains:

- the number of sexual harassment settlements made (it is unclear over what period and whether only Maryland settlements are covered),
- the number of settlements paid to the same employee over the past 10 years, and
- the number of sexual harassment settlements containing a confidentiality provision (again, it is unclear over what period and whether only Maryland agreements are covered)
- Whether personnel action was taken against an employee who was the "subject" of a settlement (it is unclear if this means the harasser or the victim or both)

The Maryland Commission on Civil Rights will post the aggregate number of responses for each item and make specific employer responses available for public review. The Commission will prepare a summary of a random selection of each set of surveys six months afterwards for submission to the Governor, the House Economic Matters Committee and the Senate Finance Committee. The reporting provision has a sunset date of June 30, 2023.

SB 853 – General Contractor Liability for Unpaid Wages

This law makes general contractors on construction projects jointly and severally liable for wage payment violations committed by a subcontractor. The subcontractor is required to indemnify the general contractor for wages, damages, interest, penalties or attorneys' fees resulting from the subcontractor's violation unless there is an indemnification provision in any contract between the

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two or the violation occurred because the general contractor failed to make timely payments to the subcontractor in accordance with the terms of any contract between the two.

SB 134 – Small Business Relief Tax Credit (for Earned Sick and Safe Leave)

The Maryland Healthy Working Families Act (MHWFA), which took effect in February 2018, requires employers of 15 or more employees to provide paid sick and safe leave, while smaller employers must provide unpaid leave. In order to encourage those smaller employers to provide paid leave, SB 134 provides a tax credit against the employer's state business income tax.

In order to qualify for the tax credit, the employer must employ "qualified employees," who are individuals earning wages equal to or less than 250% of the annual federal poverty guidelines for a single-person household (currently $12,140), and the employer must provide paid leave benefits in accordance with the MHWFA. The allowable tax credit will be the lesser of either (1) $500 per qualified employee, or (2) the total amount of the paid leave benefits accrued by all qualified employees. If the credit exceeds the employer's state income tax for the year, the employer may claim a refund.

The law also sets up a mechanism for employers to apply for a tax credit certificate. Regulations will be issued to implement the law and to set forth the criteria and procedures for the application for, approval of, and monitoring of continuing eligibility for the tax credit.

DOL Releases New FLSA Opinion Letters and Fact Sheet

The Department of Labor (DOL) has released three new opinion letters on the Fair Labor Standards Act (FLSA), addressing (1) travel time, (2) rest breaks under the Family and Medical Leave Act, and (3) lump sum payments as "earnings" subject to garnishment. Opinion letters respond to a specific wage-hour inquiry from an employer or other entity to the DOL, and represents the DOL's official position on that particular issue. Other employers may rely on these opinion letters. The DOL also released a fact sheet that summarizes the applicable exemptions to typical jobs in higher education.

Travel Time: Under the FLSA, normal commuting time to and from work is not considered compensable working time. As for overnight travel away from home, employees must be compensated for such time for those hours that correspond to their normal work hours, but need not be compensated for travel time as a passenger outside normal work hours. If the employee is required to drive, all travel time is compensable.

In Opinion Letter FLSA 2018-18, the DOL first addresses the issue of compensability of overnight travel for employees who do not have normal work hours. The DOL notes that this type of situation will be closely scrutinized, since a careful review of records "usually reveals work patterns sufficient to establish regular work hours." In those rare situations where there are no normal work hours, the DOL offers different methods for determining compensable travel time. One is to review the employee's time records for the most recent month and see if there is a pattern of typical work hours, which the employer may then utilize going forward. The employer can also choose the average start and end times. Another method is for the employer and employee/employee's representative to negotiate and agree to the compensable travel time. The DOL notes that there may be other methods as well.

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The DOL also states that if an employee chooses to drive rather than be a passenger, the employer may choose to compensate for the driving hours or for the time that would have counted as hours worked if the employee were a passenger. (Note that if the employer requires the employee to drive, all driving hours are considered hours worked).

Further, the DOL states that the time spent traveling between an employee's hotel and the work site to which they are temporarily assigned is ordinary non-compensable home-to-work travel.

The second situation involves an employee who is required to come to the office to get job itineraries before traveling to a customer location, and the third situation involves employees who drive from home to multiple customer locations during the day. The time spent traveling from home to the office or first work site is non-compensable commuting time, but travel between job sites, including the office, is compensable travel time. The DOL notes that the use of a company vehicle does not affect this analysis.

Rest Breaks for a Serious Health Condition: Under the FLSA, rest breaks of up to 20 minutes in length are generally considered to be compensable time, because they are deemed predominantly to benefit the employer. In Opinion Letter FLSA2018-19, however, the DOL recognizes that some short breaks predominantly benefit the employee, and are therefore not compensable. Specifically, the DOL stated that short breaks because of a serious health condition under the Family and Medical Leave Act fall into this category. Moreover, the FMLA provides that leave may be unpaid, without exception for breaks under 20 minutes. The DOL also notes that breaks that are provided as a reasonable accommodation under the ADA similarly predominantly benefit the employee and are noncompensable. The DOL goes on to state, however, that the employee with a serious health condition must be given the same number of paid breaks as other employees, even if those breaks are being used to address their health needs.

Garnishment of Lump Sum Payments: In Opinion Letter CCPA2018-INA, the DOL addresses whether certain lump-sum payments from employers to employees are earnings for garnishment purposes under Title III of the Consumer Credit Protection Act (CCPA). The DOL notes that this issue turns on whether the payments are being made for the employee's services, in which case they would be considered such earnings. The DOL then sets forth a list of lump-sum payments that will be considered earnings for purposes of the CCPA:

- Commissions
- Discretionary and nondiscretionary bonuses
- Productivity or performance bonuses
- Profit sharing
- Referral and sign-on bonuses
- Moving or relocation incentive payments
- Attendance, safety, and cash service awards
- Retroactive merit increases
- Payment for working during a holiday
- Workers' compensation payments for wage replacement
- Termination pay (e.g., payment of last wages, as well as any outstanding accrued benefits)
- Severance pay that is tied to the employee's length of service

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- Back and front pay payments from insurance settlements (e.g. workers' compensation or wrongful termination insurance settlements). The non-pay portions from such settlements would not be considered earnings.

On the other hand, the buyback of company shares would not be considered earnings, as they are a "flexible way of returning money to shareholders relative to dividends."

Overtime and Minimum Wage Exemptions for Higher Education Employees: The DOL also issued a new Fact Sheet # 17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA). The FLSA provides for exemptions to the minimum wage and overtime requirements for certain executive, professional and administrative employees (i.e. the "white collar" exemptions). In order to qualify for these exemptions, the employee must be paid on a salaried basis. The Fact Sheet reviews the applicability of the white collar exemptions to typical jobs in higher education institutions:

- Professors, instructors, and adjunct professors whose primary duty is teaching, even if they spend considerable time in extracurricular activities, are covered by the teacher exemption. This may include those who teach remotely or online.
- Coaches who instruct student-athletes in how to perform their sport are also covered by the teacher exemption, but not those whose primary duties are recruiting or student interviews.
- Certified public accountants, psychologists, certified athletic trainers, and librarians typically meet the professional exemption. The DOL also notes that postdoctoral fellows conducting research meet this exemption, and may also qualify for the teacher exemption if teaching is their primary duty.
- Admissions counselors or student financial aid officers meet the general administrative employees exemption.
- There is also a more specialized academic administrative personnel exemption, and this includes department heads, intervention specialists, and academic counselors.
- Deans, department heads, directors meet the executive exemption.

In addition, the DOL notes that certain student-employees are not subject to the minimum wage and overtime requirements of the FLSA.

- Graduate teaching assistants whose primary duty is teaching meet the teacher exemption.
- Research assistants performing research under faculty supervision while obtaining a degree are not employees, even if they receive a stipend.
- Residential assistants who are enrolled students and who receive reduced room or board charges or tuition credits are not employees.

TAKE NOTE

Past Salary Cannot Justify Wage Differential Under Equal Pay Act. Overturning its decades-old precedent, the U.S. Court of Appeals for the Ninth Circuit has ruled that an employee's past salary is not a "factor other than sex" that provides a legitimate basis for a wage differential under the Equal Pay Act.

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The Equal Pay Act prohibits sex-based discrimination in compensation, and requires equal pay for equal work. The law recognizes legitimate pay differentials based on seniority, merit, the employee's quantity or quality of work, and "any other factor other than sex." In 1982, the Ninth Circuit found that prior salary was such a factor, and a panel of that same court came to the same conclusion in *Rizo v. Yovino*, which was issued in 2017. The full court was asked to revisit that opinion and has now reversed the panel opinion and overturned the 1982 decision, holding that prior salary cannot constitute a legitimate "factor other than sex," as it could perpetuate existing disparities based on sex.

The Ninth Circuit's ruling sets up a circuit split with the Seventh Circuit, which has come to the opposite conclusion, and this issue may ultimately need to be resolved by the Supreme Court.

Offering Employee Work Is Not FMLA Interference. The U.S. Court of Appeals for the Fifth Circuit held that an employer's offer to the employee to perform some work from home in lieu of taking unpaid leave did not constitute interference with the employee's rights under the Family and Medical Leave Act.

In *D'Onofrio v. Vacation Publications, Inc.*, the employee argued that she was required to perform the work, but the court held that, "[g]iving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment." Employers choosing to provide this option, however, must be careful to ensure that the employee does not feel pressured to work as that may then constitute interference with the employee's FMLA rights.

Employee May Be Fired for Prescription Drug Intoxication at Work. An employee who was intoxicated on a new prescription drug could be terminated for violating the company's drug and alcohol policy, according to the U.S. Court of Appeals for the Eleventh Circuit.

In *Caporicci v. Chipotle Mexican Grill, Inc.*, the employee, who suffered from bipolar disorder, notified her manager that she was changing medications. Her work performance was admittedly affected by her medications, and she was subsequently terminated for being intoxicated at work in violation of company policy. The court found that this was a legitimate reason for her termination and not a pretext for discrimination against her disability under the Americans with Disabilities Act and state disability law.

Shortened Statute of Limitations for Arbitration Agreement Is Enforceable. The U.S. District Court for the District of Maryland held that an arbitration agreement containing a shortened one-year statute of limitations to file an arbitration claim over any employment-related disputes is enforceable, resulting in the dismissal of the employee's lawsuit.

In *Bracey v. Lancaster Foods, LLC*, the employee was required, as a condition of employment, to sign an arbitration agreement that had a one-year statute of limitations for bringing employment-related claims. When he was terminated, he filed a charge with the Equal Employment Opportunity Commission, which took several years to be resolved by the EEOC. Upon receiving his notice of right to sue from the EEOC, he filed suit. The employer filed a motion to dismiss and compel arbitration.

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The court noted that, under Maryland law, requiring an applicant to sign an arbitration agreement as a condition of employment constitutes a contract of adhesion and is procedurally unconscionable. However, for that agreement to be invalid, it must also be substantively unconscionable, which this agreement was not, because parties can agree by contract to shorten statutory limitations periods. The court found that the shortened one-year statute of limitations was enforceable, and that waiting to exhaust the EEOC's charge process did not excuse the failure to request arbitration in a timely manner. Additionally, the court awarded attorneys' fees to the employer because the agreement provided for such an award where one party seeks relief in a judicial forum and the other party prevails in having that matter dismissed.

New Jersey Enacts Sick and Safe Leave Law and Expands Equal Pay Protections. New Jersey enacted two employment-related laws – one that requires employers to provide paid sick and safe leave and another that expands the protections of the already-existing equal pay law.

A 1827 requires all employers to provide earned sick leave to all employees (with a few exceptions for construction employees covered by a collective bargaining agreement, per diem health care employees, and certain public employees), accrued at a rate of 1 hour for every 30 hours worked up to 40 hours a year. This paid leave may be used for: personal or family illness, injury or preventive care; absences due to domestic violence towards the employee or family member; the closure of the workplace or child's school because of a public health emergency or quarantine of the employee or family member; attending school-related meetings, functions and events. The law also contains requirements as to employee notice and verification of the need for leave. It prohibits retaliation for requesting or using leave, and contains requirements for employers regarding notice to employees and recordkeeping.

SB 104 amends the equal pay law to prohibit pay differentials for substantially similar work based on any characteristic protected by the state anti-discrimination law, and not just sex. Differentials may be based on certain legitimate job-related factors. The law also protects employees' ability to disclose and discuss their compensation. It further expands the limitations period for the filing of claims to up to six years, and increases the possible damages.

New York Enacts Sexual Harassment Laws. The recently-signed budget bill in New York imposes a number of sexual harassment-related obligations on New York employers. Specifically:

- Employers are required to conduct annual anti-harassment training and to distribute anti-harassment policies, both of which must meet certain statutory requirements. The State Department of Labor and Division of Human Rights will provide a model policy and a training module that may be used, or the employer may develop its own. (Effective October 9, 2018)
- Non-disclosure or confidentiality provisions in sexual harassment settlement agreements are prohibited unless the complainant prefers to have one. The complainant must be given 21 days to consider such a provision, and 7 days after signing an agreement containing the provision in which to revoke it. (Effective July 11, 2018)
- Mandatory arbitration agreements as to sexual harassment claims are prohibited. There is an exemption for arbitration agreements that are part of a collective bargaining agreement. (Effective July 11, 2018; arbitration agreements entered into prior to that date are still in effect)

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- The protections against sexual harassment under the NY Human Rights Law are expanded to cover "non-employees" such as contractors, subcontractors, vendors, consultants, and others providing services pursuant to a contract. (Effective immediately)
- Contractors bidding on state contracts must affirm in their bids that they have sexual harassment policies and conduct annual sexual harassment training. (Effective January 1, 2019)

Revised Veterans' Hiring Benchmark for Government Contractors. The Office of Federal Contract Compliance Programs has announced an updated hiring benchmark for veterans of 6.4%, based on recently-released data from the Bureau of Labor Statistics.

Under revised Vietnam Era Veterans' Readjustment Assistance Act regulations effective in March 2014, covered government (sub)contractors must set a veterans hiring benchmark for each of their establishments, either by using the OFCCP's benchmark as set forth in its VEVRAA Benchmark Database, or by developing their own individualized benchmarks. The current 6.4% figure represents a slight decrease from the previous year's 6.7% benchmark. The annual benchmark will be updated again in Spring 2019.

NEWS AND EVENTS

Elizabeth Torphy-Donzella authored an article, "*T-Mobile, Inc. v. National Labor Relations Board*: Why the Perilous Choice Is Best," which was published in the May 2018 issue of Bender's *Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Mark J. Swerdlin won an arbitration for a skilled nursing facility. Mark was able to establish that the union member was terminated for just cause in accordance with the Employee Handbook and the Collective Bargaining Agreement. The arbitrator's award was especially significant because the discharged employee was a union delegate.

Gary L. Simpler and Lindsey A. White presented a session on "Sexual Harassment: The "#METOO" Movement" at the Maryland Healthcare Human Resources Association Spring Conference, which took place on April 18, 2018.

Shelby Skeabeck moderated a panel, on which Lindsey A. White served as a panelist, at the annual American Bar Association National Symposium on Technology in Labor and Employment Law, which took place in San Francisco on April 11-13, 2018. The topic of the panel was "How Robotics are Enhancing the Workforce."

Darryl G. McCallum authored an article, "Addressing Negligent Hiring and Retention Claims," that was published in the April 4, 2018 edition of the daily legal newsletter, Law360. The article addresses an employer's potential liability for negligence claims brought by third parties based on injuries caused by employees.

TOP TIP: Shawe Rosenthal Exclusive - More from the DLLR on Earned Sick and Safe Leave

As you may know, Shawe Rosenthal has been closely monitoring the implementation of Maryland's Healthy Working Families Act, which requires employers to provide earned sick and safe leave

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(SSL). Maryland's Department of Labor, Licensing & Regulation has been issuing some guidance and FAQs on their website, but there are still many questions. Our firm developed a long list of such questions, to which the DLLR has responded and which we would like to share with you. Some particularly notable points from the DLLR's responses include the following:

- The law provides that an employer is not required to modify an "existing paid leave policy" that permits an employee to accrue and use leave under terms and conditions equivalent to the law. The DLLR states that if such an existing policy contains notice requirements that are more onerous than the law's provisions (e.g. 14 days advance notice for scheduled SSL, rather than the statutory 7 days), those requirements violate the law because they may interfere with the employee's use of SSL. (Q&A No. 6c)

- The law contains an exemption for employees who work on an "as needed" basis in the health and human services industry, as long as (1) they can accept or reject the shift," (2) they are not guaranteed to be called on to work, and (3) they are not employed by a temporary staffing agency. According to the DLLR, employees who must work a certain number of shifts in a certain period of time (e.g. 1 shift a month) are "guaranteed" to be called into work and therefore do not meet the statutory exemption. (Q&A No. 8)

- Under the law, an employer can deny SSL if notice is not provided and the absence will cause a "disruption to the employer." According to the DLLR, a "disruption" is more than a minor inconvenience. (Q&A No. 16)

- In providing the required statement of available SSL with each paycheck, if an employer has clearly communicated in writing to employees that it will refer to SSL as "PTO," it could reference "PTO" rather than SSL. (Q&A No. 18) Note, however, that if only a portion of PTO is allocated towards SSL, this may not be acceptable.

- The DLLR suggests that if requested verification is not provided, the employer cannot deny SSL for that instance even though it could deny it for future requests for the same reason. (Q&A No. 22)

- The DLLR says that employers may require employees to use available SSL if they are absent for an SSL reason, even if the employee would prefer not to do so. (Q&A No. 23)

- The DLLR says that an employer may have a neutral policy that is uniformly enforced, such as a requirement that an employee work the day before a holiday in order to be paid for the holiday. (Q&A No. 24)

Also of note, a colleague at another organization asked the DLLR about the situation where an employee does not have enough SSL to cover a full day absence, and received the following response: "If the employee does not have sufficient SSL to cover the absence, the employer can use their attendance management procedures for the time not covered by SSL hours." In other words, the employer may count the unprotected portion of the absence as an occurrence under the attendance policy, for which discipline may be imposed.

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RECENT BLOG POSTS

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

- When the FLSA and the ADA Meet …, by Fiona W. Ong, April 20, 2018.
- New York City Proposes Right to "Ignore Your Boss" Law, by Teresa D. Teare, April 13, 2018 2018 (Selected as a "Noteworthy" blog post by Employment Law Daily).
- DOL Provides Clarification on FLSA Tip Pooling Amendments, by Fiona W. Ong, April 9, 2018.
- Burning a Customer Is Not the Appropriate Response to Harassment, by Fiona W. Ong, April 5, 2018.
- Yoga Is Not a Reasonable Accommodation, by Fiona W. Ong, March 30, 2018 (Selected as a "Noteworthy" blog post by Employment Law Daily).

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