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E-UPDATE

July 27, 2018

RECENT DEVELOPMENTS

Trump DOL Offers Guidance on Independent Contractor Status

Although specifically addressing the caregiver registry industry, the Department of Labor's Field Assistance Bulletin "Determining Whether Nurse or Caregiver Registries Are Employers of the Caregiver" offers general insight into the Trump DOL's approach to independent contractor status,

This Bulletin follows the DOL's withdrawal last summer of a 2015 DOL Administrator's Interpretation on the topic that had been issued under the Obama administration and that expansively asserted "most workers are employees under the FLSA's broad definitions." The DOL now retreats to a historical "economic reality" approach, in which it reviews the "totality of the circumstances to evaluate whether an employment relationship exists."

In determining whether a caregiver registry (which acts as a "matchmaker" between clients and caregivers) is the employer of the caregiver, or whether the caregiver is an independent contractor, the DOL has set forth a non-exhaustive list of factors. This list, however, offers general guidance to all employers on what are some of the factors that should be considered in the assessment of independent contractor status, as follows:

- **Conducting Background and Reference Checks**. The performance of basic or legally required background checks does not suggest employer status. The evaluation of other subjective criteria, however, implies the pre-selection of caregivers, which argues in favor of employer status.
- **Hiring and Firing**. If the client actually hires or fires the caregiver, without input from the registry as to the terms and conditions of the caregiver's employment, this indicates that the registry is not the employer. If the registry exercises control over these functions, at the request of a client, for example, then this suggests employer status.
- **Scheduling and Assigning Work**. Similarly, if the client determines the work schedule and assignments for the caregiver, this indicates the registry is not the employer. On the other hand, if the registry assigns specific caregivers to a client based on its discretion and judgment, this control over the caregiver indicates employer status.
- **Controlling the (Caregiver's) Work**. If the registry instructs caregivers on how to provide services, or monitors their work, this suggests employer status. Registries could also exercise control indicative of employment by limiting the number of clients or hours served by the caregiver, prohibiting the caregiver from registering with other registries, or prohibiting the caregiver from working directly with clients outside the registry.
- **Setting the Pay Rate**. If the registry is not determining the rate of pay, this indicates the lack of an employment relationship. The registry can provide advice about appropriate pay rates

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derived from market information. It may also act as a liaison between the caregiver and client by relaying offers and counteroffers.

- **Receiving Continuous Payments for (Caregiver) Services**. Fees based on an initial referral or administrative efforts are not indicative of employer status; fees based on hours worked by the caregiver are so indicative.
- **Paying Wages**. A registry may perform payroll-related functions without creating an employer relationship, as long as the wages are paid directly by the client or through an escrow fund. Payment of funds directly by the registry, even if reimbursed by the client, however, indicate employer status.
- **Tracking (Caregiver) Hours**. Tracking and independently verifying time worked indicates employer status. The collection of timesheets for purposes of payroll processing does not implicate employer status.
- **Purchasing Equipment and Supplies**. If the registry purchases equipment for the caregiver, or directs the purchase of specified equipment and supplies, or pays for licensing and training, this suggests employer status.
- **Receiving EINs or 1099s**. The fact that a caregiver has an Employer Identification Number (EIN) or receives 1099s from the registry is not determinative of independent contractor status.

And More NLRB Advice Memoranda…Policies, Non-Disclosure Agreements and Outsourcing

A steady stream of Advice Memoranda continues to issue from the National Labor Relations Board's Office of the General Counsel (OGC), following up on what we reported in our February 2018, March 2018, May 2018 and June 2018 E-Updates. Seven more memos were issued on July 13, 2018, although the dates that they were originally composed range from 2014 to last month. Of particular interest are the following:

- *Lyft, Inc.* (June 14, 2018). Utilizing the Board's new balancing test set forth in *The Boeing Company*, which we discussed in a December 2017 E-Lert, the OGC found that the company's intellectual property policy and confidentiality policy to be "Category 1" rules – meaning that they are lawful. As to the intellectual property rule, which prohibited employee use of the company's logos without express written approval, the OGC noted that companies have a significant interest in protecting their intellectual property, including valuable trademarks and logos, and preventing employee postings from appearing to be official due to the use of the logo. The OGC also found the company's confidentiality policy, which prohibits disclosures of "technical, financial, strategic, and other proprietary information," including "user information" (i.e. driver and rider information), to be reasonably interpreted by employees as not prohibiting activity protected under the National Labor Relations Act (NLRA), including the discussion of wages and other working conditions.
- *Kumho Tires* (June 11, 2018). There was no violation of the NLRA when the employer terminated an employee for violating its social media policy. The employee's sharing of a photo of a team leader's bonus request form with a social media group of other employees during a union organizing campaign would normally constitute protected concerted activity. Her conduct, however, was unprotected because the employee knew the form had been improperly obtained by a fellow employee.

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- *PrimeSource Building Products* (Oct. 20, 2017). The OGC found that an employer's lawsuit against former employees seeking to enforce a non-disclosure provision in their employment agreements violated the NLRA. The non-disclosure provisions were overbroad, in that they prohibited the disclosure of "employee information," in contravention of the employees' Section 7 rights to discuss the terms and conditions of their employment.
- *United States Postal Service* (May 21, 2015). The USPS violated the NLRA when it unilaterally entered into an agreement with Staples to outsource bargaining unit work to be performed by Staples employees in Staples stores. The outsourcing of bargaining unit work is a mandatory subject of bargaining.

Full-Time Presence at Work Is Not Necessarily an Essential Function of the Job?

In a somewhat unsettling decision, the U.S. Court of Appeals for the Sixth Circuit held that "full time presence at work is not an essential function of a job simply because an employer says that it is." Interestingly, this seems to run counter to the Americans with Disabilities Act regulations, which state that evidence of whether a job function is essential includes, first, "The employer's judgment as to which functions are essential."

Facts of the Case

In *Hostettler v. College of Wooster*, an HR generalist took 12 weeks of maternity leave. Because she suffered from severe postpartum depression and separation anxiety, she requested and received approximately 4 weeks of additional leave and then a part time schedule, working until noon. For the two months following her return to work, the employee contends that she was able to do everything required of her position, even on a part-time schedule. A colleague agreed that the employee was able to complete her work on the modified schedule, and also performed much of her work from home. The employee's supervisor gave her a positive evaluation at some point during this period.

What the supervisor did not say to the employee was that her modified schedule put a strain on the supervisor and the department. There were a number of tasks that the employee did not perform, which had to be covered by the supervisor or left undone, although the supervisor did not identify them.

The employee sought to extend the period of part-time work for several more months, while potentially extending her hours to 2 or 3 p.m. However, she was terminated for being unable to return on a full-time basis. The employee sued, and the trial court dismissed her case, on the basis that full-time work was essential to her position, and she was therefore not qualified for the position.

The Court's Ruling

On appeal, the Sixth Circuit held that whether the job required the employee's full-time presence was a question for the jury, despite the employer's contention that it was. There was evidence from the employee and her colleague that she was able to complete all of her work on the modified schedule, as well as the positive review from the supervisor. On the other hand, the supervisor testified that the employee's modified schedule put a strain on the department.

The Sixth Circuit stated that, "[o]n its own, however, full-time presence at work is not an essential function. An employer must tie time-and-presence requirements to some other job requirement."

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Noting that the employer may have preferred full-time presence and that "it may have been more efficient and easier on the department if she were," the Sixth Circuit went on to state, nonetheless, "those are not the concerns of the ADA." Rather, employers are required to provide reasonable accommodations, including modified work schedules, and "an employer cannot deny a modified work schedule as unreasonable unless the employer can show *why* the employee is needed on a full-time schedule."

The Sixth Circuit also found that the employer had failed to engage in the required interactive process with regard to the employee's request to extend her modified schedule. Although it was clear that the parties met four times, it was unclear what was discussed during those meetings.

Lessons for Employers

This case offers several important lessons for employers. First, although employers do have the right to define the essential functions of a position, they also need to be able to offer an explanation as to why those functions are essential. Second, employers should be clear about the effect of an employee's absence on business operations; in this case, it appears that the supervisor may not have fully explained or shared where there were operational impacts. And finally, documentation is critical. In this case, there was no documentation as to the challenges experienced by the employer as a result of the absence, and no documentation as to the interactive process following the employee's request for an extension of her modified schedule. Accurate, contemporaneous documentation may have resulted in a more favorable outcome for the employer.

TAKE NOTE

Comments About Employee's Accent Support National Origin Discrimination Claim. A Maryland federal court found that a supervisor's comments about an employee's accent in the context of her unsuccessful application for promotion may be evidence of discrimination based on her national origin. In *Bacchus v. Price*, the court acknowledged that concerns about an employee's ability to communicate may be legitimate; however, where such concerns are unsubstantiated, they could constitute a discriminatory animus. In this case, the employee was from Guyana and her native language was English. Further, there had never previously been complaints about her communication skills.

Valet Uniforms May Be "Materials" for Purposes of FLSA Enterprise Coverage. In a decision that broadens the reach of the Fair Labor Standards Act, the U.S. Court of Appeals for the Eleventh Circuit held that valet uniforms could be "materials" that trigger enterprise coverage for a car valet service. Under the FLSA, an "enterprise" is covered if it "has employees handling, selling, or otherwise working on good or materials that have been moved in or produced for interstate or international commerce by any person." The Eleventh Circuit had previously defined "materials" as "tools or other articles necessary for doing or making something" that has "a significant connection with the employer's commercial activity."

In *Asalde v. First Class Parking Syst. LLC*, the Eleventh Circuit found that the uniforms were used in the performance of the valet service, as they offered a way for customers to identify the valets to whom they would entrust their vehicle. As such, the uniforms were essential to the commercial activity of a valet service. Finally, because the uniforms were made in other countries, they could meet the requirement of movement in "international commerce." As the dissent noted, this

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interpretation of "materials" "would make virtually every business that uses items not locally made subject to the FLSA."

Court Holds NLRB Must Tie Employee's Discharge to Anti-Union Animus. The U.S. Court of Appeals for the Eighth Circuit held that the National Labor Relations Board misapplied the standard for determining when an employee's discharge violates the National Labor Relations Act because of an employer's anti-union animus. Under the Act, an employer may not discharge an employee for activities protected under the Act, but may discharge workers for any other activities unrelated to the Act. Under the *Wright Line* analysis, the Board's General Counsel must first show that an employee's protected conduct was a substantial or motivating factor in the employer's decision. If the General Counsel makes this showing, then the burden shifts to the employer to show that it would have taken the same action regardless of the protected activity.

In *Tschiggfrie Properties, Ltd v. NLRB*, the Eighth Circuit found that the Board misapplied *Wright Line* when it held that the General Counsel does not have to establish a nexus between the anti-union animus and the discharge. The case was remanded back to the Board to reconsider whether the General Counsel could make the appropriate showing.

Of further interest, the Eighth Circuit also declined to adopt the NLRB's per se rule that questioning a co-worker in preparation for the unfair labor practice (ULP) hearing concerning the employee's discharge was unlawfully coercive, where specific safeguards were not met. In *Johnny's Poultry Co.,* the Board held that, in interviewing an employee in preparation for an ULP hearing, an employer must provide the employee "with assurances against reprisals" and "inform him that his participation … was voluntary," and the failure to do so automatically rendered the interview unlawful. The Eighth Circuit noted that it, and other circuit courts, have rejected the Board's *per se* rule, and instead will look at the totality of the circumstances to determine if the interview is coercive.

OSHA Proposes to Rescind Electronic Reporting Requirements. The Occupational Safety and Health Administration has issued a Notice of Proposed Rulemaking to rescind the majority of controversial electronic reporting requirements.

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 are required to submit electronically information from Form 300A. This electronic reporting requirement was originally to begin in July 2017, but was subject to several delays, and then a May 2018 announcement by OSHA that it would not accept the submission of Forms 300 and 301; Form 300A was required to have been submitted by July 1, 2018.

In its NPRM, OSHA proposes to rescind the requirement for larger employers to electronically submit Forms 300 and 301. OSHA seeks comment on its NPRM, particularly its empact on worker privacy (the forms required reporting on individual workers' injuries and illnesses), as well as its proposal to require covered employers to submit their Employer Identification Number (EIN) with their data submission.

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There will be a 60-day notice and comment period from July 30. You may submit comments electronically by clicking on the "Submit a Formal Comment" button on the Federal Register webpage for the proposed rule. It is unclear when OSHA will subsequently issue the final rule.

NLRB Launches Pilot Program to Enhance Use of Alternative Dispute Resolution. The National Labor Relations Board announced a pilot program that increases the opportunities for parties to participate in its voluntary, no-cost Alternative Dispute Resolution (ADR) program. The Board's Office of the Executive Secretary will engage with parties in pending cases to determine if the matter is suitable for ADR. Parties may also request to be placed in the program, and can withdraw at any time. According to the NLRB's news release, this program "can provide parties with more creative, flexible and customized settlements of their disputes."

OSHA Releases New Guidance on Temporary Workers. The Occupational Safety and Health Administration released two new temporary worker guidance documents that further emphasize the shared responsibility of staffing agencies and host employers for the temporary workers' safety and health. These documents, relating to respiratory protection and to noise exposure and hearing conservation, are part of OSHA's Temporary Worker Initiative. OSHA takes the position that temporary workers are jointly employed by the staffing agency and the host employer, and the guidance documents address what both the staffing agency and the host employer can do to ensure that temporary workers are appropriately protected in accordance with OSHA standards.

NEWS AND EVENTS

We are delighted to announce that Lindsey A. White has become a partner of Shawe Rosenthal. Lindsey joined us from the Equal Employment Opportunity Commission, where she served as a Senior Trial Attorney and was appointed as the Senior Attorney Advisor/Special Assistant to Commissioner Charlotte Burrows. Before joining the EEOC, Lindsay was a judicial clerk for a federal judge in the U.S. District Court for the Western District of Louisiana. Lindsey graduated magna cum laude from the University of Maryland School of Law and currently serves on its Alumni Board. She also was named as a Rising Star in 2018 by Super Lawyers, and is a 2014 recipient of the Daily Record's Leading Women award. Lindsey is the President of the Mt. Washington Improvement Association.

It is also our pleasure to announce that two new associates have joined our firm – Courtney Amelung and Alexander Castelli.

- Courtney joins us from a regional full-service law firm, where she was a litigation associate. After graduating from the University of Maryland School of Law *cum laude*, where she served as the Notes and Comments Editor for Law Review, Courtney clerked for the Honorable Magistrate Judge Beth P. Gesner in the U.S. District Court for the District of Maryland.
- Before joining Shawe Rosenthal, Alex practiced at a regional civil litigation firm where he focused his practice on insurance defense, including employment discrimination defense. Alex also served as a judicial law clerk for the Honorable Jeannie J. Hong of the Circuit Court for Baltimore City. Alex graduated *magna cum laude* from the University of Baltimore School of Law, where he was the Articles Editor of Law Review and competed on the National Moot Court Team.

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Teresa D. Teare was a panelist for a July 12, 2018 webinar, Sexual Harassment Among the Global Workforce: An HR Perspective in the United States, presented by the Employment Law Alliance, an international alliance of firms practicing labor and employment law, of which Shawe Rosenthal is the Maryland member. Topics covered in the presentation, which may be accessed through the link above, included:

- The definition of sexual harassment as set forth by local laws
- Actions employers can take to prevent sexual harassments in the workplace
- Best practices and policies to put in place to protect those who report a sexual harassment
- Recommendations for training and development for human resource professionals
- Tips on how to conduct an investigation into an alleged sexual harassment incident

A manufacturing client was issued a serious citation by the Occupational Safety and Health Administration for excessive noise in the plant. J. Michael McGuire and Elizabeth Torphy-Donzella appealed the citation because: (1) there was no dispute that the employer's hearing preservation program was effective (no reported hearing loss and all employees correctly using hearing protection), (2) despite actions that the employer had taken, the noise level could not be appreciably reduced, and (3) OSHA had not identified what the employer could do to achieve a lower noise level. Normally, OSHA negotiates a reduction in the citation but, in this instance, the Area Director to her credit agreed to withdraw the citation.

Fiona W. Ong was quoted in an article, "Labor board's handbook guidance eases employer concerns," that was published on BusinessInsurance.com on July 3, 2018. Fiona commented on the National Labor Relation Board's return to a common-sense approach to handbook rules that better balances the interests of workers and business.

Fiona W. Ong was also quoted in "What's Working in Human Resources," a semi-monthly newsletter for human resources professionals. Fiona offered advice on how to establish the essential job functions of a job position under the Americans with Disabilities Act.

TOP TIP: Recent Developments on *Weingarten* Rights

In *NLRB v. J. Weingarten, Inc.*, the U.S. Supreme Court upheld a National Labor Relations Board decision that an employee was entitled to union representation in an investigatory interview that could lead to discipline. Over the past four decades, other cases have expanded upon or interpreted the scope of these *Weingarten* rights, including two decisions this past month.

Request for Representation. Under Board law, "[n]o magic or special words are required" to trigger a *Weingarten* request. Rather, the employee's statements "need only be sufficient to put the employer on notice of the employee's desire for union representation." Such statements include "I would like someone there that could explain to me what was happening" and "Should I have someone in here with me, someone from the union?" Arguably, these statements affirmatively express the wish for a union presence.

In *Circus Circus Casinos, Inc.*, however, the Board takes a more expansive view of what constitutes a *Weingarten* request. In this case, the employee arrived for his interview, announcing that he had "called the Union three times [and] nobody showed up, I'm here without representation." Although a

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dissenting Board member noted that the statement could constitute a waiver of the right to union representation, the Board majority found that this statement could be reasonably understood as a request to have the union present.

Given this opinion, when faced with an ambiguous statement about union representation, employers would be wise to clarify whether the employee actually wishes to invoke *Weingarten* rights.

Drug and Alcohol Testing. In the context of drug and alcohol testing, the Board has held that *Weingarten* rights attach when an employee is sent for testing because of an employer's reasonable suspicion that the employee is under the influence. The test itself is deemed an investigatory interview. The rights are not without limitation, however.

In *Fred Meyer Stores, Inc*., an employee was suspected of drinking on the job and told that he would be sent for testing. He invoked his *Weingarten* rights, and tried calling a number of union representatives, but could not reach any of them. He did not call a 24-7 union emergency number. He refused to undergo testing without union representation and was terminated. Given that the Board has recognized that "alcohol testing is time sensitive," the Board Administrative Law Judge held that the employer acted reasonably under the circumstances: the employee was given more than 18 minutes in which to obtain union representation and, although he made several unsuccessful attempts to reach the union, he failed to call the union emergency number.

This case does not address random drug testing, which may be bargained for between the employer and the union. It appears that the Board has not yet issued any decision on this issue. In our opinion, however, *Weingarten* rights do not apply in a random drug testing situation. Unlike reasonable suspicion testing, the test is not being conducted as part of a targeted investigation. If an employee tests positive for drug use as part of the random testing process, however, any further proceedings with the employee would be subject to *Weingarten.*

RECENT BLOG POSTS

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

- Another Misleading EEOC Press Release on the ADA… by Fiona W. Ong, July 25, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- We Sued the DOL and the DOL Blinked by Fiona W. Ong, Mark J. Swerdlin, and Parker E Thoeni, July 18, 2018
- The Smoke Hasn't Cleared: What's the Workplace Impact of the FDA's Approval of a Marijuana Based Drug? by Darryl G. McCallum, July 13, 2018

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