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E-UPDATE

December 28, 2018

RECENT DEVELOPMENTS

DOL Releases New Opinion Letters: Varying Hourly Rates, the Ministerial Exception

The Department of Labor (DOL) has released two new opinion letters on the Fair Labor Standards Act (FLSA). Opinion letters respond to a specific wage-hour inquiry to the DOL from an employer or other entity, and represent the DOL's official position on that particular issue. Other employers may then rely on these opinion letters as guidance.

FLSA2018-28: The DOL stated that a compensation plan that pays an average hourly rate varying from workweek to workweek complies with the FLSA, although it cautioned that there may be overtime concerns.

The FLSA requires employers to pay a minimum wage of at least $7.25 per hour (with some state and local laws setting higher rates) and an overtime premium for all hours worked over 40 in a workweek at 1½ times the regular wage rate. In the opinion letter, the employer's home health aides receive weekly pay of an hourly pay rate times the hours spent with clients. This total amount is divided by the hours of client time plus travel time to calculate the average hourly rate for each workweek. The rate varies from workweek to workweek, but it always exceeds the required minimum wage. A typical average hourly rate is $10.00 per hour, and the overtime rate is based on a $10.00 hourly rate (i.e. $15.00 per hour), regardless of the actual hourly wage rate for the week.

The DOL found that, because the average hourly wage exceeds the minimum wage rate, the compensation plan complies with the FLSA. However, because the plan assumes a regular rate of pay based on $10.00 per hour, it would violate the FLSA when an employee's actual rate of pay for the workweek exceeds $10.00 per hour. The DOL further noted that, if the employee's actual hourly rate is less than $10.00, the plan is compliant with the FLSA since an employer can choose to pay an overtime premium that exceeds the statutory requirement.

FLSA2018-29: Members of a religious organization may not be employees within the meaning of the FLSA, where (1) they work "without promise or expectation of compensation, but solely for his personal purposes or pleasure," and/or (2) are subject to the ministerial exception to the law.

Members of a religious community work in the community's farms and gardens, schools, kitchens, laundries, medical care facilities, and non-profit ventures that generate income for the community. The DOL found that these services "do not fit any 'traditional employment paradigm covered by the Act.'" Because the members do not work at a for-profit enterprise and do not expect to receive

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compensation in exchange for their work, they are not employees. According to the DOL, this is the case whether their motivation is religious or secular, "as long as they have chosen to donate their services free of coercion by the community."

In addition, even if the members could be considered employees, they would be subject to the ministerial exception, under which "[p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious order who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be 'employees.'" The DOL notes that "[a]n entity may invoke the ministerial exception if its 'mission is marked by clear or obvious religious characteristics.'"

An Avalanche of NLRB Advice Memos – Workplace Policies, the Tax Cuts and Jobs Act of 2017, Disciplinary Warnings, and Media Contacts

The National Labor Relations Board's Office of the General Counsel (OGC) continues to issue Advice Memoranda, as it has done throughout 2018 and as we previously discussed in many of our monthly E-Updates. Eleven additional memos were issued throughout December, one of which was originally prepared years earlier, with the others prepared earlier this year. Notably, many of the principles articulated in the memos, particularly with regard to employer policies, apply to both non-union and union employers. Of particular interest are the following:

Shelby County Memorial Hospital Association d/b/a Wilson Health (June 20, 2018). In this memo, the GC addressed a "Commitment to My Co-workers" document and a number of workplace policies, finding some to be lawful under the National Labor Relations Act and others not, under the standards that the Board articulated in the 2017 case of *Boeing Co*. Under the *Boeing* standard, the Board determines whether a reasonable interpretation of a facially neutral employer work rule potentially interferes with employees' Section 7 rights to engage in concerted activity regarding the terms and conditions of employment by examining (1) the nature and extent of the potential impact on Section 7 rights, and (2) legitimate business justifications associated with the requirement(s). Under this test, rules may be classified as Category 1 (lawful), Category 2 (rules warranting individual scrutiny), and Category 3 (unlawful).

The "**Commitment to My Co-workers**" document was found to be a lawful Category 1 policy. It contained a number of pledges including: to accept responsibility for establishing and maintaining healthy interpersonal relationships; to talk promptly and directly with a co-worker about any problems; to refrain from complaining about others; to commit to finding solutions to problems; and to refrain from using cellphones except during scheduled breaks and in designated locations. In *Boeing*, the Board found that employers may establish rules requiring "harmonious relationships" and "civility" in the workplace. Specifically, the GC determined that the rule addressed comments about co-workers, as opposed to comments about the employer (which is subject to greater protection under Section 7), and the employer had significant interests in fostering harmony and civility, including keeping the workplace harassment-free, preventing violence, and avoiding unnecessary conflict or a toxic work environment that could interfere with productivity, patient care, and other legitimate business goals.

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Another Category 1 rule was **prohibiting the use of cellphones except during scheduled breaks and in designated break areas**. In *Boeing*, the Board found "no photography" rules to be Category 1, recognizing that employers have substantial interest in security, the protection of property, the protection of proprietary/confidential/customer information, avoiding legal liability, and maintaining the integrity of operation. In addition, patient privacy issues are of particular concern in a healthcare setting. Moreover, the rule does not impose a total ban on the use of cellphones.

Several policies fell within Category 2, requiring individualized scrutiny. This included a **policy that restricted the use of email, the Internet, blogs, and voicemail for business purposes only**. The restriction as to email was found to be unlawful under the Board's decision in *Purple Communications*, in which it held that "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time." The employer's stated interest in HIPAA compliance and patient confidentiality could be addressed by less than a total ban. Notably, the Board's GC has previously indicated an interest in reexamining *Purple Communications*, but at the present time it remains Board law.

Another Category 2 **policy prohibited disparaging comments about the employer in outside blogs**. Although an employer may restrict employees' ability to criticize its products or services, the ability to criticize the employer itself is a core right under Section 7, and therefore the GC found the rule to be unlawful.

The employer's **social media policy prohibits employees from speaking on behalf of the employer when posting online**, and requires employees engaging in online activity relating to the employer to post a disclaimer stating, "The views expressed on this site are my own and not those of [the Employer]." The GC found this to be a lawful Category 2 policy, based on the employer's legitimate interest in requiring that only authorized individuals speak for the company. The GC further found that it is lawful to **prohibit employees' use of the employer's logo or other intellectual property**, as the employer has a strong interest in protecting its intellectual property, which can have significant value and can result in significant financial loss if the employer fails to police its use.

Confidentiality policies regarding customer information or trade secrets are Category 1 rules, while **general confidentiality policies** fall into Category 2. In this case, the employer's policy protects the information of "patients, co-workers or other employees" in addition to "confidential or proprietary information about the employer or the employer's finances, business strategy, or any other information that has not been publically released by the employer." The GC found this policy to be lawful, as it would not reasonably be read to prohibit employees from engaging in their Section 7 rights to discuss wages or working conditions. Of note, the GC notes that the policy is lawful "even if the policy is not worded as perfectly as possible."

Nexstar Media Group, Inc. (October 15, 2018). The GC found that the employer did not violate Section 8(a)(5) of the Act when it refused to provide the union with information concerning the financial benefit it received from the Tax Cuts and Jobs Act of 2017 and its plans for that money.

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Section 8(a)(5) requires an employer to bargain in good faith with employees' representative, which includes the duty to provide relevant information necessary for the union's performance of its statutory duties as a collective-bargaining representative. The union contended that the information was required to ensure that the financial benefit would go to increasing pay and returning jobs to the U.S., as well as to aid it in bargaining about bonus payments and 401(k) contributions. The GC determined that the requested information was not relevant and necessary to the union's performance of its statutory function, particularly as there is no legal obligation for the employer to spend its tax savings towards the union's preferred objectives. According to the GC, "the Employer's decisions about how to spend its tax savings are not a mandatory subject of bargaining" and therefore there is no duty to furnish information about it.

Norwalk Meadows Nursing Center, LP (May 10, 2018). The GC reiterated the general principle that, upon written request, an employer is obligated to engage in bargaining with a union over disciplinary warnings issued to bargaining unit employees following the union's successful election as the bargaining representative for those employees but before the Board's certification of those election results. The GC noted that disciplinary actions are "unquestionable a mandatory subject of bargaining" and the union requested such post-implementation bargaining. The GC rejected the employer's proposition that it had no obligation to bargain over the pre-certification disciplinary actions.

Uber Technologies, Inc. (October 2, 2018). The GC found that the employer violated the Act when it directed employees not to comment about an ongoing employee class action lawsuit and to inform in-house counsel if they were contacted about the case. There was no violation, however, when the employer issued an internal litigation hold instructing employees to preserve all communications with or about the co-worker plaintiff.

The GC found that the directive prevented employees from discussing the lawsuit or the underlying grievance from which it arose with other employees, the media, or other third parties. This right to communicate with each other and third parties about grievances and remedies is a "significant Section 7 interest" of particular interest in the context of a class action, where one employee seeks to represent others. In contrast to the media contact policy addressed in the *Shelby County Memorial Hospital Association* memo above, this directive was not limited to speaking on behalf of the company, but also sought to regulate the employees' personal speech.

On the other hand, the litigation hold was lawful, despite the fact that it would include protected speech. The hold did not direct employees to produce the communications, but merely to preserve them for possible production. Moreover, the employer has a legal obligation to preserve evidence, or risk liability and damages for spoliation of evidence. Although the GC noted the lack of authority on whether an employer must produce the private communications of employees, it acknowledged that it was appropriate for employers to err on the side of caution.

Employers May Insist on Compliance with Medical Restrictions

This month, two separate federal appellate courts each held that an employer need not allow an employee to work in violation of medical restrictions imposed by a doctor.

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In the first case, *Denson v. Steak 'n Shake, Inc.*, the U.S. Court of Appeals for the Eighth Circuit held that an employer was not required to allow an employee to perform the essential functions of the job in violation of his permanent medical restrictions, despite the employee's subjective belief that he was able to do so. The employee's job required him to stand, bend, stretch, walk, and lift and carry up to 30 pounds, but he was medically restricted to clerical or sedentary work with no lifting. The Eighth Circuit found that "[t]he [Americans with Disabilities Act] does not require an employer to permit an employee to perform a job function that the employee's physician has forbidden." Moreover, it further noted that, "an employee's subjective belief that he or she can perform the essential functions of the job is irrelevant."

In the second case, *Stanley v. BP Products North America, Inc.*, the employee suffered a severe stroke. After several months, he was released to work by his own doctor, but pursuant to the collective bargaining agreement, he needed to be evaluated and released by a company doctor. Based on remaining cognitive and physical issues, the company doctor refused to do so. The company doctor made unsuccessful several attempts to contact the employee's doctor to discuss the situation. The HR manager finally spoke with the assistant to the employee's doctor, and received a note with severe restrictions on the employee's physical activity and recommending long term disability benefits. The employee was approved for LTD benefits, but refused them because he did not believe he was disabled. Months later, the employee's doctor wrote another note stating that his last note was issued at the request of HR because the employee "was without funds," and that there was actually no restriction on the employee's ability to work. About a month after receiving this note, the employee was again examined by the company doctor and finally released to work. He sued under the Americans with Disabilities Act, arguing that the delay in reinstatement was due to disability discrimination.

The U.S. Court of Appeals for the Sixth Circuit rejected the employee's claim and found that the employer had relied on medical opinions from both the company's doctor and the employee's own doctor in initially refusing to reinstate the employee. Although the employee argued that the opinions were flawed, the court found that this argument had no merit unless the employer had reason to know of the flaws, noting that "an employer is generally correct to take doctors' restrictions 'at face value.'" Moreover, once the employer knew that there was a question about the note from the employee's doctor, it took action to have the employee reevaluated by its own doctor and returned the employee to work once both doctors had cleared him.

What these cases establish is that employers may reasonably rely on a doctor's opinion about an employee's medical restrictions over the employee's subjective belief that such restrictions do not apply. But be warned – the same principle does not apply in reverse. As we discussed in our August 2018 E-Update, if a doctor releases an employee without restrictions, the employer should not blindly insist on full performance if the employee still complains of physical restrictions, but should obtain further information from the doctor.

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TAKE NOTE

EEOC Rescinds Incentive Provisions of Wellness Regulations. The Equal Employment Opportunity Commission has issued two final rules that remove the incentive provisions it had set forth in its 2016 wellness regulations under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.

These provisions had offered guidance on the use of and limits on such incentives to encourage employee participation in wellness programs that pose medical inquiries or require medical examinations. In August 2017, a federal court held that the EEOC had failed to provide sufficient justification for the incentive limits, and the court then subsequently vacated those provisions, effective January 1, 2019, as we discussed in our December 2017 E-Update.

Average Hourly Wage Across a Workweek Is the Relevant Unit for Determining Pay Violation. The U.S. Court of Appeals for the Seventh Circuit found that, for pay claims under the Fair Labor Standards Act (FLSA), the relevant unit is not wages per hour, but the average hourly wage across a workweek. In so doing, it joins the Department of Labor (DOL), as well as sister circuits – the Second, Fourth, Sixth, Eighth, Ninth and Eleventh.

In *Hirst v. SkyWest, Inc.*, a group of flight attendants sued their employer for failure to pay the minimum wage for all hours worked, as required under the FLSA. The flight attendants were paid only for their time in the air, known in the industry as "block time," but not for the "duty day," which includes other time spent on the aircraft as well as time in airports before, after, and between flights. Consequently, looking hour by hour, they argued that they were not paid at least the minimum wage for all hours worked.

The Seventh Circuit noted that the FLSA does not identify the measure to be used in determining compliance, but longstanding DOL policy utilizes the workweek as "the standard period of time over which wages may be averaged" to determine compliance with the minimum wage obligation. In applying this measure, the Seventh Circuit found that none of the attendants had pleaded a workweek in which they were paid an average wage of less than $7.25 per hour, and therefore their FLSA claims should be dismissed. It is worth noting, however, that the Seventh Circuit recognized that the flight attendants may have claims under state and local wage laws.

Excessive Absences Disqualifies Employee from Protection Under the ADA. An employee who missed nine months of work for reasons unrelated to her disability, and then another day without medical verification, was found by the U.S. Court of Appeals for the Eighth Circuit to be unqualified to perform an essential function of her job – regular and reliable attendance.

In *Lipp v. Cargill Meat Solutions Corp.*, the employee suffered from a lung disease that flared up two to four times a year, requiring her to miss work for two to four days each time. The employer accommodated this need, as well as providing her with a clean work environment. In 2014, she took nine months off to care for her mother. Upon her return to work, she was placed on a last chance agreement for attendance, based on this and other missed time. She then used the automated call-in system to report an absence, which recorded her absence as vacation. She was terminated for

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violation of the last chance agreement. In the termination meeting, she claimed the absence was actually for her medical condition, but did not provide medical verification although she was given the chance to do so.

The ADA prohibits discrimination against a "qualified" person on the basis of disability, meaning that the individual can perform the essential functions of the job with or without reasonable accommodation. The Eighth Circuit found that the employee was not qualified because she was unable to meet the essential job function of regular and reliable attendance, particularly for a job that required on-site presence. Moreover, this court has recognized that persistent absences from work can be excessive "even when the absences are with the employer's permission," such as the leave to care for the employee's mother.

The Eighth Circuit also found that the employee's requested accommodation – more leave for her flareups without medical verification – would not allow her to perform the essential function of regular and reliable attendance, "but would relieve her of that function."

Thus, this case reminds employers that the accommodation of leave under the ADA, which can be one of the more frustrating accommodations to manage, is not without limits.

NEWS AND EVENTS

U.S. News and World Report/Best Lawyers – "Best Law Firms." We are delighted to announce that Shawe Rosenthal has once again been recognized by *U.S. News and World Report* and *Best Lawyers in America*© in the 2019 "Best Law Firm" rankings. We were honored with a top Tier 1 ranking in the Baltimore Metropolitan Area in the areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment Law.

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 2019 Super Lawyers honorees are Bruce S. Harrison, Eric Hemmendinger, 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 Paul D. Burgin as a "Rising Star." 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.

10th Edition of the *Maryland Human Resources Manual* Released. This year's edition of the *Maryland Human Resources Manual*, for which we serve as the editor, has been released. A joint publication of the Maryland Chamber of Commerce and the American Chamber of Commerce Resources, either an online version or a print version of this practical and comprehensive legal reference can be purchased directly from the publisher here at a cost of $248.

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Victory - Lindsey A. White won dismissal of the two remaining counts in a state court lawsuit against a provider of services to individuals with developmental disabilities and mental illness, following the earlier dismissal of two other counts. The court had granted the Plaintiff leave to amend the remaining counts, but now found that the Plaintiff failed to timely amend her complaint and that, in any event, such amendments were likely to be futile.

Article - Teresa D. Teare and Lindsey A. White authored an article, "Legal Considerations in Using Technology in the Workplace," that was featured in the 2018 *Perspectives on Work Magazine*, an annual publication of the Labor and Employment Relations Association.

Article - Alexander I. Castelli authored "Fired Worker Advances Race-Bias Claims" for the Society for Human Resource Management's December 5, 2018 *Court Report*, which is a feature of its *HR Magazine.*

TOP TIP: The Punishment May Fit the Crime

Wise employers know that consistency in discipline is key, but what does that mean? If two employees are involved in an altercation, must both employees receive the exact same discipline? According to a recent federal court decision, the answer is "not necessarily."

In *Findlator v. Allina Health Clinics*, two coworkers – one black and one white – began arguing. The white employee threw a lab coat at the black employee (which missed her), and the black employee shoved the white employee. Other employees separated the two and Human Resources conducted an investigation. HR concluded that the white employee had violated the company's Respectful Workplace Policy, and she was given a written warning and suspended. As to the black employee, HR found that she not only violated the same policy, but also the company's Violence-free Workplace Policy, and she was terminated. She then sued for race discrimination, contending that she and her coworker should have received the same discipline for being involved in the same altercation.

Although the Violence-free Workplace policy made no distinction between threats of violence and actual violence, or between levels of violence, the court found that the employer was free both to make such distinctions and to select corrective action proportional to the severity of the policy violation. Thus, the employer could determine that shoving a fellow employee was a more serious violation than throwing a lab coat, and could discipline accordingly.

The lesson here is that employers need not blindly apply the same corrective action in each case. Factors such as the individual employee's specific conduct and disciplinary history may be taken into consideration in determining the appropriate level of discipline.

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RECENT BLOG POSTS

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

- Leaving Work Early Due to Fear of Rush Hour Traffic Is Not a Reasonable Accommodation by Lindsey A. White, December 27, 2018.
- Tattoos and Social Media = Age Discrimination? by Alexander I. Castelli, December 20, 2018.
- 21C Workplace Success Begins with a Handshake (and Eye Contact)! by Elizabeth Torphy-Donzella, December 12, 2018.
- Employers Tread Carefully! The Interplay between Federal and State Laws Regarding Medical Marijuana Usage by Darryl G. McCallum, December 5, 2018.

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