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E-UPDATE

March 29, 2019

RECENT DEVELOPMENTS

DOL Issues Opinion Letters on Designating FMLA Leave, as well as Volunteer Activities and State Law Exemptions Under the FLSA

The Department of Labor (DOL) has released three new opinion letters – one on the Family and Medical Leave Act and two 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.

FMLA2019-1-A: The DOL stated that **an employer may not delay designating FMLA leave that is qualifying**, even at the request of the employee. Nor may an employer expand FMLA-qualifying leave beyond 12 weeks of leave (or 26 weeks of military caregiver leave).

The DOL was asked whether it was permissible to allow employees to use non-FMLA leave prior to designating leave as FMLA-qualifying. The DOL responded that an employer may not delay the designation of FMLA-qualifying leave. Specifically, "[o]nce an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave…. Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation." In so stating, the DOL disagreed with a decision from the U.S. Court of Appeals for the Ninth Circuit that found an employee could decline to use FMLA leave for an FMLA-qualifying reason.

In addition, the DOL noted that, while an employer may provide greater leave benefits to employees than the rights established by the FMLA, such additional leave cannot expand the employee's 12/26 week entitlement under the FMLA. Only the 12/26 week period is covered by the FMLA.

This opinion letter provides clear guidance to most employers that, in the view of the DOL, the designation of FMLA is mandatory and immediate. Employers in the Ninth Circuit, however, may be subject to a different interpretation.

FLSA2019-2**:** The DOL confirmed that **employee participation in certain volunteer activities, even if sponsored by the employer, does not constitute hours worked under the FLSA**.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The employer at issue provided an optional community service program for its employees, under which employees may participate in volunteer activities sponsored by the employer or selected by the employees. Although activities during working hours were paid, those that took place outside normal working hours are not. At the end of the year, the group of employees with the greatest community impact, which can include the number of hours volunteered, received a monetary award.

Under the FLSA, volunteers are not considered employees if they offer their services for religious, charitable, civic, humanitarian or similar public services without contemplation or receipt of compensation. Such services must be offered "freely without coercion or undue pressure" from an employer. While employers may notify employees of volunteer opportunities, there can be no negative consequences if the employee chooses not to participate. In addition, compensating employees for volunteer hours worked during normal working hours does not change their volunteer status during non-working hours.

The DOL also noted that an employer may consider time spent volunteering in calculating a bonus without rendering that time compensable, as long as (1) volunteering is optional, (2) not volunteering has no negative impact on the employee's working conditions or employment prospects, and (3) the employee is not guaranteed a bonus for volunteering.

Applying these principles, the DOL found the employer's program to be charitable and voluntary, such that employee participation did not constitute hours worked. The DOL also noted that the employer could use a mobile device application to track volunteer hours, but not to direct or control the employee's activities, as that would render the hours compensable.

FLSA2019-1: The DOL offered guidance on **compliance with multiple and differing overtime and minimum wage laws**. In a matter involving the residential janitors exemption under New York state law – which is not recognized under the FLSA – the DOL affirmed that "When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with both laws and meet the standard of whichever law gives the employee the greatest protection." Thus, in this matter, for example, the residential janitors were not exempt from the minimum wage and overtime protections of the FLSA, the state law exemption notwithstanding, because the FLSA contains no such exemption. The DOL observed that "[c]ompliance with state law does not excuse noncompliance with the FLSA."

Moreover, if there is a willful violation under the FLSA, an employer may be subject to a three year statute of limitations, rather than two years, and liquidated damages. A court may deny liquidated damages if the employer can show that it acted in "good faith," meaning that it had "reasonable grounds for believing that his act or omission was not a violation" of the FLSA. The DOL suggested, however, that relying on the state law exemption is not a good faith defense.

More NLRB Advice Memos – Cooperation in Investigations, Workplace Policies, and Facebook Posts

The National Labor Relations Board's Office of the General Counsel (OGC) continues to issue Advice Memoranda, as it has regularly done for the past year or so. Five additional memos were

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

issued in March, one of which was originally prepared years earlier, with the others prepared more recently. 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:

Nuance Transcription Services, Inc. (Nov. 14, 2018). The OGC concluded that a directive to an employee to cooperate in employer investigations into workplace misconduct did not violate the National Labor Relations Act. It distinguished such a directive from one requiring employees to participate in an investigation regarding an unfair labor practice charge, which would be illegal, as the employer must specifically inform employees that such participation is strictly voluntary.

The OGC also found several handbook policies to be illegal, utilizing the *Boeing* test that it articulated in December 2017 and that we fully discussed in our December 15, 2017 and June 8, 2018 E-Lerts: (1) a requirement to keep the handbook and its contents confidential, as that would preclude employees from discussing policies regarding employee pay, benefits and working conditions with unions and other third parties; (2) a ban on non-business use of the email system, since that runs counter to current Board law which permits use of the email system during non-working time for protected communications under the Act; and (3) a restriction on the disclosure of payroll information, as employees have the protected right to discuss terms and conditions of employment including pay.

North West Rural Electric Cooperative (Sept. 21, 2015). The OGC found that an employee's Facebook posts discussing workplace safety concerns constituted protected concerted activity regarding the terms and conditions of employment, even though they were not part of a direct dialogue with coworkers. According to the OGC, the posts involved mutual aid or protection, and the employee was engaged in concerted activity with other statutory employees through an online community for electrical workers. In the alternative, the OGC concluded that discussions of health and safety issues are "inherently concerted" and subject to the protection of the Act.

ADT, LLC (July 31, 2018). The OGC examined a number of handbook rules under the *Boeing* test and found the following to be lawful: (1) a dress code policy that prohibited the wearing of "any items of apparel with inappropriate commercial advertising or insignia," because the policy would not be reasonably understood to apply to protected union insignia; (2) a confidential information policy, which restricts employees with access to such information from discussing or divulging it, as such policy would not be understood to prohibit the sharing of employee names and addresses obtained separately without resorting to the employer's files; and (3) a media relations policy stating that "all information provided to media, financial analysts, investor or any other person outside the [Employer] may be provided only by [Employer] designated spokesperson or [Employer] officers," as it would be reasonably construed as only limiting who may speak on the employer's behalf and not as prohibiting all employee contact with the media.

On the other hand, the OGC found unlawful a rule limiting the use of personal cell phones to "work-related or critical, quality of life activities only," with the latter defined as communications with service or health providers who cannot be reached during a break or after business hours. The rule also prohibited text messaging and photography during working hours. Therefore, this rule inappropriately restricted the right of employees to communicate with each other during lunch or break periods, as it was not limited to "working time."

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

NLRB's General Counsel Issues Memos on Union Obligations

The General Counsel (GC) of the National Labor Relations Board, Peter Robb, issued two General Counsel memos this month dealing primarily with unions' obligations under the National Labor Relations Act (the Act). These memos recommend actions and positions to be taken by the Board, and technically speaking, may or may not be adopted by the Board. From a practical standpoint, the current GC and the Board majority are operating in sync, and we can expect the Board to adopt the GC's recommended positions.

In *GC 19-04*, the GC announced two policy positions in situations where employees are subject to compulsory union dues payments pursuant to so-called union-security clauses. First, the GC will seek to overturn current Board law requiring unions to disclose only the percentage reduction of union dues for employees who wish to be non-members paying only the portion of dues for a union's representational activities (i.e. *Beck* objectors). The GC intends to ask the Board to extend a union's obligation to disclosing the reduced amount of dues and fees for objectors when it notifies these employees of their legal right to be non-members.

Second, the GC directed the Board's Regions to issue complaints where union dues-checkoff authorizations – an authorization allowing employers to deduct union dues from an employee's pay, and remit the dues directly to the union – limit an employee's right to revoke that authorization at contract expiration by imposing an earlier revocation window period. Typically, unions require dues checkoff authorizations to be revoked 60-75 days prior to a CBA's expiration – a period often missed by unwitting employees.

The GC also directed the Regions to issue complaints against employers that continue to deduct an employee's dues following receipt of an employee's written revocation request made at or following expiration of a CBA – and also issue complaints against the union who continues receiving those dues. In summary, if the GC's policy positions become NLRB law, it appears that union coffers will likely take another hit.

Next, in *GC 19-05*, the GC clarified his earlier guidance concerning unions' processing of grievances. In an earlier memo, *GC 19-01*, the GC announced his position that a union violates the Act where it has lost track of or forgotten about a grievance, or has failed to communicate the status of a grievance or respond to inquiries concerning the status of the grievance. In *GC 19-05*, the GC explained that his earlier memo did not alter the analysis concerning a union's decision whether to pursue a grievance in the first place.

TAKE NOTE

Employee May Bring Hostile Work Environment Claim Under the ADA. The U.S. Court of Appeals for the Second Circuit joined several other federal Circuits in finding that hostile work environment claims are cognizable under the Americans with Disabilities Act.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

In *Fox v. Costco Wholesale Corp.*, an employee with Tourette's Syndrome and Obsessive Compulsive Disorder alleged that his coworkers mimicked his verbal and physical tics. He sued under federal and state law, asserting a hostile work environment claim, among other things. The Second Circuit, for the first time, specifically addressed whether such a claim can be brought under the ADA. Observing that the language of the ADA was borrowed from that of Title VII, under which such claims have been recognized, the Second Circuit found that a hostile work environment claim exists under the ADA as well.

No ADA Protection for Employee Whose Condition Was Triggered by Supervisor's Management Style. Many employers struggle with employees who seek the accommodation of a new supervisor, alleging that their disability is caused or triggered by a particular supervisor. The U.S. Court of Appeals for the Sixth Circuit found, however, that an employee whose medical condition was triggered by a specific supervisor was not, in fact, disabled within the meaning of the Americans with Disabilities Act.

In *Tinsley v. Caterpillar Financial Services Corp.*, the employee suffered from PTSD. Following a series of complaints about her supervisor, the employee requested a transfer to a different supervisor as an accommodation for her condition, as well as leave. Both were denied, she retired, and then sued, asserting claims under the ADA and Family and Medical Leave Act.

The Sixth Circuit noted that the ADA defines a disability as a substantial limitation on a major life activity – in this case, working. In this case, the employee failed to show that she was substantially limited in working, as she was not limited in her ability to perform "a class of jobs or broad range of jobs in various classes." The inability to perform the unique aspects of a single job, as alleged here, does not meet that standard. Accordingly, the Sixth Circuit found that the employee was not disabled within the meaning of the ADA.

Lobbying Costs May Not Be Charged to Beck Objectors. The National Labor Relations Board held that union charges for lobbying activities violated the National Labor Relations Act because the activities were not related to the union's representational duties to employees in the bargaining unit as to justify the compelled financial support of the activities by *Beck* objectors, who are employees paying only the portion of dues related to the union's representational duties.

In *United Nurses and Allied Professionals (Kent Hospital)*, the Board reasoned that even though the legislative bills at issue may have generally related to employee terms and conditions of employment, lobbying activity is not part of a union's statutory collective-bargaining obligation, and, thus, cannot be charged to *Beck* objectors.

The Board also held that unions must provide *Beck* objectors with verification that the financial information chargeable to them has been independently confirmed by an auditor, and the failure to do so was also a violation of the Act.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

NLRB Addresses Supervisory Status. In a case involving whether dispatchers are statutory supervisors under the National Labor Relations Act, the National Labor Relations Board addressed the issue of whether the dispatchers used "independent judgment" when assigning field employees to locations during power outages.

In order to be considered a statutory supervisor, and therefore outside the protections of the Act, the Board and courts will consider 12 statutory indicia, which includes the assignment of employees. In *Entergy Mississippi, Inc.*, the Board assessed whether the dispatchers utilized independent judgment when assigning field employees to locations. Specifically, the dispatchers prioritized outages, determined how many employees should be sent to address a given outage, and decided to reassign or hold field employees over from their regular shift or to summon additional on-call employees to work. The dispatchers also independently assessed, in the case of multiple outages, whether to address the outages sequentially or simultaneously. Further, the employer did not utilize standard operating procedures or rules for dispatchers to follow given outages. Instead, the dispatchers held broad discretionary authority in making prioritization decisions. This exercise of independent judgment determined the places where field employees would be sent. Thus, the dispatchers assigned field employees to places using independent judgment, and are therefore supervisors under the Act who cannot participate in the bargaining unit.

NLRB Offers Guidance on When Employer Must Provide Financial Information to Union. The National Labor Relations Board held that the employer did not violate Section 8(a)(5) of the National Labor Relations Act by refusing to provide general financial information requested by the union, where there was no claimed inability to pay.

In *PSAV Presentation Services, Inc.*, the Board found that an employer negotiator's statement at bargaining that the union's initial wage proposal would be "suicide" for the company, and would put the company "underwater," constituted a claim of inability to pay, which would typically obligate the employer, upon request, to provide the union with general financial information. In this case, however, the Board concluded that the employer retracted its claimed inability to pay, clarifying that it was refusing only to pay a rate detrimental to the business, thereby obviating its obligation to provide the union with general financial information.

The Board did find, however, that the employer violated Section 8(a)(5) of the National Labor Relations Act by failing to produce *specific* financial information to the union. The information sought by the union was relevant to assessing specific claims made by the employer to justify its rejection of the union's wage proposal, including statements about employer agreements with hotels and commission payments. The Board also noted that the information would assist the union in formulating wage counterproposals by helping the union to better understand the employer's business model.

The takeaway here is that employers should avoid making statements that may be construed as claims of "inability to pay." If, however, an employer makes such a statement, it should quickly retract the statement and clarify that it is merely asserting an unwillingness to pay what the union is

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

seeking. Finally, where an employer cites specific reasons in support of rejecting a wage proposal, it should be prepared to produce information in support of those claims in order for the union to assess these claims.

OFCCP Update – CSAL List, Focused Review FAQs, and Veterans' Hiring Benchmark. The Office of Federal Contract Compliance Programs has had a busy month, with the issuance of the following items of interest to government contractors and subcontractors:

- **CSAL (Corporate Scheduling Announcement List).** In the past, the OFCCP has sent letters to contractors on its Corporate Scheduling Announcement List (CSAL), informing them of its intent to conduct a compliance audit; this year, the OFCCP has instead chosen to post the list on its website. In addition to the traditional broad-based compliance review that examines compliance under various Executive Orders and laws, the OFCCP will also be doing more limited Section 503 Focused Reviews and Compliance Checks, among other things. For contractors on the list, the OFCCP will begin sending out individual letters of the actual audits in about 45 days. Once a contractor receives a letter, it will have 30 days in which to provide the requested information, which will be extensive. We recommend that those on the list take steps now to ensure that they are ready to submit the required information and that they have taken other appropriate actions to demonstrate compliance with the relevant requirements.
- **Focused Review FAQs.** In light of the upcoming implementation of Section 503 focused reviews, the OFCCP has created a new Section 503 landing page, which includes FAQs to explain what employers can expect during a review, as well as other relevant resources.
- **Veterans' Hiring Benchmark.** The Office of Federal Contract Compliance Programs has announced an updated hiring benchmark for veterans of 5.97%, 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.

EEOC Update – Notice Posting Violation Penalties and the EEO-1 Pay Data Requirement. This month, there were some developments from the Equal Employment Opportunity Commission of interest to employers:

- **Notice Posting Penalty.** The penalty for violations of the notice posting requirements under Title VII, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act is again increasing – from $545 to $559, effective April 20, 2019. Title VII, ADA and GINA each require employers to post a notice describing the protections provided by these laws. This can be accomplished by displaying the Equal Employer Opportunity Commission's "EEO is the Law" poster in a conspicuous location in the workplace where such notices for applicants and employees are customarily posted. Failure to post this required notice is subject to a monetary penalty.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

- **EEO-1 Pay Data Requirements.** As we have previously discussed, the EEOC's proposal to expand the EEO-1 form to collect pay data was placed on hold by the Office of Management and Budget. Litigation ensued, and this month, a federal court found the stay to be illegal and ordered the revised EEO-1 form to take effect. The court further ordered that the EEOC must clarify for employers by April 3, 2019, whether they will have to report pay data in this year's EEO-1 reports. Given that the EEO-1 submission period began on March 18, 2019, and that the online process does not include pay data, we doubt that the EEOC will require submission of pay data this year.

Plaintiff's Failure to Show Equality of Work Dooms Equal Pay Case. A recent case from the U.S. Court of Appeals offers employers guidance on pay equity claims under the Equal Pay Act (EPA).

In *Spencer v. Virginia State University*, a sociology professor claimed she was paid less than two male professors in different departments who previously worked as administrators. The University has a policy of paying former administrators who become professors a proportion of their administrative salaries, which the University said was the reason for the pay difference.

The Fourth Circuit rejected the professor's attempts to show equality through common tasks such as preparing syllabi and lessons, teaching, and grading. Noting that these are responsibilities of professionals ranging from middle school teachers to law school professors, the Fourth Circuit emphasized that plaintiffs proceeding under the EPA may not rely upon broad generalizations to establish that the work is equal. It is particularly difficult to show equality between different departments in the higher education context.

Even if the professor could have shown equality of work with the two male comparators, the Fourth Circuit found the University proved that the difference in salary was due to a factor other than sex—its proportionate pay policy—which is an affirmative defense available under the EPA. Likewise, the court also accepted the proportionate pay policy as the University's legitimate, non-discriminatory reason for the wage gap and upheld dismissal of the professor's Title VII claims. Interestingly, the Court noted that even if the University improperly applied this policy it would still provide a reason for the pay disparity that is not based on sex—which is quite helpful for employers.

This case shows the importance of employers actually having a reason that explains a pay disparity. This case also shows that the Fourth Circuit will not question whether the reason is rational, wise, or well-considered—only whether it did in fact explain the wage gap.

Employer May Determine Relevant Qualifications for Position. The U.S. Court of Appeals for the Eighth Circuit credited the employer's explanation for the selection of a Caucasian candidate as more qualified in denying the plaintiff's failure to promote claim.

In *Nelson v. USAble Mutual Ins. Co.*, an African-American employee asserted a discrimination claim for failure to promote, claiming that she was more qualified for the position than the selected Caucasian for an operations manager position because she had 11 years of "transactional" retail experience compared with the Caucasian candidate's 3 years of "full customer service" retail experience. The Eighth Circuit, however, found that the employee could not demonstrate that the employer's explanation that the Caucasian employee's experience was "extremely" similar to what

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

he envisioned for the new position, and was therefore more directly relevant. Because the employee was only "similarly qualified," there was no inference of race discrimination.

NEWS AND EVENTS

Victory – Stephen D. Shawe won an arbitration for a food distribution company. The case involved the payment structure used to compensate truck drivers for dropping cargo. The arbitrator found that the collective bargaining agreement and past practice supported the Company's payment structure. Therefore, the arbitrator rejected the Union's attempt to renegotiate the payment agreement via a grievance when collective bargaining had concluded just five months earlier.

Victory – Parker E. Thoeni and Lindsey A. White won dismissal of Maryland Uniform Trade Secrets Act and tortious interference claims in federal district court.

Media – Fiona W. Ong was quoted in a March 22, 2019 Bloomberg Law article, "Businesses face expanding harassment risks, liabilities," by Patrick Dorrian. Fiona offered insights on developments in the area of harassment of and by third parties.

Media – Mark J. Swerdlin was quoted in the article, "Who Will Benefit from the Overtime Pay Proposal?" by Danielle Westermann King, which was published on March 8, 2019 on hrexecutive.com. Mark discussed the DOL's new proposed overtime rule and offered suggestions for actions for employers to consider.

Media – Fiona W. Ong was quoted in the article, "Trump administration's overtime proposal scales back Obama-era plan," by Tim Curtis and Jeff Stein, which was published in the March 8, 2019 edition of The Daily Record.

Article – Elizabeth Torphy-Donzella's blog post, Pharmacist Afraid of Needles? Be a Stickler About Essential Job Functions, was republished on SHRM.org as "Be Precise About Essential Job Functions" on March 28, 2019.

Article – Teresa D. Teare and Courtney B. Amelung authored "Best Practices for Employers in the Era of the #MeToo Movement," which was published in the Winter 2019 edition of the Maryland Bar Journal, a publication of the Maryland State Bar Association.

TOP TIP: Maryland Sexual Harassment Disclosure Survey Now Open

Last year, the Maryland General Assembly passed a law that, in part, requires Maryland employers with 50 or more employees to report on sexual harassment settlements. The reporting is done through a Maryland Commission on Civil Rights survey, which is now live and may be accessed here.

The first survey must be submitted on or before July 1, 2020, and the second and last survey must be submitted on or before July 1, 2022.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The survey consists of five webpages, and we are providing a pdf of those webpages for employers to see what information is being requested. The survey includes the following information of significance:

- The survey period is October 1, 2018 through July 1, 2020. Thus, we note that employers who complete the survey well before the end of the period are not fulfilling the obligation to report for the entire period. Employers should wait until just before July 1, 2020 to complete the survey.
- According to the survey, the 50-employee count includes employees across all the employer's locations, and not just those employees in Maryland. The survey does not indicate when the count should take place; we suggest it is the count as of the date of the employer's submission.

We also note that the survey (and the law) do not specify if the settlements to be reported are only those executed with Maryland employees or across all locations. The MCCR would probably contend that it should be all settlements, not just those in Maryland. We believe there is a tenable argument, however, that the MCCR and General Assembly only have jurisdiction over Maryland matters, and therefore only Maryland settlements need to be reported. (Of course, this is moot if there were no sexual harassment settlements at all.)

RECENT BLOG POSTS

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

- Forcing Employee to Quit Second Job Is Not a Tangible Job Action? by Fiona W. Ong, March 27, 2019 (Selected as "noteworthy" by the Employment Law Daily).
- An Employer's Guide to March Madness, by Fiona W. Ong and Nick Vogt, March 18, 2019 (Selected as "noteworthy" by the Employment Law Daily and featured on hrsimple.com).
- Pharmacist Afraid of Needles? Be a Stickler About Essential Job Functions, by Elizabeth Torphy-Donzella, March 13, 2019 (Selected as "noteworthy" by the Employment Law Daily).
- DOL Proposes New Overtime Rule, Increasing Salary Level for Exempt Employees, by Fiona W. Ong, Mark J. Swerdlin and Parker E. Thoeni, March 8, 2019.
- FOIA Request to the EEOC - Maybe Think About Section 83 Instead? by Fiona W. Ong and Paul D. Burgin, March 6, 2019 (Selected as "noteworthy" by the Employment Law Daily).

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(410) 752-1040 www.shawe.com