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E-UPDATE

April 30, 2019

RECENT DEVELOPMENTS

The Latest on the EEO-1 Form: Demographic Data Due By May 31, Compensation Data Due By September 30

In the latest development of the long-running saga of whether and when the new requirement to submit compensation data through the EEO-1 form will take effect, a federal district court has now ordered that covered employers must submit such data by September 30, 2019, and the Equal Employment Opportunity Commission intends to begin collection on July 15, 2019. Meanwhile, as of the current time, the traditional demographic data must still be submitted by May 31, 2019.

The Addition of Compensation Data to the EEO-1 Form. Employers who are required to file an EEO-1 form are those with 100 or more employees and federal contractors and first-tier subcontractors with 50 or more employees. The original EEO-1 form sought information regarding the race, ethnicity, and sex of the workforce in 10 job categories (Component 1). In September 2016, the EEOC issued a revised EEO-1 survey form that added the requirement for employers with 100 or more employees (but not federal contractors and subcontractors with fewer than 100 employees) to provide aggregated data for the prior year on pay and hours worked, broken down into 12 pay bands across the 10 job categories, by the same racial, ethnic, and sex groups (Component 2). This data would be drawn from one single payroll period of the employer's choosing occurring between October 1 and December 31 of the prior (reporting) year. The annual submission period of the form was also moved from September to March. The form was to take effect in March 2018, and the data would be collected for two years.

The Stay and the Litigation. On August 29, 2017, the Office of Management and Budget, which has the responsibility of reviewing all significant regulatory actions before they take effect, informed the EEOC that it was initiating an immediate stay of the pay data collection aspects of the revised EEO-1 form. Litigation ensued, however, with the National Women's Law Center and other groups suing to enforce the implementation of the revised EEO-1 form. Last month, a federal court found the OMB's stay to be illegal and ordered the revised EEO-1 form to take effect. The parties then argued over when that would be.

In the meantime, the EEOC announced that the reporting period for Component 1 data would commence on March 15 and end May 31, 2019.

The Court's Order and the EEOC's Next Steps. On April 25, 2019, the Court issued an order that the EEOC must collect Component 2 pay data for 2018 by September 30, 2019. The EEOC must

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also collect either 2017 pay data by that date or 2019 pay data during the 2020 reporting period. The EEOC will announce by May 3, 2019 whether it will collect data from 2017 or 2019.

In a hearing before the court, the EEOC announced that it will be utilizing a contractor – the University of Chicago: National Opinion Research Center – to collect the data. The reporting portal will reportedly open in mid-July and close on September 30, 2019, although the EEOC will allow "straggler" employers to report up to two weeks later.

What Now? Utilizing EEOC's online portal, employers with 100 or more employees, as well as federal contractors and subs with 50 or more employees, must file Component 1 data by May 31, 2019. (Although the EEOC had previously suggested extending this deadline to September 30, that did not occur). Employers with 100 or more employees (including such employers who are also federal contractors and subs) will also need to file Component 2 data between mid-July and September 30, 2019. The EEOC will announce by Friday, May 3 whether it is collecting data from 2017 this year or from 2019 next year, and will provide additional information regarding the pay data portal at a later time. We will keep you updated on any further developments.

DOL Issues New (Not So Interesting) FLSA Opinion Letters on the "8 and 80" Rule, the Teacher Exemption, and the Agricultural Exemption

In addition to the significant opinion letter on independent contractor status discussed elsewhere in this E-Update, the Wage and Hour Division of the Department of Labor issued three other new opinion letters of limited general interest to employers. 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. Even though these do not seem to have general applicability, we summarize them here as follows:

FLSA2019-3: Under the **"8 and 80" overtime rule**, a hospital or residential care institution may enter into an agreement or understanding with its employees to pay overtime for all hours worked over 8 in a workday and over 80 in a 14-day period. In order to constitute a residential care institution, the facility must (1) have more than 50% of its income attributable to providing residential care to disabled or ill individuals; (2) if an institution for the residential care of emotionally disturbed persons, have more than 50% of its residents admitted by a qualified physician, psychiatrist, or psychologist; or (3) if a youth residential care facility, retain a qualified physician, psychiatrist, or psychologist who regularly provides therapy to adolescents comprising more than 50% of the residents at the facility. In the present case, however, insufficient facts were provided to allow the WHD to determine if the youth residential care facility in question met the requirements for any of the three scenarios.

FLSA2019-4: Under the FLSA, **teachers in elementary or secondary schools are exempt** from its minimum wage and overtime requirements. As the DOL notes, in order to be a teacher, the individual's primary duty must be "teaching, tutoring, instructing or lecturing in the activity or imparting knowledge" as an employee of an "educational establishment," which is any public or private educational institution. The DOL states that employees who teach remotely or online may qualify for the exemption. Applying these rules, the DOL found the "Nutritional Outreach Instructors" to meet this exemption in that they teach community members about healthy nutrition and cooking techniques over a 9-week period.

FLSA2019-5: The FLSA provides an **overtime exemption for agricultural employees**. By regulation and judicial precedent, agriculture is divided into primary (farming, which includes the raising of crops, livestock, bees, fur-bearing animals, or poultry) and secondary (activities performed by a farmer or on a farm incidental to or done in conjunction with farming) concepts. In order to be secondary, the activity must be (1) more akin to farming than manufacturing; (2) subordinate to the farming operation; and (3) not an independent business. Secondary activities include preparation for market and delivery to storage, market, or carriers.

The DOL found that "light processing" activities, in which a farm cuts or freezes its own fruit, vegetables, or meat without adding any ingredients, as well as packing, storing and transporting the items to market, do not constitute primary agriculture, but may be secondary agriculture. Cutting and freezing are methods of preservation and preparation for market. These activities, however, must be subordinate to its farming operations, and not amount to an independent business, in order to meet the exemption. Similarly, packing and storing activities are generally considered "preparation for market," but those activities are only considered agriculture if the cutting and freezing activities that preceded it are also agriculture. Finally, the delivery activities may also be secondary agriculture, as long as it is performed by farm employees, and the preceding cutting, freezing, packing or storing activities constitute agriculture, as described above.

Union Dues Revocation Developments – NLRB Issues Both Advice Memo and Decision

This month, the National Labor Relations Board issued both a decision and an Advice Memorandum (from 2016) that addressed the issue of the revocation of dues check-off authorizations.

Teamsters Local 385 (Walt Disney World) (Feb. 8, 2016). As noted in another article in this month's E-Update, advice memoranda contain the recommendations of the Office of General Counsel to the Board on particular issues of interest. In this memo, the OGC found that the union breached its duty of fair representation (under which the union has the obligation to represent the interests of its members fairly, impartially and in good faith) in handling employee requests to revoke their dues checkoff authorizations. The duty of fair representation includes the obligation to deal fairly with employee requests for information regarding matters affecting employment, including dues checkoff.

In the matter at hand, the union improperly failed to respond to premature revocation requests, which included requests for information necessary to properly revoke dues checkoff authorizations. It also breached the duty through its practice of disregarding telephone and in-person requests for information about or assistance with the dues revocation process. It also improperly failed to honor untimely requests that two employees sent after their revocation window closed. The remedy to be sought by the OGC in this case is for the union to refund the employees' dues effective as of the date their revocation period opened, since they would have timely revoked had the union met its duty to provide the requested information.

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Metalcraft of Mayville, Inc**., 367 NLRB No. 116** (Apr. 17, 2019). In this decision, the Board addressed dues revocation in the context of the enactment of Wisconsin's right-to-work law, which curtailed dues checkoff. The Board determined that the employer's belief that its employees' dues-checkoff authorizations did not conform to the law was reasonable and its decision therefore to stop deducting and remitting dues to the union was lawful.

The Wisconsin law contains a provision that prohibits requiring employees to become members of a labor organization or pay dues or fees. The law states that any such contract provision is void, and further specifically prohibits dues-checkoff authorizations unless they are revocable by the employee upon 30-days' notice. Based upon this newly enacted law, the employer believed the current authorizations were invalid and stopped deducting and remitting dues to the union.

The Board first found that the employer's decision to stop honoring the dues-checkoff authorizations was not an illegal midterm contract modification, as the employer had a "sound arguable basis for its belief that the contract authorized its action" in that the contract specified that the authorization must "conform[] to applicable law." The new law provides that any contract provision requiring the payment of union dues as a condition of employment is void. In addition, the authorizations did not comply with the newly-required specific revocation language.

The Board also found that the employer did not act in bad faith in unilaterally stopping the deductions. This stoppage was based on the language of the contract requiring the authorizations to "conform[] to applicable law" and therefore the employer had no duty to bargain with the union over the stoppage.

As a practical matter, however, we suggest that an employer consider its relationship with the union in deciding how to communicate with employees regarding the impact of any state law changes affecting union security and dues-checkoff authorizations. If the employer is trying to forge a positive working relationship with the union, negatively impacting the union's income stream through the cessation of dues payments may be counter-productive.

And Even More NLRB Advice Memos – Work Rules, Communication Practices, and the Union's Duty of Fair Representation

In addition to the dues revocation advice memo discussed elsewhere in this E-Update, the National Labor Relations Board issued another eight advice memoranda from the Office of General Counsel this month, some originally written years ago. These memoranda reflect the General Counsel's recommendations on issues facing the Board, which may then be adopted by the Board. Some 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:

Colorado Professional Security Services (Aug. 17, 2018). The OGC found the employer's following work rules to be overbroad, 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 "harm to Business or Reputation" policy that prohibited criticism by employees; and (2) language prohibiting employees from discussing their discipline with co-workers and clients. Under the *Boeing* test, which divides rules into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful, the OGC determined that these rules were Category 2 rules in which the impact on employee rights outweighed the employer's legitimate business interests.

St. Barnabas Medical Center (Mar. 22, 2019). In a recently-prepared memo, the OGC found that the employer did not violate the National Labor Relations Act when it unilaterally ended its practice of having nurse managers and supervisors respond directly to phone call, emails, and text messages from the union representative concerning union-related matters, including grievances, while increasing Human Resources' involvement in grievances. The OGC found such changes in communication practices to be not material or significant.

Sheet Metal Workers, Local 312 (Schoppe Co.) (Oct. 22, 2018). The OGC determined that the union violated an employee's rights under the National Labor Relations Act by handling the employee's grievance in an arbitrary manner and willfully misleading the employee about the status of the claim. Although a union is allowed a wide range of reasonableness and is not required to process every grievance that it receives, it may not breach its duty of fair representation, which requires it to represent the interests of its members fairly, impartially and in good faith. In this case, the union ignored the grievance and failed to take any action to file or investigate the matter, while falsely telling the employee that it was working to resolve it.

TAKE NOTE

Fifth Circuit Holds That Title VII Does Not Prohibit Sexual Orientation Discrimination. Recognizing that other federal circuit courts have found Title VII's prohibition on "sex discrimination" to encompass sexual orientation discrimination, the U.S. Court of Appeals for the Fifth Circuit nonetheless reiterated its longstanding position that "Title VII in plain terms does not cover 'sexual orientation.'"

Thus, in *O'Daniel v. Industrial Service Solutions*, the court affirmed the dismissal of the plaintiff's claim that she was fired in retaliation for her opposition to discrimination on the basis of her heterosexual orientation. We note that the U.S. Supreme Court has recently agreed to hear three other cases in which circuit courts have split on this issue, and will therefore resolve the question of whether sexual orientation discrimination is prohibited by Title VII.

Comparators Must Be Similarly Situated, Not Identical. Two separate U.S. Court of Appeals reiterated that, for purposes of establishing discrimination, comparators need only be similarly situated and not identical.

In *Andujar v. General Nutrition Corp.*, the employee claimed age discrimination, relying on evidence that, although there were multiple younger store managers in his region with failing performance scores, he was the only one put on an action plan and then terminated. The employer argued that the other managers were not appropriate comparators for various reasons – their stores did not have failing audit scores, they had worked only a short time, or they had engaged in different misconduct. The U.S. Court of Appeals for the Third Circuit, however, found that the comparators

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were all either managers or assistant managers in the same region with failing performance scores, and that this was enough for a jury to decide if they were similarly situated for purposes of finding discrimination.

Similarly, in *Haynes v. Waste Connections, Inc.,* the African-American employee asserted a race discrimination claim, based in part on evidence that a white co-worker reporting to the same supervisor had committed several workplace infractions but was not fired. Although the infractions were not the same, the U.S. Court of Appeals for the Fourth Circuit stated that comparators "will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances."

Thus, both in terms of imposing discipline and in defending against claims of discrimination, employers must be thoughtful and open-minded about which employees may be appropriate comparators for purposes of ensuring consistency of treatment.

DOL Announces Toolkit for Cultivation of Mental Health-Friendly Workplaces. The Department of Labor has announced a "Mental Health Toolkit" intended to help employers better understand mental health issues and to provide background, tools, and resources to assist employers in creating a supportive work environment for employees with such conditions.

DOL Announces New Pilot Program for Discretionary Suspensions and Debarments of Government Contractors. The Department of Labor has created a one-year pilot program intended to ensure accountability by expediting the process for discretionary suspensions (for up to 12 months) and debarments (for up to 3 years) of government contractors found to have engaged in inappropriate or illegal conduct.

The goal of the program is to reduce the processing time on suspensions and disbarments from months to days by increasing efficiency and sharing of information regarding indictments and convictions. The DOL's Office of Inspector General will include additional information in its referrals to the Office of the Assistance Secretary for Administration and Management to speed up the decision-making process. This program will be in effect from April 2019 to April 2020.

Complaining and Swearing About Clients Is Not Protected Under the NLRA. In *Quicken Loans, Inc.,* the National Labor Relations Board found that two mortgage bankers' discussion involving complaints about clients, including swearing about the clients, was not protected concerted activity under the National Labor Relations Act.

One of the employees, during a conversation in a bathroom open to the public and customers, complained that a client he had assisted years ago "should get in touch with a f***ing client specialist and stop wasting [the employee's] f***ing time." The second employee responded that he understood his co-worker's frustration. The conversation was overheard by a supervisor in a nearby bathroom stall. Later, the employer terminated the second employee.

While the NLRA protects employee discussions about the terms and conditions of employment, the Board found that the discussion amounted to "mere griping," which is not protected. The Board reasoned that the employees were not looking forward to initiating any action at all, and, thus, neither employee was contemplating taking concerted action to improve their working conditions or the working conditions of their co-workers. The Board also noted that there was no evidence that employees had any pre-existing concerns about the issue raised during the employees' bathroom discussion. Because the second employee was not engaged in protected concerted activity at the time of the bathroom discussion, his termination stemming from that discussion did not violate the NLRA.

As in *Alstate Maintenance, LLC*, which we discussed in our January 2019 E-Update, this case illustrates the Board's trend of holding that employees' mere griping that does not seek to initiate group action, or better employees' working conditions, does not constitute protected concerted activity.

Employer's "Significant and Pervasive" Unfair Labor Practices Result in Special Remedies. In *Sysco Grand Rapids, LLC,* although the National Labor Relations Board declined to issue a remedial bargaining order against an employer who engaged in "pervasive unlawful conduct" during a union organizing campaign, it nonetheless imposed unusual remedies for such conduct.

The Board found that the passage of four years and turnover in the workforce during that time rendered a bargaining order likely unenforceable. Nonetheless, the Board held that several special remedies were warranted in light of the employer's "significant and pervasive" unfair labor practices, in addition to the standard remedies of back pay and reinstatement. First, the Board ordered that the employer read the notice aloud during an all-hands meeting attended by two high-ranking management officials who were "personally and directly involved in unlawfully threatening employees." Second, the Board ordered that the employer grant the union and its representative reasonable access to bulletin boards where notices to employees are posted, and to turn over names and addresses of current unit employees. Further, the Board ordered "equal time and facilities for the Union to respond" to any employer presentation "on the question of representation."

There are two important takeaways here. First, where there is significant delay between an employer's unfair labor practices aimed at union organizing and the Board's decision, the current Board is less likely to order the employer to bargain with the union. Second, even absent a bargaining order, the Board may order that such an employer provide a number of remedies that may assist future union organizing efforts, including access to employer bulletin boards, names and addresses of new employees, and the ability to respond to employer presentations regarding unionization, among others.

What's the Buzz? NYC Bans Pre-employment Marijuana Testing. The New York City Council has passed legislation banning pre-employment testing for marijuana, and the Mayor has indicated that he will sign it.

Under this first-in-the-nation law, employers may not test applicants for the presence of any tetrahydrocannabinols (THC), the active ingredient in marijuana. There are exceptions to this ban, including for: law enforcement; certain building occupations; commercial drivers; those supervising or caring for children, medical patients and vulnerable individuals; and certain positions that could significantly impact public safety. In addition, pre-employment testing may be conducted if it is required by: federal, state or local Departments of Transportation regulations; federal or state law, order, or regulation requiring testing for safety or security purposes; a federal contract or grant; or a collective bargaining agreement. Notably, employers may still prohibit employees from using marijuana or being under the influence while at work.

NEWS AND EVENTS

Honor - Shawe Rosenthal has been ranked in the top tier of Maryland labor and employment firms for the sixteenth consecutive year by Chambers USA: America's Leading Lawyers for Business – one of only two firms to receive this ranking in Maryland. Seven Shawe Rosenthal partners – the most of any labor and employment firm in the State – received recognition as top individual practitioners: co-managing partners Stephen D. Shawe and Gary L. Simpler, as well as Eric Hemmendinger, J. Michael McGuire, Fiona W. Ong, Mark J. Swerdlin, and Elizabeth Torphy-Donzella. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients.

Victory – J. Michael McGuire won an arbitration for an energy company. The company had terminated an employee for sending threatening text messages to two fellow union members, after those employees cooperated in the Company's investigation into co-worker misconduct. Although the union argued that the employee had been drunk when sending the messages and should have been offered rehab, the arbitrator found the termination was for just cause.

Victory – J. Michael McGuire won an arbitration over whether an energy company had the right to discontinue retiree life insurance benefits. The arbitrator found negotiated language that "Effective 10/1/19 Retiree Life Insurance will no longer be provided" meant that no benefits would be provided after that date, not that only those retiring after that date would be affected as the union argued.

Victory – J. Michael McGuire assisted a healthcare company to avoid a union election, when the union decided to withdraw its petition for recognition.

Article – Mark J. Swerdlin and Parker E. Thoeni authored an op-ed, "What the new overtime proposal could mean for businesses," which was published in the April 12, 2019 edition of the *Baltimore Business Journal*. (Subscription required to access article).

Article – A blog post by Elizabeth Torphy-Donzella was featured as an article, "Be Precise About Essential Job Functions," in the April 4, 2019 edition of *SHRM's HR Daily,* an online publication of the Society for Human Resource Management.

Speaking Engagement – On April 12, 2019, Lindsey A. White moderated a panel on Biometrics and Privacy in the Workplace at the American Bar Association's National Symposium on Technology in Labor & Employment Law in Chicago, Illinois.

Speaking Engagement – Darryl G. McCallum was a panelist for the Maryland State Bar Association's Employment Law Federal Bench/Bar Spring Program, held on April 4, 2019 at the federal courthouse in Greenbelt, Maryland.

TOP TIP: DOL Offers Guidance on Determining Independent Contractor Status Under the FLSA

The Department of Labor issued an opinion letter in which it details the principles by which independent contractor status under the Fair Labor Standards Act should be determined. This letter outlines the DOL's latest position on this controversial topic and provides significant guidance to employers.

The DOL's Changing Positions. The FLSA covers "employees," broadly defined as "any individual whom an employer suffers, permits or otherwise employs to work." But it does not cover independent contractors, which leads to the question of whether an individual is an employee or independent contractor. The issuance of this guidance on independent contractor status follows the DOL's 2017 withdrawal 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." As discussed in our July 2018 E-Update, the DOL subsequently issued a Field Assistance Bulletin on the employer status of nurse or caregiver registries, in which it retreated to a historical "economic reality" approach, under which it reviewed the "totality of the circumstances to evaluate whether an employment relationship exists."

The DOL's Current Test for Independent Contractor Status. The DOL reiterates its "economic reality" approach, and notes that "the touchstone of employee versus independent contractor status has long been 'economic dependence.'" Whether an individual is economically dependent on a potential employer is a fact-specific inquiry, in which six factors are assessed:

- The nature and degree of **the potential employer's control**. The DOL notes that "A business may have control where it, for example, requires a worker to work exclusively for the business; disavow working for or interacting with competitors during the working relationship; work against the interests of a competitor; work inflexible shifts, achieve large quotas, or work long hours, so that it is impracticable to work elsewhere; or otherwise face restrictions on or sanctions for external economic conduct, among others."

- The **permanency of the worker's relationship** with the potential employer. According to the DOL, "Permanence arises where a business, for example, requires a worker to agree to a fixed term of work; disavow working for or interacting with competitors after the working relationship ends; or otherwise face restrictions on or sanctions for leaving the job in order to pursue external economic opportunities, among others." The DOL further notes that the existence of a longstanding relationship may also indicate permanence.

- The **amount of the worker's investment** in facilities, equipment, or helpers. The DOL states that if the business provides these, the worker may come to rely on them to the detriment of his ability to provide services to others, which increases his economic dependence on the business.

- The **amount of skill, initiative, judgment, or foresight** required for the worker's services. If the work is more like piecework, and the business can provide the worker with the skills necessary to perform the job, then the worker is likely an employee.

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- The worker's **opportunities for profit or loss**. According to the DOL, such opportunities support independent contractor status and "These opportunities typically exist where the worker receives additional compensation based, not on greater efficiency, but on the exercise of initiative, judgment, or foresight (e.g., commission); has flexibility to renegotiate compensation throughout the working relationship; or has capital expenditure at risk in the job." Moreover, the worker need not have sole control over such opportunities in order to support an independent contractor finding.

- The **extent of integration** of the worker's services into the potential employer's business. According to the DOL, "a worker's services are integrated into a business if they form the 'primary purpose' of that business."

In addition, other factors may be relevant, and the weight assigned to each factor is dependent on the facts. The assessment is based not upon counting factors, but assessing the circumstances of the whole activity.

In the opinion letter, the DOL applied these factors to determine that service providers working for a virtual marketplace company (VMC) in the "on-demand" or "sharing" economy are independent contractors. A VMC is an online and/or smartphone based referral service connecting service providers to end-market consumers for a variety of services (e.g. transportation, delivery, shopping, moving, cleaning, plumbing, painting, household services, etc.), using technology to match consumers to service providers through objective criteria.

Employers may rely on this opinion letter as the DOL's (current) position on the independent contractor analysis. Note, however, that the test for independent contractor status differs under various laws, and those tests may be in flux. For example, as we discussed in our January 2019 E-Update, the National Labor Relations Board has recently returned to a longstanding independent contractor analysis that had been briefly overturned under the Obama administration. In addition, federal courts may have adopted different and potentially more expansive versions of the test under the FLSA.

RECENT BLOG POSTS

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

- The Maryland Department of Labor, Licensing and Regulation Will Be No More… by Fiona W. Ong, April 24, 2019.
- Be VERY CLEAR In Your Communications About FMLA! by Fiona W. Ong, April 17, 2019 (Featured on hrsimple.com).
- Baltimore City Employers Must Provide Lactation Accommodations, Effective April 15, 2019 by Fiona W. Ong, April 11, 2019.
- New Employment Laws in Maryland – Minimum Wage, Workplace Harassment and More! (And a Webinar!) by Fiona W. Ong, April 10, 2019.
- The DOL Is On Fire – Proposed Joint Employer Rule Issued by Fiona W. Ong, April 1, 2019 (Selected as "noteworthy" by the Employment Law Daily).

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