SHAWE ROSENTHAL LLP

E-UPDATE

July 31, 2019

RECENT DEVELOPMENTS

More NLRB Advice Memos – Wage Increases and Information, and Beck Rights!

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. Of particular interest are the following:

Providence St. John's Health Center (June 17, 2019). The OGC found that the employer violated the National Labor Relations Act when it failed to give employees an annual wage increase following expiration of its three-year contract with the union. The OGC determined that the annual wage increase was an established practice that existed before, as well as during, the contract term. Moreover, the contract language did not limit the increases to the contract term. Thus, the post-contract "status quo" was to continue the practice of annual wage increases.

Centura (June 24, 2019). The OGC found that the employer did not violate an employee's right under the National Labor Relations Act to engage in concerted activity regarding the terms and conditions of employment when it terminated an employee based on its belief that the employee inappropriately divulged confidential wage information, obtained through the employee's position in human resources, to other employees. The employer believed that the employee had breached the confidentiality required of the position.

United Food & Commercial Workers Union, Local 5 (Safeway Store) (January 22, 2019). In *CWA v. Beck*, the U.S. Supreme Court held that a private union may not use monies collected from objecting non-members (i.e. employees who are subject to a union security clause that requires them to pay union dues, but who choose not to become members of the union) for activities unrelated to collective bargaining, contract administration or grievances – such as political advocacy. Those "*Beck* objectors" are consequently entitled to a reduction in their dues. Unions must provide a *Beck* notice to its members, informing them of the right not to pay full union dues and to revoke any prior dues authorizations.

In this advice memo, the OGC held that the *Beck* notice provided by the union to its members was deficient because it did not include the percentage reduction in dues and fees for *Beck* objectors, which the OGC deemed "essential to an employee's ability to decide on an informed basis whether to become a *Beck* objector." This recommendation would expand the *Beck* notice requirements for unions, since such information was previously only required to be given to those who already objected, and not at the initial notice stage.

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Following the internal dissemination of this advice memo, the General Counsel issued a GC memo in which he adopted the position recommended by the advice memo, stating that he intends to ask the Board to extend a union's obligation to disclosing the reduced amount of dues and fees for objectors in the initial *Beck* notice, which we discussed in our March 2019 E-Update.

A Busy Month at the OFCCP - Update for Government Contractors

The Office of Federal Contract Compliance Programs had an active month, issuing an Opinion Letter, three Frequently Asked Questions (FAQs) documents, and a revised Functional Affirmative Action Plan directive. We summarize these as follows:

Opinion Letter – Pay Analysis Groupings. The July 22, 2019 letter, which is issued pursuant to the OFCCP's new initiative to provide opinion letters as guidance for the contractor community, responds to a contractor's inquiry as to whether contractors can work with OFCCP to develop a pay analysis grouping structure that would be accepted as valid in future OFCCP audits. PAGs are composed of groups of employees who are comparable for the purpose of evaluating the contractor's pay practices.

In the opinion letter, the OFCCP states that, as part of its efforts to work collaboratively with federal contractors, contractors are encouraged to submit their pay analysis groups for review by and to receive feedback from the agency, which would be taken into account in future compliance evaluations. The OFCCP states that it does not, however, provide any guarantees with regard to such future evaluations due to the possibility of material changes to the factors considered by the OFCCP in its initial evaluation.

FAQs. The OFCCP issued three documents addressing the topics of validation tests, the OFCCP's use of "practical significance" in compliance evaluations, and whether project or freelance workers qualify as employees for purposes of inclusion in an affirmative action program (AAP).

- **Validation of Employee Selection Procedures FAQs.** The OFCCP provides guidance on what constitutes a valid selection procedure subject to the *Uniform Guidelines on Employee Selection Procedures* (UGESP).
- **Practical Significance in EEO Analysis FAQs**. According to the OFCCP, "Practical significance is a conceptual framework for evaluating discrimination cases developed primarily on statistical evidence." The FAQs provide definitions and measures of practical significance.
- **Project-Based or Freelance Workers and the Affirmative Action Program FAQs**. Generally, the OFCCP states that workers performing work on a project or freelance basis are typically classified as independent contractors who are not included in an AAP.

FAAP Directive. The OFCCP permits the use of functional or business unit based affirmative action programs, which allows a federal contractor to organize its AAP according to its functional operation, rather than by establishment. In September 2018, the OFCCP proposed revisions to its Directive, which sets forth the application process by which contractors may request permission to develop and use a FAAP, as we discussed in our September 2018 E-Update. The OFCCP has now issued its final FAAP Directive. The revisions to the Directive, which took effect on June 20, 2019, are intended to "improve the application process for FAAP agreements and ease burdens associated

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with maintaining FAAP agreements." According to the OFCCP, the key changes to the Directive include:

- OFCCP will **no longer consider compliance history** when reviewing a request for a new FAAP agreement or termination.
- The **agreement term is extended to five years,** up from three years.
- There will be a **minimum of 36 months between compliance evaluations** for a single functional unit. This is 12 months longer than an establishment review.
- Complete FAAP **applications will be determined within 60 days**. Historically, there was no deadline.
- **OFCCP no longer requires** that FAAP contractors undergo at least one compliance evaluation during the term of their FAAP agreement.

Department of Labor Offers Guidance on Sleeping Time for Truck Drivers

The Department of Labor (DOL) has released a new opinion letter on sleeping time for truck drivers under 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 look to these opinion letters as general guidance.

Under an FLSA regulation, sleeping time is considered time worked and compensable if the employer permits the employee to sleep during an on-duty period when the employee is not busy. If the employee is required to be on-duty for a continuous period of 24 hours or more, however, the parties may agree to designate between 5-8 hours as a non-compensable sleeping period.

Of specific relevance to truck drivers, another FLSA regulation provides that travel time while driving a truck or being required to ride along as an assistant or helper is considered compensable working time. However, such drivers/assistants are not "working while riding" when they are permitted to sleep in adequate facilities furnished by the employer" such as a sleeper berth and are completely relieved of all duties.

Prior guidance from the DOL found that, by reading these regulations in conjunction, only up to 8 hours of sleeping time may be excluded in a trip 24 hours or longer, and no sleeping time could be excluded for trips under 24 hours. The DOL is now rejecting such guidance as "unnecessarily burdensome for employers." Instead, in FLSA2019-10, the DOL now states that a straightforward reading of the driving regulation means "the time drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non-working time that is not compensable." Thus, the under-24 hour period of duty prohibition on non-compensable sleeping time and the 8-hour limitation on sleeping time in a period of duty exceeding 24 hours does not apply to truck drivers.

The DOL notes that there may be some instances in which a driver or assistant who retires to a sleeping berth "is unable to use the time effectively for his own purposes," such as when required to remain on-call, study job-related materials, or do paperwork. In those cases, the time would be considered compensable hours worked.

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NLRB Adopts New Framework for Anticipatory Withdrawal of Union Recognition

In *Johnson Controls, Inc.*, the National Labor Relations Board overruled its own precedent and adopted a new framework for the case when an employer notifies the union representing its employees that it will withdraw recognition at the expiration of the parties' collective-bargaining agreement (i.e., an "anticipatory" withdrawal of recognition).

An "anticipatory" withdrawal of recognition typically begins when employees provide their employer with evidence that at least 50 percent of the bargaining unit no longer wishes to be represented by their union. Within a reasonable time before contract expiration, the employer notifies the union that it will withdraw recognition when the parties' CBA expires, and then actually withdraws recognition at the expiration of the agreement.

Prior Precedent: Under prior precedent, the Board would determine the union's representative status and the legality of the employer's withdrawal of recognition by applying a "last in time" rule. Thus, if the union reacquired majority support between the employer's stated intent to withdraw recognition and its actual withdrawal of recognition, the employer violated Section 8(a)(5) of the National Labor Relations Act because the union's evidence postdated the employer's evidence underlying the withdrawal of recognition, i.e., the union's evidence was "last in time." Even worse, the employer would violate the NLRA regardless of whether it knew that the union had reacquired majority status, because the union was under no obligation to notify the employer that it had reacquired majority status. The remedy for this violation of the NLRA was an order to continue bargaining for a reasonable period (between six months and one year), and if a successor contract was reached during that period, the union would enjoy a contract bar, which bars a decertification petition for up to three years.

New Framework: The Board's modified framework for anticipatory withdrawal of recognition modified this precedent in two ways. First, the Board will now define a reasonable time before contract expiration within which anticipatory withdrawal can be made to be no more than 90 days before contract expiration. Second, if the incumbent union wishes to re-establish its majority status following an anticipatory withdrawal of recognition, it must file an election petition with the NLRB within 45 days from the date that the employer gives notice of an anticipatory withdrawal of recognition.

The modified framework effectively does away with the "last in time" rule. Accordingly, it is now insufficient for a union to surreptitiously reacquire majority status and conceal that fact from the employer, thereby setting up an unwitting employer to commit an unfair labor practice when it withdraws recognition pursuant to its evidence that the union no longer enjoys majority support. Instead, a union may only re-establish its majority status through a petition filed with the NLRB and a subsequent election.

TAKE NOTE

DOL Issues New Compliance Tools. The Wage and Hour Division of the U.S. Department of Labor has announced the release of new tools intended to assist employers in complying with federal labor laws.

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These new tools include plain-language presentations on topics such as the Fair Labor Standards Act, federal child labor requirements, and employers' responsibilities to provide rest breaks and proper facilities for nursing mothers. The WHD states that these tools, in conjunction with worker.gov, employer.gov, and other recently released online tools, will ensure greater understanding of federal labor laws and regulations.

Refusal to Operate Machine Because of Safety Concerns Was Protected Concerted Activity. The U.S. Court of Appeals for the Eighth Circuit found that an employee's refusal to follow an order to operate a machine based on safety fears that he and a coworker expressed earlier in the day was concerted activity regarding the terms and conditions of employment and thereby protected by the National Labor Relations Act.

In *St. Paul Park Refining Co., LLC dba Western Refining v. NLRB*, the Eighth Circuit found that the employee's refusal to operate the machine was a "logical outgrowth" of his earlier discussions with his coworker about safety concerns arising from a change in the operating procedure for that machine. Of significance to the Eighth Circuit, the employee had repeatedly called for a "safety stop," under which workers could stop a job due to safety concerns and discuss mitigation measures with Company supervisors. Accordingly, the employee's unpaid suspension was a violation of the NLRA. The Eighth Circuit also noted other evidence of a discriminatory motive, in that the employee was sent home after his refusal to work, that the Company relied almost entirely on supervisors' accounts in its investigation into the matter, and that the Company gave inconsistent reasons for the discipline.

This case emphasizes the need for employers to tread carefully when employees raise safety concerns – beyond workplace safety issues, such conduct can also implicate rights under the NLRA.

Employer Does Not Forfeit Right to Terminate for Previously Unaddressed Performance Issues. Although the employee had not been previously disciplined for various performance issues, the U.S. Court of Appeals for the Seventh Circuit found the employer did not forfeit its right to hold the employee accountable for the same type of conduct.

In *Graham v. Arctic Zone Iceplex, LLC*, following a release to work on a different shift after a work-related injury, the employee drove a Zamboni into the ice-rink wall, causing damage to the wall. He was terminated for his poor attitude about the change in shift, customer complaints, inability to perform tasks in a timely manner, insubordination, and failure to drive the Zamboni properly resulting in damage. He sued, claiming his termination violated the Americans with Disabilities Act. In support of his claim, he argued that he had not previously been disciplined for behavioral issues.

The Seventh Circuit, however, found that the employer had an honest belief in the reasons that it offered for his termination. As it stated, the employer's "decision to let something slide without a formal response does not mean that it went unnoticed or untallied. And even minor grievances can accumulate into a record that justifies termination."

While this case provides some comfort to employers that letting past transgressions slide does not necessarily insulate employees from negative consequences for similar conduct in the future, we emphasize that the case would have been much stronger for the employer had it been able to demonstrate a record of prior discipline. With such documentation, the employer might have been able to avoid litigation and its significant financial and other costs.

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"Regular and reliable job attendance is a necessary element of most jobs." So says the U.S. Court of Appeals for the Eighth Circuit, in rejecting a locomotive engineer's failure to accommodate claim under the Americans with Disabilities Act, while also finding that providing an accommodation in the past does not necessarily render the accommodation reasonable.

In *Higgins v. Union Pacific Railroad Co.*, the employee suffered several on-the-job injuries, resulting in a 1992 settlement agreement that allowed him to "lay off" whenever his back bothered him. He subsequently requested and received a work restriction that he would not go out on a job assignment more than once every 24 hours. Due to a manpower shortage starting in 2013-14, the employer began holding employees accountable for attendance. Because the employee had missed 26% of his scheduled shifts, he was required to provide additional information regarding his condition. His doctor stated that he continued to require at least 24 hours off between shifts and also to be able to lay off as needed. It was determined that these accommodations could not be provided, based on his work responsibilities, and he was terminated. He then sued for violations of the ADA.

The Eighth Circuit found that, contrary to the engineer's argument, attendance was an essential function of the job, as evidenced both by the job description, which listed attendance as an essential function, and the attendance policy, which required employees to be "available to work [their] assignment whenever [they are] scheduled to work." Under the ADA, employers are not required to excuse employees from performing the essential functions of their job.

The Eighth Circuit also found that the requested accommodations "essentially amount[] to an 'unlimited absentee policy,' which is unreasonable as a matter of law." Of particular interest, the Eighth Circuit found that the fact the employer had previously provided an accommodation that allowed him to miss a large percentage of his shifts was not determinative. As the Eighth Circuit noted, "If an employer bends over backwards to accommodate a disabled worker . . . it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."

Employer Not Necessarily Liable for Insulting Facebook Posts. The U.S. Court of Appeals for the Third Circuit rejected a flight attendant's hostile work environment claim based on offensive posts to a Facebook group that was neither created nor monitored by the employer.

In *Chinery v. American Airlines*, the flight attendant was outspokenly opposed to a collective bargaining agreement. She claimed that she was harassed on a Facebook group for flight attendants through derogatory photos and offensive comments about her gender and appearance, among other things. She complained to Human Resources, which concluded her claims were without merit. She then sued, alleging the creation of a hostile work environment in violation of Title VII and state law.

A hostile work environment exists when discriminatory conduct is so severe or pervasive as to alter the conditions of the plaintiff's employment and create an abusive working environment. The Third Circuit found, however, that the complained-of conduct was neither pervasive nor severe. Specifically, the Third Circuit rejected the flight attendant's argument that the posts were inherently pervasive because "social media posts are public and endure." According to the Third Circuit, permanence alone does not render the posts so extreme as to change her terms and conditions of employment. Although it acknowledged some of the posts were offensive, the Third Circuit also found that they were "offhand comments and isolated incidents" that did not rise to an extreme level.

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Of particular note, the Third Circuit dismissed the argument that the employer, by failing to adequately investigate her complaint or enforce its social media policy, rendered the conduct severe. The Third Circuit acknowledged that these alleged failures could have some bearing on whether the employer had *respondeat superior* liability for the offensive conduct of the flight attendant's fellow employees – apparently an argument that the flight attendant did not make. Thus, this case warns employers that they may have an obligation to investigate, and redress, if possible, conduct that occurs outside of the workplace, to the extent that there is an impact that could carry over into the workplace.

"No Magic Number" of Insults Required to Support Hostile Environment Claim. A supervisor's near-daily use of offensive comments about Puerto Ricans over a two-year period was sufficient to sustain the employee's claim of a hostile work environment, even if the comments did not affect the employee's work performance, according to the U.S. Court of Appeals for the Eleventh Circuit.

In *Ortiz v. School Board of Broward County, Florida*, an employee brought national origin discrimination claims against his employer based on his supervisor's near-daily comments disparaging Puerto Ricans, as well as Blacks and Muslims. Some of the comments were made directly to or in front of him, while others were made outside his presence but reported to him. In addition, the supervisor refused to use the employee's name, instead referring to him as "Puerto Rican." He also used the offensive ethnic terms "wetback" and "spic." The employee objected to the supervisor and complained to the management, but nothing was done.

As noted elsewhere in this E-Update, a hostile work environment exists when discriminatory conduct is so severe or pervasive as to alter the conditions of the plaintiff's employment and create an abusive working environment. In this case, the Eleventh Circuit found that the conduct, occurring near-daily over a two-year period, "reflect[ed] a work environment permeated with discriminatory intimidation, ridicule, and insult." Moreover, the slurs "wetback" and "spic" fall on the more severe end of the spectrum of comments, and the severity was compounded by the fact that the employee's supervisor made the comments. While the employee could not remember the specific number of times that such comments were made, the Eleventh Circuit noted that "there is no magic number of racial or ethnic insults that a plaintiff must prove." The Eleventh Circuit acknowledged that, while the evidence that the employee's job performance was impacted was weak, the totality of the circumstances – given the frequency and severity of the comments – supported a hostile environment claim.

FMLA Does Not Insulate Employee From The Consequences of Poor Behavior. A recent case reminds employers that they can hold employees accountable for their misconduct, even under the Family and Medical Leave Act.

In *Tatum v. Southern Co. Servs. Inc.*, the employee had been subject to repeated coaching and counseling for inappropriate behavior over his years of employment. On January 20, 2017, there was another incident of inappropriate behavior, and when the plant manager met with him to discuss it, the employee was unapologetic, which cause the plant manager to contact Human Resources to discuss escalating his discipline. That same day, the employee requested FMLA leave. In addition, later that day, the employee reported that he had observed a potentially fatal safety risk created by a co-worker over a month earlier. His request for FMLA leave was subsequently approved, but a day

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later, he was terminated for failing to correct his inappropriate behavior and failing to report timely the serious safety risk. He then sued, alleging violation of his rights under the FMLA.

The U.S. Court of Appeals for the Fifth Circuit found that the employer had articulated a legitimate reason for the employee's termination – his continuation of inappropriate behavior after years of counseling and coaching, including the failure to report a potentially fatal safety risk for over a month. The employer had made it clear for years that his conduct was unacceptable.

NEWS AND EVENTS

Save the Date – Shawe Rosenthal Conference. We hope you will join us for our biennial client conference, which will be held on Friday, October 4, 2019 at Oriole Park at Camden Yards. Detailed information will be forthcoming in the near future.

Honor - Fiona W. Ong has once again been recognized by Lexology as its top "Legal Influencer" for employment in the U.S. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. Fiona previously received this distinction for Q4 of 2019.

Speaker – Teresa D. Teare served as a member of a panel for a July 10, 2019 Employment Law Alliance webinar on "Navigating Executive Leadership Transitions: A North American Perspective." The webinar addressed the complexities that can occur when transitioning or exiting executive leadership.

Conference – Parker E. Thoeni will present a session on "Conducting Internal Investigations: Best Practices and Recent Developments" at the LifeSpan Network's Annual Conference and Expo, which will be held on September 24-27, 2019 in Ocean City, Maryland. The conference is targeted towards senior care providers and is open to non-members of LifeSpan. You may register at https://www.lifespan-network.org/.

TOP TIP: Maryland Commissioner of Labor and Industry Provides Clarification of New Noncompete Law

As we reported in our April 10, 2019 E-lert on new Maryland employment laws, Maryland has enacted a **Noncompete and Conflict of Interest Clauses (HB38/SB328)** law covering low-wage workers. Under the new law, employers are prohibited from including a noncompete or conflict of interest provision in an employment contract with an employee earning $15 or less per hour or $31,200 or less annually. We noted an ambiguity in the language as to whether the pay thresholds were to be read together or should be applied separately. For example, if a part-time employee made $20 per hour, but less than $31,200 for the year, would it be permissible to require them to sign a noncompete?

On behalf of Shawe Rosenthal, the Maryland Chamber of Commerce (with whom our partners Elizabeth Torphy-Donzella, Fiona Ong and Lindsey White work closely to promote the interests of the business community before the General Assembly) reached out to the state Commissioner of Labor and Industry, Matthew Helminiak, regarding this question. Commissioner Helminiak

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informed the Chamber that he views the pay thresholds as speaking to the rate of pay and not total earnings. Thus, each threshold applies separately, and a part-time employee need only make more than $15 per hour in order to be exempt from the noncompete prohibition.

We thank the Maryland Chamber and Commissioner Helminiak for providing guidance to employers on this new prohibition.

RECENT BLOG POSTS

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

- Ride for Respect: Intermittent "Hit and Run" Strike or Presumptively Protected Work Stoppage? by Elizabeth Torphy-Donzella, July 31, 2019.
- What the EEOC Thinks About Opioid Use and the ADA, by Alexander Castelli, July 25, 2019 (Selected as a "noteworthy" blog post by the *Employment Law Daily*).
- EEOC Opens Online Portal for 2017 and 2018 Pay Data Collection, by Courtney Amelung, July 17, 2019.
- U.S. Department of Labor Issues New Opinion Letters: Part Three – Rounding Hours, by Courtney Amelung, July 15, 2019.
- U.S. Department of Labor Issues New Opinion Letters: Part Two – Paralegals, by Courtney Amelung, July 10, 2019.
- U.S. Department of Labor Issues New Opinion Letters: A Three-Part Series (Part One – Bonuses and the Regular Rate), by Courtney Amelung, July 8, 2019.

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