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E-UPDATE

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RECENT DEVELOPMENTS

DOL Proposes New Regulations Regarding Tipped Employees

One of the more complicated wage and hour issues we often advise on involves the tip credit that employers may take for the amount of time an employee engages in a tipped occupation. Recently, the U.S. Department of Labor issued a Notice of Proposed Rulemaking in order to implement changes to the tip credit provisions of the Fair Labor Standards Act.

Under the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour) and counting a limited amount of its employees' tips (no more than $5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage. (Notably, many states have enacted higher minimum wage rates, including for tipped employees). This partial credit is known as the "tip credit." Tipped employees are those who customarily and regularly receive more than $30 per month in tips. Tips do not include service charges, such as minimum gratuity amounts for large groups of customers, which are considered revenue to the employer.

29 U.S.C. § 203(m) of the FLSA provides that an employer who takes a tip credit may include only employees who customarily and regularly receive tips, such as restaurant servers and bartenders, in mandatory "tip pools" (*i.e.*, the practice of requiring employees to contribute a certain amount of tips into a collective pool that is divided among employees). The DOL promulgated regulations in 2011 that applied this restriction on mandatory tip pools to all employers, whether or not those employers make use of the tip credit.

In March of 2018, as part of a budget compromise, Congress passed the Consolidated Appropriations Act of 2018 (the "CAA") which amended the FLSA by reversing the DOL's restriction on tip pooling practices of employers that did not utilize the tip credit. As a result, if the employer does not take the tip credit, tips may be shared with other employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs and janitors. Regardless of whether the employer takes the tip credit, the law prohibits owners, managers and supervisors from receiving any share of the tips. An employer who unlawfully keeps tips earned by employees is subject to a civil monetary penalty of up to $1,100 for each violation, pursuant to 29 U.S.C. § 16(e)(2).

The proposed regulations reflect the Department of Labor's recent guidance that an employer may take a tip credit for any amount of time an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately

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

before or after performing the tipped duties. The proposed regulation also addresses which non-tipped duties are related to a tip-producing occupation.

Previously, the Department took the position that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on non-tip producing duties exceeded 20% of the employee's workweek. This rule, known as the 80/20 rule, was difficult to administer for many employers because they lacked guidance to determine whether a non-tipped duty is "related" to the tip-producing occupation.

As noted in our November 2018 E-Update, the DOL issued an opinion letter that month rejecting the 80/20 rule. The DOL now takes the position that there is no limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the FLSA are met. The DOL states that "Duties listed as core or supplement for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation. For example, for waiters and waitresses, such tasks include preparing and clearing tables, sweeping and mopping floors, taking out trash, answering phones, rolling silverware, stocking service items, and filling condiment containers, among many others. If the task is not listed in O*NET, the employer may not take a tip credit for time spent performing that task – although such task may be deemed non-compensable under the *de minimis* rule (meaning that such little time is spent on the task that it need not be paid).

It is important to note, however, that many courts have rejected the DOL's November 2018 opinion letter and continue to enforce the 80/20 rule.

In summary, the proposed regulations (which, to be clear, are not yet in effect):

- Explicitly prohibit employers, managers, and supervisors from keeping tips received by employees;
- Remove regulatory language imposing restrictions on an employer's use of tips when the employer does not take a tip credit, making it clear that such employers may allow workers such as cooks or dishwashers, to share in a mandatory tip pool;
- Incorporate in the regulations, as provided under the CAA, new civil money penalties, currently not to exceed $1,100, that may be imposed when employers unlawfully keep tips; and
- Amend the regulations to reflect recent guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

The proposed regulations are open for public comment until December 9, 2019. Comments may be submitted here. Once the comment period has closed, the DOL will consider the comments received and will eventually issue final regulations.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
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NLRB Provides Clarity on Confidentiality and Social Media Contact Rules

In *LA Specialty Produce Co*., the National Labor Relations Board (the Board) applied its *Boeing* framework to an employer's Confidentiality and Social Media Contact rules, finding both to be lawful. As the Board set forth in the 2017 case, *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), workplace rules are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful under the National Labor Relations Act.

Confidentiality Rule: An administrative law judge initially found this rule was unlawful, reasoning that the rule could be reasonably read to prohibit employees from sharing customer and vendor names with third parties, such as a union:

> Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [the employer] including but not limited to client/vendor lists…

The Board, however, concluded that the rule does not prohibit employees from disclosing *names* of employer customers and vendors to third parties. Rather, the rule prohibits disclosure of client/vendor lists, which contain sensitive information about pricing and discounts, and confirms that the language at issue applies only to the employer's non-public, proprietary records. Thus, the Board found that an objectively reasonable employee would not interpret the Confidentiality Rule as potentially interfering with their rights under the NLRA.

Media Contact Rule: The employer's Media Contact rule, which the administrative law judge also found unlawful, provides:

> Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our [company president] is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

The Board first acknowledged that employees have the right to speak with the media regarding working conditions, labor disputes, and other terms and conditions of employment. The Board found that this rule, when reasonably interpreted, provides only that employees cannot speak *on the employer's* behalf if approached by the media. The Board reasoned that the words "authorized and designated" would be read by an objective reasonable employee to mean that only the employer's president may speak to the media on the employer's behalf.

Board Creates Stability: With respect to each rule, the Board held that it will characterize such rules to be lawful "Category 1" rules under *Boeing*. Category 1 rules are lawful either because the rule when reasonably interpreted does not prohibit or interfere with rights protected by the NLRA (now referred to as "Category 1(a) rules" after this case), or the potential adverse impact on protected rights is outweighed by justifications associated with the rule (the Board will now consider these "Category 1(b) rules"). The Board found each will be considered Category 1(a) rules under the *Boeing* framework.

Takeaway: This decision provides useful guidance for employers. Going forward, the Board – at least *this* Board – will hold rules prohibiting disclosure of non-public and proprietary information and prohibiting employees from speaking to the media on the company's behalf to be lawful. Notwithstanding this decision, however, employers should clearly articulate that employees may not comment on the company's behalf and should designate an individual with the responsibility for speaking on the employer's behalf to the media.

TAKE NOTE

Title VII Limitations Period May Not Be Shortened By Contract. Addressing the issue for the first time, the U.S. Court of Appeals for the Sixth Circuit held that employers cannot by contract shorten the statutory limitations period (i.e. the time period within which a claim must be brought) under Title VII.

Title VII contains specific time periods applicable to bringing a lawsuit. An employee must first file a charge of discrimination with the Equal Employment Opportunity Commission or a state anti-discrimination agency within 180 days, although this is extended to 300 days in "deferral" states (i.e. states with both anti-discrimination laws and state agencies to enforce them). The EEOC maintains jurisdiction over the matter for 180 days following the charge filing, during which time it conducts an investigation into the charge, which may last longer than 180 days. Once the EEOC makes a determination and issues a notice of right to sue, the employee has 90 days in which to file suit in federal court.

In *Logan v. MGM Grand Detroit Casino*, the employee signed a job application containing a provision that established a six-month limitations period for bringing any lawsuit against the employer and that waived any applicable statutes of limitation. The employee, 216 days after her resignation, filed a charge of discrimination with the EEOC, and after she received a notice of right to sue, brought suit in federal court. The employer moved to dismiss her lawsuit because it was not timely filed within the contractual six-month period.

The Sixth Circuit, however, found that contractual limitation to be unenforceable. Notably, the Sixth Circuit drew a distinction between statutes containing a limitations period, such as Title VII, the Fair Labor Standards Act, and the Equal Pay Act, and those that do not, such as the Employee Retirement Income Security Act and Section 1981. Thus, Title VII's limitations period is a non-waivable substantive right, rather than a waivable procedural one, which is intended to protect the pre-suit process established by Congress to allow the EEOC to investigate charges and promote voluntary compliance with Title VII.

This case makes clear that, while employers may shorten limitations periods by contract for certain claims, such contractual limitations would not apply to any statutory claim where the statute itself – like Title VII – contains a limitations period.

Employer May Need to Consider More Than Employee's Requested Accommodation. A recent case highlights both that employers may not simply refer employees to the employee handbook in response to a request for accommodation and that they may need to consider accommodations beyond simply the one requested by a disabled employee.

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

In *Garrison v. Dolgencorp, LLC*, a "key holder" employee, who was required to be present at either the opening or closing of the store, requested a leave of absence for her medical condition from her manager by several text messages and in person. The manager responded that she should "read the employee handbook" and that leave was not available. After yet another request for medical leave was denied, the employee quit and sued under the Americans with Disabilities Act.

The U.S. Court of Appeals for the Eighth Circuit found that a jury could find that the employer had violated the ADA by failing to provide a reasonable accommodation. Although the employee did not specifically request an "accommodation," no "magic words" were needed. Rather, she had put the employer on notice that she needed an accommodation by informing her manager of her medical condition, her doctors' visits, and by repeatedly requesting leave.

Once the employer knew of the employee's need, it was required to engage in the interactive process to identify a reasonable accommodation. The Eighth Circuit specifically noted that referring the employee to the employee handbook was not enough. Moreover, had the employer engaged in the interactive process, it might have identified a reasonable accommodation; "After all, [the employer] was only obligated to provide a *reasonable* accommodation, not the particular one [the employee] requested."

Written Disclaimers Are Essential to Avoiding Tort Claims of Promised Employment. In *Bisig v. Time Warner Cable, Inc.*, the U.S. Court of Appeals for the Sixth Circuit emphasized the importance of written disclaimers in avoiding tort claims based on alleged promises of continued employment and better pay.

The plaintiffs were sales employees whose company was acquired by Time Warner. At the time of the acquisition, the employees entered into several compensation agreements with Time Warner containing specific "Important Notice" disclaimers stating that "You will be employed on an at-will basis unless you are subject to a written employment agreement signed by a company representative authorized to enter into an employment agreement." At approximately the same time, Time Warner allegedly made promises to them of continued employment and better pay. The employees were subsequently told that the workforce was being cut in half and they would need to reapply to keep their jobs. They quit and sued Time Warner for fraud, negligent misrepresentation, and promissory estoppel based on the alleged promises.

The Sixth Circuit rejected the employees' claims and found that it was not reasonable for the employees to rely on Time Warner's promises where they had read and accepted the clear disclaimer. In Kentucky, as is the case in most states, "As a matter of law, a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing." This was the case here, as the promises conflicted with the written at-will disclaimer.

Initial Categorization Determines Whether Employees Were Temporarily Laid Off or Fired Under WARN. In *Leeper v. Hamilton County Coal, LLC*, the U.S. Court of Appeals for the Seventh Circuit held that, under the Worker Adjustment and Retraining Notification Act, whether the cessation of employment is permanent or temporary should depend on the initial categorization, and not a "hindsight-based" approach.

WARN requires 60 days' notice of a "mass layoff," defined as a reduction in force resulting in an employment loss at a single site of employment during any 30-day period for at 33% of the full-time employees and at least 50 employees. There are three categories of "employment loss": termination, layoff in excess of 6 months, or at least a 50% reduction in work hours for a six-month period.

In the present case, the employer announced a temporary layoff lasting less than six months, and instructed employees to "return," not reapply, at the end of the period. The Eighth Circuit found that, based on the language of the notice, this was clearly not a termination. As the Eighth Circuit noted, once the initial categorization is made, the duration may then be evaluated. WARN provides a layoff of more than six months that was initially announced to be less will be treated as an employment loss unless the extension was caused by business circumstances that were not reasonably foreseeable at the time of the initial announcement and notice was provided when it became foreseeable. Here, although some employees' layoff period extended beyond six months, a sufficient number of employees returned to work within that period such that 33% of employees did not suffer an employment loss and therefore WARN was not triggered.

"Regular, in-person attendance constitutes an essential function of most jobs." So says the U.S. Court of Appeals for the Sixth Circuit, in ruling that an auditor who was unable to perform that essential function was not qualified for her job under the Americans with Disabilities Act.

In *Popeck v. Rawlings, Co., LLC*, an employee with irritable bowel syndrome (IBS) missed approximately 60% of her work time – being tardy, leaving early, taking excessive breaks, and taking full day absences. She was eventually fired for her attendance, purportedly unrelated to her medical condition. But even if all of her missed time was related to her IBS, the Sixth Circuit found no violation of the ADA.

Noting that regular, in-person attendance is an essential function of most jobs, the Sixth Circuit first examined whether it was an essential function of her job as an auditor. The auditor position required the employee to access information from secure on-site computers. Telework was prohibited because of the large volume of confidential and HIPAA-protected information. Therefore, regular in-person attendance was, in fact, an essential function of the job, and there was no reasonable accommodation that would have enabled the employee to perform it. Although the employee had requested the ability to come in late and leave early when her symptoms flared up, this would not have "come close to solving her attendance problem." Accordingly, she was not qualified for the job.

Employee's Pay Complaints to Passive Coworkers May Be Protected Concerted Activity.
Among the latest batch of Advice Memoranda from the National Labor Relations Board, the Office of General Counsel (OGC) offers further guidance to employers, both unionized and non-union on the issue of when discussions about pay are protected by the National Labor Relations Act. Advice Memoranda contain the recommendations of the OGC to the Board on specific issues.

Under the NLRA, employees may engage in concerted activity regarding the terms and conditions of employment, and the Board has found that this protection to extend to discussions about pay. On the other hand, there is no protection for individual gripes. In *Gallup, Inc.*, the company reclassified its quality assurance coordinators from exempt to non-exempt and cut their base salary by $7000. One QA coordinator complained to his fellow QA coordinators about the change, who responded "with at most passive agreement rather than a willingness to join [that employee] in seeking concrete action." Nonetheless, the OGC found that the employee's actions were protected under the Act.

Arbitration Agreements May Not Restrict Access to Board Processes. The National Labor Relations Board recently struck down two arbitration provisions that the Board concluded restricted employee access to the agency.

In *Cedars-Sinai Medical Center*, the Board held that the Hospital's arbitration clause would reasonably be read by employees to make arbitration the exclusive forum for the resolution of statutory claims, including those arising under the National Labor Relations Act (NLRA). The Board previously held such restrictions to violate Section 8(a)(1) of the NLRA in *Prime Healthcare Paradise Valley* (discussed in our recent blog post). In the present case, the employer contended the agreement specifically excluded from the arbitration mandate claims "preempted by federal labor laws," and argued that this savings clause rendered the agreement lawful. The Board disagreed and adopted the principle that vague savings clauses requiring employees to "meticulously determine the state of the law," as did this savings clause, were not sufficient to make lawful an otherwise unlawful provision. The Board concluded that the objective reasonable employee would not understand this savings clause to exclude claims under the NLRA. Accordingly, the agreement restricted employee access to the Board, and the Board found that such a restriction cannot be supported by any business justification.

In *Beena Beauty Holding, Inc.*, the employer maintained an arbitration agreement providing that "the company and [employees] agree…to submit any claims that either has against the other to final and binding arbitration." As in *Prime Healthcare*, the Board found that this rule, when reasonably interpreted, interferes with employee access to the Board. The Board noted that the agreement contained no exception for filing charges with the Board or administrative agencies, generally. Thus, taken as a whole, the agreement makes arbitration the exclusive forum for resolution of claims arising under the NLRA, which the Board has consistently found to be unlawful.

The takeaway here is simple: if your company maintains an arbitration agreement, provide an *explicit* exclusion in the agreement establishing that employees are not prohibited from accessing the Board to resolve claims under the NLRA.

No First Amendment Right in Secondary Picketing. The U.S. Court of Appeals for the Ninth Circuit rejected a union's constitutional challenge to the National Labor Relations Board's ruling that it had engaged in unlawful secondary picketing.

As the Ninth Circuit observed, under the National Labor Relations Act, a union may not "induce or encourage" employees of a neutral employer to strike against that secondary employer in order to provide greater leverage in the union's dispute against the primary employer. The Supreme Court in the 1951 case of *Int'l Brotherhood of Electrical Workers v. NLRB (IBEW)*, found that peaceful picketing violated this prohibition and that the prohibition "carries no unconstitutional abridgement of free speech."

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

In *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental and Reinforcing Workers, Local 229*, a union business agent spoke to, texted, and gave flyers to the employees of a neutral employer in order to persuade them to engage in a secondary boycott of their employer in support of the union's dispute with a fellow subcontractor. The union argued that *IBEW* was limited to picketing activity, and that its speech activity was protected by the First Amendment right to free expression. The Ninth Circuit disagreed, finding "the words 'induce and encourage' broad enough to include every form of influence and persuasion." Joining two other sister circuits that had previously addressed this issue, the Ninth Circuit found that the "First Amendment is not at all implicated" in the Act's prohibition on secondary boycott activities.

Board Offers Guidance on Joint Employer Status. In *Seven Seas Union Square*, the Board applied the possibly (likely?) soon-to-be-overruled decision in *Browning-Ferris*, and held that a cooperative that exercised control over scope of individual stores' initial workforce was a joint employer with the individual stores.

The cooperative is comprised of corporate members that include the individual stores that own supermarkets. The cooperative purchased supermarkets previously owned by A&P, which were unionized. The cooperative then sold the recently-purchased markets to the individual stores. The purchase agreements provided that the individual store agreed to be bound by any collective bargaining agreement (CBA) negotiated between the respective unions and the cooperative. The cooperative exercised control over the negotiations for a common CBA that bound all the individual stores and covered employees at all the newly-purchased supermarkets.

In finding that the cooperative and the individual stores were joint employers, the Board held that the cooperative exercised "direct and immediate" control over the employees' working conditions. Under the purchase agreements, the cooperative had significant control over the scope and identity of each store's initial workforce. Further, the cooperative referred to itself as an "employer" in the CBAs it reached with the union. The individual store owners distributed an employee handbook entitled "[The Cooperative's] Rules and Regulations." Moreover, one store owner told the union that he could not do anything without the cooperative's approval when the union and the store owner began discussing issues that related to mandatory subjects of bargaining.

With such "direct and immediate" control over employee working conditions, the cooperative would likely be held to be a joint employer even under a more restrictive joint employer standard – and a new standard may be issued soon, given that the Board issued a proposed regulation on this topic in 2018.

NLRB Mandates E-Filing for ULPs and Representation Cases. The Office of General Counsel of the National Labor Relations Board issued a Memorandum, GC-20-01, requiring the e-filing of all affidavits, correspondence, position statements, documentary or other evidence in connection with unfair labor practice or representation cases. The initial filing of an unfair labor practice or the representation petition, however, may still be made by regular mail, personal delivery or facsimile, although the Board encourages use of the e-filing system for these initial filings.

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

OFCCP Update– Technical Assistance Guide for Educational Institutions and Proposed Changes to Disability Form. The Office of Federal Contract Compliance Programs released two documents of interest to government contractors this month.

- The Technical Assistance Guide for Educational Institutions with federal contracts follows the earlier release of eight other Technical Assistance Guides (as discussed in our August 2019 E-Update). This TAG provides: an overview of the equal employment opportunity obligations for covered educational institutions; the required components of affirmative action programs and related information; and what to expect during an OFCCP compliance evaluation.
- Government contractors are required to ask applicants and employees to self-identify as to disability, and must use the OFCCP's form to do so. The OFCCP has proposed changes to the current version of the Voluntary Self-Identification of Disability Form, intended to increase response rates. The public may submit comments on the proposed changes through December 2, 2019.

NEWS AND EVENTS

Honor - Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" (i.e. leading author) for employment in the U.S. for Q3 of 2019. 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 Q2 2019 and Q4 2018.

Victory – Chad M. Horton won a contract interpretation arbitration for a manufacturer of lighting systems. Chad was able to demonstrate that the company did not violate the parties' CBA when it contracted out vendor-managed inventory services for new manufacturing lines that were transferred to that facility.

Presentation - Darryl G. McCallum conducted a webinar training on behalf of the Equal Employment Opportunity Commission on #MeToo and harassment issues for Equal Employment Opportunity officers from a multitude of U.S. federal agencies. The EEOC specifically sought a speaker from the private sector, in order to provide the federal EEO officers perspective from outside the government, and selected Darryl for his expertise.

Presentation – Parker E. Thoeni spoke on "Conducting Internal Investigations: Best Practices and Recent Developments" at LifeSpan's annual conference on September 24, 2019 in Ocean City, Maryland.

TOP TIP: Remember That You're Still Responsible for What Your PEO or TPA Does

Many employers choose to outsource aspects of human resources administration, such as payroll or leave tracking, to professional employer organizations (PEO) or third party administrators (TPA). Employers assume that, once it is out of their hands, they can simply forget about it. But what they should realize is that PEOs or TPAs are the employer's agent – and the employer will be liable for their noncompliance with the law.

A recent case makes this point. In *Parks v. Central USA Wireless LLC*, a wireless company turned over its payroll and related obligations to a PEO. The company admittedly failed to pay overtime to certain workers. Under the Fair Labor Standards Act, liquidated damages in the amount of the unpaid overtime is awarded unless the employer can show that the overtime violation "was in good faith and that [the employer] had reasonable grounds for believing that [the] act or omission was not a violation" of the FLSA. In this case, the employer argued that it relied on the PEO to carry out its payroll function and "we didn't think anything else about it."

The U.S. District Court for the Southern District of Ohio found that the employer failed to show that its act was in good faith and that it had reasonable grounds for believing that it had not violated the FLSA, such as by consulting with the PEO or an attorney as to whether these employees were exempt from overtime under the law. To the contrary, the CEO's statement that they "didn't think anything else about it" once turning it over to the PEO was evidence of negligence, warranting the imposition of liquidated damages.

The lesson for employers is that they must continue to do their due diligence to ensure that they are in compliance with the law – even and especially where they choose to outsource their responsibilities to others.

RECENT BLOG POSTS

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

- Nothing Good Comes From Hitting "Reply All" by Chad M. Horton, October 24, 2019.
- Executive Rules of Etiquette for RIFs by Elizabeth Torphy-Donzella, October 17, 2019 (Selected as a "noteworthy" blog post by the *Employment Law Daily*).
- A Halloween Tale: Ghosted by Laws that Are Passed But Not Implemented! by Fiona W. Ong, October 9, 2019.
- Female Employee Marries Coworker, Gets Fired; Husband Keeps Job, Gets Raise by Chad M. Horton, October 2, 2019 (Selected as a "noteworthy" blog post by the *Employment Law Daily*).

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