SHAWE ROSENTHAL LLP

E-UPDATE

November 27, 2019

RECENT DEVELOPMENTS

The DOL Proposes a Reinterpretation of the Fluctuating Workweek Method for Computing Overtime

On November 5, 2019, the Department of Labor (DOL) published, for public comment, a proposed revision to its interpretation of the fluctuating workweek (FWW) method of computing overtime. Under the revised interpretation, bonuses, commissions, shift differentials and other additional payments will not prevent an employer from using that method.

When non-exempt employees are paid a salary for varying hours, their additional overtime pay is computed, each week, by dividing the salary by the number of hours to obtain the "regular rate," and then paying one-half the regular rate for overtime hours. As the number of hours increases, the half-time overtime rate decreases. The employees receive only a half-time premium because one times the regular rate is already included in their pay. This formula was established in an early Supreme Court decision and has come to be known as the FWW method. (The method is not allowed in Alaska, California and New Mexico and, according to a November 20, 2019 decision, Pennsylvania).

The DOL's longstanding interpretation of the FWW method, published at 29 C.F.R. § 778.114, allows it to be used when employees receive a "fixed salary" for fluctuating hours. Some courts held that that additional compensation, such as bonuses or shift differential, mean that the salary is not "fixed," which in turn means that the FWW method cannot be used. Other courts say that additional hourly compensation, such as shift differential, is incompatible with the FWW method, but that non-hourly compensation, such as sales commissions, is compatible. This confusion is partially of the DOL's own making, due to some earlier proposals that were considered and withdrawn, and partially the result of some courts' hostility to the FWW method.

The DOL's new proposed interpretation says that additional payments of any nature are compatible with the FWW method of computing overtime. Only the salary portion of the compensation must be "fixed." The additional payments would still be included in the regular rate for purposes of computing overtime. To compute overtime, the salary and additional payments would be combined, and divided by hours worked, to obtain the regular rate. The overtime premium rate would still be one-half the regular rate.

The DOL does not have statutory authority to issue regulations on the computation of overtime, and courts have the final say on the issue; however, courts normally defer to the DOL's interpretation if it is well-reasoned. The DOL's proposed new interpretation of the FWW method is consistent with the Supreme Court's holdings on the issue and is, in our view, legally correct.

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The notice period for the proposed new interpretation closes December 5, 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. We will publish an update when the new interpretation is issued in final form.

A Contractual Non-Disparagement Provision May Violate the National Labor Relations Act

Among the latest batch of Advice Memoranda from the National Labor Relations Board, the Office of General Counsel (OGC), weighs in on the issue of whether provisions prohibiting employee disparagement of the employer violate the National Labor Relations Act. Employers, both unionized and non-union, can look to Advice Memoranda, which contain the recommendations of the OGC to the Board on specific issues, for guidance.

In *Stange Law Firm*, a law firm required all staff to enter into employment agreements containing the following provision:

> [D]uring and after Employee's employment or association with Law Firm ends, for any reason, Employee will not in any way criticize, ridicule, disparage, libel, or slander Law Firm, its owners, its partners, or any Law Firm employees, either orally or in writing. However, nothing in this Section 3.2 shall be deemed to limit or prohibit Employee from engaging in concerted group activity and communications with coemployees to try to improve his or her working conditions, as provided under Section 7 of the National Labor Relations Act.

Several former employees posted negative reviews about the firm on various websites, including Glassdoor.com, Indeed.com, Avvo, Yelp, and Yahoo.business. The law firm then filed suit against them for breach of contract and defamation.

Contractual Provision Unlawfully Prohibits Disparagement of Employer. 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. The OGC deemed this provision to be an unlawful Category 2 rule that restricted employees' rights under the NLRA to criticize their employer and its policies. (Employers may lawfully prohibit employee criticism of their products or services, or of other employees, however).

Although the OGC acknowledged the existence of the savings clause in the provision, it noted that "an effective savings clause should address 'the broad panoply of rights protected by Section 7' as well as be prominent and proximate to the rule that it purports to inform." This clause, while addressing some of the rights, failed to address the "full panoply" of rights, for example by referencing only coworkers and not third parties such as unions.

Negative Online Reviews Are Not Protected Activity. The OGC next determined that anonymous postings on sites such as Glassdoor.com do not amount to protected concerted activity. There was no evidence that the employees acted in concert to make the negative postings, or that the postings were intended to incite group action regarding the terms and conditions of employment. Rather, they were deemed to be unprotected individual gripes. Thus, the employer's lawsuits were not retaliation against protected activity. To the extent, however, that portions of the lawsuits were based on

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enforcing the unlawful contractual non-disparagement provision, those portions were preempted by the NLRA.

Tips for Employers. In drafting non-disparagement clauses, employers must be careful. While prohibiting disparagement of co-workers, products and services is lawful, prohibiting disparagement generally of the employer, management, or policies is not. Employers may prohibit illegal conduct, such as defamation. And if an employer chooses to include a savings clause, it must specifically address the "full panoply" of rights at issue.

Government Contractor Update – November Was a Busy Month!

This month, there were a number of actions of more or less interest for government contractors. These include the following:

- **Executive Order for Successor Contractors.** President Trump issued an "Executive Order on Improving Federal Contractor Operations by Revoking Executive Order 131495." This revokes an EO issued by President Obama that had required federal contractors taking over a federal contract to offer a right of first refusal of employment to their predecessor's employees under certain circumstances.

- **CSAL List for VEVRAA Focused Reviews.** The Office of Federal Contract Compliance Programs announced a supplement to its Corporate Scheduling Announcement List (CSAL), listing those contractors who will be subject to a VEVRAA Focused Review. The supplemental list is available on its website. For contractors on the list, the OFCCP will begin sending out individual letters of the actual reviews in about 45 days. Once a contractor receives a letter, it will have 30 days in which to provide the requested information, which will be extensive. In connection with this announcement, the OFCCP has also created a new VEVRAA Focused Reviews landing page to provide compliance assistance resources. We recommend that those on the list take steps now to ensure that they are ready to submit the required information and that they have taken other appropriate actions to demonstrate compliance with the relevant requirements.

- **Commitment to Disability Inclusion in the Workplace.** The OFCCP also announced that a focus of its enforcement activities will be disability inclusion under Section 503 of the Rehabilitation Act. Earlier this year, the OFCCP commenced Section 503 Focused Reviews, and it has now implemented a Section 503 Focused Reviews landing page with compliance resources for government contractors.

- **Construction Technical Assistance Guide.** The OFCCP continues to issue technical assistance guides for various categories of government contractors. This latest one covers construction contractors. This, as well as the other guides, are available on the OFCCP website. This TAG provides: an overview of the equal employment opportunity obligations for construction contractors; the steps for effectively implementing the Standard Federal EEO Construction Contract Specifications; and what to expect during an OFCCP compliance evaluation.

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- **OFCCP Directive on Spouses of Military Veterans.** This directive provides guidance to OFCCP staff and contractors on its enforcement efforts to ensure non-discrimination against spouses of protected veterans.

- **Opinion Letters.** The DOL released two opinion letters related to veterans transitioning to the workforce.

    - FLSA2019-4: The DOL's Wage and Hour Division found that active duty servicemembers participating in the U.S. Department of Defense's SkillBridge job training program, which offers on the job training at participating private businesses during the servicemembers' last 6 months of service, are not covered by the Fair Labor Standards Act, the Davis-Bacon Act, the Service Contract Act, and the Contract Work Hours and Safety Standards Act.
    - OFCCP2020-2: The OFCCP stated that businesses participating in the SkillBridge program are not considered federal contractors.

TAKE NOTE

An Employer Is Not Required to Continue an Unreasonable Accommodation. According to the U.S. Court of Appeals for the Eleventh Circuit, "just because an employer has, in the past, done more than required to accommodate an employee who cannot fulfill all the requirements of his job does not mean that the employer must continue to do so."

In *Hartwell v. Spencer*, a Navy firefighter was chronically late. Under a 2008 Memorandum of Agreement, firefighters were allowed to exchange up to 59 minutes at the beginning or end of a shift, and the firefighter in question was thus usually able to find someone to cover for him. In 2011, however, such time swaps were no longer allowed in order to comply with strict Navy "business rules" on timekeeping and overtime. In addition, there was a change in supervisor, who issued progressive discipline to the firefighter for his tardiness. The firefighter then notified the supervisor that his tardiness was due to drowsiness caused by medications he took for several mental health conditions, and he requested an accommodation of being allowed to use sick leave for his tardiness and to reinstate the ability to informally exchange time with others. This was denied and he was terminated.

The Eleventh Circuit found that punctuality was an essential function of the firefighter's job. The employer established the importance of having a full staff ready to respond to emergencies, and that when a firefighter is late, someone must stay longer to cover, which was a safety concern due to fatigue and also increased overtime costs. Thus, the firefighter's requested accommodation – to continue to allow him to be late – would not have allowed him to perform the essential function of punctuality and was therefore not reasonable.

The Eleventh Circuit also rejected the firefighter's argument that the accommodation was reasonable because the employer had permitted it for years without adverse consequences. The Eleventh Circuit noted that, "prior accommodations do not make an accommodation reasonable." As quoted above, the Eleventh Circuit further noted that employers are not bound to continue unreasonable accommodations. Thus, the good news for employers is that they will not be penalized for doing more than they should.

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NLRB Holds That Employee Activity on Behalf of Non-Employees is Unprotected. In *Amnesty International, Inc.*, the National Labor Relations Board held that the employee activity in support of unpaid interns did not amount to protected concerted activity, because the activity was not protected. Specifically, employee support for nonemployees is not "for the mutual aid or protection" within the meaning of Section 7 of the National Labor Relations Act.

Amnesty International's Washington, D.C. office was staffed by approximately 25 employees and 15 uncompensated interns. A group of the interns planned to write a petition seeking to be compensated for their work. The paid employees assisted with the drafting of the petition and all but a few of the employees joined the interns in signing the petition. Unbeknownst to the employees and interns, Amnesty had been developing a paid internship program. Amnesty's executive director announced the program at an employee meeting. The next day, the employees and interns delivered the petition to the executive director. During subsequent meetings, the executive director stated she was "disappointed" with and "embarrassed" by the petition. An administrative law judge found these statements violated Section 8(a)(1) of the NLRA. A majority of the Board reversed that decision.

The Board concluded that the interns were not employees because they were unpaid. Accordingly, the employees' activity advocating only for non-employees is not "for the mutual aid or protection" within the meaning of Section 7 of the NLRA. Because there was no evidence that the employees joined the petition for any reason beyond supporting interns' effort to be paid, the activity was not protected. Additionally, the Board found that even if the interns were employees, the executive director's comments were not coercive, and, thus, did not violate the NLRA for that reason, as well. Member McFerran, who dissented from the majority's holding that the interns were non-employees and employee activity in support of interns is not protected, nonetheless agreed with the majority that the executive director's statements were not coercive.

The primary takeaway here is that the current Board will find that employee activity in support of nonemployees – including the working conditions of nonemployees – is not protected activity.

The ADA Does Not Protect Future Impairments. The Americans with Disabilities Act "plainly encompasses only current impairments, not future ones," according to the U.S. Court of Appeals for the Seventh Circuit.

The ADA prohibits discrimination on the basis of disability, which is defined as (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

In *Shell v. Burlington Northern Santa Fe Railway Co.*, an applicant for a safety-sensitive railway job was rejected after a post-offer, pre-employment medical evaluation revealed that he was obese. The company does not hire obese applicants for such positions because they are at a substantially higher risk of developing certain medical conditions like sleep apnea, diabetes, and heart disease, which can result in unpredictable and sudden incapacitation. Those individuals could thus experience an unpredictable medical episode that causes loss of consciousness while operating dangerous equipment.

The Seventh Circuit first reiterated that obesity alone does not constitute a disability under the ADA, unless it is caused by an underlying physiological disorder or condition, which was not present here. It went on to address "whether the ADA's regarded-as provision encompasses conduct motivated by

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the likelihood that an employee will develop a future disability within the scope of the ADA." According to the Seventh Circuit, it does not and, in so holding, the Seventh Circuit joins the Eighth, Ninth and Tenth Circuits and rejects the Equal Employment Opportunity's position. The Seventh Circuit looked to the plain language of the statute, which is written in the present tense and thus encompasses only current disabilities and not future ones.

Mandatory Arbitration Policy Created in Response to Collective Action is Lawful, Says NLRB. The National Labor Relations Board held that an employer's promulgation of a mandatory arbitration provision in response to employee protected concerted activity does not violate the National Labor Relations Act (NLRA).

In *Tarlton and Son*, three employees jointly filed a wage-and-hour suit in state court against the Employer. Weeks later, the Company implemented the mandatory arbitration policy. The policy required that employees, in the future, submit most legal claims arising from their employment to binding arbitration. The Board acknowledged that the employees' lawsuit constituted protected concerted activity. But as the Board held in *Cordua Restaurants* (which we wrote about here), the Supreme Court's *Epic Systems* decision establishes that requiring employees to resolve employment claims through individualized arbitration rather than through collective action does not violate an employee's Section 7 rights under the NLRA. Thus, the promulgation of the arbitration policy did not violate Section 8(a)(1) of the NLRA.

Different Discipline for Hitting on Arrestees Was Not Based on Race. In a case about which we previously and irreverently blogged, the U.S. Court of Appeals for the Sixth Circuit has now affirmed that a black trooper appropriately received harsher discipline than a white trooper for hitting on arrestees.

In *Johnson v. Ohio Dept. of Public Safety*, a black trooper was placed on a last chance agreement (LCA) after hitting on a female motorist when he initially arrested her for DUI and then again a month later when he stopped her without probable cause. Despite the LCA, which provided for termination for any further incidents of misconduct within a two year period, the trooper subjected another arrestee to sexual harassment. Specifically, after arresting a woman for DUI, the trooper drove her home without his in-car camera on, in violation of policy. Although he radioed that he had left her house, he actually stayed for over 30 minutes, and then subsequently texted the woman from his personal cell phone. He was terminated and sued for race discrimination. The trooper contended that he had been treated less favorably than a white trooper who engaged in similar misconduct.

The Sixth Circuit, however, found that the white trooper was not a proper comparator. His misconduct was not as serious, as he had only been warned about sending Facebook "friend" requests to two women, approximately three years apart. Moreover, as the Sixth Circuit noted, the women were not intoxicated, they were not being detained, the trooper was not on duty at the time of his misconduct, he did not proposition the women, he did not pull them over without probable cause, and he did not go to their homes. The Sixth Circuit further noted that the troopers had different supervisors. And at the time of the second incidents, the black trooper was on an LCA while the white trooper had only received a warning of possible unspecified discipline for further misconduct. Thus, the black trooper appropriately received much harsher discipline.

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A Medical Expert Is Not Necessarily Required To Prove Disability at Trial. According to the U.S. Court of Appeals for the Tenth Circuit, a medical expert is not always required to establish a plaintiff's disability for purposes of a lawsuit under the Americans with Disabilities Act.

In *Tesone v. Empire Marketing Strategies*, the trial court dismissed the plaintiff's suit because she did not have a medical expert report to establish that she had a disability for purposes of the litigation. The Tenth Circuit, however, noted that nothing in the law or regulation requires medical testimony to establish disability, nor is there a general rule to that effect. Expert evidence would be required where a condition is unfamiliar to a lay jury and an expert diagnosis is needed. In contrast, when the plaintiff alleges a disability that "a lay jury can fathom without expert guidance," no medical testimony is required, and the plaintiff can testify as to her own limitations.

The ADA Encompasses Hostile Work Environment Claims. The U.S. Court of Appeals for the Seventh Circuit held that a plaintiff may assert a hostile work environment claim under the Americans with Disabilities Act, in addition to the more typical claims of discrimination and failure to accommodate.

In *Ford v. Marion County Sheriff's Office*, a deputy was injured on the job and, after a year of light duty, was required to transfer to another job. She sued under the ADA, asserting, among other things, that she had been harassed by her co-workers because of her disability. The Seventh Circuit held that hostile work environment claims are cognizable under the ADA, joining the Second, Fourth, Fifth, Eighth and Tenth Circuits.

The Seventh Circuit further found that, while an "entire hostile work environment" constitutes a single unlawful practice, a plaintiff may assert multiple separate hostile environment claims, as long as there were separate acts underlying each claim bearing no relation to each other. In this case, there was an 18-month gap between the first set of harassment and the second, which the Seventh Circuit found to be significant. The Seventh Circuit noted the fact that the first set of harassers were different from the second set of harassers was not relevant to the analysis, as it is the employer, and not the coworkers, who is responsible for the harassment under the law. On the other hand, a change in managers is relevant to whether the acts of harassment are related.

NEWS AND EVENTS

Presentation – Mark J. Swerdlin was a speaker for a panel on "Hot Topics in FLSA Wage & Hour Compliance: The Legal and Practical Impact on Institutions," at the National Association of College and University Attorneys 2019 CLE Workshop in Washington D.C. on November 14, 2019.

Article - Elizabeth Torphy-Donzella authored an article, "U.S. Court of Appeals for the Ninth Circuit Rules That Joint Employer Status Cannot Arise From Mere Franchisor 'Brand Control' Measures," which was published in the November 2019 issue of *Bender's Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Article - An article by Fiona W. Ong from our September 2019 E-Update, "Maryland Employers Must Consider Noncompetitive Reassignment as Reasonable Accommodation" was featured as a November 14, 2019 blog post on HRSimple.com.

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TOP TIP: Winter Is Coming… What Are the Rules on Pay for Weather-Related Business Closures?

With the onset of winter, many employers anticipate some snow-related closures. A business may decide to remain closed for the whole day, or perhaps shut down early. How does this impact an employee's pay? Let's take a look at some different circumstances.

When the business is closed – non-exempt employees. Under the federal Fair Labor Standards Act (FLSA), non-exempt employees are only paid for hours actually worked. Thus, non-exempt employees who are not required to report to work do not get paid. If a non-exempt employee is sent home early, they must be paid only for the hours worked that day. Employers may, but are not required, to allow non-exempt employees to use paid leave, such as vacation or paid time off, to cover the scheduled but unworked time.

A caveat – some states have "reporting time" pay laws that require employers to pay non-exempt employees who show up at work only to be sent home. These laws typically require payment for a certain minimum number of hours, even if the employee does not end up working those hours. Similarly, state and local predictable scheduling laws may impose certain pay obligations on employers who change employees' work schedules without sufficient notice – although such laws may contain exceptions for acts of God or acts of nature, which may include weather-related events. It is important to be aware of and compliant with such laws.

When the business is closed – exempt employees. The FLSA generally does not permit deductions from the pay of exempt employees for weather-related closures of less than a full week, and even in such circumstances, the employee may not perform any work during that week. An employer may require exempt employees to use vacation or paid time off to cover any weather-related closures. If the employee does not have sufficient paid leave to cover the missed time due to the closure, however, the employer must still pay the employee their full salary.

When the business is open – non-exempt employees. If the business remains open but the non-exempt employee chooses not to come to work for weather-related reasons, the employee is not paid. Again, an employer may choose to allow the non-exempt employee to use paid leave to cover the absence.

When the business is open – exempt employees. One of the exceptions to the no-deductions rule for exempt employees is if they take a full day off for personal reasons. Thus, if the business is open but the exempt employee chooses not to work that day, the employer may deduct the full day from the employee's salary. The employer may instead require or allow the employee to use paid leave to cover the absence, in which case the employee still receives their full salary for the week.

But a word of warning – many exempt employees are able to check their work email from their cell phones. If an exempt employee chooses not to come in but performs any work from outside the office – including checking email – they must be paid. Again, they could be required to use paid leave for that day, but if they do not have paid leave available, they must receive their full salary nonetheless.

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Non-exempt employees required to remain on the premises. But what if the employee is required to remain on the premises because of a weather emergency?

If this time period is less than 24 hours, all hours on the premises must be paid, even if the employee is sleeping or resting during part of that time.

There is a different rule if the employee is required to remain for more than 24 hours. The Department of Labor recognizes that up to 8 hours of non-working "sleep time" may be deducted from an employee's hours under such circumstances, where there is an agreement to that effect. The FLSA does not define what is such an "agreement." However, various courts have done so, and these courts have found that if an employer publishes a policy that explains the sleep time deduction and if employees continue to work for the employer, this constitutes an agreement for the deduction.

Employers may only deduct for sleep time if the employee is fully relieved of all work during that time and if adequate sleeping facilities are provided. If the employee's sleep period is interrupted because of work, the interruption is counted as hours worked. If the interruptions are so frequent that the employee cannot get a reasonable night's sleep, then that entire sleep period would be counted as hours worked. According to the DOL, a reasonable night's sleep means that the employee is able to get at least 5 hours of sleep during the scheduled sleep period. These five hours need not be continuous uninterrupted hours of sleep.

In addition, only the actual number of hours spent sleeping, up to a maximum of 8 hours, is deducted. If the sleep time is more than 8 hours, no more than 8 hours can be deducted. Obviously, this means that each incidence of sleep time would need to be assessed individually.

Additional pay for exempt employees required to remain on the premises? If an exempt employee remains on the premises and works more than their usual hours, there is no obligation under the FLSA to pay them any additional compensation for the extra work. However, an employer can choose to pay a bonus or other additional compensation – even compensation calculated based on the additional hours worked – in addition to their normal salary without jeopardizing the employee's exempt status.

RECENT BLOG POSTS

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

- Behind the Blind Selection Screen by Elizabeth Torphy-Donzella, November 19, 2019.
- A New Protected Class in Montgomery County: Natural Hairstyle by Lindsey A. White, November 14, 2019.
- Pregnancy Protections for Partners? by Fiona W. Ong, November 6, 2019 (Selected as a "noteworthy" blog post by the *Employment Law Daily*).
- What Does the EEOC Think About Religious Accommodations? It's Spooky! by Fiona W. Ong, October 31, 2019 (Selected as a "noteworthy" blog post by the *Employment Law Daily*).

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