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E-UPDATE

March 31, 2020

RECENT DEVELOPMENTS

New Employment Laws in Maryland – COVID-19, Mandatory WARN Requirements, Salary History Ban, Hair Discrimination and More!

In the midst of the COVID-19 pandemic, the Maryland General Assembly managed to pass well over 600 bills in the three days before the session's early adjournment. One of the bills, which has already been signed into law, was emergency legislation intended to address the COVID-19 situation. There were a number of other significant employment bills that have been sent to the Governor's desk as well. The Governor can choose to sign them into law, allow them to become law without his signature, or veto them (with the possibility of a veto override when the General Assembly next convenes, which may be for a special session in May). Assuming that they become law, these remaining bills will take effect on October 1, 2020.

COVID-19 Public Health Emergency Protection Act of 2020 (HB1663/SB1080). This law contains several employment-related provisions, in addition to others, intended to address the current COVID-19 emergency in Maryland. It will remain in effect only until April 30, 2021.

The law provides that an employee who is temporarily unable to work for the following COVID-19-related reasons will be eligible for unemployment insurance benefits:

- The employer temporary ceases operations due to COVID-19, preventing employees from coming to work. (This provision is likely implicated by the Governor's shut-down order for non-essential businesses, which we discussed `in our March 23, March 24, and March 25 E-lerts).
- The employee is quarantined due to COVID-19 with the expectation of returning to work after the quarantine is over.
- The employee leaves employment due to a risk of exposure or infection of COVID-19 or to care for a family member due to COVID-19. (This would apply to situations where an employee is sent home by the employer due to a possible exposure to COVID-19. In addition, we note that the "due to COVID-19" language with regard to the care of a family member is very vague and broad, and therefore conceivably could cover school closures or situations where the employee must provide care for a child or parent who has been exposed to, but is not showing symptoms of, COVID-19).

The law also protects employees from being terminated solely because the employee has been required to be isolated or quarantined under Maryland law. (Notably, this is a right that already exists in Maryland law. Now it exists twice over.) An order of isolation or quarantine is defined in the Maryland law, both in the Public Safety article and the Health article, and requires a directive of

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the Secretary of Health that meets very specific requirements, including a right to a hearing to challenge the directive. Thus, the Governor's shut-down order and employer requirements for employees who may have been exposed to COVID-19 to self-quarantine do not meet the definition of a "quarantine" under state law.

Mandatory WARN Act (HB1018/SB0780). Similar to the federal Worker Adjustment and Retraining Notification Act, Maryland has a law providing for certain notifications to employees in the case of a reduction in operations, although unlike the federal WARN Act, Maryland's mini-WARN has been voluntary. This bill, however, makes the state law mandatory.

Maryland's mini-WARN applies to employers with at least 50 employees operating an industrial, commercial or business enterprise in the State for more than one year. It is triggered by a reduction in operations, meaning either:

1. the relocation of part of its operation from one workplace to another; or
2. the shutting down of a workplace or a portion of its operations that reduces the number of employees by the greater of at least 25% or 15 employees over a 3-month period (not counting employees working less than an average of 20 hours a week or who have worked less than 6 of the preceding 12 months).

A "workplace" is defined as a factory, plant, office or other facility where employees produce goods or provide services, but does not include construction sites and temporary workplaces.

The law also exempts the following types of reductions in operations by private employers: resulting solely from labor disputes; occurring at construction sites or other temporary workplaces (redundantly); resulting from seasonal factors customary in the industry (as determined by the state Department of Labor); or resulting from an employer's bankruptcy.

Under the bill, an employer must give a 60-day (a reduction from the voluntary 90 days under the existing law) written notice prior to a reduction in operations to:

- All employees at the workplace that is subject to the reduction in operations, including those working on average less than 20 hours a week and those who have worked less than 6 months during the prior 12-month period;
- Any representative or bargaining agency representing those employees (i.e. a union);
- The state Dislocated Worker Unit; and
- All elected officials in the jurisdiction where the affected workplace is located.

The required notice must include:

- The name and address of the affected workplace;
- A supervisor's name, telephone number and email address to contact for further information;
- A statement explaining whether the reduction in operations is expected to be temporary or permanent, and whether the workplace is expected to shut down; and
- The expected date the reduction in operations will begin.

The bill further directs the Secretary of Labor, in cooperation with the Workforce Development Board, to develop mandatory guidelines regarding the required written notice and the continuation of

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benefits, such as health, pension, and, of particular concern, severance. (New Jersey recently amended its mini-WARN act to require the payment of severance).

If there is a violation, the Secretary can issue an order compelling compliance and may assess a discretionary civil penalty of up to $10,000 per day. The following factors will be considered in determining the amount of the penalty: the gravity of the violation, the size of the business, the employer's good faith, and the employer's history of prior violations. The Commissioner's penalties shall be subject to notice and hearing requirements.

Salary History Ban (HB123). Riding the wave of salary history bans in other states and local jurisdictions, this bill imposes a number of obligations and prohibitions:

- It requires an employer to provide the wage range for the position in question upon an applicant's request.
- It prohibits an employer from relying upon an applicant's wage history in screening, hiring, or determining wages.
- It also prohibits an employer from asking for wage history, whether orally, in writing, or through an employee or agent, or from a current or former employer.
- It prohibits an employer from retaliating against, or refusing to interview, hire, or employ an applicant who did not provide their wage history or who requested the wage range for the position in question.
- It acknowledges that an applicant may voluntarily provide their wage history.
- After a conditional offer of employment is made, it permits the employer to confirm and to rely on voluntarily-provided wage history to support a higher wage offer than initially offered, as long as the higher wage does not create an unlawful pay differential based on sex or gender identity.

Applicants may complain of violations to the Commissioner of Labor and Industry. The Commission can issue an order compelling compliance. The Commissioner also has the discretion to issue a letter compelling compliance for a first violation, a civil penalty of up to $300 per applicant for a second violation, and a civil penalty of up to $600 per applicant for each subsequent violation occurring within three years of a prior violation. The following factors will be considered in determining the amount of the penalty: the gravity of the violation, the size of the business, the employer's good faith, and the employer's history of prior violations. The Commissioner's penalties shall be subject to notice and hearing requirements.

Hair Textures and Hairstyle Discrimination Ban (HB1444/SB0531). In the wake of public outrage over media reports that a high-school wrestler was forced to cut off his locks before a match, several states and local jurisdictions passed laws prohibiting discrimination based on hairstyles associated with race. This bill follows that lead, and adds "protective hairstyle" including braids, twists, and locks to the list of characteristics that are protected from discrimination under state law. It also clarifies that "'Race' includes traits associated with race, including hair texture, afro hairstyles, and protective hairstyles."

Virginia enacted similar legislation, effective July 1, 2020.

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Equal Pay Act Revision (HB0014). Maryland's Equal Pay Act was expanded in 2016 to prohibit discriminatory pay practices based on gender identity as well as sex and to add a new pay transparency provision. The bill amends the law to prohibit taking any adverse employment action against an employee for asking about the employee's own wages, as well as the wages paid to other employees.

Heat Stress Standards (HB0722). This bill requires the Commission of Labor and Industry to develop regulations on or before October 1, 2022, requiring employers to take certain actions to protect employees from heat-related illness. Maryland Occupational Safety and Health will hold informational hearings in four different locations within the State to obtain input. The Commissioner is directed to consider standards created by the National Institute for Occupational Safety and Health, the American Conference of Governmental Industrial Hygienists, and the American National Standards Institute.

Revised Definition of Family Member Under Maryland Healthy Working Families Act (HB0880). The 2018 Maryland Healthy Working Families Act requires employers to provide paid sick and safe leave for employees, which can be used to care for family members. This bill expands the provision of "family member" to now include the employee's ward, as well as the legal guardian or ward of the employee's spouse.

Facial Recognition Technology for Applicants (HB1202). This bill prohibits the use of a facial recognition technology during an applicant's interview without their consent. An applicant may consent to the use of such technology by signing a waiver that contains the applicant's name, the interview date, the applicant's consent to the use of facial recognition during the interview, and whether the applicant read the consent waiver.

Adjusting the Amount for Wage Complaints to the Commissioner (SB0119). Under current law, there is a wage complaint resolution procedure before the Commissioner of Labor and Industry, and the bill increases the cap on the amount eligible for this procedure from $3000 to $5000.

List of Incentive Programs for Hiring and Retraining the Formerly Incarcerated (HB0835). This bill directs the state Department of Labor to develop and make available on its website a list of federal and state incentive programs available to an employer who hires and trains formerly incarcerated individuals.

U.S. Supreme Court Sets High Bar for Section 1981 Race Discrimination Claims

On March 23, 2020, the U.S. Supreme Court issued a decision in which it held that plaintiffs bringing claims under Section 1981 must show that race was the only reason, not just one of the reasons, for the challenged action. Although this case arose in a non-employment context, the holding is equally applicable to Section employment claims.

Background. Section 1981 guarantees "[a]ll persons … the same right … to make and enforce contracts … as is enjoyed by white citizens." This has been interpreted to prohibit race discrimination in employment "contracts," meaning with regard to hiring and employment. As relevant to the Supreme Court's decision, it also establishes criminal sanctions permitting the prosecution of anyone who "deprive[s]" a person of "any right" protected by the law "on account of" that person's prior "condition of slavery" or "by reason of" that person's "color or race."

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In *Comcast Corp. v. Nat'l Assn. of African American-Owned Media*, the plaintiff company alleged that Comcast systematically disfavored 100% African American-owned media companies. The U.S. Court of Appeals for the Ninth Circuit held that a Section 1981 claim required only a showing that race played "some role" in the decisionmaking process. The Ninth Circuit's holding, however, was not consistent with that of other sister Circuits, which have held that a Section 1981 plaintiff must plead and prove that its injury would not have occurred "but for" the unlawful conduct.

The Supreme Court's Ruling. The Supreme Court reversed the Ninth Circuit's ruling. Applying traditional tort principles, which it found to be the "default" or "background" rule for federal antidiscrimination laws, the Supreme Court found that the stricter "but-for" standard was the appropriate causation standard under Section 1981. The Supreme Court looked to the statute's language (i.e. "by reason of … color or race"), history, and its own precedents (using "because of race" language) in arriving at that ruling.

The Supreme Court rejected the argument that Title VII's motivating factor standard – under which a plaintiff need only show that discrimination was a motivating factor in the adverse decision – should be imported into Section 1981. Given Section 1981's long history without reference to motivating factors, as well as the lack of evidence that Congress intended for the two statutes to incorporate the same causation standard, the Supreme Court found no basis to apply that standard to Section 1981.

What This Means for Employers. This case is good news, as it will be more difficult for employees to meet the standard for maintaining a successful Section 1981 claim.

DOL Opinion Letters Address Whether Other Payments Must Be Included in the Employee's Regular Rate

The U.S. Department of Labor released three new opinion letters on March 26, 2020, addressing whether certain payments – longevity bonuses, referral bonuses, and employer benefit contributions – must be included in the employee's regular rate of pay for purposes of calculating overtime payments under the Fair Labor Standards Act. 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 for guidance.

The FLSA requires payment to non-exempt employees of an overtime premium for all hours worked over 40 in a workweek, at 1½ times the employee's regular rate. The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," subject to eight statutory exclusions. The DOL recently issued a final rule listing payments that could be excluded from the regular rate, which we discussed in our December 12, 2019 E-Lert. In announcing these opinion letters, the DOL stated, "All three of the opinion letters published today provide further clarity on the Department's recently announced final rule on FLSA regular rate requirements, which allows employers to more easily offer perks and benefits to their employees."

FLSA2020-3 – Longevity Payments. One of the statutory exclusions from the regular rate is "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." Such payments may be tied to length of service. They may also be "paid with regularity

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so that employees are led to expect it." But if the payment is made pursuant to contract, or if it is so substantial that it can be assumed to be part of the employee's wages, then it is not a gift and is not excludable from the regular rate.

Applying these principles, the DOL found that longevity payments were made pursuant to a city resolution that provided that eligible employees "shall" be entitled to the award. Although the form and time of the payment were left to the City's discretion, the fact of the payment was not. Thus, the payments were not in the nature of gifts, and must be included in the regular rate. The DOL observed that, had the resolution stated that employees "may" be entitled to longevity pay up to a maximum amount, leaving the actual amount up to City official to determine each year at Christmas time, such payments would have been authorized but not required, and therefore could have been excluded as gifts.

FLSA2020-4 – Referral and Longevity Bonuses. At issue here is the same statutory exclusion discussed above - "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." In its preamble to the 2019 Final Rule, the DOL reaffirmed its longstanding principle that referral bonuses are not remuneration and therefore are not included in the regular rate if the following conditions are met: (1) participation in recruitment activities is strictly voluntary; (2) the recruitment activities do not involve significant amounts of time; and (3) the recruitment activities are limited to after-hours solicitation among friends, relatives, neighbors and acquaintances as part of the employee's social affairs. Such payments would be in the nature of an excludable gift.

The situation in question involved a proposed referral bonus program available to employees who do not work in human resources and who have no responsibilities as to recruitment, hiring, selection or hiring. The program would be voluntary, require only the submission of a potential applicant's name, and be limited to the employee's after-hours social affairs. The payment, which would be "significant," would be made in two installments – one at the time the referred employee is hired, and the second on the one-year anniversary of the hire, assuming both the referring and referred employees are still employed.

In applying the principles above to this situation, the DOL determined that the first installment could be excluded. Because the second installment would only be paid after a year, it is more properly characterized as a longevity bonus that rewards the referring employee for a year of service. The DOL observed that, if the second installment were to be paid regardless of whether the referring employee were employed or if the period of time was only a month rather than a year, then it would be more similar to the properly excludable first installment.

As a longevity bonus, in order to qualify for the exclusion that it is a "payment[] in the nature of gifts . . . as a reward for service", the bonus must meet two conditions: (1) not be measured by hours worked, production or efficiency; and (2) not be paid pursuant to a contract. As noted in the prior opinion letter, if the payment is not contractually enforceable, it may be excluded from the regular rate, but it if is contractually enforceable, it must be included in the regular rate. While the payment met the first condition, the DOL found it unclear whether a contractual right to payment was created by the program.

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FLSA2020-5 – Benefits Payments. The FLSA provides that "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide [benefit] plan" may be excluded from the regular rate, if they meet certain requirements: the "benefits must be specified or definitely determinable on an actuarial basis" or there must be "a definite formula" for determining both the employer's contributions and the employees' benefits.

The DOL applied this analysis to an employer's contribution to group-term life insurance coverage of over $50,000 for the employee, which was required to be reported as taxable gross income by the Internal Revenue Code. The DOL noted that imputed income that is taxable under the IRC need not necessarily be included in the regular rate; thus the treatment of income for tax purposes is not determinative of whether it must be included in the regular rate. Rather, the payment met the requirements for the statutory exclusion, and the amount of the payment was irrelevant to this analysis.

NLRB Rules Severance Agreement Provisions Are Lawful; *Boeing* Work Rule Framework Not Applicable

The National Labor Relations Board held that two disputed provisions in the Employer's severance agreements were not unlawful work rules. The Board reasoned that the agreements were optional and signing was not a condition of continued employment. Additionally, the agreements applied only to post-employment activities, had no impact on terms and conditions of employment, and did not affect pay or benefits accrued during employment.

Background: In *Baylor University*, the Employer offered voluntary severance agreements to discharged employees. The Board addressed two provisions in the severance agreements. First, the agreement included a "Confidentiality" provision stating that the signatory agreed to keep secret information related to operations, finances, and other information regarding employees. Second, the agreement contained a "No Participation in Claims" clause where the signatory agreed not to pursue, assist, or participate in claims brought by third parties against the Employer. Separating employees were not required to sign the severance agreements. If the separating employees did execute the agreement, however, they would receive severance pay and post-employment benefits to which they would not otherwise be entitled.

Analysis: Under the now familiar *Boeing* framework, work rules are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. An administrative law judge applied *Boeing* and concluded that the "Confidentiality" and "No Participation in Claims" provisions were unlawful Category 3 work rules.

The Board reversed the judge. Initially, the Board found that *Boeing* did not apply in this case. Rather, *Boeing* only applies where an employer allegedly makes or maintains an unlawful work rule. In this case, however, the Board concluded that the severance agreements differ from work rules in two ways. First, the agreement was not mandatory and signing it was not a condition of continued employment; instead, the agreement was optional and applied only in the event of separation. Second, the agreement pertained only to post-employment activities, and had no impact on terms or conditions of the signatory's employment or benefits accrued during the signatory's employment that the Employer would have been obligated to pay. Additionally, the proffer of the severance agreement was not unlawful because none of the individuals offered the agreement were unlawfully

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discharged for conduct protected by the National Labor Relations Act. Nor was the severance agreement offered under circumstances that would tend to infringe upon the employees' or their coworkers' right to engage in protected activities.

Lessons for Employers: The takeaway from this case is that the Board will not apply *Boeing* to severance agreement provisions. Employers are free to condition severance pay and other post-employment benefits *to which employees would not otherwise be entitled* on separating employees' agreement to provisions similar to those addressed by the Board in this case. Employers should not, however, condition pay or benefits accrued during an individual's employment on execution of a severance agreement.

Drivers Who Leased Trucks From Shipping Company Are Employees, Not Independent Contractors, Says NLRB

In *Intermodal Bridge Transport*, the Board held that the Company did not meet its burden of establishing that delivery drivers were independent contractors. Applying its decision in *SuperShuttle* – which we discussed here – the Board concluded that drivers who leased their trucks are employees, and, thus, enjoy the protections of the National Labor Relations Act.

Background: The Company operates a logistics and storage container business that services ports in Southern California. The Company engaged truck drivers, who transport goods in storage containers. The drivers whose status was in controversy leased their trucks from the Employers.

In analyzing whether the drivers were independent contractors, the Board applied the common law agency test viewed through the prism of "entrepreneurial opportunity," as required by *SuperShuttle*. The Board found that the drivers had limited entrepreneurial opportunity and that the common law factors weighed in favor of finding that the drivers are employees:

Lack of Entrepreneurial Opportunity: Drivers did not have meaningful opportunity for economic gain through their own efforts or initiative. The Company set the drivers' compensation rate and operational costs. Thus, the only way for a driver to earn more was simply to work more hours. Customers, not the drivers, negotiated the per-load rate directly with the Company. The drivers paid a daily lease rate and fuel surcharge, and received cleaning assistance payments, all of which were set by the Company. Importantly, the drivers could not use the leased trucks to perform work other than to perform work for the Company.

Limited Control of Work: Drivers did not have their own routes. Moreover, the drivers had little control over when they worked, the loads they hauled, or the customers they serviced. While drivers could pick what days they worked, and what time they started, the Company determined whether the driver worked the day or night shift. Drivers could select between two and four assignments determined exclusively by Company dispatchers. The dispatchers then controlled the flow of the drivers' work during the shift and communicated directly with customers. Finally, the Company controlled drivers' terms and conditions of employment through application of policies and procedures, including a detailed progressive disciplinary policy.

Other Factors: The Board found that other factors also supported the conclusion that drivers were employees. For example, the Company provided the drivers' tools and instrumentalities. In addition,

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approximately 80% of the drivers had worked for the Employer for more than six years, suggesting the drivers were a permanent workforce.

In short, drivers had limited discretion in when they would work, less discretion to decide which loads to haul, and no discretion to decide to work beyond the end of their shift. The Board, however, found that the mere misclassification of the drivers was not an unfair labor practice.

Lessons for Employers: This case underscores that the Board will closely scrutinize an alleged independent contractor's opportunity for entrepreneurial opportunity. Where an employer exercises significant control over an individual's working conditions, and the individual has limited entrepreneurial opportunity or risk of loss, the Board is likely to conclude the individual is an employee, not an independent contractor.

TAKE NOTE

Other Federal Agency COVID-19-Related Actions. Several other federal agencies have announced COVID-19-related actions of interest to employers:

- The Department of Homeland Security has announced flexibility with regard to the Form I-9 requirement that employers review the employee's identity and employment authorization documents in the employee's physical presence. This applies only to employers that are operating remotely, and will last until May 19, 2020, or three days after termination of the National Emergency.
    - Employers must still inspect the documents remotely (by video link, fax or email) and obtain, inspect and retain copies of the documents within three business days for purposes of completing Section 2 of the form.
    - After normal operations resume, all employees who were subject to remote verification must report to their employer within **three business days** for in-person verification of Form I-9 identity and employment eligibility documentation.
    - Employers must enter "COVID-19" as the reason for the physical inspection delay in the Section 2 "Additional Information" field once physical inspection takes place.
    - Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 "Additional Information" field on the Form I-9, or to section 3 as appropriate.

- The National Labor Relations Board has taken several actions:
    - The General Counsel (GC) of National Labor Relations Board, Peter Robb, issued a General Counsel Memorandum summarizing case law pertaining to an employer's duty to bargain during emergency situations. The memo was prompted by questions from employers and unions in light of responsive measures taken to contain the spread of COVID-19.

      It is well established that employers have a duty to bargain over subjects related to bargaining unit employees' terms and conditions of employment. An exception to this duty exists where "economic exigencies compel prompt action," which is limited to "extraordinary events which are unforeseen, and have a major economic effect requiring

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the company to take prompt action." GC Memo 20-04 sets forth case law relevant to this standard in two categories. First, GC Robb summarized decisions addressing an employer's duty to bargain where a public emergency has been declared. For example, an employer may not be obligated to bargain over the decision to lay off employees where the layoff is necessitated by a local evacuation order, but the employer may be required to bargain the effects of the layoff. Additionally, an employer's decision of whether to treat its unionized workforce the same as its non-union workforce (e.g., pay issues) where employees are unable to work due to a public emergency may require an employer to bargain with the Union before taking action. Second, the GC discussed an employer's duty to bargain during emergency situations particular to the employer.

The memo makes clear that an employer will be excused from its duty to bargain only under extraordinary circumstances. Further, even where such extraordinary circumstances warrant an exception to the employer's duty to bargain over a decision, the employer will very likely be obligated to bargain the "effects" of that decision.

- The effective date for the Board's final rule modifying its Representation Case Procedures (which we discussed in our December 13, 2019 E-Lert) has been delayed from April 16, 2020 to May 31, 2020. The modified election procedures will allow non-petitioning parties – employers, typically – to litigate unit scope and voter eligibility issues, and will generally increase the number of days between an election petition and the election. The delay allows for resolution of legal challenges to the rule. Earlier this month, the AFL-CIO filed a lawsuit in federal court, alleging that the Board's final rule violates the Administrative Procedure Act (APA), National Labor Relations Act (NLRA), and is "arbitrary and capricious."
- The Board has suspended all representation elections, including mail ballot elections, through April 3, 2020. This suspension may be extended if the COVID-19 situation continues to worsen.

- The Office of Federal Contract Compliance Programs has taken the following actions:
  - Issued a temporary national interest exemption to contractors entering new federal COVID-19-related contracts from certain affirmative action obligations under Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act, and Section 503 of the Rehabilitation Act. There are FAQs regarding this exemption.
  - According to the National Industry Liaison Group, the OFCCP has agreed as to its audit process that it will grant automatic 30-day extensions for submission of AAPs after receipt of a Scheduling Letter and, following the agency's receipt of a written AAP narrative, for submission of supporting data reports and analysis. It will also grant an automatic extension of 14 days (up to 30 days upon request) for contractors to respond to information requests. It will conduct 503 focused review onsites via video or phone conference until the contractor's normal operations resume.

An Actual Arbitration Agreement Is Required for Enforcement. An employer could not enforce an arbitration agreement, purportedly requiring its employees to arbitrate any work-related disputes,

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where it could not produce a signed copy of the agreement, according to the U.S. Court of Appeals for the D.C. Circuit.

In *Camara v. Mastro's Restaurants LLC*, the employee brought claims under the Fair Labor Standards Act, and the employer sought to compel arbitration. The employer, however, could not produce an agreement that had been signed by the employee, and the employee denied signing it. The party seeking to enforce an arbitration agreement has the burden of proving the other party agreed to arbitrate. An affidavit from the restaurant general manager stated that they required all employees to sign such agreements, personally presented each employee with the agreement, and "virtually every" employee had signed one. The HR manager submitted an affidavit that the electronic HR system noted that the employee had signed the agreement. Yet, because the employee denied doing so and because the actual agreement could not be produced, the court found that the employer failed to meet its burden of proof. Moreover, his continued employment could not be construed as implied agreement to arbitrate where there was no evidence that he knew of the agreement's existence.

The lesson for employers is quite simple – make sure you have copies of signed agreements.

FCRA Disclosure May Include "Concise" Explanation of Consumer Report. The U.S. Court of Appeals for the Ninth Circuit found that required disclosure to applicants and employees before obtaining a consumer report under the Fair Credit Reporting Act could include a brief explanation of what is a consumer report and how it would be used. It also found that the FCRA does not require employers to provide an opportunity to discuss the consumer reports directly with the employer.

The Fair Credit Reporting Act requires employers, before using a third party consumer reporting agency to obtain an applicant's or employee's consumer report (i.e. background check), to provide a disclosure document consisting "solely of the disclosure" that such a report may be obtained. In *Walker v. Fred Meyer, Inc.*, the plaintiff claimed that the company violated the FCRA by including additional information. The Ninth Circuit held "that beyond a plain statement disclosing 'that a consumer report may be obtained for employment purposes,' some concise explanation of what that phrase means may be included as part of the "disclosure" required by [the law]. For example, a company could briefly describe what a 'consumer report' entails, how it will be 'obtained,' and for which type of 'employment purposes' it may be used."

The Ninth Circuit also held "that the right provided by the FCRA to dispute inaccurate information in a consumer report does not require employers to provide job applicants or employees with an opportunity to discuss their consumer reports directly with the employer." Rather, those individuals have the right to dispute the consumer report only with the third party consumer reporting agency.

Although only binding in the Ninth Circuit, this decision provides some useful guidance to employers regarding the appropriate parameters of what information may properly be included in the requisite disclosure document, as well as what recourse is legally required to be available to applicants and employees regarding inaccuracies in the consumer report.

UberBLACK Drivers May Be Employees, Not Independent Contractors. In another case of interest regarding the gig economy, the U.S. Court of Appeals for the Third Circuit reversed a federal district court ruling that UberBLACK drivers were independent contractors, finding there to be a material dispute over the determination of such status.

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In determining employee status under the Fair Labor Standards Act, the Third Circuit applies a six-factor test adopted from the Ninth Circuit and set forth in *Donovan v. DialAmerica Marketing, Inc.*: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered required a special skill; (5) the degree of permanence of the working relationship; [and] (6) whether the service rendered is an integral part of the alleged employer's business.

The Third Circuit applied this test in *Razak v. Uber Technologies, Inc.*, in which UberBLACK limousine drivers claimed that they were employees entitled to minimum wage and overtime pay under the FLSA. The district court had found that the drivers were independent contractors based on a number of Uber's assertions, including that the drivers could work for other companies, paid their own expenses, could hire subcontractors, could engage in personal activities while online, could work as much or little as they liked, and could choose not to accept trip requests, among other things. The Third Circuit found, however, that there were actually genuine disputes as to Uber's right to control the drivers through its technology service and whether drivers could work for others while online for Uber. There were also disputes as to the drivers' opportunity for profit or loss, as Uber set the fare, assigned trip requests, determined whether to refund or cancel passenger fares, and could change the drivers' territories without notice. Accordingly, the case was remanded back to the district court for further proceedings.

The test articulated by the Third Circuit generally follows the one set forth by the Department of Labor in an opinion letter, as we discussed in our April 2019 E-Update. Notably, not all jurisdictions utilize the same test. The Fourth Circuit, for example, has adopted a stricter test that favors findings of employee status, as discussed in our January 2017 E-Update.

Threat of Firing or Criminal Charges Not Required For Constructive Discharge Claim. The U.S. Court of Appeals for the Second Circuit found that the district court had imposed an "unduly stringent" standard for a constructive discharge claim in finding the plaintiff failed to show that she had been given an ultimatum to quit or be fired or threatened with criminal charges.

In *Green v. Town of East Haven*, the Second Circuit noted that the appropriate legal standard for a constructive discharge claim is whether in light of the evidence as a whole, the working circumstances were so intolerable that a reasonable person in the employee' shoes would have felt compelled to resign. The Second Circuit found that the plaintiff had met this standard in that, among other things, Internal Affairs determined she had stolen a basket and a package of biscuit dough, that she was told Department officials no longer trusted her, that she was told that if the Internal Affairs report was upheld she would likely be fired, that she was advised to resign or retire if she could, and that her union representative told her she would almost certainly lose at an appeals hearing.

What this case establishes is that while the standard for constructive discharge claims is strict, it does not require an actual threat of firing or criminal charges. Rather, the situation is fact-specific, and many different circumstances can establish a constructive discharge claim.

Staffing Company Liable for Low Level Employee's FLSA Violations. In a warning to employers about their responsibility for the actions of low level employees under the FLSA, the U.S.

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Court of Appeals for the Ninth Circuit found that a staffing company was liable for the actions of its low level employee and, further, that there was no right to indemnification or contribution under the FLSA.

In *Scalia v. Employer Solutions Staffing Group, LLC*, the company contracted with middlemen companies to recruit employees and place them at jobsites for which the company handled administrative tasks. The company's employee was placed at a jobsite, and was responsible for processing their payroll. She was told by the middleman company to pay all hours worked over 40 at straight time, without an overtime premium. She did this for over one and a half years, dismissing the error messages that the software produced. The Secretary of Labor then sued the company, the middleman company, and the jobsite company for more than 1000 overtime violations. The company brought cross-claims against the others for contribution or indemnification.

The company argued that it could only be held liable for the actions of its supervisor or manager, and not low-level employees. The Ninth Circuit rejected the argument, noting that the company had chosen the employee as its agent for payroll processing and she was therefore its agent, rendering the company liable for her actions. In addition, because the employee dismissed the software's repeated warnings about unpaid overtime for more than a year, without seeking any explanation that would justify such dismissal, the Ninth Circuit found that the company, through its agent, recklessly disregarded the possibility that it was violating the FLSA. Thus its violations were willful, extending the statute of limitations from two years to three, and mandating the award of liquidated damages.

The Ninth Circuit also found no basis in the FLSA or under common law to support a right of indemnification or contribution for liable employers. Therefore they will be fully responsible for damages under the law.

"Employees Cannot Mandate an Accommodation." As the U.S. Court of Appeals for the Sixth Circuit found, an employee must engage in the reasonable accommodation process and must provide medical documentation that actually supports his reasonable accommodation request.

In *Tchankpa v. Ascena Retail Group, Inc.*, an employee with a shoulder injury demanded to work from home. The employer sought medical documentation, which the employee took ten months to provide. And when it was finally received, it stated that the employee could perform his job with intermittent breaks and a lifting restriction, with no mention of working from home. His request was denied, the employee resigned, and then sued the company, alleging a failure to provide reasonable accommodations.

Observing that "the disabled employee's requested accommodation does not bind his employer," the Sixth Circuit stated that "an employee's failure to provide requested medical documentation supporting an accommodation precludes a failure to accommodate claim." It also reiterated that an employee must show that his requested accommodation is medically necessary when requested to do so by his employer. In short, the Sixth Circuit found that the employee failed to show that working from home related to his disability, failed to provide satisfactory documentation to support his requested accommodation, and resigned before the parties could agree on an accommodation, which constituted a failure to participate in the interactive process.

This case reiterates a number of important principles. First, the employee has a responsibility to engage in the interactive process. Second, the employee's requested accommodation must relate to

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his disability. Next, the employer is entitled to medical documentation to support an accommodation for a non-obvious disability. And finally, the employer is not bound to the employee's requested accommodation. As we have previously discussed, the employer may choose the accommodation, and it need not be the best or most effective one, as long as it enables the employee to perform his essential job functions.

An Alcoholic Employee May Not Come to Work Drunk. As the U.S. Court of Appeals for the Fifth Circuit stated, "an employer can hold alcoholic employees to the same standards as other employees, even if the behavior in question is related to alcoholism."

In *Kitchen v. BASF*, the employee struggled with alcohol abuse during his tenure with the company, going in and out of treatment. After he was again convicted of driving while intoxicated, the company required him to sign a Return to Work Agreement that required him to submit to breath alcohol testing and a final written warning that stated he would be terminated for testing positive at work, among other things. Subsequently, he tested positive at work and was terminated based on his supervisor's belief that he came to work under the influence of alcohol in violation of the company's alcohol policy, the Return to Work Agreement, and the final written warning. He sued, alleging that he had been discharged because of his disability – alcoholism.

The Fifth Circuit found that firing the employee for arriving to work under the influence of alcohol is not the same as firing him because of a prejudice against alcoholics. It noted that the ADA recognizes that employers "may require that employees shall not be under the influence of alcohol … at the workplace" and "may hold an employee … who is an alcoholic to the same qualification standards for employment or job performance and behavior that [the employer] holds other employees, even if any unsatisfactory performance or behavior is related to the … alcoholism of the employee." Moreover, the court found that the employer reasonably believed its non-discriminatory reason for firing the employee – that he had violated company policy, the Agreement and the final warning – and then acted on that basis.

Discriminatory and Nondiscriminatory Comments Can Combine to Create Hostile Work Environment. A hostile work environment can be created through a combination of both explicitly discriminatory and non-discriminatory (but offensive) comments, according to the U.S. Court of Appeals for the Second Circuit. It also held that the employee need not show that he was physically threatened or that the harassment interfered with his job performance in order to sustain a hostile work environment claim.

Under Title VII, hostile work environment harassment exists when the harassment is so severe or pervasive that it alters the employee's work environment. In *Rasmy v. Marriott Int'l, Inc.*, an employee sued for hostile work environment harassment based on his religion and national origin, as a Coptic Christian of Egyptian heritage. He claimed that following his complaints to human resources that co-workers engaged in wage theft, the co-workers retaliated by calling him derogatory names like "the mummy," "camel," "Egyptian rat," and "pretentious Christian," as well as other names that were not explicitly discriminatory. There were also other discriminatory comments that were not directed at him but purposely made in his presence. The district court dismissed his claims, finding that the discriminatory comments were not sufficiently severe to create a hostile work environment and that the other comments were simply stray remarks that did not target the employee. In addition, it found that, even if the conduct were pervasive harassment, no hostile work

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environment existed because the employee had not been physically threatened and his work performance had not suffered.

On appeal, the Second Circuit stated that "when the same individuals engage in some harassment that is explicitly discriminatory and some that is not, the entire course of conduct is relevant to a hostile work environment claim." It also found that "conduct not directly targeted at or spoken to an individual but purposefully taking place in his presence can nevertheless transform his work environment into a hostile or abusive one." In addition, the Second Circuit found that an employee does not have to be physically threatened or experience interference with his work performance to sustain a claim of hostile work environment.

NEWS AND EVENTS

Victory – Teresa D. Teare and Paul D. Burgin successfully defended a residential program that provides services to disabled adults from a claim in Maryland federal court that employees should have been paid for all time set aside for sleeping (or engaging in personal activities) during their 7-day shifts. The court found that the employees were "waiting to be engaged" in their duties during that sleep period, which was not compensable, and not "engaged to wait," which would have been compensable.

Media – Mark J. Swerdlin and Fiona W. Ong were featured in a March 18, 2020 Baltimore Business Journal article by Holden Wilen, "What should I do if my employee gets COVID-19? Attorneys tackle these and other pressing questions," in which he summarized guidance given by Mark and Fiona during Shawe Rosenthal's March 17, 2020 webinar on "Coronavirus in the Workplace." (Subscription required for article).

Webinar – Mark J. Swerdlin and Fiona W. Ong conducted a webinar for hrsimple.com, "Coronavirus in the Workplace and Families First Coronavirus Response Act," on March 19, 2020. You may view the webinar here.

Advocacy – On behalf of the Maryland Chamber of Commerce, Fiona W. Ong and Elizabeth Torphy-Donzella participated in a conference call with Senators Benjamin Cardin and Christopher Van Hollen to pose questions about the practical impact of the Families First Coronavirus Response Act on small businesses.

Webinar – Fiona W. Ong offered guidance to business owners in a webinar, COVID-19: Maryland Chamber's Response and Resources," presented by the Maryland Chamber of Commerce for its members on March 23, 2020. You may listen to the webinar here.

Blog – Shawe Rosenthal was the guest author for a blog on the Maryland Chamber of Commerce's website, Shawe Rosenthal's "Coronavirus in the Workplace: Practical Guidance for Employers" Webinar Recap.

TOP TIP: Mid-Atlantic Employers – Your Governor(s) Just Issued a Shut-Down (or Other) Order. What Does This Mean?

In light of the COVID-19 pandemic, governors in Delaware, the District of Columbia, Maryland, New Jersey, New York, Pennsylvania and Virginia have issued various orders requiring certain

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business closures or restrictions, limiting travel, and imposing other restrictions that impact the workplace. What are these various orders, and how do they compare from state to state? We have prepared a chart that summarizes these orders, available here.

Additionally, employers are struggling with many questions about the impact of COVID-19 in the workplace. We have prepared answers to many Frequently Asked Questions, including the Families First Coronavirus Response Act, available on our website. As this is a fast-moving and volatile situation with shifting legal analyses, we are constantly updating this comprehensive and detailed resource. Please check back often for information on the latest laws and federal agency guidance. If you experience difficulty accessing this resource, please be patient and try again later. Unusually heavy traffic has sometimes caused problems with access.

RECENT BLOG POSTS

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

- Coronavirus Aid Relief and Economic Security Act Becomes Law by Elizabeth Torphy-Donzella, Eric Hemmendinger, and Lindsey A. White, March 27, 2020
- DOL Answers More Burning Questions and Provides a Poster About Families First Coronavirus Response Act by Fiona W. Ong, March 27, 2020
- DOL Provides Guidance on the Families First Coronavirus Response Act by Fiona W. Ong, March 26, 2020
- Is Your Business "Essential"? More Guidance from Governor Hogan's Office by Fiona W. Ong, March 25, 2020
- Additional Guidance on Governor Hogan's Shutdown Order by Fiona W. Ong, March 24, 2020.
- Maryland Orders Closure of Non-Essential Businesses to the Public by Lindsey A. White, March 23, 2020.
- EEOC Declares COVID-19 a "Direct Threat," Updates 2009 Pandemic Guidance by Fiona W. Ong, March 21, 2020.
- Love You! by Elizabeth Torphy-Donzella, March 20, 2020 (Selected as a "noteworthy" blog post by Employment Law Daily).
- The Families First Coronavirus Response Act Has Been Signed Into Law – What This Means for Employers by Fiona W. Ong, March 19, 2020.
- Extraordinary Employee Misconduct: FMLA Does Not Cover Travel to and from an NFL Game by Chad M. Horton, March 11, 2020.
- The EEOC Weighs in on COVID-19 by Fiona W. Ong. March 5, 2020.

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