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E-UPDATE

April 30, 2020

RECENT DEVELOPMENTS

CDC Updates COVID-19 Guidance to Add New Symptoms and Guidelines on Release from Isolation

The federal Centers for Disease Control and Prevention (CDC) provided updated guidance on several issues of relevance to employees infected with COVID-19 – additional symptoms of COVID-19 and when individuals who have tested positive for COVID-19 may stop self-isolating, which would enable them to return to work.

New Symptoms. The CDC updated its webpage on the symptoms of COVID-19 to add six new symptoms to the previously-identified symptoms of fever, cough, and shortness of breath or difficulty breathing. The new symptoms are: chills, repeated shaking with chills, muscle pain, headache, sore throat, and a new loss of taste or smell.

Release from Isolation. In a separate Interim Guidance on Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings, the CDC provides guidance on when those individuals with COVID-19 and were directed to isolate at home may stop self-isolating (and therefore return to work).

- Where follow-up testing is not available or used, employees with symptoms who initially tested positive must be fever-free for at least three days without the use of fever-reducing medicines, there must be an improvement in their respiratory symptoms, and at least 7 days must have passed since the symptoms first appeared.
- Where follow-up testing is being used, employees with symptoms who initially tested positive must be fever-free for at least three days without the use of fever-reducing medicines, there must be an improvement in their respiratory symptoms, and they must have tested negative from at least two consecutive specimens collected 24 or more hours apart.
- Employees without symptoms who tested positive may discontinue isolation when 7 days have passed since the date of their first positive COVID-19 test and they remain asymptomatic. The CDC cautions that for three days following release from isolation, these individuals should stay 6 feet away from others and wear a face covering or mask.

DOL Issues New COVID-19-Related WARN FAQs and Updates FFCRA Q&As

The federal Department of Labor (DOL) issued new Worker Adjustment and Retraining Notification (WARN) Act COVID-19 Frequently Asked Questions and added to its extensive Questions and Answers resource for the Families First Coronavirus Response Act (FFCRA).

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WARN Act and COVID-19. The DOL has provided additional guidance for employers navigating the COVID-19 pandemic, by issuing a Frequently Asked Questions resource on the Worker Adjustment and Retraining Notification (WARN) Act and COVID-19.

WARN Act Overview: The WARN Act requires employers with 100 or more full-time employees to provide at least 60 calendar days advance written notice of a worksite closing affecting 50 or more employees, or a mass layoff affecting at least 50 employees and 1/3 of the worksite's total workforce or 500 or more employees at the single site of employment during any 90-day period.

Temporary Layoffs or Furloughs: Furloughs or layoffs of six months or longer that otherwise meet WARN requirements will trigger WARN's 60-day notice requirement. Employers that did not issue WARN notices because they did not intend layoffs to last longer than six months may be subject to WARN liability if the layoff or furlough is extended beyond six months. According to the DOL, an employer would not incur WARN liability in this scenario if: (1) the extension beyond six months is caused by business circumstances not foreseeable at the time of the initial layoff; and (2) notice is given at the time it becomes reasonably foreseeable that a layoff beyond six months will be required.

Notably, the DOL indicates that a layoff extending beyond 6 months for any other reason is treated as an employment loss from the date the layoff or furlough starts.

Permanent Layoffs Due to COVID-19: The DOL recommended employers review the "unforeseeable business circumstances" exception to WARN's 60 day notice requirement in assessing whether they may claim an exception for instituting permanent layoffs without providing 60 days' notice. This exception applies if the plant closing or mass layoff was necessitated by business circumstances that were not reasonably foreseeable 60 days' in advance of the employment action. The DOL further provided:

> (1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer… and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.
>
> (2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services

Even if 60 days' notice may not have been required pursuant to this exception, employers must still send WARN notices as soon as practically possible, and include a brief statement of the reason for giving less than 60 days' notice.

WARN Notices By Email: The Department of Labor confirmed that WARN notices may be sent via email, as "[a]ny reasonable method of delivery . . . which is designed to ensure receipt of notice' is

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One South Street, Suite 1800, Baltimore, MD 21202
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an acceptable form of notice." If notices are sent by email, the same requirements for the contents of the notice remain in place (found at 20 CFR 639.7).

Key Takeaways: The application of an exception to WARN's 60-day notice requirement does not eliminate employer's need to issue WARN notices if they otherwise meet WARN's requirements. Even if 60 days' notice was not required pursuant to an exception, employers must still send WARN notices for employment actions covered by one of WARN's exceptions as soon as practically possible, even if they are issued after the employment action occurs.

Accordingly, in the event that what was initially thought to be a short term layoff may extend beyond six months, employers should not wait until 60 days prior to the end of the six month period to issue WARN notices. They must continue to monitor the layoff and analyze the likelihood of whether the layoff will last beyond six months. As soon as it becomes reasonably foreseeable that the layoff may extend beyond six months, employers should issue WARN notices as soon as possible to avoid WARN liability.

FFCRA Q&As. The additions to the DOL's Questions and Answers resource for the Families First Coronavirus Response Act include the following:

- Detailed directions on how to compute the number of hours of emergency paid sick leave the number of expanded Family and Medical Leave Act hours that must be paid for employees with irregular hours.
- Specific guidance on how to calculate an employee's average regular rate of pay for FFCRA paid leave purposes, including those on a fixed salary.
- Permission to round to the nearest time increment customarily used to track hours worked (e.g. tenth, quarter or half hour), when computing emergency paid sick leave or expanded Family and Medical Leave.
- Clarification that the six-month period used to calculate an employee's regular rate is only measured once, upon the first day that the employee takes emergency paid sick leave or expanded Family and Medical Leave, even if the employee ends up taking leave in several blocks or on an intermittent basis.
- Reiteration that an employer may not require an employee to use existing paid leave concurrently with emergency paid sick leave under the FFCRA, but may require such use with expanded Family and Medical Leave. In the latter instance, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay up to $200 per day ($10,000 total).
- Confirmation that stay-at-home and shelter-in-place orders are the same as quarantine or isolation orders that trigger FFCRA emergency paid sick leave. The DOL emphasizes that the employee must be unable to perform available work because of the order, and that if the employer does not have work for the employee to perform because of the order, the employee may not take such leave.
- Explanation that if the DOL brings an enforcement action against an employer for failure to pay the paid sick leave, the employee is entitled to recover the full amount due.

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One South Street, Suite 1800, Baltimore, MD 21202
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EEOC Provides Guidance on Reasonable Accommodations and Employee Testing When Returning to Work

The federal Equal Employment Opportunity Commission (EEOC) updated its "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" resource to expand upon its guidance on some issues of concern to employers – reasonable accommodations and employee testing.

Reasonable Accommodations. The Americans with Disabilities Act requires employers to provide reasonable accommodations to employees with disabilities to enable them to perform the essential functions of their jobs or to enjoy equal benefits and privileges of employment. This obligation continues regardless of the pandemic, and applies equally to critical infrastructure or essential workers. Thus employers must engage in the interactive process with all employees with regard to any request for accommodation, which includes obtaining medical information to support the request where the need for accommodation is not obvious, as well as an exploration of possible accommodations. Because of the pandemic and if the need is urgent, however, employers may choose to forego or shorten the exchange of information and provide an accommodation on a temporary basis, subject to changing circumstances.

Accommodations need not be provided if they pose an undue hardship. The circumstances of the pandemic may cause an undue hardship where it would not have done so prior to the pandemic. The EEOC recognizes that current circumstances may create "significant difficulty" in acquiring or providing certain accommodations. For example, it may be significantly more difficult at the current time to conduct a needs assessment or to obtain certain items required for an accommodation. Additionally, it may be significantly more difficult to provide temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions.

Moreover, the EEOC acknowledges that, while expense is not normally a significant consideration (as compared with an employer's overall budget and resources), current economic conditions, such as the loss of some or all of the employer's income stream or the amount of discretionary funds available in consideration of other expenses, makes expense relevant to the undue hardship assessment. The employer must still weigh the cost of an accommodation against its current budget, and must consider no-cost or low-cost alternatives.

Return to Work Testing. According to the EEOC, under the current circumstances, employers may administer (or require to be administered) a test to employees before they enter the workplace to determine if they have the virus. Employers should ensure that such tests are accurate and reliable, in accordance with guidance from the U.S. Food and Drug Administration. Keep in mind, however, that there may be false negatives or positives, and that testing will not reveal future infection. In addition, this guidance may change as the pandemic eases.

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

NLRB Issues "Election Protection" Final Rule

On April 1, 2020, the National Labor Relations Board issued its anticipated "Election Protection" final rule. (Last August, the Board issued the Notice of Proposed Rulemaking, which we discussed here.) The final rule differs in some respects from the proposed rule. But the issuance of the final rule will unquestionably be viewed positively by employers. The final rule is now scheduled to become effective on July 31, 2020.

The final rule amends representation case ("R Case") regulations in three ways:

- **Blocking Charges:** The final rule institutes a vote-and-impound procedure only in certain cases. Specifically, impoundment is required where unfair labor practice charges, filed by the party seeking to block the election, allege: (a) violations of 8(a)(1) or (2), or 8(b)(1)(A) of the National Labor Relations Act that challenge the circumstances surrounding the petition or showing of interest in support of the petition; or (b) that an employer has dominated a union in violation of Section 8(a)(2) and seeks to disestablish a bargaining relationship. For all other cases, ballots will be opened and counted, rather than impounded. Regardless of the nature of the charge, the certification of results (or certification of representative) shall be withheld until there is a final disposition of the charge and its effect, if any, on the election.

  These changes represent a substantial improvement in the Board's blocking charge policy. Previously, unions or pro-union employees could, in many cases, block a decertification petition from proceeding to an election by filing a charge that claims to create doubt as to the validity of the petition or employees' ability to make a free and fair choice about continued representation. Now, the Board will proceed to an election even after a blocking charge is filed. The process will allow for employees to cast their vote on representation close in time to when the petition is filed.

- **Voluntary Recognition Bar:** The final rule re-establishes the notice posting requirement and 45-day open period for filing an election petition following an employer's grant of voluntary recognition to a union. The Board reasoned that this process accords with the Board's and courts' preference for resolving questions concerning representation through a Board-conducted secret-ballot election. Prior to the final rule, an employee or rival union would be precluded from following a petition following the grant of recognition for at least six (6) months and generally no more than 12 months. But where the employer and union reached an agreement during that voluntary recognition bar period, employees and rival unions may be precluded from filing a petition for up to an additional three (3) years.

  Thus, where an employer voluntarily recognizes a union, the employer or union must notify the NLRB Regional Office in that jurisdiction. The Regional Office will then send a Board notice to be posted by the employer – and, where appropriate, distributed electronically. Employees or a rival union will have a 45-day open period from the posting of the notice during which an election petition may be filed. If a petition is timely filed, the Regional Office will process the petition; if no petition is timely filed, the recognition bar shall apply for a period of no less than six (6) months and generally no more than 12 months. Additionally, an election petition filed during the 45-day open period will be processed even

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

where the employer and union have reached a collective-bargaining agreement. Notably, the final rule's provisions are applicable to voluntary recognition extended on or after the rule's effective date.

- **Proof of Majority-Based Recognition in the Construction Industry:** Section 8(f) of the NLRA allows construction employers to recognize a union even in the absence of majority support. In many cases, this recognition may occur before the employer has hired any employees (i.e., "pre-hire agreements"). This is an exception to the majority-based requirement for establishing a bargaining relationship mandated by Section 9(a) of the Act applicable to non-construction employers. When an 8(f) agreement expires, the employer is under no duty to continue bargaining with that union – which, of course, is not true of a 9(a) relationship for non-construction employers. Prior to the final rule, employers and unions could "convert" the 8(f) relationship to a 9(a) relationship by contract language alone – and without any evidence of a contemporaneous showing of majority support. Consequently, construction employees would be precluded from filing a petition for up to an additional three years by the Board's contract bar doctrine.

  Under the final rule, employers and unions representing construction-industry employees can only establish a Section 9(a) bargaining relationship based on positive evidence – rather than contract language alone – of employees' majority support for the union. The final rule prevents construction employees from being "locked in," by contract language alone, to several years of union representation where a union may have never had evidence of majority support.

The Board's final rule removes unnecessary barriers to fair and prompt resolution of questions concerning representation. Blocking charges will no longer delay elections indefinitely. Employees and rival unions will be able to file a petition in the weeks following voluntary recognition, which will trigger the preferred secret-ballot election to determine whether the union has majority support. Finally, construction employers and unions cannot convert an 8(f) bargaining relationship to a 9(a) relationship – and the contract bar principles that come with it – absent evidence of majority support of the union.

NLRB Addresses "Contract Coverage" Standard Following Expiration of CBA

In *KOIN-TV*, the National Labor Relations Board held that its recently adopted "contract coverage" standard is inapplicable to an employer's unilateral changes made after a collective-bargaining agreement ("CBA") has expired *unless* the CBA "contained language explicitly providing that the provision [permitting the unilateral change] would survive contract expiration." Here, because the parties' CBA included no such explicit language providing that the contractual management rights clause survived the CBA's expiration, the Board held that the employer violated Section 8(a)(5) of the National Labor Relations Act by making two unilateral changes.

Background: The parties' CBA included a management rights clause, as well as provisions related to employee scheduling and employee travel. The management rights clause vested the employer with the authority to "establish working rules [that]…do not violate the terms and provisions of [the

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CBA].” Additionally, while the CBA required the employer to post schedules at least two weeks in advance, the employer had an established practice of posting schedules four months in advance. Following expiration of the CBA, the employer made two changes to employees’ terms and conditions of employment. First, the employer began posting work schedules two weeks in advance, which was consistent with the expired CBA provision but constituted a change from the established practice of posting four months early. Second, the employer instituted a requirement that employees complete a driver background check annually. The employer conceded that both changes were made unilaterally, and without prior notification or bargaining with the union. The union alleged that both changes violated Section 8(a)(5) of the NLRA.

Analysis: The Board first reaffirmed that the “contract coverage” standard applies to changes made *during the term of a CBA*. That is, an employer has right to act unilaterally – and without notifying or bargaining with the union – during the term of a CBA where the change is “within the compass or scope of the contractual language granting the employer’s right to act unilaterally.” (This principle was established in the Board’s 2019 *MV Transportation* decision that we discussed here). But this case addressed whether that standard is applicable to unilateral changes after a CBA has expired.

The Board held that the “contract coverage” standard does not apply to unilateral changes made after expiration of the CBA unless the CBA includes explicit language giving the employer the right to act unilaterally after contract expiration. The Board reasoned that contractual rights expire with the CBA unless the parties agree in “explicit” terms that the provision providing the contractual right will survive expiration of the CBA. In other words, absent explicit language to the contrary, the contractual rights exist only for the duration of CBA agreed upon by the parties. Accordingly, because the CBA lacked explicit language giving the employer the right to act unilaterally after expiration of the CBA, the employer violated Section 8(a)(5) by unilaterally altering the scheduling procedures and instituting the driver background check. (Notably, the employer conceded that it did not notify or bargain the changes to impasse with the union prior to implementing the changes. Similarly, the Board found that the union did not “clearly and unmistakably” waive its right to bargain over the changes.)

Lessons for Employers: Employers will be unable to rely upon contractual language to make unilateral changes – typically set forth in the management rights clause – after expiration of the CBA unless the CBA included *explicit* language that the provision privileging the unilateral action survived expiration of the CBA. Absent such explicit language, an employer seeking to act unilaterally will typically have to (a) notify and bargain with the union to impasse, or (b) establish that the union “clearly and unmistakably” waived its right to bargain over the change, or some other recognized defense for making the unilateral change (e.g., exigent circumstances). Employers desiring to act unilaterally after expiration of a CBA should seek clear, explicit contract language providing that right.

TAKE NOTE

D.C. Expands Both DC-FMLA and Sick and Safe Leave Law for COVID-19. The District of Columbia temporarily expanded both its Family and Medical Leave Act (DC-FMLA) and its Sick and Safe Leave Act (DC-SSLA) to include COVID-19-related reasons.

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DC-FMLA Expansion. Under this expansion, which is in effect until June 15, 2020, during the time that the Mayor has declared a public health emergency, as she has done for COVID-19, an employee is entitled to "Declaration of Emergency" (DOE) leave if they are unable to work because of the public health emergency.

- This leave will apply to all employers, regardless of size (unlike regular DC-FMLA).
- All employees will be eligible for this leave, and the normal DC-FMLA eligibility requirements of one-year and 1000 hours of service do not apply.
- A recommendation from the Mayor, Department of Health, any other District or federal agency, or a medical professional that the employee self-quarantine or self-isolate will serve as certification of the need for such leave. In the case of a government mandated quarantine or isolation, the declaration of public health emergency will serve as such certification.
- Employers must display a mandatory poster.

DC-SSLA Expansion. The D.C. Council also added two weeks (up to 80 hours) of emergency paid leave (EPL) to the DC-SSLA requirements in order to address COVID-19-related reasons, effective until July 9, 2020.

- EPL will apply to non-healthcare employers with between 50-499 employees.
- Employees are eligible if they have worked for the employer for at least 15 days.
- EPL may be used if the employee is unable to work for the reasons set forth in the Families First Coronavirus Response Act: the employee is quarantined pursuant to Federal, State or local government order or the advice of a health care provider; the employee is experiencing symptoms of COVID-19 and is seeking a diagnosis; the employee is caring for an individual subject to quarantine; the employee is caring for a child whose school or child care provider is closed or unavailable because of COVID-19; or other reason specified by the Secretary of Health and Human Services.
- Employees can be required to exhaust any available paid leave before using EPL.
- If an employee exhausts EPL and needs additional leave, the employer must inform them of any paid or unpaid leave to which they are entitled under law or employer policy.
- Employees must provide 48 hours' notice of the need for EPL, except in emergency circumstances when they must provide reasonable notice.
- Employees cannot be required to find a replacement to perform their work.
- Certification of the need for EPL is permitted only if the employee uses 3 or more consecutive days of leave, and is due one week after the employee's return to work. In addition, if the employer does not contribute towards the employee's health insurance premiums, it cannot require certification.

Virginia Vastly Expands Its Employment Laws. Substantial changes to Virginia's employment laws were enacted, including expanding anti-discrimination protections, requiring reasonable accommodations for pregnancy and childbirth, increasing the minimum wage, providing a private right of action for wage payment violations, strengthening worker misclassification laws, prohibiting non-competes for low-wage employees, and implementing whistleblower protections.

- The Virginia Values Act added sexual orientation and gender identity to the list of characteristics protected from discrimination. The law also now covers all employers with 15 or more employees, with varying coverage for unlawful discharge claims based on age

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(employers with more than 5 and fewer than 20 employees) and other unlawful discharge claims (employers with more than 5 employees). It also added a private right of action, and authorized the Virginia Division of Human Rights to investigate charges of discrimination.

- Discrimination based on pregnancy, childbirth or related medical conditions, including lactation, is prohibited. Employers must also provide reasonable accommodations, including for lactation, absent an undue hardship.
- The General Assembly initially approved an increase in the minimum wage to $15 by 2026. Pursuant to an amendment by the Governor to that original legislation, approved by the General Assembly, the minimum wage will increase to $9.50 on May 1, 2021, $11 on January 1, 2022, and $12 on January 1, 2023, with further increases contingent on specific General Assembly action by 2024.
- Employees now have a private right of action for violations of the wage payment law and for discrimination or retaliation with regard to complaints for unpaid wages. Subcontractor employees may sue both the subcontractor and general contractor for unpaid wages.
- Employees who are misclassified as independent contractors may bring a private right of action against the employer, and may also sue for retaliation for reporting misclassification.
- Virginia now prohibits non-compete agreements for low-wage employees.
- Under a new whistleblower law, employees are protected from retaliation for reporting violations or suspected violations of law, refusing to violate the law, or engaging in certain protected conduct.

Employer Legally Obligated Only to Stop Co-worker Harassment, Not More. The U.S. Court of Appeals for the Fourth Circuit found that the employee could not sustain a hostile environment harassment claim where the employer had effectively stopped the co-worker harassment, and the employer was not required to do more than that.

Under Title VII, employers will be liable for co-worker harassment only where it knew or should have known about the harassment and failed to take action reasonably calculated to stop it. In *Bazemore v. Best Buy*, an employee asserted a hostile work environment claim based on a co-worker's racially and sexually charged joke comparing Brazil nuts to a black woman's breasts. The court, however, found that the harassment had stopped after the employer issued a final warning to the offending co-worker. It rejected the employee's contentions that the company's response was inadequate because the company could have done more – such as by having the General Manager meet with her, by having an all-staff meeting to remind employees about Company policy, or by firing the offending co-worker. The Fourth Circuit noted that "Title VII does not prescribe specific action for an employer to take in response to racial or sexual harassment, or require that the harasser be fired …[I]t is enough for an employer to take action 'reasonably calculated' to stop the harassment."

"There are no nuances to be discerned regarding the Holocaust"; Holocaust-Denier's Discrimination Claim Dismissed. The U.S. Court of Appeals for the Third Circuit rejected a teacher's claims of race, ethnicity and religion discrimination under federal and state law, finding that his termination was legitimately based on his teaching anti-Semitic views to his students.

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

In *Ali v. Woodbridge Township School Dist. et al.*, the teacher, who was an Egyptian Muslim, was terminated following complaints that his instruction minimized or denied the Holocaust, and included links to anti-Semitic writings. He sued for discriminatory termination and a hostile work environment, among other things, alleging that the principal had made disparaging comments about his ethnicity (calling him "Arabia Nights," "Big Egypt," and "Mufasa" from the Lion King).

The Third Circuit began its opinion by flatly asserting that, while there may be nuances in history that create equivocation about certain historic events, no such nuances exist with regard to the Holocaust; rather "It is a historic fact." The Third Circuit thus rejected the teacher's claims, finding no pretext for discrimination in the school's articulated reasons for his termination, as the teacher did not deny that he engaged in the anti-Semitic conduct, including teaching Holocaust-denial, without remorse. The Third Circuit further found that the alleged disparaging name-calling was neither sufficiently severe nor pervasive to create a hostile work environment.

ADA Does Not Require "Forgiveness or a Second Chance." An employee could be terminated for violating conduct rules, even resulting from her disability, and the employer was not required to provide an accommodation to enable her to meet the standards in the future, according to the U.S. Court of Appeals for the First Circuit.

In *Trahan v. Wayfair Maine, LLC*, the call center employee was terminated for violating the employer's conduct policy following a conflict with co-workers in which she threw her headset, slammed her phone, and called her co-workers "bitches," and then at a subsequent meeting with management regarding the conflict in which she exhibited rude and unprofessional behavior. After the decision was made to terminate but before the employee was informed of the decision, she informed the company that the incident had triggered her PTSD arising from her military service, and she asked to be moved away from the co-workers. The company decided to proceed with the termination. The employee sued for disability discrimination and failure to provide a reasonable accommodation.

Noting that the "ADA is not license for insubordination at the workplace," the First Circuit found that the employee's behavior clearly violated the company's conduct rules and that the company enforced those rules uniformly with regard to similar behavior. It went on to note that the employee's requests for accommodation were made after her misconduct, and that "where, as here, an accommodation request follows fireable misconduct, it ordinarily should not be viewed as an accommodation proposal at all." Rather, it should be viewed as "a plea for forgiveness or for a second chance," which is not required by the ADA.

OFCCP Update – New Directives, Lower Veterans' Hiring Benchmark. The Office of Federal Contract Compliance Programs issued several items of interest to government contractors and subcontractors this month. These include the following:

- Directive 2020-02 to increase the efficiency of compliance evaluations.
- Directive 2020-03 to establish a mediation program intended to resolve findings of discrimination prior to referral to the Office of the Solicitor for enforcement.

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- Directive 2020-04 to provide a Protocol for the Ombuds Service, which was originally implemented to facilitate the fair and equitable resolution of certain contractor concerns.
- Updating the hiring benchmark for protected veterans to 5.7%, based on recently-released data from the Bureau of Labor Statistics. Under revised Vietnam Era Veterans' Readjustment Assistance Act regulations issued in 2014, covered government (sub)contractors must set a veterans' hiring benchmark for each of their establishments, either by using the OFCCP's annual benchmark as set forth in its VEVRAA Benchmark Database, or by developing their own individualized benchmarks. The current 5.7% figure represents a slight decrease from the previous year's 5.9% benchmark.

NLRB Reaffirms Employer's Right to Require Confidentiality During Internal Investigation. In *Securitas Security Services*, the National Labor Relations Board concluded that the employer lawfully required confidentiality during an internal investigation of a confrontation and allegation of racial discrimination. Specifically, a manager told an employee that all employees were prohibited from discussing the confrontation and investigation while the investigation was ongoing. The Board reaffirmed its 2019 decision in *Apogee Retail LLC* establishing that confidentiality rules limited to the duration of an investigation are categorically lawful. (See our discussion of *Apogee Retail* here.)

Additionally, in this case, the manager added that after the investigation is concluded "if anyone starts conversing about [the incident and investigation] and those conversations become a distraction to the workplace, anyone involved in conversing could face disciplinary action in accordance with the handbook." In a footnote, the Board noted that an objectively reasonable employee would understand that this statement was not part of its confidentiality policy, but rather as a reminder that, while not banned, conversation about the confrontation and investigation would remain subject to work rules against disruptive, inappropriate, or abusive workplace discussions. (Recall, in *Apogee Retail*, the Board remanded the case to address whether the justification for the employer's confidentiality rule requiring confidentiality after the investigation outweighed the rule's effect on employees' rights under the National Labor Relations Act.)

The takeaway here is a reaffirmation that employers may require employees to maintain confidentiality during an internal investigation. Further, while requiring confidentiality after the investigation will be subject to increased Board scrutiny, employers may remind employees that post-investigation discussion of the investigation or underlying incident remain subject to the employer's civility work rules.

A New Supervisor May Set New Expectations. The U.S. Court of Appeals for the Eighth Circuit rejected an operations manager's claim that he was terminated in retaliation for filing a discrimination charge with the Equal Employment Opportunity Commission, finding instead that he was unable to meet the expectations of his new supervisor.

In *Couch v. American Bottling Co.*, an operations manager with a history of positive performance evaluations began struggling following a change in supervisors. He filed an EEOC charge. Several weeks later, he received an "unsatisfactory" performance evaluation in a meeting during which he became angry. He was subsequently suspended and fired, and then filed suit for retaliation, relying upon the short turnaround between his charge and the negative review.

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The Eighth Circuit noted that "timing alone is not enough to establish pretext" for retaliation, particularly where the plaintiff could have anticipated the negative action – such as here, where the operations manager knew that his interim review was taking place in August when he filed his charge in July. More significantly, the Eighth Circuit found "another rational explanation" – "the shifting expectations of a different supervisor" – to undercut any potential inference of discrimination or retaliation. Moreover, the Eighth Circuit quoted its own precedent that "Title VII protection from retaliation from filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct…."

"Employees cannot immunize themselves from legitimate termination by taking FMLA leave."
The U.S. Court of Appeals for the Fifth Circuit provides support to an employer's ability to take legitimate employment action for an employee's misconduct, regardless of the employee's use of leave under the Family and Medical Leave Act.

In *Amedee v. Shell Chemical, LP*, the employee was formally disciplined for attendance violations and warned that additional violations could result in termination. She then missed her scheduled shift the next day after driving drunk in the middle of the night, wrecking her truck and getting arrested. She then applied for and was granted FMLA leave for anxiety. While she was on leave, the company conducted an investigation and then terminated her. She sued for violation of her FMLA rights, among other things.

The Fifth Circuit found that, "[A]s should go without saying, an employee's failure to show up for work is a legitimate reason for firing her," particularly given the warning she had just received the day before. The employer showed that it would have lawfully terminated the employee had she not taken leave, and thus she was not entitled to be reinstated to her position. The use of FMLA leave does not protect employees from their misconduct.

NEWS AND EVENTS

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

Honor - Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for employment in the U.S. for Q1 of 2020. 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, Q3 and Q4 2019, as well as Q4 2018.

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

Webinar – Fiona W. Ong offered guidance on the Families First Coronavirus Response Act to small business owners in a webinar, "Navigating the Coronavirus Business Resources," presented by the Washington County Chamber of Commerce for its members on April 7, 2020.

Webinar – Darryl G. McCallum participated on a webinar panel on "COVID-19 in the Workplace: Your Questions Answered," for the Labor and Employment Section of the Maryland State Bar Association on April 1, 2020.

Article – Teresa D. Teare authored an article, "What to do when an employee refuses to work during the pandemic," which was published in the April 16, 2020 edition of the Baltimore Business Journal. (Subscription required to access article).

Article – Lindsey A. White authored an article, "How may 'non-essential' Md. businesses operate?" that was published in the April 7, 2020 issue of The Daily Record.

TOP TIP: Leave Donation Programs – Complying with IRS Requirements

The current COVID-19 crisis has had a significant impact on many employees who have had to take leave for COVID-19-related reasons. While the Families First Coronavirus Response Act provides paid leave to certain employees, and some states and local jurisdictions have implemented specific COVID-19 paid leave requirements, in addition to existing employer paid leave programs, there will be some employees who do not have or have exhausted paid leave to cover their COVID-19-related absences. One option to assist these employees is a leave donation program, but employers should recognize that such programs raise tax issues for their employees – both donors and recipients. The Internal Revenue Service ("IRS") has set forth guidance, stating that employees will not be taxed upon donating leave to other employees so long as the donation is made pursuant to a "bona fide" plan. The bona fide plans the IRS recognizes are (1) medical emergency leave sharing plans, and (2) major disaster-leave sharing plans – both of which may be applicable in the COVID-19 context.

1. Medical Emergency Leave Sharing Plans

In a 2007 Private Letter Ruling, the IRS stated that a specific employer's donation program was tax-free to donors where the plan allowed eligible employees to request additional leave if they suffered a medical emergency. The plan defined a "medical emergency" as a "major illness or other medical condition **that requires a prolonged absence from work**, including intermittent absences that are related to the same illness or condition." The plan also allowed employees to request leave to care for a spouse or child that suffered a medical emergency. Lastly, leave could be requested following the death of a parent, spouse, or child. The employer's plan additionally maintained a strict procedure. Before employees could request leave, they were required to exhaust all paid leave. Then, the employee had to submit a written request and authorization form, describing the medical emergency. The plan also contained the amount of paid leave that could be surrendered by the donor and had rules for how the surrendered paid leave would be granted to eligible recipients.

To ensure your donation plan meets the IRS' framework, we recommend you use an identical definition of "medical emergency" and limit the definition of family member to spouses, children and parents. We also recommend you utilize a similar procedure to ensure that donors are not taxed. If a donor and recipient have different pay rates, IRS guidance states that the leave time

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should be converted to reflect the recipient's pay rate. For example, if a donor is paid $15/hour and surrenders eight hours of paid leave to an employee that is paid $10/hour, the recipient will receive twelve hours of paid leave, paid at $10/hour.

2. Major Disaster-Leave Sharing Plans

A leave donation program also may be used for situations where employees are affected by "major disasters." The IRS' Notice 2006-59 states that donors do not incur gross income when they deposit leave into an employer-sponsored leave bank for employees who need assistance after suffering from a presidentially declared major disaster.

A "major disaster" under Notice 2006-59 is defined, in relevant part, as a situation declared a major disaster by the President of the United States under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (which generally requires the Governor of each state to separately request the President to make such a declaration). All 50 States have been approved for disaster reliefs under this Act (this link provides pertinent information).

Under Notice 2006-59, leave sharing for major disasters must meet the following conditions:

- The leave-sharing plan is for employees who have been adversely affected by a major disaster, as declared by the President of the United States. An employee is adversely affected if the disaster has caused severe hardship to the employee or a family member that requires the employee to be absent from work.
- An employee who donates leave may not designate its use by a specific employee.
- An employee may not donate more leave in a given year than she normally accrues for the year.
- A recipient may receive leave at her normal rate of compensation.
- A recipient must use the leave for purposes related to the major disaster.
- The plan must adopt a reasonable limit on how long after the disaster leave deposits may be made to the plan and leave may be used by recipients. The period must be based on the severity of the disaster.
- A recipient may not convert leave received under the plan into cash in lieu of using it.
- The employer must make a reasonable determination, based on need, as to how much leave each approved recipient may receive under the plan.
- Leave deposited on account of one disaster may be used only for employees affected by that specific disaster.

Conclusion

Following IRS guidance and precedent, leave donors will not be taxed if the donation plan meets one of the two exceptions outlined above. However, recipients are always taxed. If the plan does not meet one of the two exceptions, both the donor and the recipient will be taxed. Further, donors are not permitted to take the charitable tax deduction upon donating leave because employee-recipients are not qualified charities. Employers should also ensure that the plan is applied uniformly to avoid claims of discrimination.

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With regard to COVID19, absent further guidance from the IRS, medical emergency benefits will not be available to employees or family members absent a need for a prolonged absence from work as a result of a COVID19-related medical condition. Absences resulting from a decision to self-quarantine, even pursuant to a recommended order from State Governors, would not appear to qualify. Major disaster-related relief may be available based on the approved disaster order where the absence from work causes the requisite hardship.

RECENT BLOG POSTS

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

- DWZ – Drinking While Zooming (And Other Telework Dilemmas) by Elizabeth Torphy-Donzella, April 29, 2020
- What Does Governor Hogan's Roadmap to Recovery Mean for Maryland Employers? by Fiona W. Ong, April 26, 2020
- WFH Dress Codes? by Paul D. Burgin, April 22, 2020 (Selected as a "noteworthy" blog post by Labor & Employment Law Daily)
- COVID-19 Agency Update: CDC and Essential Workers, EEOC and Non-Discrimination, OSHA and COVID-19 Recordkeeping/Enforcement, DOL and Unemployment Compensation Under CARES, and VETS and COVID-19 National Guard Service by Fiona W. Ong, April 15, 2020
- The Lighter Side of COVID-19 State Laws by Fiona W. Ong, April 13, 2020
- Updated Workplace Cleaning Guidelines from the CDC and a New OSHA Poster! by Courtney B. Amelung, April 7, 2020
- IRS Identifies What Documentation Can Be Required by Employers for FFCRA Leave, and Much More on Tax Credits by Fiona W. Ong, April 1, 2020
- Wait – the DOL Made Their FFCRA Guidance Less Useful?!! by Fiona W. Ong, March 31, E2020

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