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E-UPDATE

August 31, 2020

RECENT DEVELOPMENTS

Back to School - DOL Offers FFCRA Guidance on Hybrid Schedules and Optional Remote Learning

As the school year begins, employers are struggling to understand how the paid leave mandates under the Families First Coronavirus Response Act (FFCRA) apply to the varied iterations of school reopening. The Department of Labor has updated its Q&A resource to address some of these questions.

As a reminder, under the FFCRA, employers with fewer than 500 employees must provide ten days of emergency paid sick leave (EPSL), paid at 2/3 the employee's rate up to $200 per day, for reasons including the COVID-related closure of the child's school. In addition, employees may use their twelve weeks of Family and Medical Leave Act leave for such school closure, with the first two weeks unpaid (although it may be covered by EPSL) and the last 10 weeks paid at the same 2/3 rate as EPSL. This expanded FMLA (EFMLA) obligation also applies to smaller employers who are not subject to regular FMLA. Moreover, employees are eligible for EFMLA leave after one month (rather than one year) of employment. Notably, in order to qualify for these school-related leave rights, the employee must be needed to care for the child, with no other suitable person available to provide the care.

During the initial stages of the pandemic in the spring, many schools moved to online or distance learning only. The DOL issued a Q&A at that time confirming that these schools are considered closed for purposes of the FFCRA's paid leave mandates.

Hybrid Schedules. Many schools have developed hybrid schedules, where the school is open each day but students alternate days between in-person and online learning, in order to minimize the number of students physically present at the school. The DOL states that employees may use FFCRA leave on those remote-learning days that their child is not permitted to attend in-person, because the school is effectively "closed" to the child on those days.

Optional Remote Learning. Another approach taken by many schools is to conduct in-person classes, but give parents the option to have their child participate remotely. The DOL states that, because the school is open for in-person attendance, FFCRA leave is not available. If, however, the child is s under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the employee will be able to take EPSL – but not EFMLA – for that reason.

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Initial Remote Learning Subject to Change. Some schools have announced that the school year will begin with remote learning only, with a possible transition to in-person attendance at a later point. The DOL confirms that FFCRA leave is available while the school remains closed to in-person attendance.

CDC Updates COVID-19 Guidance on Testing, Quarantine, and Release from Isolation

In the past several weeks, the Centers for Disease Control and Prevention revised its guidance on several significant issues of interest to employers –whether testing is required following exposure to COVID-19, when to quarantine, and when to stop home isolation.

COVID-19 Testing Overview. Somewhat controversially, the CDC states that not everyone needs to be tested. Testing is recommended for: those with symptoms of COVID-19; those who have been in close contact (within 6 feet of an infected person for at least 15 minutes); and those who have been asked or referred for testing by their healthcare provider, or local/state health department. Individuals should home-isolate pending their test results.

Notably, for healthcare workers, the CDC does not recommend testing for close contact, unless the worker has symptoms, is a vulnerable individual, or their healthcare provider or state/local health department recommends such testing.

It is worth noting that the Equal Employment Opportunity Commission's COVID-19 guidance permits employers to broadly require testing before allowing employees to enter the workplace. In addition, the CDC's retreat from broad testing recommendations has come under fire from many health officials and scientists.

When to Quarantine. Of significance, the CDC suggests that there may be immunity for up to three months following infection with COVID-19. Specifically, the CDC states that those who have had COVID-19 do not need to quarantine or get tested again following close contact with an infected individual for a period of three months, unless they have symptoms. Otherwise, those in close contact should stay at home for 14 days from their last contact with the infected individual and self-monitor for symptoms. Moreover, the CDC expressly states that individuals should quarantine even if they test negative, as symptoms may appear up to 14 days after exposure.

The CDC also expands the definition of "close contact." In addition to its previous definition of being within 6 feet of an infected individual for 15 minutes or more (which is repeated in the CDC's other guidance), the CDC lists the following:

- Providing care at home to an infected individual
- Having direct physical contact (e.g. hugging or kissing) with an infected individual
- Sharing eating or drinking utensils with an infected individual
- An infected individual sneezed, coughed or somehow got respiratory droplets on the person

The CDC further provides various quarantine scenarios:

- Those who had close contact with no further contact should quarantine for 14 days from the date of contact.

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- Those who had close contact and live with an infected individual, but can avoid further close contact should quarantine for 14 days from the date the household member began home isolation.
- Those under quarantine who had close contact with either the same or a different infected individual (such as another household member who becomes sick) must restart their 14-day quarantine period from the date of their most recent close contact.
- Those who cannot avoid close contact with an infected household member must avoid outside contact while the household member is sick and then quarantine for 14 days after the household member meets the criteria for ending home isolation.

Notably, despite the CDC's apparent recognition of limited immunity following infection, it has not updated its Interim Guidelines for COVID-19 Antibody Testing to reflect this changed position. Thus, as of August 28, the Interim Guidelines still specify that antibody test results should not be used to make decisions about returning persons to the workplace.

Travel During the COVID-19 Pandemic. The CDC reiterates its recommendation to avoid travel. However, it has retreated from its recommendation to quarantine for 14 days following out-of-state or foreign travel. Now the CDC offers the following recommendations after any travel: stay at least 6 feet away from non-household members, whether inside or outside; wear a mask; wash or sanitize hands frequently; and monitor for symptoms.

If the travel is "higher-risk," meaning to an area with high levels of COVID-19, the CDC then makes the following recommendations: "stay home as much as possible" (although not specifically for 14 days); avoid those at increased risk for severe illness from COVID-19: and consider getting tested.

When You Can Be Around Others After You Had or Likely Had COVID-19. The CDC reiterates its suggestion of three-month immunity in this guidance as well. Specifically, the CDC states that those having close contact with someone with COVID-19 should isolate for 14 days following exposure unless they had COVID-19 within the last three months, have recovered, and do not have symptoms.

The CDC also sets forth guidelines for various other scenarios, as follows:

- Those who had or likely had COVID-19 with symptoms may be around others if 10 days have passed since the symptoms first appeared, they have been fever-free without fever-reducing medications for at least 24 hours, and their other symptoms have improved.
- Those who tested positive for COVID-19 without symptoms may be around others once 10 days have passed since the positive test, as long as they remain asymptomatic.
- Those who were severely ill with COVID-19 may need to stay home for up to 20 days, and may need to be tested before being released from home isolation, depending on what their healthcare provider determines.
- Those with COVID-19 and compromised immune systems may need to be tested before being released from home isolation, depending on what their healthcare provider determines.

Notably, the CDC no longer recommends testing for most people to determine whether they may be released from home isolation, except as to those who are severely ill or immunocompromised or who have been so directed by their healthcare provider.

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NLRB Issues Additional COVID-19 Advice Memos

As we detailed last month, the National Labor Relations Board's (NLRB) Division of Advice (DOA), an arm of the General Counsel's (GC) Office, has been busy releasing to the public Advice Memoranda addressing complex or novel legal issues that have arisen during COVID-19 pandemic. Advice Memoranda contain the recommendations of the OGC to the Board on specific issues, and offer some guidance to employers, both unionized and non-union.

Hornell Gardens – The National Labor Relations Act protects employees' ability to engage in concerted action for their mutual benefit or protection. The GC found that a charging party letter expressing a refusal to wear shared gowns with other nurses did not constitute protected concerted activity because, even though she discussed the issue with another employee, there was no evidence that the purpose of the letter was to initiate or induce group action in the interest of employees. Rather, the GC concluded that this was an individual gripe. Moreover, the GC found that another charging party was not engaged in protected concerted activity when they refused to work a scheduled shift, because her discussions with employees about the risks of COVID-19 were not meant to prepare for or induce group action. Additionally, a passing reference to a union during an employee meeting, and later to the employer, played "no apparent role" in the employee's discharge. Accordingly, both employees' allegations that they were discharged unlawfully were dismissed. Finally, the NLRB dismissed an allegation that the employer unlawfully threatened employees by stating in a news article that it would report the nurses who refused to work to the state licensing board, and those nurses would be unable to receive unemployment. The GC determined that the comments could not be construed as a threat to blackball the employees by preventing future employment; rather, the state's licensing board maintained factors it would analyze to determine whether job abandonment warranted license revocation.

Marek Bros. Drywall Co. – The GC addressed whether the company discriminatorily laid off an employee in retaliation for comments at a group safety meeting. The GC first concluded that the employee was engaged in protected concerted activity when he raised concerns about the lack of available facilities to wash or sanitize their hands as a safety precaution in the COVID-19 pandemic. The issue affected multiple employees and the employee expressed concern for all employees on the jobsite. The GC found, however, that the company did not have animus towards the employee's protected concerted activity, and ordered the charge dismissed.

Memphis Ready Mix – Soon after the COVID-19 pandemic began, the union requested that the company bargain over union proposals for paid sick leave and hazard pay. The company declined to bargain, and the union filed a charge. The GC determined that the company did not have an obligation to bargain during the term of the parties' CBA (i.e., midterm bargaining) because the CBA included provisions addressing leave and wages. In addition, even if the CBA had not addressed these terms and condition of employment, the CBA included a "zipper clause" stating that the parties waived the right to demand midterm bargaining over matters not otherwise covered by the CBA. Accordingly, the GC dismissed the union's charge alleging an unlawful refusal to bargain.

Crowne Plaza O'Hare – Here, the GC dismissed a charge alleging that the company failed to provide requested information related to the hotel's decision to close after the onset of the COVID-19 pandemic. The GC reasoned that the union failed to demonstrate the relevance of certain

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information requested and, regarding requested financial information, the employer was not obligated to produce the information where it had not made an "inability-to-pay" argument for closing the hotel.

The memos further evidence that the current GC will provide flexibility to companies dealing with this unprecedented pandemic. We will keep you updated regarding additional Advice Memos addressing issues arising out of the COVID-19 pandemic.

TAKE NOTE

D.C. Enacts COVID-19 Workplace Protections. The District of Columbia Council passed the Protecting Businesses and Workers from COVID-19 Emergency Amendment Act of 2020, which temporarily mandates certain COVID-19 workplace protections for all employers with at least one employee in D.C. This law, which will remain in effect from August 13 through November 11, 2020, imposes the following requirements:

- Employers must adopt and implement social distancing policies that adhere to Mayor's Order 2020-080, concerning the wearing of masks in D.C. The Mayor's Order requires that employers ensure that all persons in the workplace wear face coverings, except customers who are eating, drinking, or engaging in socially-distanced exercising.
- Employers are prohibited from disclosing the identity of a COVID-positive employee to anyone aside from the Department of Health, or other District or federal agency responsible for contract tracing and the containment of COVID-19.
- Employers may choose to establish a workplace policy that requires an employee to report a positive test for an active COVID-19 infection.
- Employers are prohibited from retaliation against employees who refuse to serve a customer or client or work within 6 feet of another individual who is not complying with the employer's social distancing policy. In addition, employers may not take adverse action against employees who: have tested positive for COVID-19 (unless the employee reports to work after testing positive), are symptomatic and awaiting test results, must quarantine after exposure, or are caring or seeks to care for someone who is symptomatic or quarantined.

In addition, the Mayor is authorized to issue grants in an amount up to $1,000 to businesses eligible for certification as a small business enterprise or a nonprofit entity for the purpose of purchasing personal protective equipment for its employees. Such business must demonstrate financial distress due to a COVID-19-related reduction in business revenue.

As to enforcement, the Mayor has the authority to conduct investigations, enforce the bill administratively, and assess discretionary penalties. The Attorney General may also conduct investigations and bring a civil action in District courts to seek reasonable attorneys' fees and costs, payment of lost wages, statutory penalties, and other equitable relief as appropriate.

Virginia Adopts First-in-Nation COVID-19 Workplace Safety Standards. On July 27, 2020, Virginia's COVID-19 Emergency Temporary Standard ("ETS"), 16VAC25-220, went into effect after being adopted by the Department of Labor and Industry's (DOLI) Virginia Occupational Safety

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and Health (VOSH) Program and the Virginia Safety and Health Codes Board. The ETS "is designed to establish requirements for employers to control, prevent, and mitigate the spread" of COVID-19 "to and among employees and employers." Unless superseded by a permanent standard or repealed by the Virginia Safety and Health Codes Board, the ETS will expire within six months of its effective date (on January 27, 2021).

The DOLI has provided guidance to educate and train employers and their employees on how to comply with the new ETS. Important obligations imposed by the new ETS with links to related materials are summarized below.

Assessment, Implementation, and Training

Employers must assess their workplace for hazards and job tasks that could potentially expose employees to COVID-19. Employers must classify each job task according to the hazards employees are potentially exposed to and ensure compliance with the applicable sections of the ETS for "very high," "high," "medium," or "lower" risk levels of exposure. Employers may have employees classified in more than one risk level.

Very High Risk: Job tasks with "very high" risk levels are those in places of employment with high potential for employee exposure to known or suspected sources of COVID-19 during specific medical, postmortem or laboratory procedures.

High Risk: Jobs with "high" risk levels are those that have high potential for exposure inside six feet to known or suspected sources of COVID-19.

Medium Risk: Jobs with "medium" risk levels are ones that require more than minimal occupational contact inside six feet with other employees, other persons, or the general public who may be infected with COVID-19, but who are not known or suspected to be infected with the virus. Examples of workplaces with medium risk levels include: schools, high population density work environments (e.g., poultry, meat, other food processing; manufacturing, etc.), high-volume customer facing retail settings (grocery stores, restaurants, bars, etc.), and mass gathering venues (e.g., sports, entertainment, movies, theaters, etc.)

- Employers in this risk group are to provide—and employees are to wear—face coverings to employees that have job tasks where physical distancing cannot be feasibly practiced if the hazard assessment has determined that PPE such as respirators or surgical/medical procedure masks are not required for the job task.
- If employees are in customer facing jobs, employers are to provide—and employees are to wear—face coverings.
- If an employer has eleven or more employees and job tasks that are classified as medium risk, the employers must prepare an Infectious Disease Preparedness and Response Plan and train employees on the practices by September 25. An Infectious Disease Preparedness and Response Plan template can be found here.

Lower Risk: Jobs with a "lower" risk level do not require contact inside six feet with persons known to be, or suspected of being, or who may be infected with COVID-19. Employees in this category have minimal occupational contact with other employees, other persons, or the general public; or are

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able to achieve minimal occupational contact through the implementation of engineering, administrative and work practice controls.[1]

- When it is necessary for an employee to have brief contact with others inside of a distance of six feet, employers are required to provide—and employees are to wear—a face covering.
  - E.g., passing another person in a hallway that does not allow physical distancing of six feet is considered brief, minimal contact which would require a face covering.
- Employers with a lower risk workplace must provide employees with basic written or oral information on COVID-19 hazards and measures to minimize exposure by August 26, 2020. There is no written certification of training requirement for employers in the lower risk category. VOSH has provided a training aid which satisfies the ETS requirements here.

Employers must make a written certification of the assessment and retain the form either electronically or as a hard copy in a location easily accessible to employees and inspectors. VOSH provided a detailed hazard assessment so that employers may properly assess their level of exposure risk. This document can also be used to satisfy the ETS's written certification requirement. If the employer has multiple locations where the job tasks are similar in nature and expose employees to the same hazard, the tasks may be grouped for classification purposes. In that case, individual worksite locations need to be made aware of corporate assessments and ensure they can provide appropriate protections.

Notably, employers with medium, high, and very high-risk workplaces were required to provide COVID-19 training to all employees, regardless of their job task classification, by August 26, 2020. These employers must also maintain a written certification of training. The DOLI has provided an acceptable written training certification form that can be found here.

Additional Measures for Compliance for All Employers

The DOLI provides further guidance on additional steps that should be taken to ensure compliance with the new ETS.

- Establish and implement procedures to ensure employees known or suspected of having COVID-19 do not come to work, as well as procedures for them to return to work. This return to work policy must include:
  1. Prohibiting employees known or suspected of having COVID-19 from reporting to work until they have been cleared to return through either a symptom-based or test-based strategy.

[1] Examples of such controls include:

- Installation of floor to ceiling physical barriers constructed of impermeable material;
- Staggered work shifts that allow employees to maintain physical distancing from other employees, other persons, and the general public;;
- Delivering services remotely by phone, audio, video, mail, package delivery, curbside pickup or delivery, etc., that allows employees to maintain physical distancing from other employees, other persons, and the general public; and
- Mandatory physical distancing of employees from other employees, other persons, and the general public.

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2. If a test-based strategy is not used, consultation with appropriate healthcare professionals concerning when an employee's symptoms indicate it is safe for them to return to work.

- If an employer discovers that 3 or more people that have been present at the workplace in the last 14 days have tested positive for COVID-19, the employer must notify the Virginia DOLI.
- If an employer receives a report of a positive COVID-19 test, within 14 days of receiving the report the employer must notify employees who may have been exposed, other employers if their employees were present at the work site, and the building or facility owner.
- Building owners are required to notify employer tenants of a COVID-19 positive test of an employee in the building.
- Make handwashing and hand sanitizer available to all employees where feasible.
- Establish and implement a system for employee self-assessment and screening for COVID-19 signs and symptoms.
- Provide flexible sick leave policies, telework, staggered shifts, and other administrative/work practice controls when feasible to reduce or eliminate contact with others inside six feet. Encourage employees to report symptoms by ensuring they are aware of any company sick leave policies and alternative working arrangements, as well as the paid sick leave available through the Families First Coronavirus Response Act (FFCRA).
- If an employee does not understand English, employers are required to provide training to an employee in a language other than English or in some other manner that they can understand.
- Employers must ensure that they are in compliance with the anti-discrimination provisions in the new ETS. This includes refraining from discharging or in any way discriminating against an employee because they have raised a reasonable concern about infection control regarding the COVID-19 disease in the workplace with the employer, other employees, a government agency, or to the public through any form of media.
- Requests to the Department for religious waivers from the required use of respirators, surgical/medical procedure masks, or face coverings will be handled in accordance with the requirements of applicable federal and state law, standards, regulations and the U.S. and Virginia Constitutions, after Department consultation with the Office of the Attorney General. Requests for religious waivers can be sent to:

  Division of Legal Support
  Virginia Department of Labor and Industry
  600 E. Main Street, Suite 207
  Richmond, VA 23219
  jay.withrow@doli.virginia.gov (mailto:jay.withrow@doli.virginia.gov)

"Distraction" May Be Associational Discrimination Under ADA, But Not Here. While rejecting an employee's claim that he was subjected to unlawful discrimination under the Americans with Disabilities Act for his association with his disabled grandfather, the U.S. Court of Appeals for the Seventh Circuit explained the major forms of associational discrimination, including "distraction."

In *Pierri v. Medline Industries, Inc.*, the employee requested and was granted leave under the Family and Medical Leave Act to care for his ailing grandfather. According to the employee, his supervisor then became so hostile to him that he was forced to take FMLA for his own mental health condition.

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He never returned from that leave, and was eventually terminated from the company. He then sued, alleging that he was discriminated against due to his association with his disabled grandfather.

The ADA prohibits discrimination against an employee because of the known disability of an individual with whom the employee is associated. The Seventh Circuit noted that it has previously identified three (non-exhaustive) situations in which claims of associational discrimination exist: (1) "expense," where the employee's family member has a disability that is costly under the employer's health plan; (2) "disability by association," where the employer fears that the employee will be infected with their associate's disease; and (3) "distraction," where "the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation." In this case, the employee claimed "distraction," but offered no evidence in support of this contention. Thus, according to the Seventh Circuit, he had no claim for associational discrimination.

Employees May Be Prohibited From Linking to Company Website on Personal Blogs. The National Labor Relations Board held that a company's policy prohibiting employees from linking to the company's website on their personal blogs was lawful under the National Labor Relations Act.

In *Shamrock Foods Company*, an administrative law judge found that the company's policy "effectively discouraged" employees from communicating with each other and the company about their work-related concerns and disputes. On review, the Board disagreed, finding that the company had a legitimate interest in maintaining its brand identity, integrity and reputation while minimizing legal risks. The Board stated, "Linking a blog to the [company's] website could create the impression that Shamrock is associated with the blog in some way, possibly that it endorses or at least does not dispute the contents of the blog." The Board found that employees would not view the policy as an infringement of their rights under the Act, but as "simply discouraging employees from giving the impression that the employee was speaking on behalf of the [company] or making statements that might be interpreted as coming from or endorsed by the [company]."

This decision continues the Board's trend under the Trump administration of approving common-sense employment policies.

Decision by Committee Cannot Overcome Supervisor's Racist Statements. The U.S. Court of Appeals for the Fourth Circuit (which includes Maryland, North and South Carolina, Virginia, and West Virginia) found that, although the promotion decision in question was made by committee, the decision was nonetheless led – if not controlled – by a racist supervisor.

In *Gary v. Facebook, Inc.*, a Black employee made an internal complaint that he was denied a promotion because of his race. The company investigated and concluded that a white co-worker was promoted because he was better-qualified than the Black employee. Subsequently, another employee complained that the supervisor had made explicitly racists statements. This was confirmed in another investigation, and the supervisor was fired. The Black employee then filed suit for discriminatory non-promotion.

The employer argued that there was no discrimination because the decision was made by committee – not just the racist supervisor. The Fourth Circuit, however, found that the unquestionably-racist supervisor played a significant role in the committee's decision-making process. Consequently, the

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Fourth Circuit determined that, because of this and other evidence regarding the employee's qualifications, the employee's claim should not have been thrown out by the trial court.

Employers should be warned that a committee decision-making process does not necessarily mean that a racist (or sexist or ageist) supervisor cannot taint the process.

HR Official Loses Title VII Protections Due to Her Unreasonable Oppositional Conduct. Although Title VII protects those who oppose discrimination under that law, such opposition must be reasonable, as the U.S. Court of Appeals for the Eleventh Circuit stated in finding an HR official's solicitation of another employee to sue the company to be unreasonable.

In *Gogel v. Kia Motors Manufacturing of Georgia, Inc.*, following a complicated series of workplace complaints by a female employee and a high level female HR official, the HR official and her white male counterpart filed a lengthy report regarding American management's concerns with the Korean parent company's oversight. Both HR officials subsequently filed charges of discrimination with the Equal Employment Opportunity Commission. Given the sensitivity of the HR officials' positions and their access to the entire workforce, the head of HR and the General Counsel required both officials to sign an agreement to prevent misuse of their positions in their interactions with employees. The agreement also prohibited them from soliciting or influencing employees to bring claims against the company, or to malign the company. The company then discovered that both, in fact, were soliciting another employee to sue the company, with the female HR official as the ringleader. She was terminated and then sued, alleging among other things that her termination violated Title VII, because her encouragement of another employee to sue the company was protected oppositional conduct.

Relying upon long-standing precedent, the Eleventh Circuit rejected the female HR official's claim. The Eleventh Circuit stated that "when the means by which an employee expresses her opposition so interferes with the performance of her job duties that it renders her ineffective in the position for which she was employed, her oppositional conduct is not protected under Title VII's oppositional clause." In this case, the Eleventh Circuit found that soliciting an employee to sue the company so conflicted with the HR official's duties to ensure a positive work environment and avoid litigation as to render her ineffective in her position. Accordingly, her oppositional conduct was unreasonable and unprotected by Title VII.

Uber and Lyft Drivers Found to Be Employees, Not Independent Contractors. In a major development impacting the gig economy, a state court judge in California rejected the argument from Uber and Lyft that their drivers were independent contractors. The court found that, under the ABC test, such drivers were actually employees.

California codified the ABC test, which is used to classify workers as either employees or independent contractors. Under this test, a worker is presumed to be an employee unless all of the following are met:

A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
B. The person performs work that is outside the usual course of the hiring entity's business.

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C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In *California v. Uber Technologies, Inc.*, Uber and Lyft argued that they provided the platform for connecting drivers and riders, and not the rides themselves. The judge flatly rejected this argument, stating ""it's this simple: defendants' drivers do not perform work that is 'outside the usual course' of their businesses" as transportation network companies that "engage in the transportation of persons by motor vehicle for compensation."

This case is significant, as a number of states also utilize the ABC test and may find the ruling persuasive. Other states, however, utilize a different test, a "right to control" test (which is also applied under the Fair Labor Standards Act), under which the employer/employee relationship exists when the employing entity has the right to control and direct the individual performing the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. Many factors are reviewed under the "right to control" test, none of which are individually determinative. It is less clear how these states will view the California court's ruling.

New Resources for Government Contractors. This month, there were several developments of relevance to federal contractors and subcontractors. The Office of Federal Contract Compliance Programs issued the following:

- National Pre-Award Registry**,** which is a searchable database of contractors determined to be in compliance with their EEO obligations during OFCCP compliance evaluations within the past two years. This information is used by federal contracting officers during the contracting process.
- VEVRAA Hiring Benchmark Database**,** which provides federal contractors a more streamlined way to identify their VEVRAA Hiring Benchmarks each year for their protected veterans' affirmative action program.
- Focused Review Landing Page, which is a centralized location for contractors to obtain information and resources about focused reviews of a contractor's affirmative action obligations towards protected veterans under VEVRAA and disabled individuals under Section 503 of the Rehabilitation Act.
- COVID-19 and the Service Contract Act: Questions and Answers, which offers guidance to federal contractors covered by the Davis-Bacon Act or the Service Contract Act on compliance with the Families First Coronavirus Response Act's paid leave mandates.

NEWS AND EVENTS

Honor. We are delighted to announce that eleven of our partners were listed in *The Best Lawyers in America*© 2021: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Teresa D. Teare, Parker E. Thoeni, and Elizabeth Torphy-Donzella. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation.

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Victory – In one of the Firm's first in-person trials since the COVID-19 pandemic hit, a masked Mark J. Swerdlin represented a floor covering distributor in a district court wage payment claim. The estate of a deceased long-term employee sued for vacation and other PTO that was unused as of the employee's termination due to his death. After a trial on the merits the Court ruled in the Company's favor and dismissed the case because the Company acted in accordance with its published policies that provide that unused vacation and personal days are not paid at termination.

Webinar – Fiona W. Ong and Parker E. Thoeni presented "Federal Court Vastly Expands FFCRA Paid Leave Mandate – What This Actually Means for Covered Employers" for myLawCLE and the Federal Bar Association on August 27, 2020. This webinar is also available on demand.

Webinar – Parker E. Thoeni was a speaker at the Maryland State Bar Association's August 12, 2020 presentation, Developments in Discrimination, Harassment & Retaliation Law, along with Maryland Commission on Civil Rights General Counsel Glendora Hughes.

TOP TIP: Timekeeping and Telework – Guidance from the U.S. DOL

The surge in telecommuting during the COVID has raised many issues for employers, including compliance with the Fair Labor Standards Act. The DOL has issued guidance on telework pay that explains the legal standards applicable to the FLSA's requirement to track and pay for employees' hours worked, including remote workers.

The DOL reiterates that employers must pay for all hours worked, including hours not requested but "suffered or permitted" to be worked – meaning hours the employer knew or should have known about through reasonable diligence. However, employers are not required to pay for those hours worked that it did not know about and had no reason to know about: "[t]he reasonable diligence standard asks what the employer should have known, not what it could have known."

In the teleworking context, the DOL states: "One way an employer generally may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees' unscheduled hours of work is by establishing a reasonable process for an employee to report uncompensated work time." The employer, of course, cannot discourage accurate reporting under this process. It is also important that the employee knows that the process exists and how to use the process.

Notably, if an employee fails to report unscheduled hours worked through the procedure, the DOL specifically states that "the employer is generally not required to investigate further to uncover unreported hours." Therefore, as a normal matter, the employer does not need to sort through all its records/data to determined hours worked. As the DOL states, "Though an employer may have access to non-payroll records of employees' activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported."

The important takeaways from this guidance are:

- Employers are responsible for tracking and paying for the hours worked by telecommuting employees.

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- Employers may rely upon normal work schedules to establish the hours worked, but must set up a reasonable process for employees to report unscheduled hours worked. We recommend that such process include obtaining supervisory approval before working such hours
- Employees must be trained on the process.
- Employees must not be discouraged from using the process, as this may lead to claims of off-the-clock work – a popular claim for plaintiffs' employment attorneys.

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