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E-UPDATE

September 30, 2020

RECENT DEVELOPMENTS

DOL Provides Guidance on Reimbursement for Business-Related Use of Personal Property

The U.S. Department of Labor recently released an opinion letter, FLSA2020-12, that offered employers guidance on the common issue of reimbursement of an employee's use of personal property, such as a personal vehicle, for business purposes. Opinion letters respond to a specific employer's inquiry, but may be relied upon by other employers with regard to the topic at issue.

Under the Fair Labor Standards Act (FLSA), employees must receive wages, paid at no less than the minimum wage rate and "free and clear." Wages include the reasonable cost of board, lodging and "other facilities" primarily for the benefit of the employee, but not such items that are primarily for the employer's benefit. The cost or expense of those items, which may include tools of the trade, required uniforms, or the use of a personal vehicle, may not reduce the employee's wages below the minimum wage rate, including any required overtime premium.

Recordkeeping. Employers are not required to keep records of an employee's expenses, but are required to record "the dates, amounts and nature of the items" that result in deductions or additions to a non-exempt employee's pay. This includes records used to determine "the original cost, operating and maintenance cost, and depreciation and interest charges" to the extent that such costs are involved in the deductions or additions to pay.

"Any Method" That Reasonably Approximates Expenses is Acceptable. Under the FLSA, reimbursement of expenses incurred on the employer's behalf or for the employer's benefit is sufficient if it "reasonably approximates the expenses incurred." With regard to the reimbursement for a delivery driver's use of their personal vehicle, the DOL states that reliance on IRS guidelines for such reimbursements, including the annual standard mileage rate" "is per se reasonable." But the DOL makes clear that the IRS rate is not the only method of reasonable approximation. The employer here sought the DOL's input on various other methods and sources of data used for calculating the reimbursement; the DOL, however, refused to provide such specific approval (although it did note that using a percentage of the net sales of a driver's deliveries is unlikely to be a reasonable approximation of expenses). Instead, the DOL notes that, to the extent any method reasonably approximates business expenses, it would be acceptable, and that each determination would depend on "a myriad of particulars." The DOL further observes that costs (such as gas prices) may vary by geographic area, potentially rendering national data averages of "little practical use."

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Reimbursement for Fixed and Variable Expenses. The DOL states that whether reimbursements must include fixed expenses (i.e. costs that do not vary with the amount or way the asset is used – in the case of a vehicle, insurance, depreciation, registration and license fees, etc.) depends on whether the item is solely a tool of the trade (i.e. used primarily for the employer's benefit). In situations where there is mixed personal and business use, the employer is required to reimburse only the variable expenses. In the case of a personal vehicle, this might include costs that vary with the amount and distance driven, such as gas, periodic maintenance like oil changes and tire rotations/replacement, and depreciation attributable to the business travel.

Of additional interest, in its analysis, the DOL also addresses uniforms v. required dress styles – the costs of required uniforms cannot reduce the wage below the minimum rate, whereas certain required styles of dress that may also be worn outside the job do not require reimbursement. The DOL notes that "the more distinctive the clothing and the more likely an employee would be to find it distasteful, uncomfortable, or inappropriate for everyday use, the more likely it is that the clothing would be found to be a uniform for which the employer would have to pay."

DOL's Proposed Rule Would Make It Easier to Achieve Independent Contractor Status

On September 22, 2020, the U.S. Department of Labor released a proposed Final Rule to provide guidance on the determination of whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). The proposed Rule would make findings of independent contractor status more likely, and it is almost certain to be challenged by worker advocates.

Background. A worker who is an independent contractor is generally not protected by employment laws, and companies are not required to provide them with employment benefits (including health insurance, leave, or retirement benefits) or pay employment taxes and contributions (including workers' compensation and unemployment insurance). The misclassification of employees as independent contractors – enabling companies to avoid these obligations – has become a particularly hot area of employment litigation in recent years.

Adding to the confusion, the standard for the determination of independent contractor varies across laws, agencies, and courts at both the federal and state level. For example, as discussed in our January 2019 E-Update, the National Labor Relations Board, which has applied different tests over the years, currently utilizes a 10-factor common-law agency test that focuses on the worker's entrepreneurial opportunity. This test also favors a finding of independent contractor status. In contrast, the U.S. Court of Appeals for the Fourth Circuit has articulated a very restrictive standard that makes independent contractor status under the FLSA more difficult to establish, as discussed in our January 2017 E-Update. At least with regard to the FLSA, the DOL's proposed Rule is intended to bring some consistency to the analysis.

The Proposed Rule. According to the DOL, the proposed Rule would do the following:

- Adopt an "economic reality" test to determine a worker's status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer for work (employee);

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- Identify and explain two "core factors," specifically: the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative and/or investment. These factors help determine if a worker is economically dependent on someone else's business or is in business for himself or herself;
- Identify three other factors that may serve as additional guideposts in the analysis including: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the putative employer; and whether the work is part of an integrated unit of production; and
- Advise that the actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

With regard to the **factor of "control**," the DOL provides examples of when an individual exhibits substantial control over the work, such as "setting his or her own work schedule, choosing assignments, working with little or no supervision, and being able to work for others, including a potential employer's competitors." In contrast, a potential employer would be found to exercise control through requirements "that the individual work exclusively for it during the working relationship or prohibiting the individual from working for others after that relationship ends." The DOL further clarifies that "employer" control is not found through requiring an individual "to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses."

As to the **factor of "the opportunity for profit or loss**," the DOL states that a finding of independent contractor status is more likely where the worker "has an opportunity for profit or loss based on either or both: (1) The exercise of personal initiative, including managerial skill or business acumen; and/or (2) the management of investments in, or capital expenditure on, for example, helpers, equipment, or material." On the other hand, this factor would be weighted towards employee status "to the extent the individual is unable to affect his or her earnings through initiative or investment or is only able to do so by working more hours or more efficiently."

The **"amount of skill required" factor** weighs in favor of independent contractor status "where the work at issue requires specialized training or skill that the potential employer does not provide."

The **"permanence of the working relationship" factor** considers whether the relationship "is by design definite in duration or sporadic," favoring independent contractor status, or "is by design indefinite in duration or continuous," favoring employee status. The DOL notes that seasonal employment does not necessarily implicate independent contractor status, especially where the employment is permanent during the season and the employee has been employed for multiple seasons.

The "**integrated unit" factor** examines "whether the work was part of the integrated unit of production, with an emphasis that the factor is different from the concept of importance or centrality." Analogizing the situation to a production line, the DOL states that employee status is

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favored “where a worker is a component of a potential employer's integrated production process, whether for goods or services.” Independent contractor status, on the other hand, is favored “where an individual service provider is able to perform his or her duties without depending on the potential employer's production process.”

The DOL also explains that where the two “core factors” identified above are aligned, they will generally drive the determination of the worker’s status, regardless of the other three factors. The other three factors will be determinative only where the two core factors point in different directions.

Next Steps. The DOL has set an expedited 30-day period for public comment on its proposed Rule, rather than the usual 60 days. Comments may be submitted here until October 26, 2020. Once the comment period has closed, the DOL will review the comment and may make revisions to the Rule before issuing the Final Rule.

NLRB General Counsel Details Employer Unfair Labor Practices During COVID-19 Pandemic

National Labor Relations Board (NLRB) General Counsel Peter Robb released GC Memo 20-14 summarizing unfair labor practice charges relating to the COVID-19 pandemic. The memo addresses cases sent to the Agency’s Division of Advice and which the Agency has issued a complaint or directed further investigation. Below are some of the key cases addressed by the memo, and takeaways for employers:

In recent months, we have summarized COVID-related advice memoranda released by the NLRB’s Division of Advice (here and here). Those advice memos addressed cases in which the General Counsel found no merit. (Because the cases referenced in GC 20-14 remain open, the advice memo setting forth the General Counsel’s determination will not be released until the case is closed.) To provide stakeholders “a better understanding of [the General Counsel’s] office’s approach” to critical issues arising in the wake of the COVID-19 pandemic, the GC issued this guidance.

Protected Concerted Activity: The memo addressed two cases at two non-union employers. First, employees working at a food delivery establishment protested their employer’s alleged failure to provide PPE and enforce social distancing guidelines. Days after several employees exercised their option to take leave without pay, the employees asked if they remained employed. The employer permitted all but two employees to return to work. One of the employees not allowed to return was the leader of the group protest. The General Counsel issued complaint alleging that the employer violated Section 8(a)(1) of the NLRA by unlawfully discharging the protest leader for engaging in protected concerted activities.

In the second case, employees of a health care provider wrote a letter to the employer requesting more input regarding how to provide services to clients during the pandemic. The employer coercively questioned an employee about her role in drafting the letter and her contributions to the letter. The employer further directed the employee not to share with coworkers her interactions with management, contact only management about work problems, and that taking problems to coworkers

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only made things worse. The employer then stated that failure to follow these directives would indicate that the employee did not want to continue working for the employer. The General Counsel issued complaint alleging, among other violations, unlawful interrogation, threats of discharge, and constructively discharging the employee by providing her a "Hobson's Choice" of keeping her job and agreeing not to engage in protected activities, or resigning.

Takeaways: Employers should not discriminate against, threaten, or coercively question employees expressing group concerns about working conditions. Moreover, employers should not state or suggest to employees that engaging in protected activities is incompatible with continued employment.

Bargaining: In one case, the employer unilaterally eliminated furloughed (unionized) employees' health insurance and vacation leave balances. The employer cited government restrictions on reopening and other uncertainty caused by the pandemic as reasons for its decision. The GC found that these conditions did not excuse the employer from its obligation to bargain prior to making the unilateral changes. Nor did the economic uncertainty caused by significantly reduced revenues constitute an "economic exigency" that would excuse pre-implementation bargaining. Because the employer continued paying for employees' health insurance for three weeks after making its decisions, the GC determined that the employer had ample time to bargain over the changes at issue and issued a complaint alleging the employer violated Section 8(a)(5) of the NLRA.

In another case, the GC directed further investigation in a case involving a private school forced into a remote learning environment by state order. Generally, employers may, at least initially, act unilaterally during emergencies so long as its actions are reasonably related to the emergency. While the employer was not required to bargain over the state-mandated move to remote learning, the Regional office was directed to investigate (1) whether the changes related to the decision to move to remote learning were "reasonably related to the COVID-19 emergency," and (2) whether the changes were "material, substantial, and significant" adjustments to employees' pre-existing working conditions, thereby creating a bargaining obligation.

Takeaways: Very rarely will an employer be able to successfully assert that "economic exigency" excuses the employer from bargaining over a change to employee working conditions. Further, even where government mandates force changes upon a unionized employer, the employer may make unilateral changes only to those subjects "reasonably related" to the underlying emergency; the employer must notify and, upon request, bargain with the union regarding other proposed changes.

The memo also addresses discriminatory layoffs and recalls from layoff – hint: do not lay off or recall employees based on union sympathies or to rid your workplace of all unionized employees. We will keep you updated about the outcomes of these cases as we learn more.

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When Does a Neutrality Agreement Provide Unlawful Assistance to a Union? The NLRB GC Weighs In.

National Labor Relations Board General Counsel Peter Robb issued guidance concerning how he will analyze whether a neutrality agreement provides unlawful assistance to a union, in violation of Section 8(a)(2) of the National Labor Relations Act.

In GC Memo 20-13, the General Counsel directed Regions to apply a "uniform standard" to determine whether an employer is providing unlawful assistance to a union's pre-recognition campaign or an employee decertification. Currently, the NLRB applies different standards depending on whether the assistance arose in the context of a pre-recognition union campaign ("totality of the circumstances") or an employee decertification effort (whether the employer provided "more than ministerial aid"). Going forward, the General Counsel will apply the "more than ministerial aid" standard to pre-recognition campaigns, as well. In the GC memo, the General Counsel provides guidance concerning activities and neutrality agreement provisions that he will find provides "more than ministerial aid" and will violate Section 8(a)(2) of the NLRA. The General Counsel will seek an appropriate case to present to the Board where he will argue for the uniform standard, and seek the Board's agreement that certain types of pre-recognition conduct constitutes unlawful assistance.

Employers sometimes enter into so-called "neutrality agreements" with a union or unions seeking to represent its employees. Generally, these agreements provide that the employer will neither assist nor oppose the union's organizing efforts. Further, the employer typically agrees to recognize the union – absent a NLRB election – if the union demonstrates that a majority of employees in the proposed unit have signed an authorization card. An employer might enter into such an agreement in consideration for the union's agreement not to wage a corporate campaign, or because one union may be the "lesser of two evils" in comparison to another union that may be seeking to represent its employees. But, in practice, these agreements may include provisions that assist the union in advancing their effort. The General Counsel will consider the following employer activities and neutrality agreements to constitute "more than ministerial aid" and, thus, unlawful assistance in violation of the NLRA:

- Permitting non-employee union organizers access to employer facilities: According to the General Counsel, providing union representatives access to employer property or advising employees of union organizers' presence will be considered unlawful assistance. Notably, this will be true even where the employer restricts the access to before and after the work day, or during non-work time such as employee meal breaks.

- Allowing union solicitation during work time: The General Counsel concluded that doing so effectively provides employees with "time off from work to collect signatures in the workplace." The General Counsel noted that an employer would provide "more than ministerial aid" to a decertification effort if it permitted anti-union employees to use working time to seek signatures for a disaffection petition.

- Providing the union with employee contact information: An employer that gives a union a list of employee names as part of a neutrality agreement will have rendered unlawful assistance.

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- Statements of preference for a specific union: Often, pursuant to a neutrality agreement, the employer will post a notice announcing the agreement. Where the employer's notice crosses the line into expressing preference for a specific union, the General Counsel has stated that such a statement will constitute unlawful assistance.

- Negotiating terms and conditions of employment prior to the union obtaining majority support: Some neutrality agreements specify the substantive terms and conditions of employment that will go into effect if the union obtains majority support and the employer recognizes the union as employees' bargaining representative. Inclusion of the following terms in a neutrality agreement or pre-recognition agreement violate the NLRA, according to the General Counsel:
  - *Wage Provisions*: Either specifying the post-recognition wage rate or agreeing to "consider" the wage rates of unionized competitors.
  - *No-Strike Provisions*: Any agreement waiving employees' right to strike prior to the union engaging majority support. But provisions stating that the union will not call or cause a strike prior to obtaining recognition remain lawful.
  - *Agreeing to the Appropriate Unit*: Such a provision ousts the Board of its authority to determine what constitutes an appropriate bargaining unit.

- Restraints on employees' right to seek Board assistance: Provisions requiring that both the employer and union request dismissal of any employee-filed petition with the NLRB create "mandatory opposition" to employees' exercise of their statutory right to seek an election, and is "inconsistent with the Board's compelling interest in protecting employee freedom of choice."

While the General Counsel's positions have not been adopted by the Board – and may never be depending on what happens in this year's presidential election (a "Biden Board" would likely not adopt the GC's policy positions espoused in this memo) – employers should think twice before agreeing to a union's template neutrality agreement. Given the nuances of the General Counsel's policy positions, we would recommend that employers contemplating neutrality agreements seek legal counsel to ensure that the agreement minimizes the employer's exposure to liability.

TAKE NOTE

DOL Clarifies Application of Fluctuating Workweek for Purposes of Overtime Calculation. In a recently-released opinion letter, FLSA2020-14, the U.S. Department of Labor provided some guidance on the use of the fluctuating workweek (FWW) method of calculating overtime.

As noted elsewhere in this E-Update, opinion letters respond to a specific inquiry but may be relied upon by other employers with regard to the issue at hand – in this case, the FWW method. Under the Fair Labor Standards Act, employers must pay non-exempt employees at least one-and-one-half times their regular rate for all hours worked over 40 in a workweek. The FWW method is an alternative method of computing overtime for non-exempt salaried employees. If there is a clear and mutual understanding that the salary covers straight time pay for all hours worked, whether few or many, the additional overtime compensation is one-half the regular rate.

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In the opinion letter, the DOL affirmed that the hours need not fluctuate both above and below 40 in order to use the fluctuating workweek method; they can, in fact, fluctuate only above 40. The DOL also offered the guidance that employers using the FWW method may not deduct from an employee's salary for absences, such as when the employee has exhausted a sick leave bank or has not yet earned sufficient sick leave to cover an absence because of illness. The sole exception to this prohibition is an occasional disciplinary deduction for willful absences or tardiness or for violations of major work rules.

DOL Offers Insight on Highly Compensated Employee Exemption. An opinion letter from the U.S. Department of Labor, FLSA2020-13, provided some illumination on certain aspects of the highly compensated employee (HCE) exemption to the requirement under the Fair Labor Standards Act to pay overtime for all hours worked over 40 in a workweek.

Although this letter responds to a particular inquiry, it may be relied on by other employers for general applicable principles under the HCE exemption. This exemption applies to an employee who regularly performs at least one exempt administrative, executive or professional duty, and receives a total annual compensation of at least $107,432 that is paid at a rate of at least $684 a week on a salary basis (meaning that they receive a predetermined amount that is all or part of the employee's compensation on a weekly or less frequent basis that is not reduced based on the quantity or quality of work performed). Beyond the specific application to the employer's corporate trainers (who were found to perform professional duties), the DOL also made the following assertions:

- Employees paid a daily rate do not meet the salary basis test for purposes of the HCE exemption.
- Exempt employees, including HCEs, may receive additional compensation on a commission, bonus, flat, straight-time, or other basis without losing the exemption.
- The minimum weekly and annual salary requirements do not vary based on a part-time or full-time basis. Thus, proportional payments to part-time employees do not satisfy the HCE test.

EEOC Issues Opinion Letter Restricting Its Own Ability to Bring Suit. As we discussed in an E-Update earlier this year, the Equal Employment Opportunity Commission has recently begun issuing opinion letters, which have been used by other federal agencies, like the Department of Labor, to reflect official agency positions on topics of (more or less) general interest to businesses that may then be relied upon as official guidance. The EEOC's second such Opinion Letter addresses its ability to bring pattern or practice claims under Title VII.

Section 707 of Title VII allows the EEOC to bring suit against an employer for a pattern or practice of unlawful discrimination. In the opinion letter, the EEOC confirms that Section 707 does not provide a separate violation of Title VII; rather, a Section 707 claim only arises from violations of Sections 703 (discrimination) or 704 (retaliation). Thus, "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII (i.e., unlawful employment practices involving discrimination or retaliation defined in Sections 703 and 704) in one consolidated proceeding." The EEOC acknowledges that it has not always taken a consistent position on this issue in the past, and is using the Opinion Letter to formalize its position now.

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The EEOC also discussed the technical requirements for bringing such claims. First, there must be a charge of discrimination, whether filed by an individual victim of alleged discrimination or by a member of the EEOC. Next, the EEOC must attempt to conciliate any claim after it finds reasonable cause and before filing suit.

Interestingly, in this Opinion Letter, the EEOC is retreating from the aggressive approach to Section 707 claims that it has asserted in the past, which is good news generally for employers. This is in keeping with the generally business-friendly approach employers are seeing from the Department of Labor and the National Labor Relations Board under the Trump administration.

Is Misuse of Information That An Employee Was Authorized to Access A Violation of the Computer Fraud and Abuse Act? The U.S. Court of Appeals for the Sixth Circuit recently deepened a federal circuit split on what constitutes a violation under the Computer Fraud and Abuse Act (CFAA) in a situation involving employee misuse of confidential company information for personal gain.

In *Royal Truck & Trailer Sales & Service, Inc. v. Kraft*, the company discovered that, prior to their sudden departure, two employees had accessed confidential company information and utilized that information for their own purposes. The company sued the former employees under the CFAA, which provides for claims against someone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains...information from any protected computer." One of the elements of such a claim is that "the access was unauthorized or exceeded Defendants' authorized access."

The Sixth Circuit noted that the employees were authorized to access the confidential information, and thus the only question was whether their misuse exceeded their authorized access. According to the Sixth Circuit, it did not, as the phrase "exceeds authorized access" means that an individual has permission to enter a computer for specific purposes, but later obtains information for which access has not been authorized. The Sixth Circuit determined that the purpose of the law "is penalizing those who breach cyber barriers without permission, rather than policing those who misuse the data they are authorized to obtain."

In so holding, the Sixth Circuit noted that the conduct at issue might violate company policy, or other state or federal laws. It also recognized that its holding reinforced a circuit split – that it joined the Second, Fourth and Ninth Circuits in finding that misuse of information that is validly accessed is not a violation of the CFAA, while the First, Fifth, Seventh, Eighth and Eleventh Circuits have interpreted the "exceeds authorized access" language more broadly. The Sixth Circuit pointed out that this issue will likely be resolved by the U.S. Supreme Court in a criminal case that it had recently agreed to hear.

OFCCP Update for Government Contractors and Subcontractors. It has been an eventful month for government contractors and subcontractors, with a number of interesting actions from President Trump, as well as the Office of Federal Contract Compliance Programs. The following are included among the more significant developments:

- Executive Order on Combating Race and Sex Stereotyping. On September 22, 2020, President Trump signed an executive order that prohibits "divisive concepts" such as race or sex stereotyping or scapegoating in diversity training. The order requires the following of government contractors and subcontractors:
    - Workplace training may not include any form of race or sex stereotyping or scapegoating (e.g. that an individual is inherently racist, sexist or oppressive by virtue of their own race or sex, among other things)
    - A forthcoming notice, "Combating Race and Sex Stereotyping," must be posted in a conspicuous location for employees and applicants.
    - The same notice must be provided to labor unions or worker representatives, if any.
    - Subcontracts and purchase orders must include these same provisions, which will be binding on subcontractors and vendors, unless exempted by the Secretary of Labor.
    - In response to a forthcoming Request for Information from the Director of the OFCCP, contractors and subcontractors will provide information about their diversity and inclusion training.

  The OFCCP has established a hotline to receive complaints of violations of the Order, which it will investigate: 202-343-2008 or via email at OFCCPComplaintHotline@dol.gov. Violations may result in cancelation, termination or suspension of the federal contract, and debarment from future contracts.

- CSAL (Corporate Scheduling Announcement List). In the past, the OFCCP sent letters to contractors on its Corporate Scheduling Announcement List (CSAL), informing them of its intent to conduct a compliance audit. Beginning two years ago, the OFCCP instead posted the list on its FOIA website, and it has now released the next list, separated into FY2020 supply and service contractors and FY2020 construction contractors. In addition to the past reviews for supply and service contractors that included traditional broad-based compliance reviews, glass ceiling reviews, functional affirmative action reviews, and more limited Section 503 Focused Reviews and Compliance Checks, the OFCCP will also be conducting focused reviews on promotions and accommodations. Construction contractors will be subject to Compliance Checks. For contractors on the list, the OFCCP will begin sending out individual letters of the actual audits in about 45 days. Once a contractor receives a letter, it will have 30 days in which to provide the requested information, which will be extensive. We recommend that those on the list take steps now to ensure that they are ready to submit the required information and that they have taken other appropriate actions to demonstrate compliance with the relevant requirements.

- Promotions and Accommodations Focused Reviews Landing Pages. In connection with the newly-implemented focused reviews on promotions and accommodations, the OFCCP has created landing pages for each of those types of reviews that provides an overview of the reviews and what contractors may expect. These join the existing landing pages for Section 503 and VEVRAA focused reviews.

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- FAQ on Counting Non-binary Employees. The OFCCP added a question to its General Affirmative Action Program FAQs that addresses an issue of increasing interest – how to count employees who self-identify as non-binary or other than male/female. The OFCCP states that, with regard to such employees, “the contractor must still include the individual in its AAP submission. However, the contractor may exclude that individual's data from the gender-based analyses required by OFCCP's regulations.”

Employee on FMLA Leave Has Obligation to Communicate with Employer. A recent case reminds employers that employees can be required to communicate with them while on Family and Medical Leave Act leave, and the failure to do so may jeopardize their employment.

In *Alkins v. Boeing Co*., the employee was on FMLA leave through February 19, 2017 and expected to return to work on February 20. He received several reminders of the upcoming expiration of his leave from the third-party leave administrator. In addition, pursuant to a last chance agreement arising from prior attendance issues, the employee was required to call in any absences. The employee did not return on February 20 and did not contact his employer. The employer confirmed with the leave administrator that the employee had not requested any extension of leave, and after the third day of absence, terminated his employment. In response to the termination, the employee requested a leave extension, which was subsequently approved by the leave administrator although he was no longer an employee. The employee then sued, in part for interference with his FMLA rights.

The U.S. Court of Appeals for the Third Circuit rejected the employee’s claim of FMLA interference, stating that the employee “indisputably” failed to give either the employer or the leave administrator notice of his intention to extend his FMLA leave prior to his termination. The Third Circuit noted that the employee had not communicated with anyone from the beginning of his leave through his termination, and that all the employer knew was that the employee was required to report to work for the three days leading up to his termination, that he did not do so, and that he did not tell the employer that he was unable to do so. His subsequent request for a leave extension did not change those facts.

This case reiterates the principle that employees have obligations, as well as rights, under the FMLA, and that their failure to comply with those obligations means that they will lose the protection of the law.

“Title VII claims require an employment relationship between plaintiff and defendant.” The U.S. Court of Appeals for the Fifth Circuit confirmed that only employees – and not third parties – may bring claims under Title VII.

In *Simmons v. UBS Financial Services, Inc.*, the plaintiff was a wholesaler of life insurance products to UBS clients, working from the UBS offices. His daughter, who was a UBS employee, filed a charge with the Equal Employment Opportunity Commission for pregnancy discrimination. She eventually resigned and settled her claim with UBS. The father was then denied access to the UBS office and clients, which resulted in his separation from his own employer. He then sued UBS, alleging that he was the target of UBS’ retaliatory animus against his daughter.

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The Fifth Circuit summarily threw out the claim, finding that the father was not within the "zone of interests" of Title VII. As the Fifth Circuit stated, " Title VII protects employees from the unlawful acts of their employers. It does not—even arguably—protect nonemployees from mistreatment by someone else's employer."

Who Has the Burden to Prove Whether Bonuses Should Be Included in the Regular Rate? According to the U.S. Court of Appeals for the Fifth Circuit, the employee bears the burden, but not all the sister Circuits agree.

Under the Fair Labor Standards Act, non-exempt employees must be paid at one and one-half times their regular rate for all hours worked over 40 in a workweek. The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," subject to eight statutory exclusions, one of which is a discretionary bonus that is "not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly." The employer must retain discretion over both the fact of payment and the amount.

In *Edwards v. 4JLJ, LLC*, the Fifth Circuit addressed the issue of who bears the burden of proof on whether bonuses are discretionary and therefore excluded from the regular rate, and held that the burden fell on the employee, not the employer. The Fifth Circuit acknowledged that other Circuits – the First and Third – have come to the opposite conclusion.

In the present case, there were two bonuses at issue. One was for completing each stage of a project, which was not memorialized in writing. For this one, the plaintiffs did not offer sufficient evidence that the bonus was non-discretionary. The other was a quarterly performance bonus that was memorialized in a written contract that stated that the bonus was not to be expected but earned, but also provided the criteria and pay scale for the bonus. As to this one, although the employer clearly retained discretion over the fact of payment, the criteria and pay scale demonstrated that the employer had no discretion over the amount – and thus the bonus must be included in the regular rate.

Regardless of who bears the burden of proof at trial, this case reminds employers to evaluate any bonus programs carefully in order to determine whether the bonuses must be included in the regular rate. If the employer wishes to exclude the bonus, they must assess the circumstances and language of any such bonus protocols thoughtfully.

D.C. Mandates on Workplace Posting and Notices, as well as Sexual Harassment Training and Reporting, Finally to Take Effect. As we reported in our October 2018 E-Update, the District of Columbia had enacted a law imposing certain notice and posting requirements for all employers and broad new training and reporting obligations for employers of tipped workers. These mandates were tied to funding requirements that were not implemented, and consequently had not taken effect – until now, with the passage of a law that repeals the funding requirement.

The following mandates now will take effect after a 60-day Congressional review period ending on October 30, 2020:

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Applicable to all private employers:

- To post a new poster, forthcoming from the Mayor's office, containing information about D.C. workplace rights in a conspicuous location, specifically including timeclocks and breakrooms. This will replace the individual posting requirements under various D.C. workplace laws.
- To provide a binder or other compilation of the information from a new website to be created by the Mayor at each poster location. This information must be updated monthly.
- The failure to comply with these posting and notice obligations is subject to a $100 per day fine.

Applicable to employers of tipped workers:

- Mandatory sexual harassment training, either through a course developed by the Office of Human Rights (OHR) or from an OHR-certified provider:
    - New employees must receive in person or online training within 90 days after hire, unless they have received such training within the past two years.
    - Current employees must receive in person or online training within two years.
    - Owners and operators must receive in person or online training every two years.
    - Managers must receive in person training (online is not permitted) every two years.
    - Certification of the training completed by each individual must be provided to the OHR within 30 days.

- Sexual harassment policy and reporting:
    - A policy that outlines how to report sexual harassment to management and to the OHR must be filed with the OHR.
    - The employer must distribute its sexual harassment policy to all employees and post the policy in conspicuous locations.
    - By the effective date of the law, employers must document instances of sexual harassment reported to management, including whether the reported harasser was a non-manager, a manager, an owner, or an operator.
    - Employers must annually report to OHR the number of sexual harassment complaints received by management, as well as the total number of reported harassers who were non-managers, managers, owners, and operators.

Federal Court Recognizes Successor Liability Under Maryland Wage Payment Law.
Addressing a question not yet answered by the state courts, a Maryland federal court found that successor liability may exist for purposes of the Maryland Wage Payment and Collection Law (MWPCL) in the context of an asset purchase.

In *Hencin v. Avant Diagnostics, LLC*, a company purchased "substantially all" of the assets of the employer and, in the Asset Purchase Agreement, assumed some of the employer's liabilities, expressly including payroll accruals, deferred compensation, paid time off balances, and expense reimbursement. Two employees were subsequently terminated and sued the new company for the compensation and other monies owed as a successor to their employer under the MWPCL.

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The U.S. District Court for the District of Maryland noted that, as the state Court of Special Appeals has stated, the MWPCL does not define "successor" nor have any court decisions analyzed successor liability under the law. However, the Court of Special Appeals did recognize that an exception to the general rule that a successor is not liable for its predecessor's legal obligations exists when there is an express or implied agreement to assume the liabilities. The federal court found that was the case here, where the purchaser specifically agreed to assume the liabilities for these various forms of compensation in the Asset Purchase Agreement.

On a side note, the federal court also found that expense reimbursements and unused paid time off may constitute wages under the MWPCL. The issue of expense reimbursements was addressed in an earlier case. As for the paid time off, under the MWPCL, "accrued leave" is included as compensation unless certain conditions are met, including expressly stating in the leave policy that it will not be paid out upon termination.

NEWS AND EVENTS

Appointment - Darryl G. McCallum was elected to the Board of Directors of the Better Business Bureau of Greater Maryland at its annual meeting on September 18, 2020. The BBB advances marketplace trust by setting standards and best practices for marketplace behavior and creating a community of trustworthy businesses and charities.

Presentation – Fiona W. Ong, Teresa D. Teare, and Lindsey A. White presented a webinar, "COVID-19 and Beyond: The Top Labor and Employment Law Issues of 2020" to the Baltimore chapter of the Association of Corporate Counsel on September 23, 2020.

Webinar – On October 1, 2020, Fiona W. Ong and Parker E. Thoeni will present "**FFCRA Paid Leave Mandate Revised, DOL Reaffirms its FFCRA Regulations: What attorneys and employers need to know**" for myLawCLE and the Federal Bar Association. The U.S. Department of Labor has revised its Final Rule under the Families First Coronavirus Response Act (FFCRA) in response to a federal court's decision that upended some of the Final Rule's employer-friendly limitations. Intended primarily for attorneys, this webinar will include a discussion regarding the legal and practical implications of the revised Final Rule. Fiona and Parker will also address open questions about retroactive application of the revised Final Rule. You may register for this webinar and obtain CLE credit, at a cost of $95, here.

Article – A blog post by Fiona W. Ong, "Timekeeping and Telework – Guidance from the DOL" was featured on HRSimple.com on September 15, 2020.

TOP TIP: Employers – Be Accurate with Your Explanations and Your Paperwork!

A recent case from a Maryland federal court offers a simple but important lesson to employers – to be careful and accurate with regard to both explanations and paperwork for employment actions.

In *Meyer v. DynCorp Int'l, LLC*, the employee, who was an aircraft mechanic, was on an extended medical leave. Three days before his leave was scheduled to end, he met with a Human Resources representative to request reasonable accommodations for his return to work. His doctor released him to work, but he was not allowed to lift more than 20 pounds or perform overhead work for a period

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of one month, after which the restrictions would be lifted. The employee also told his managers of these restrictions, and they told him they did not think it would be a problem, as the employee was rarely required to do these things. Nonetheless, when he met with HR again on the date of his return, he was told that no accommodations could be provided and his employment was terminated. He then filed suit under the Americans with Disabilities Act, and the employer moved to have the case dismissed.

The Maryland federal court refused to dismiss the case, finding significant concerns about the underlying facts. Although the employer argued that overhead work and lifting more than 20 pounds were essential functions, the court observed that, in essence, the employer was arguing that any task normally done by an aircraft mechanic was "definitionally" essential – which is not the standard. Here, the mechanic had offered evidence that he rarely performed those tasks, that many others were available to assist, and that his managers thought he could perform the job even with those limitations.

The employer also argued that no reasonable accommodation was available. But as the court noted, the mechanic had identified several possible accommodations that could be reasonable – a finite period of leave (one month until the restrictions were lifted), a transfer to another position, or job restructuring to move marginal functions (lifting and overhead work) to another employee. All of these were possible accommodations that would require further exploration to determine if these were, in fact, reasonable.

The court also found the employer's actions in the termination itself to be problematic. The employer said that it terminated the employee because he exhausted his 26 weeks of leave and could not return to full duty (and whether that requirement itself was appropriate is an issue). But the effective date on his Exit Interview form was the same day that he first spoke to HR about his request for accommodations – three days before the end of his leave.

So, there are several lessons that can be drawn from this case:

- Be thoughtful about what functions are actually essential for a job. Simply because the function is performed as part of the job does not automatically mean that it is essential.
- Make sure to engage in the interactive discussion regarding possible accommodations.
- Be open to considering various accommodations – even ones that are not requested by the employee.
- Do not require an employee to be "100%" or "fully" healed in order to return.
- Make sure the paperwork aligns with the explanation (and don't terminate an employee before the end of their leave!).

RECENT BLOG POSTS

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

- Maryland Bans Another Box from Employment Applications (and Discussions) by Elizabeth Torphy-Donzella, September 22, 2020

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- DOL Revises FFCRA Final Rule: What This Means for Covered Employers by Fiona W. Ong, September 13, 2020

- New York Court Vacates Portion of DOL's Joint Employer Rule by Parker E. Thoeni, September 10, 2020

- EEOC Expands COVID-19 Guidance on Testing, Medical Inquiries, Confidentiality, Accommodations, and More by Fiona W. Ong, September 9, 2020 (Selected as a "noteworthy" blog post by Labor & Employment Daily)

- Treasury Department Provides Guidance on President Trump's Deferral of Payroll Taxes by Eric Hemmendinger, September 2, 2020

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