SHAWE ROSENTHAL LLP

E-UPDATE

November 30, 2020

RECENT DEVELOPMENTS

CDC Modifies Guidance on Essential Workers Exposed to COVID-19: Working is "a Last Resort."

Back in April, the Centers for Disease Control and Prevention (CDC) issued guidance that permitted workers in critical infrastructure industries to continue working after exposure to COVID-19 (rather than quarantining) as long as they remained asymptomatic. The CDC has now revised its guidance to state that this should be used only as "a last resort and only in limited circumstances, such as when cessation of operation of a facility may cause serious harm or danger to public health or safety."

The revisions are based on new scientific evidence regarding the transmission risk from asymptomatic individuals as well as the ongoing community transmission risk in many areas. The CDC notes that a 14-day quarantine following exposure is still the safest approach.

If COVID-exposed but asymptomatic critical infrastructure workers are required to work, the CDC continues to apply the guidelines that it previously articulated (which we summarized in our April 15, 2020 E-lert):

- Employees should self-screen at home prior to reporting to work. They should not report to work if they have COVID-19 symptoms, a temperature equal to or higher than 100.4 °F, or are waiting for the results of a viral test.
- Employers should conduct an on-site symptom assessment, including a temperature check, prior to each work shift.
- The employee should self-monitor for symptoms under supervision of the employer's occupational health program.
- The employee should wear a face mask or covering (which may be required under local or state mandates in any case).
- To the extent possible, the employee should maintain a distance of 6 feet from others in the workplace.
- Work spaces such as offices, bathrooms, common areas, and shared equipment should be cleaned and disinfected routinely.

If the employee becomes ill, they should be sent home immediately and their workspace cleaned and disinfected. Other employees who came into close contact with the employee during the two days prior to any symptoms would themselves be considered exposed and subject to the guidelines above.

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

The CDC recommends that critical infrastructure employers reduce the need to reintegrate exposed critical infrastructure workers by:

- Identifying and prioritizing job functions essential for continuous operation,
- Cross-training employees to perform critical job functions so the workplace can operate even if key employees are absent, and
- Matching critical job functions with other equally skilled and available workers who have not experienced an exposure to a person with confirmed COVID-19.

OSHA Explains Common COVID-19 Citations and How to Avoid Them

The Occupational Safety and Health Administration has issued guidance identifying the violations of workplace standards most often found during COVID-related inspections, accompanied by a one-page summary identifying requirements that employers must follow.

According to OSHA, the most frequently-cited standards include Respiratory Protection, Recording and Reporting Occupational Injuries and Illnesses, Personal Protective Equipment and the General Duty Clause. In its guidance, OSHA provides descriptions of the various violations, as well as links to relevant resources and other information. With regard to the General Duty Clause, which is applicable to all employers, OSHA noted that "employers must protect employees from COVID-19 hazards at the workplace by, for example, installing plastic barriers or ensuring social distancing."

The one-pager provides examples of requirements employers have most frequently failed to follow, such as:

- Provide a medical evaluation before a worker is fit-tested or uses a respirator.
- Perform an appropriate fit test for workers using tight fitting respirators.
- Assess the workplace to determine if COVID-19 hazards are present, or likely to be present, requiring the use of personal protective equipment (PPE).
- Establish, implement, and update a written respiratory protection program with required worksite-specific procedures.
- Provide an appropriate respirator and/or other PPE to each employee when necessary.
- Train/retrain workers to safely use respirators and/or other PPE in the workplace.
- Store respirators and other PPE properly in a way to protect them from damage, contamination, and possible deformation of the facepiece and exhalation valve.
- For any fatality that occurs within 30 days of a work-related incident, report the fatality to OSHA within eight hours of finding out about it.
- Keep required records of work-related fatalities, injuries, and illness.

OSHA also reminds small and medium-sized employers that it offers a no-cost, confidential On-Site Consultation Program to help them identify workplace hazards, provide advice for compliance with OSHA standards, and assist in establishing and improving safety and health programs. The consultation program is separate from enforcement and will not result in penalties or citations.

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

Is Time Attending Voluntary Training Programs Compensable? The DOL Weighs In

In November 2020, the Department of Labor's Wage and Hour Division issued several opinion letters under the Fair Labor Standards Act, of which one addressed the compensability of time spent by non-exempt employees attending voluntary training programs. Opinion letters respond to a wage-hour inquiry to the DOL from an employer or other entity, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters for guidance.

Under the FLSA's implementing regulations, "[a]ttendance at lectures, meetings, training programs and similar activities" do not constitute compensable working time if the following four criteria are met:

a) Attendance is outside of the employee's regular working hours;
b) Attendance is in fact voluntary;
c) The course, lecture, or meeting is not directly related to the employee's job; and
d) The employee does not perform any productive work during such attendance.

The regulations also recognize two situations in which training time may be excluded from working time, even if the training is related to the non-exempt employee's job. The first is when an employer establishes an educational program that corresponds to courses offered by independent institutions of learning, and the employee voluntarily attends the program during non-working hours. The second is when "an employee on his or her own initiative attends an independent school, college or independent trade school after hours."

The WHD then applied these principles to six scenarios:

- A webinar that is directly related to the employee's job and provides continuing education (CE) credits towards the employee's professional license, which the employee chooses to view outside her scheduled work hours. The WHD found this time to be non-compensable, as it corresponds to courses offered by independent bona fide institutions of learning. The DOL said the fact that the employee could have viewed the webinar during work time was "immaterial"; it only matters when the training actually occurred.

- A webinar that is directly related to the employee's job, but does *not* provide CE credits, which the employee chooses to view outside his scheduled work hours. The WHD acknowledged that such webinars could be non-compensable, even without a CE component, if they correspond to courses offered by an independent bona fide institution of learning. The WHD stated that it will consider such correspondence to exist if, for example, "[t]he course content, like that of other instruction in bona fide institutions of learning, [is] not tailored to any peculiar requirements of a particular employer or of a particular job held by an individual employee and is such that the skill or knowledge imparted through training would enable an individual to gain or continue employment with any employer."

- A webinar that is directly related to the employee's job, but does *not* provide CE credits, which the employee chooses to view during his scheduled work hours. According to the WHD, this is compensable because "[e]mployee participation during regular work hours in a training program that directly relates to the employee's job is work time for FLSA purposes."

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

This is the case regardless of whether it could have been viewed during non-work hours. The employer therefore cannot require employees to use paid leave to cover the training time, but WHD offers that employers can prohibit such viewing during scheduled work hours, in order to avoid paying for such time.

- A webinar that is *not* directly related to the employee's job and does *not* provide CE credits, which the employee chooses to view during his scheduled work hours. As with the last example, the WHD states that this is compensable time because it occurs during the employee's regular work hours. Again, however, employers can prohibit such viewing during scheduled work hours.

- A webinar that is *not* directly related to the employee's job, but provides CE credits, which the employees choose to view during her scheduled work hours. Again, any training that occurs during work hours is compensable time, regardless of what the training is. And, again, employers can prohibit such viewing during scheduled work hours.

- An in-person, out-of-town weekend conference, where some but not all topics relate to the employee's job and CE credits are available, which the employee voluntarily chooses to attend and during which she does not perform any productive work. The WHD found this to be a special situation that does not count as hours worked since her attendance is voluntary, occurs outside regular working hours, and corresponds to courses offered by an independent bona fide institution of learning. And because the attendance is not work time, any time spent traveling to the conference is non-compensable personal travel time.

More from the DOL – When Is Travel Time Compensable?

As noted elsewhere in this E-Update, the Department of Labor's Wage and Hour Division issued several opinion letters under the Fair Labor Standards Act (FLSA) this month, including this one on travel time for non-exempt employees. Opinion letters respond to a wage-hour inquiry to the DOL from an employer or other entity, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters for guidance.

Under the Portal-to-Portal Act, which is an amendment to the FLSA, a non-exempt employee's time spent traveling to and from their workplace – whether a fixed location or different job sites – is not compensable if it occurs "before the employee starts or after the employee stops his principal activity or activities." However, "travel from [a] designated place to the work place is part of the day's work, and must be counted as hours worked when an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools[.]" Further, preliminary or postliminary travel, even if required by the employer, is only compensable if it is "integral and indispensable to the principal activities that [the] employee is employed to perform," meaning that it is required in order for the employee to perform their principal activities.

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

The FLSA regulations also address other travel circumstances. Special one-day travel to another city is compensable worktime, although the employer may deduct the normal commuting time. Overnight travel is considered travel away from home, and is compensable when the travel time occurs during the employee's normal working hours, even on non-work days – but not travel time that occurs outside the employee's normal working hours. And required driving time is compensable, except that if the employee could have taken public transportation but chooses to drive, the employer may choose to pay either the driving time or the time that it would have paid if the employee had taken public transportation.

The WHD addressed travel time questions in the context of a construction employer, but the principles may be generally applicable to other employers:

- At the beginning of the day, the foreman is required to go to the employer's principal place of business to retrieve a truck that is required to transport tools and materials around separate job sites. The foreman must return the truck at the end of the day, since the trucks are kept at the principal place of business for safety and security reasons. Under these circumstances, an employee who is required to go to the principal place of business to retrieve tools or equipment required to perform their work at a separate job site and return the tools or equipment at the end of the day is performing activities that are integral and indispensable to their principal activities at the job site – and the time spent traveling between the principal place of business and the job site is compensable, whether the job site is local or remote (and requiring overnight stays).

- Laborers may travel directly to the local job site, and their normal commute time is not compensable. But some choose to go to the employer's principal place of business and ride to the job site on the company truck, driven by the foreman. Where an employee makes a voluntary choice to engage in this extra travel, the travel time between the principal place of business and the job site is not compensable.

- A laborer is staying at a hotel for an out-of-town project and travels from the hotel to the remote job site. The travel time between the hotel and the job site is considered normal, non-compensable commuting time. The travel time between the employee's home and the hotel at the beginning and end of the trip may or may not be compensable, depending on whether it occurs during normal work hours and whether the employee is a driver or passenger.
    - As noted above, an employee who is a passenger is compensated for travel time to an out-of-town project that occurs during their normal work hours, even on non-working days, but not for travel time that occurs outside those hours.
    - An employee is offered a ride on the company truck to out-of-town project by the employer, but chooses to drive instead. The regulation addressing other forms of travel speaks only to public transportation, but the WHD notes that the regulations do not address every conceivable situation, and the principles expressed in that regulation apply equally to "other offers of transportation." Thus the employer would have the option to count as compensable worktime either (1) the actual time driving to the remote project or (2) the amount of time that would have been compensable as a passenger. WHD further notes that its regulations "allow an employer to control

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

those travel costs by offering public transportation to a remote job site on its preferred schedule."

- A laborer on an out-of-town project is offered overnight accommodations, but chooses to drive back and forth to their home. The initial drive to and final drive from the remote job site would be compensated as above. However, the voluntary intervening drives to and from the remote job site from home are not compensable.

Employers Have Discretion to Determine Essential Job Functions and What Accommodations are Reasonable

The U.S. Court of Appeals for the Fourth Circuit recently issued a decision that is remarkable for its focus on the need to balance the prerogative of employers to make decisions about the workplace in the context of accommodating employees with disabilities under the Americans with Disabilities Act.

Facts of the Case: In *Elledge v. Lowe's Home Centers, Inc.*, a Market Director of Stores (MDS) (Elledge) responsible for overseeing the quality and profitability of a dozen Lowe's stores, developed mobility issue and his doctor restricted him to walking no more than four hours and working no more than eight hours per day. Normally, Elledge worked 50 to 60 hours a week and conducted at least two store visits each day which required him to drive regularly and walk the stores well in excess of four hours. Lowe's accommodated the restrictions temporarily, but when it became clear after several months that the restrictions would be permanent, HR met with Elledge to identify other positions that he could perform. Elledge refused to pursue lesser positions and instead applied for two open director-level positions. He was rejected for each in favor of two candidates deemed by the company to be more qualified. Elledge accepted a severance package through early retirement which apparently did not require him to sign a release because he filed suit against Lowe's. Of relevance to this case summary, he claimed that Lowe's violated the American with Disabilities Act ("ADA") when it declined to further accommodate him and then failed to hire him for either director opening. The trial court granted summary judgment to Lowe's and Elledge appealed.

The Fourth Circuit's Decision. The U.S. Court of Appeals for the Fourth Circuit (which covers Maryland, Virginia, West Virginia, and the Carolinas) affirmed.

With respect to the essential functions determination, the court specified that such functions are ones that bear "more than a marginal relationship to the job" and emphasized that the employer's judgment must be accorded considerable deference. As the court observed, "That makes sense. The employer's business judgment—that is, the judgment of the entity that defined the employee's role in the first place—commences the analysis." While a written job description can be helpful, "a court performing the essential functions inquiry must consult the full range of evidence bearing on the employer's judgment, including the testimony of senior officials and those familiar with the daily requirements of the job." The court concluded that both the job description and the uncontroverted testimonial evidence made clear that an MDS was required to walk and drive extensively, and that each of two store visits per day required 2 to 3 hours of walking the floor. The same applied to the

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

weekly schedule exceeding the 40-hour limit placed on Elledge's work, which he testified was, in fact, his pre-surgery regular schedule. The fact that Lowe's permitted him to work fewer hours on a temporary basis while he was recovering did not change the essential functions of the job (and the fact that Elledge himself worked beyond those limits during this period demonstrated that he knew a 40 hour week was inconsistent with his role).

The determination of what constituted reasonable accommodation was, the court noted, a fact-specific inquiry. The mere identification in the text of the ADA to accommodations that "may" be reasonable (including assignment to an open position) does not mean that these accommodations *will be reasonable* in all cases. Instead, the court reasoned, what is reasonable must begin with the "actor responsible in the first instance for reducing this wide solution-space to a concrete accommodation [which] is not the judiciary, or even the disabled employee—it is the employer. To the extent an employee may be accommodated through a variety of measures, the employer, exercising sound judgment, possesses 'ultimate discretion' over these alternatives." The court then reasoned that Lowe's offered accommodations to try to enable Elledge to perform the job functions, including the use of a scooter, which he rejected. Ultimately, however, when his doctor opined that the limitations were permanent, no accommodations would enable Elledge to work the required hours and engage in the degree of driving and walking indisputably required by the job.

Finally, the court examined Elledge's assertion that he should have been placed in one of the two director level positions for which he was qualified as an accommodation mandated by the law. Although two Lowe's HR employees identified a number of positions in company stores that would accommodate Elledge's restrictions, he rejected them because of their lesser status and pay. The court observed that both the EEOC and other courts view reassignment to a vacant position as "a last resort" and (in the court's word) having "last among equals" status. The foregoing status, said the court:

> [R]espects core values underlying the ADA and employment law more generally. It recognizes that basic fairness in such a context rests atop an often-rickety three-legged stool, whose legs are the employer, the disabled employee, and—easiest to neglect—the other employees. Allowing other reasonable forms of accommodation to take precedence over reassignment protects the employer's discretion over hiring. This discretion is what makes it possible for the employer to discharge its responsibility to promote workplace stability as its workforce changes over time, and—to the extent appropriate—to reward merit through predictable advancement. Such discretion is also fundamental to the employer's freedom to run its business in an economically viable way.

The court also noted that reassignment as a last resort respected the rights of disabled employees to be afforded accommodations in the positions they hold where possible. Finally, it preserves what the court deemed the "fair balance in the relationship between the disabled employees and his colleagues." Said the court, "[h]olding reassignment in reserve for unusual circumstances bolsters the confidence of other employees that the misfortune of a colleague will not unfairly deprive them of opportunities for which they themselves have labored."

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

The court rejected Elledge's argument that only certain narrow exceptions (such as a seniority system established by a collective bargaining agreement) will allow an employer to deny reassignment to a disabled employee as an accommodation when he no longer is able to perform his own job. Equality of opportunity for disabled employees that is the goal of the ADA should not, the court reasoned, "require employers to construct preferential accommodations that maximize workplace opportunities for their disabled employees. It does require, however, that preferential treatment be extended as necessary to provide them with the *same* opportunities as their non-disabled colleagues."

The court likened Lowe's internal system for merit-based promotions, which identified and created promotion pipelines, to the established seniority systems that the statute and the Supreme Court have recognized as not requiring displacement to favor disabled employees. The Fourth Circuit found there to be no dispute of fact that each of the individuals selected by Lowe's for the open director spots were most qualified under that system and that the ADA was not violated by failing to preferentially transfer Elledge into the jobs. That Lowe's made numerous efforts to accommodate Elledge in his MDS job and worked to identify openings into which he could have transferred without competition had he accepted them satisfied Lowe's obligations under the ADA.

Lessons Learned: The Fourth Circuit's decision displays an unusual (and for employers, welcome) recognition that the rights of disabled employees to be reasonably accommodated under the ADA must take into account the legitimate interests of employers in managing their workforces and of other employees in not having their reasonable expectations for advancement nullified. The principle that merit-based qualification standards may be followed in appropriate cases (especially where the employer assists disabled employees in finding other opportunities for work when they can no longer perform the essential functions of their jobs) is helpful.

One final caveat - employers in Maryland should be aware that the State Civil Rights Act was interpreted by the Maryland Court of Appeals in *Peninsula Reg. Med. Cntr v. Adkins*, 137 A.3d 211 (Md. 2016) as imposing a broad *right* to reassignment to an open position to employees with disabilities who no longer are able to perform their jobs. The Fourth Circuit, by contrast, viewed this as one among a number of other possibilities that may or may not be appropriate in a given case (and in the case before it, where the employer engaged in numerous other efforts to accommodate the employee and where it demonstrated an interest in honoring its existing system of promotions, an option the employer did not have to choose).

NLRB Releases Advice Memo Regarding Civility Rules, As Well As Governmental Inquiries

In a recently issued Advice Memorandum, the National Labor Relations Board's (NLRB) Office of the General Counsel (OGC) offered guidance to employers – both union and non-union – regarding the maintenance of rules relating to civility in the workplace, as well as when employees may be required to notify their employer about governmental inquiries or subpoenas. NLRB Advice Memoranda contain the recommendations of the OGC to Regional Offices on novel or complex issues. These memos may be publicly released years after issuance, but often contain helpful guidance for employers.

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

In *Chipotle Mexican Grill*, the OGC held the restaurant chain's "Ethical Communications" rule to be lawful. The OGC applied the Board's *Boeing* framework – under which work rules are divided into Categories 1 (lawful), 2 (requires individualized scrutiny), or 3 (unlawful). The restaurant's rule requires "fair and courteous" employee conduct, cautions against communications that "reasonably could be viewed as malicious, obscene, threatening, or intimidating," and encourages employees to "be…objective" in their communications with coworkers, customers, and suppliers.

Noting that the Board made clear in *Boeing* that employers may maintain work rules requiring employees to uphold basic standards of "civility," the OGC determined that the rule at issue is akin to the sort of civility rule the Board has found lawful under *Boeing*. The OGC reinforced the important distinction between rules restricting employee speech about their coworkers (i.e., disparaging coworkers), which have little or no impact on employees' Section 7 rights to communicate between themselves and others about their terms and conditions of employment, and rules restricting what employees can say about their employer (i.e., disparaging the owners). Because the Ethical Communications rule restricted the former, and not the latter, the OGC concluded that the rule is a lawful civility rule that belongs in Category 1 of the *Boeing* matrix.

Next, the OGC concluded that the employer's "Government Inquiries/Investigations" rule, on the other hand, violated Section 8(a)(1) of the National Labor Relations Act (NLRA), and directed the Regional Office to issue a complaint. Specifically, this rule required employees to immediately forward to the company any inquiry, request for information, or subpoena from a government agency or authority.

The OGC determined that this rule plainly restricts employees from cooperating in government investigations, including NLRB investigations. Noting that employees have a Section 7 right to cooperate in Board investigations, or to concertedly participate in investigations by other regulatory agencies, the OGC reasoned that employees would reasonably conclude that the rule prohibits them from providing evidence or cooperating in an investigation without first notifying the employer. By requiring employees to identify themselves to the employer before participating in an investigation, subjecting the employee to coercion and intimidation, the OGC opined that the potential impact of the rule on Section 7 rights was significant. While the employer claimed that the rule does not apply to inquiries or subpoenas directed to individual employees, the rule made no such distinction. Thus, the OGC concluded that the rule had significant impact on Section 7 rights and the employer could "easily accommodate its legitimate business interests" with a narrower rule. Accordingly, the OGC considered this rule to be a Category 3 rule (unlawful rules) under *Boeing*.

TAKE NOTE

OSHA Issues COVID-19 Guidance on Ventilation in the Workplace. OSHA has released another in its series of COVID-related safety alerts – this one on ventilation in the workplace. OSHA recommends that employers work with a heating, ventilation, and air conditioning (HVAC) professional to optimize building ventilation. In addition, OSHA offers a number of tips, including the following:

- Ensure all HVAC systems are fully functional, especially those shut down or operating at reduced capacity during the pandemic.

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

- Remove or redirect personal fans to prevent blowing air from one worker to another.
- Use HVAC system filters with a Minimum Efficiency Reporting Value (MERV) rating of 13 or higher, where feasible.
- Increase the HVAC system's outdoor air intake. Open windows or other sources of fresh air where possible.
- Be sure exhaust air is not pulled back into the building from HVAC air intakes or open windows.
- Consider using portable high-efficiency particulate air (HEPA) fan/filtration systems to increase clean air, especially in higher-risk areas.
- Make sure exhaust fans in restrooms are fully functional, operating at maximum capacity, and are set to remain on.

EEOC Issues Proposed Update to Guidance on Religious Discrimination. On November 17, 2020, the EEOC issued a proposed update to the agency's guidance on religious discrimination in the workplace, taking account of the "altered legal landscape" in this area since 2008, when the guidance last was updated.

The proposed guidance addresses every aspect of the obligations of employers and rights of employees under Title VII as they relate to religion and related statutes, including the Religious Freedom Restoration Act. Among the topics covered:

- Coverage issues – when a practice or belief triggers Title VII and when it does not (i.e. religious vs. secular beliefs), the requirement of the sincerity of the belief (generally presumed) and certain exemptions from other provisions of Title VII in select circumstances.
- Employment decisions – how religion and the protections afforded by Title VII apply in the context of recruitment, hiring, promotion, discipline and discharge, compensation, and many other terms and conditions of employment.
- Harassment – including how religious beliefs and practices may be the basis for coercion in the workplace (including supervisor mandated participation in prayer or penalties imposed for refusal to participate) and how employee proselytizing may amount to harassment of coworkers.
- Accommodations – the varied areas where requests for accommodations arise, from the common (related to dress codes and other practices that conflict with religion) to the less frequent but equally challenging (use of facilities, such as for prayer meetings, and objections to generally required practices, like payment of union dues or agency fees).

Each section of the guidance includes lists of best practices for employers (and the section on harassment also offers a list of best practices for employees). The proposed update was approved in a 3-2 vote, with two Commissioners opposing moving forward based on the short window they were given to review the draft (5 days) and the reliance by the guidance on many unpublished cases.

Public comments may be submitted through December 17, 2020 via this link.

The Doctor – Not The Employee – Defines Applicable Medical Restrictions. An employer is entitled to rely upon the medical evaluation by a doctor over an employee's own view as to his medical condition, according to the U.S. Court of Appeals for the Sixth Circuit.

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

In *Gearhart v. E.I. Du Pont De Nemours and Co.*, the employee was a casting operator whose job required him to enter into and clean a Kapton oven. He developed cardiac issues, and his cardiologist stated in a report that the employee should no longer work in the oven. The employee did not provide the report to his employer, but told human resources, a company nurse and a company doctor of his cardiologist's recommendation – although he later denied doing so. The company doctor, based in part on this verbal communication from the employee, issued a permanent restriction from working in the oven. Because the employee was unable to perform this essential function, and there was no other position available that would allow him to avoid oven work, his employment was terminated. He then sued under the Americans with Disabilities Act and state law for disability discrimination and failure to accommodate.

The Sixth Circuit rejected his claims, finding that the employee was not qualified to perform the essential functions of his job. Although the employee disputed that he ever told the company that his cardiologist restricted him from going in the oven, the Company's records from HR, the nurse, and the doctor all reflected this information. In addition, the employee's own cardiologist's report also stated this. There was simply nothing to credit the employee's argument regarding what was told to the Company or his condition.

This case is helpful to employers as it demonstrates that the opinion of the employee's doctor can be credited over the employee's own determinations. It also reinforces the need for employer representatives to keep accurate and detailed records regarding discussions with the employee – in this case, the records clearly supported the employer's position that the employee himself stated that his doctor would not permit him to work in the oven, and the employer was entitled to rely on such statements about the doctor's opinion.

Employee's Own Perception of Her Performance Is Not Determinative, and What Is An Adverse Employment Action, Anyway? The U.S. Court of Appeals for the Fifth Circuit reaffirmed the principle that an employee's subjective perception of her own performance does not support a discrimination claim, while also providing guidance on the types of actions that are or are not adverse employment actions necessary to establish a discrimination claim.

In *Price v. Wheeler*, the employee claimed race discrimination and harassment, in part because she received a rating of "fully successful" rather than the "outstanding" that she thought she deserved. The Fifth Circuit, however, noted that "her subjective belief about her own performance is insufficient to demonstrate that her supervisor had a discriminatory motive in assigning her a lower rating." Thus, this affirms that it is the employer's – not the employee's – view of the employee's performance that is relevant.

Also of interest to employers, the case provides many examples of the types of actions that do not constitute adverse employment actions. Under Title VII, an adverse employment action, which is defined as an "ultimate employment decision, such as hiring, granting leave, discharging, promoting, or compensating," is required in order to sustain a discrimination claim. In this case, the employee asserted a number of negative actions, but the Fifth Circuit found the following did not rise to the level of an adverse employment action: administrative matters (such as failing to provide a necessary format for a particular task, removing documents, failing to sign a document, failing to meet), the occasional assignment of administrative tasks outside the normal job description, oral reprimands, performance evaluations, presentation opportunities, employee awards, the temporary revocation of

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

telework privileges, and the denial of a single leave request. On the other hand, a suspension without pay is an adverse employment action.

No Adverse Employment Action Is Required for a Failure to Accommodate Claim. In a classic discrimination case, the employee must show that they experienced an adverse employment action – but this is not required in a failure to accommodate claim under the Americans with Disabilities Act, according to the U.S. Court of Appeals for the Tenth Circuit.

In *Exby-Stolley v. Bd. of County Commissioners*, the full court revisited the decision of a three-judge panel affirming a district court determination that an adverse action was required for a failure to accommodate claim, and this time reversed the district court's decision. Noting that reasonable accommodation is an affirmative obligation under the ADA, the Tenth Circuit found that "it would verge on the illogical to require failure-to-accommodate plaintiffs to establish that their employer *acted* adversely toward them—when the fundamental nature of the claim is that the employer *failed to act*." (Emphasis in original). This is contrasted with a disparate treatment discrimination claim, which is based on discrimination actions by the employer.

The Tenth Circuit held that an adverse action requirement would frustrate the remedial purpose of the ADA to promote full participation and equal opportunity "to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability." The Tenth Circuit also noted that its approach is consistent with that of the Equal Employment Opportunity Commission, as well as multiple sister circuits.

FLSA's "Willful" Standard Applies to FMLA. The U.S. Court of Appeals for the Ninth Circuit held that the definition of "willful" violations under the Fair Labor Standards Act should be applied to the Family and Medical Leave Act, which does not define the term.

In *Olson v. United States of America*, the employee brought a claim for interference with her rights under the FMLA, based on her employer's admitted failure to provide her notice of such rights. She alleged the violation was willful, which is significant because willful violations are subject to a three-year statute of limitations (meaning the period in which a lawsuit can be brought) while a two-year limitations period applies to those that are not willful.

Because "willful" is not defined under the FMLA, the Ninth Circuit adopted the definition of "willful" under the Fair Labor Standards Act, joining a number of sister circuits in doing so. Under the FLSA, which has a similarly-structured statute of limitations provision, "the employer must know, or show reckless disregard for, whether its conduct was prohibited by the statute." The Ninth Circuit further found that, based on a number of factors, including the employer's consultation with its legal department regarding the employee's status, no willful violation existed here that would trigger the three-year statute of limitations. And because the employee did not meet the two-year period, her FMLA claims were barred.

OFCCP Update for Government Contractors. Continuing on with a busy year, the Office of Federal Contract Compliance Programs has engaged in additional actions of interest to government contractors and subcontractors.

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

- The OFCCP has issued a final rule, setting forth the procedures it uses to resolve claims of potential discrimination and other legal violations. There are some changes from the proposed rule that we discussed in our January 2020 E-Update. Among other things, the final rule does the following:
    - It codifies the procedures that OFCCP uses to resolve discrimination claims – specifically Predetermination Notices (PDN), Notices of Violation (NOV), and an expedited conciliation option.
    - It provides greater clarity as to the types of evidence that OFCCP utilizes in determining whether violations have occurred.
    - It differentiates the procedures and evidentiary standards for disparate treatment and disparate impact theories of discrimination, which have separate, although similar, elements.
    - It requires the OFCCP to explain in detail the basis for its findings in pre-enforcement notices, obtain approval from the OFCCP Director or acting agency head, and, upon the contractor's request, provide the model and variables used in the agency's statistical analysis and an explanation for any variable that was excluded from the statistical analysis.

- A new Technical Assistance Guide for Supply and Service Contractors. The Guide outlines a contractor's equal employment opportunity obligations, lists the required components of mandatory affirmative action programs, and discusses what to expect during compliance reviews.

- The Department of Labor (of which the OFCCP is part) and the Equal Employment Opportunity Commission revised their Memorandum of Understanding (MOU) on the coordination of civil rights enforcement. Among other things, the revisions grant the OFCCP greater latitude to retain and investigate individual complaints of discrimination, rather than being required to refer them to the EEOC. Thus contractors and subcontractors should be aware that the OFCCP may begin to conduct more investigations into employee discrimination complaints. Although the EEOC's procedures for such investigations are quite well-established, the OFCCP's processes are not as clear.

NEWS AND EVENTS

Honor - We are delighted to announce that Shawe Rosenthal has once again been recognized by *U.S. News and World Report* and *Best Lawyers in America*© in the 2021 "Best Law Firm" rankings. We were honored with a top Tier 1 ranking in the Baltimore Metropolitan Area in the areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment Law. As we previously announced, eleven of our partners have also received individual recognition by *Best Lawyers in America*©: 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.

Victory – J. Michael McGuire won an arbitration for an energy company, involving the interpretation of contract language regarding the calculation of overtime.

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

Honor - Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for Q3 2020 – U.S. – Employment. 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" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the sixth consecutive quarter and seventh time overall that Fiona has received this honor.

Article – A blog post, "It's the Holiday Season – Can Employers Restrict Personal Travel?" by Fiona W. Ong and Lindsey A. White was featured on hrsimple.com.

TOP TIP: Cloth Masks: PPE or Not PPE? That Is the Question

With apologies to William Shakespeare, these past couple of weeks have been rather confusing, with two of the major federal agencies leading the battle against COVID-19 - the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) - issuing somewhat, well, inconsistent guidance on the use of cloth face coverings or masks.

For many months now, the CDC has told us that cloth masks help to control the spread of COVID-19 by providing a barrier to help prevent the wearer's respiratory droplets from reaching others - but that the masks did not protect the wearer. And because such cloth masks had no protective function, OSHA naturally declared that they were not personal protective equipment (PPE), which is significant because there may be OSHA-mandated employer obligations relating to the use of PPE in the workplace (e,g. fit testing, training, documentation, etc.).

On November 12, 2020, however, the CDC asserted for the first time that cloth masks also offer some protection to the wearer - although how much protection depends on a number of factors, such as the type of fabric used, the number of layers, and the fit. But if the masks have a protective function, doesn't that make them PPE?

Well, not according to OSHA, which added the following question and answer to its COVID-19 FAQs:

> Since the CDC has determined that some cloth face coverings may both serve as source control and provide some personal protection to the wearer, will OSHA consider them to be personal protective equipment under 29 CFR 1910.132?
>
> Not at this time. OSHA continues to strongly encourage workers to wear face coverings when they are in close contact with others to reduce the risk of spreading COVID-19, if it is appropriate for the work environment. As the agency has previously noted, employers may determine that cloth face coverings must be worn as a feasible means of abatement in a control plan designed to address hazards from COVID-19. Currently, however, OSHA's guidance is unchanged; OSHA does not consider cloth face coverings PPE and they are not required under OSHA's PPE standard (29 CFR 1910.132).

OSHA goes on to note that the CDC has remarked on the need for additional research as to the factors impacting the cloth masks' effectiveness as personal protection. Thus, "[a]t this time, OSHA

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

does not think enough information is available to determine whether a particular cloth face covering provides sufficient protection from the hazard of COVID-19 to be personal protective equipment under OSHA's standard (29 CFR 1910.132)." OSHA leaves open the possibility that such a determination could be made in the future.

But regardless of whether a cloth mask is PPE or not, the CDC, OSHA and the overwhelming majority of scientists agree that wearing one can help prevent the spread of COVID-19 and, now, can also offer at least *some* degree of protection. So, in the words of Maryland Governor Larry Hogan, "Just wear the damn mask!"

RECENT BLOG POSTS

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

- Go Phish: Preying on Vulnerable Job Seekers by Lindsey A. White, November 19, 2020
- It's the Holiday Season – Can Employers Restrict Personal Travel? by Fiona W. Ong and Lindsey A. White, November 11, 2020 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)
- Here's What Not to Do When Faced With Union Organizing Activity by Chad M. Horton, November 4, 2020

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