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E-UPDATE

December 31, 2020

RECENT DEVELOPMENTS

Electronic Posting of Required Workplace Notices? The DOL Provides Guidance

In our "new normal," the U.S. Department of Labor is dealing with how to help employers comply with legal obligations under laws that never contemplated these conditions. The Wage and Hour Division of the DOL has just issued a Field Assistance Bulletin (FAB) No. 2020-7 that provides guidance on the issue of whether required workplace postings under various employment laws may be done electronically.

As employers know, certain employment laws require employers to post notices in places where employees and applicants can readily view them. The DOL enforces the following: the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), Section 14(c) of the FLSA (dealing with subminimum wage certificates), the Employee Polygraph Protection Act (EPPA), and the Service Contract Act (SCA). Many of the older laws and regulations contemplated only a physical posting in the workplace, whereas more recently issued or revised regulations acknowledged the growing remote workforce. With the pandemic, many workforces suddenly became largely or wholly remote, and some employers questioned how to meet the mandatory posting requirements.

The WHD notes that the FLSA and FMLA require "continuous posting," meaning that the posting is required "at all times" and delivery of a single notice, whether in hard copy or electronically, does not meet this requirement. If continuous posting is required, the WHD says that electronic posting in lieu of hard copy posting is acceptable only where:

1) all of the employer's employees exclusively work remotely,
2) all employees customarily receive information from the employer via electronic means, and
3) all employees have readily available access to the electronic posting at all times.

An electronic posting may be made on an intranet site, internet website, or shared network drive or file system posting – but it must be at least as effective as a hard copy posting to allow the employees to readily see the posting. This is a fact-specific inquiry. Moreover, employers must customarily post notices electronically in order for such posting to be deemed effective. And they must specifically inform employees of where and how to access the electronic posting. In addition, the employee must be able to readily determine which electronic posting is applicable to them and their worksite.

If individual notices are permitted, the employer may use email only if it customarily provides employees with information by that method.

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If an employer's workforce is both in person and remote, the employer must post a hard copy in the workplace, but the WHD also encourages them to supplement it with an electronic posting. In the context of the pandemic, any employer with a physical workplace – even if most or all workers are temporarily remote – should continue to make the hard-copy posting in the workplace, but may also use electronic posting to ensure that employees are adequately informed of their rights and obligations under the applicable employment laws.

Telemedicine and the FMLA – The DOL Weighs In

Even before the pandemic, employers were questioning whether a telemedicine visit could constitute a visit with a health care provider for purposes of the Family and Medical Leave Act. In a Field Assistance Bulletin, No. 2020-8, the Wage and Hour Division of the U.S. Department of Labor offered guidance on this issue.

The FMLA applies to serious health conditions, which requires treatment by a health care provider. Such treatment has been defined to involve in-person visits with the provider. Earlier this year, the WHD issued frequently asked questions about the FMLA and the pandemic (as discussed in our July 20, 2020 E-lert), in which it stated that it would consider telemedicine visits to be in-person visits for purposes of the FMLA.

The WHD reiterates this position in the FAB, specifying that, in order to satisfy the in-person requirement, the telemedicine appointment: (1) must include an examination, evaluation, or treatment by a health care provider; (2) generally, should be performed by video conference; and (3) must be permitted and accepted by state licensing authorities. The WHD notes that communication methods that do not meet these criteria – such as simple phone calls, emails, letters, and text messages – will not be considered an in-person visit.

Of course, an employer is still entitled to have the health care provider complete the FMLA certification form, which explains that in-person visit requirement, but does not address telemedicine visits. Thus, employers may wish to make clear to their employees – and the health care providers – that telemedicine visits meeting the specified criteria are considered in-person visits, but phone calls or emails are not.

DOL Issues Final Rule on Tipped Employees – Mandatory Tip Pools and Related Duties

On December 22, 2020, the U.S. Department of Labor announced a final rule that revises its tipped employee regulations to conform with amendments that were made to the Fair Labor Standards Act by the Consolidated Appropriations Act of 2018 (the "CAA"), which we discussed in our March 2018 E-Update.

Under the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour) and counting the employees' tips as a credit to satisfy the difference between the direct cash wage and the federal minimum wage. (Notably, many states have enacted higher minimum wage rates, including for tipped employees). This credit is known as the "tip credit." Tipped employees are those who customarily and regularly receive more than $30 per month in tips. Tips do not include service charges, such as minimum gratuity amounts for large groups of customers, which are considered revenue to the employer.

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Tip Pools. The FLSA provides that an employer who takes a tip credit may include only employees who customarily and regularly receive tips, such as restaurant servers and bartenders, in mandatory "tip pools" (*i.e.*, the practice of requiring employees to contribute a certain amount of tips into a collective pool that is divided among employees). The DOL promulgated regulations in 2011 that applied this restriction on mandatory tip pools to all employers, whether or not those employers make use of the tip credit. However, in March of 2018, as part of a budget compromise, Congress passed the CAA which amended the FLSA by reversing the DOL's restriction on tip pooling practices of employers that did not utilize the tip credit. As a result, if the employer does not take the tip credit, tips may be shared with other employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs and janitors. The final rule imposes new recordkeeping requirements under such circumstances.

Tips for Employees Only. The CAA also provided that, regardless of whether the employer takes the tip credit, the law prohibits employers, managers and supervisors from receiving any share of the tips. An employer who unlawfully keeps tips earned by employees is subject to a civil monetary penalty of up to $1,100 for each violation, pursuant to 29 U.S.C. § 16(e)(2). The final rule makes clear that an employer must distribute any tips collected as part of a mandatory tip pool at least as often as it pays wages in order to avoid "keeping" the tips.

Related Duties and the 80/20 Rule. In addition to conforming the regulations to the CAA's provisions, the final rule also reflects the Department of Labor's recent guidance that an employer may take a tip credit for any amount of time an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties. Previously, the Department's position was that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on non-tip producing duties exceeded 20% of the employee's workweek. This rule, known as the 80/20 rule, was difficult to administer for many employers because they lacked guidance to determine whether a non-tipped duty is "related" to the tip-producing occupation.

As noted in our November 2018 E-Update, the DOL issued an opinion letter that month rejecting the 80/20 rule. The DOL now takes the position that there is no limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the FLSA are met. The DOL states that "Duties listed as core or supplement for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation. For example, for waiters and waitresses, such tasks include preparing and clearing tables, sweeping and mopping floors, taking out trash, answering phones, rolling silverware, stocking service items, and filling condiment containers, among many others. If the task is not listed in O*NET, the employer may not take a tip credit for time spent performing that task – although such task may be deemed non-compensable under the *de minimis* rule (meaning that such little time is spent on the task that it need not be paid).

It is important to note, however, that many courts have rejected the DOL's November 2018 opinion letter and continue to enforce the 80/20 rule. Whether these courts will accept the regulatory guidance remains to be seen.

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Summary. The final rule:

- Explicitly prohibits employers, managers, and supervisors from keeping tips received by employees;
- Removes regulatory language imposing restrictions on an employer's use of tips when the employer does not take a tip credit, making it clear that such employers may allow workers such as cooks or dishwashers, to share in a mandatory tip pool, and imposes new recordkeeping obligations under those circumstances;
- Incorporates in the regulations, as provided under the CAA, new civil money penalties, currently not to exceed $1,100, that may be imposed when employers unlawfully keep tips; and
- Amends the regulations to reflect prior guidance explaining that an employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

The DOL has also issued Frequently Asked Questions on the new final rule.

NLRB Finds Employee Civility, No-Recording, and Confidential Information Rules to Be Lawful

In *BMW Manufacturing Co.*, the National Labor Relations Board (the Board) held that several work rules found in the employer's employee handbook did not violate Section 8(a)(1) of the National Relations Act (NLRA), which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights to engage in concerted activities for their mutual aid and protection.

The Board utilized its now-familiar *Boeing* framework in which facially neutral work rules are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. Generally, the disputed rules related to employee civility towards the company and coworkers, and rules designed to protect trade secrets and the employer's confidential information.

1. *Attitude Towards the Company*: The employer maintained two rules requiring that employees "demonstrate respect for the Company" and "not engage in behavior that reflects negatively on the Company." In reversing the administrative law judge, who found that these rules violated Section 8(a)(1) of the NLRA, the Board held that the employer's legitimate justifications for the rule outweighed any adverse impact on employees' exercise of Section 7 rights. Specifically, the Board reasoned that an employer's legitimate interest in the loyalty integral to the employer-employee relationship are self-evident, and outweigh any speculative adverse impact on employees' Section 7 rights. Accordingly, such rules will be deemed to be *Boeing* Category 1 rules that will be found lawful moving forward.

2. *Civility Rule*: The employer's rule prohibited employees from using "threatening or offensive language." The Board found the rule to be the type of "lawful, commonsense" rule that an objectively reasonable employee would not view as potentially interfering with Section 7

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rights. Accordingly, the Board placed the rule in *Boeing* Category 1 of work rules that this Board will consider lawful.

3. *No-Recording Rule*: The rule prohibited employees from using personal recording devices within employer manufacturing facilities, and not use business recording devices within manufacturing facilities without management approval. The Board reaffirmed that employer no-recording rules of this nature are lawful. The Board reasoned that the rule services compelling employer interests in safeguarding proprietary secrets and classified information. Because the legitimate interests served by the rule "far outweigh[s]" the adverse impact of the rule on employees' exercise of Section 7 rights, the Board placed the rule into *Boeing* Category 1, wherein no case-specific justification for the rule would be required.

4. *Confidential Information*: Finally, the employer maintained a confidential information policy that encompassed "personal and financial information." The Board again found that the "objectively reasonable employee" would understand the rule applies only to the employer's proprietary business information, noting that the rule does not reference employee wages, contact information, or other terms and conditions of employment. Accordingly, the Board dismissed the allegation that the rule violated Section 8(a)(1) of the NLRA, and placed the rule in *Boeing* Category 1 because objectively reasonable employees would not interpret the rule, when read as a whole, to potentially interfere with Section 7 activities.

This case reaffirmed several previous Board holdings addressing similar rules, and serves as a reminder to employees that this Board will side with employers who maintain commonsense rules relating to civility and protection of trade secrets and confidential information.

TAKE NOTE

Employers and Employees Can Contractually Agree to Shorter Claims Periods. The U.S. Court of Appeals for the Fourth Circuit stated that, "[a]s a general rule, statutory limitations periods may be shortened by agreement, so long as the limitations period is not unreasonably short and the statute at issue does not prohibit a shortened limitations period."

In *Bracey v. Lancaster Foods, LLC*, the employee signed an arbitration agreement that shortened the statute of limitations (i.e. the time within which a claim must be filed) for all employment-related claims to one year. He subsequently brought a discrimination lawsuit against his employer. The employer moved to compel arbitration, and the employee argued that the agreement was unconscionable because it shortened all the applicable statutes of limitation to one year. The Fourth Circuit rejected this argument, noting that it had previously held that parties may agree to shorten limitations period by contract, and that "[c]ourts have frequently found contractual limitations periods of one year (or less) to be reasonable."

The employee also argued that a one-year limitations period would make it difficult to exhaust his administrative remedies before the Equal Employment Opportunity Commission (which requires employees to file a charge of discrimination and receive a notice of right to sue before bringing a federal lawsuit) prior to making a demand for arbitration. The Fourth Circuit noted, however, that "it is not entirely clear that administrative exhaustion would even be required when the parties contractually agree to resolve employment disputes in arbitration."

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Although this unpublished case cannot be considered binding precedent, it provides some interesting options for employers to consider in drafting arbitration agreements.

Suspicious Timing of Performance Management Supports FMLA Retaliation Claim. An employee's claim of retaliation under the Family and Medical Leave Act was supported by the suspect timing of her employer's performance management activities following her notice to management of her need for leave in the future, according to the U.S. Court of Appeals for the Eleventh Circuit.

In *Munoz v. Selig Enterprises, Inc.*, the employee had chronic health issues for which she was often absent or tardy. She was not provided with notice of her FMLA rights, but was given the leave, and the Eleventh Circuit found that therefore there had been no interference with her FMLA rights. It found merit to her retaliation claim, however. The employee had given notice of her need for future leave. Although she did not provide details as to the timing and duration of such leave, the Eleventh Circuit found that those details were not required for an unforeseeable need due to a condition with sudden, acute flareups. Moreover, just days after she notified her employer of her need for future leave, her managers downloaded software onto her computer to monitor her off-task time. And three weeks later, she was disciplined for her performance, including her attendance. The Eleventh Circuit found her managers' numerous comments about her attendance and tardiness, as well as questioning whether she was truly sick, to be particularly problematic.

This case poses a warning to managers to be careful with comments about an employee's attendance issues that may be connected to a serious health condition. In addition, although employers may certainly hold employees accountable for performance, they should be thoughtful about the timing of such activities.

Diving Into the (Tip) Pool - Fourth Circuit Addresses Tipped Employee Issues. The U.S. Court of Appeals for the Fourth Circuit (which covers Maryland, Virginia, West Virginia, and the Carolinas) held that automatic gratuities or service charges are not tips, but may be considered commissions that may be used to satisfy the overtime obligations under the Fair Labor Standards Act. The Fourth Circuit also addressed the composition of tip pools in *Tom v. Hospitality Ventures, LLC*.

Tip Pool. As explained elsewhere in this E-Update, under the FLSA, an employer may pay a tipped employee a tipped wage and count its employees' tips as a credit (i.e. "tip credit") in order to meet the applicable minimum wage rate. The FLSA also provides that an employer who takes a tip credit may include only employees who customarily and regularly receive tips, such as restaurant servers and bartenders, in mandatory "tip pools" (*i.e.*, the practice of requiring employees to contribute a certain amount of tips into a collective pool that is divided among employees). In this case, there was a factual question as to whether one of the employees in the pool – the Kitchen Closing Supervisor – was an employee who customarily and regularly received tips. The question was sent back to the trial court. (We further note that there was no discussion of the employee's "supervisor" title – given that amendments to the FLSA and the recently revised regulations make clear that supervisors may not keep tips, this could be a further concern).

Service Charges. The FLSA specifically provides that tips do not include mandatory service charges, such as minimum automatic gratuities for large groups of customers, which are considered

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revenue to the employer. Tips are discretionary, while automatic gratuities are not – even if sometimes waived by the employer at the request of the customer, according to the Fourth Circuit. (There may be circumstances in which "suggested" charges are discretionary, however, in which case they might be deemed tips). Service charges may be used to satisfy the employer's minimum wage and overtime obligations.

Commissions. Of relevance in this case, the FLSA also contains an exemption from the obligation to pay overtime (but not minimum wage) for retail or service employees if their regular rate of pay exceeds one and one-half times the federal minimum wage rate and more than half their compensation during a representative period of not less than a month represents commissions. In this case, the Fourth Circuit noted that any tips received by the employees, whether or not counted as a tip credit, should be included in the calculation of their compensation for the purpose of determining whether the automatic gratuity amounted to more than half. This issue was sent back to the trial court for proper calculation.

Lessons for Employers. This case is illustrative of the fact that there may be multiple methods for an employer of tipped employees to meet their overtime (tips, service charges and commissions) and minimum wage (tips and service charges) obligations. However, the mechanics of such methods are fact-specific.

2nd Circuit Provides Guidance on Questioning of Employees During Work Stoppage. The U.S. Court of Appeals for the Second Circuit provided guidance to employers on the parameters of lawful questioning of employees during a work stoppage.

In *Time Warner Cable of New York City LLC v. NLRB*, approximately 50 employees engaged in a work stoppage and demonstration, which resulted in delayed and missed service appointments that day. The Employer used video surveillance to identify the employees involved in the demonstration. The employees were then summoned for investigatory interviews, where the employer inquired as to who told the employees about the gathering, when the employees received notification of the gathering, and how the gathering was communicated to the employees. The employees involved in the demonstration were suspended, and their Union filed an unfair labor practice charge, alleging that their National Labor Relations Act rights had been violated. The National Labor Relations Board agreed, and the case was appealed to the Second Circuit.

The Second Circuit concluded that the Board's standard requiring that employers "focus closely" on unprotected activity where it might touch on protected activity has a reasonable basis in law; but the Board's requirement that an employer "minimize" intrusion into Section 7 activity in such questioning does not.

Where the unprotected activity that was the legitimate focus of the employer's inquiries was potentially intertwined with protected activity, such that any inquiry into the planning or motivation of the unprotected activity risked eliciting answers that would implicate the exercise of protected rights, the Board has previously allowed questioning that could elicit considerably more than minimal information protected activity. The Second Circuit found that by prohibiting inquiry into any conduct preceding the unprotected conduct except to identify "actual participants" in the demonstration, the Board disallowed highly relevant inquiry into identification of those deserving of discipline and into making appropriate distinctions among them. Because it found the Board's

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enunciated standard, as applied to the facts of this case, lacked a reasonable basis in law, the Second Circuit remanded the matter to the Board for further proceedings consistent with its opinion.

Takeaway: Where employees engage in unprotected conduct, employers may lawfully question employees regarding the participants in the unprotected conduct. In addition, employers may also inquire as to the planning of the unprotected activity even if those questions may elicit answers that bear on the exercise of Section 7 rights. The questioning may also touch upon the planning of the unprotected conducted, as well.

And Exactly How Does Your Own Shredder Help You Perform Your Essential Job Functions? Reinforcing a perhaps obvious point, the U.S. Court of Appeals for the Seventh Circuit recently reiterated that, under the Americans with Disabilities Act, the employer need provide only accommodations that are necessary to enable the employee to perform their essential job functions.

In *Williams v. Board of Education of the City of Chicago*, the employee was a social worker for the school system, suffering from depression, anxiety and chronic sinusitis. These conditions made it difficult for him to sleep at night, which consequently made it difficult for him to concentrate and recall information. He made a number of demands for accommodation, including that each of his assigned schools provide him with a private office and dedicated equipment, specifically: a telephone, a high-capacity laser printer with extra ink, a private fax machine, a large high-resolution monitor, a high-capacity shredder, a high-capacity scanner, a proper desk and swivel chair, and large HEPA filter. The schools gave him computer monitors and HEPA filters, and arranged for a private space to meet with students; his other equipment requests were denied. He subsequently sued, alleging a failure to accommodate these requests as well as others.

The Seventh Circuit summarily dealt with this claim, noting that the employee had not established how the requested equipment would help him accomplish the essential functions of his job. In a slightly snarky manner, the Seventh Circuit observed, "Moreover, despite his claim that he could easily explain the necessity for these specific requests, he has yet to set forth a connection between, for instance, his own dedicated shredder and his disability."

EEOC Provides New Resources for Employers – Requesting Opinion Letters and a Data Search Tool. In December 2020, the Equal Employment Opportunity Commission took several actions of (more or less) interest to employers:

- **Opinion Letter Requests.** The EEOC announced a new process for requesting opinion letters. Opinion letters respond to an inquiry from an employer or other entity regarding EEOC-enforced anti-discrimination laws, and represent the EEOC's official position on that particular issue. Other employers may then look to these opinion letters for guidance. As the EEOC's website explains, the request should be in writing, signed by the person making the request, specifically request an "opinion letter," and be addressed to the Chair, Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507. Requests should also be sent to: EEOCopinionletters@eeoc.gov. The request should contain: A concise statement of the issue; the names and addresses of the person making the request and of other interested persons; as full a statement as possible of all known relevant facts and law; and a statement of reasons why the opinion letter should be issued. The EEOC has discretion whether to respond to the request.

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- **Data Search Tool.** The EEOC also announced the release of EEOC Explore, a new interactive data query and mapping tool that enables the exploration and comparison of data trends across a number of categories, including location, sex, race and ethnicity, and industry sector. The tool uses privacy-protected demographic data from EEO-1 reports, which are filed annually by employers with 100 or more employees and government contractors with 50 or more employees.

OFCCP Issues Final Rule on Religious Exemptions for Government Contractors. The Office of Federal Contract Compliance Programs issued *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption* final rule, which becomes effective on January 8, 2021. According to the OFCCP, this rule provides clarity on the religious exemption for government contractors and subcontractors in Executive Order 11246, and ensures that religious organizations can participate in federal procurement.

The final rule is intended to clarify the scope and application of the religious exemption in light of recent developments, including Supreme Court rulings and Executive Orders. Among other things, it clarifies that, in addition to churches, the exemption covers employers that: are organized for a religious purpose; hold themselves out to the public as carrying out a religious purpose; engage in exercise of religion consistent with and in furtherance of a religious purpose; and either operate on a not-for-profit basis or present other strong evidence that their purpose is substantially religious. Moreover, religious employers may condition employment on compliance with religious tenets, as long as they do not discriminate on other protected bases. This particular provision has caused concern, as some have interpreted it to permit discrimination against LGBTQ individuals.

The OFCCP identified the following as key provisions of the final rule:

- The final rule amends 41 CFR 60-1.3 and clarifies the Executive Order 11246 religious exemption parameters by adding definitions of key terms: *Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society; and Sincere*.

- The final rule adds a rule of construction to provide the maximum legal protection of religious exercise permitted by the Constitution and laws, including the Religious Freedom Restoration Act.

- The final rule also adds several illustrative examples within the definition of *Religious Corporation, association, educational institution, or society* to better illustrate which organizations may qualify for the religious exemption.

- The final rule does not change the equal employment opportunity obligations under Executive Order 11246 for the vast majority of federal contractors.

The OFCCP also provided frequently asked questions along with the final rule.

Worker Recall and Retention Mandates Imposed on Baltimore City Commercial Properties, Event Centers, and Hotels. In December 2020, the Baltimore City Council passed laws that impose reinstatement and retention obligations for commercial property (janitorial, maintenance and security

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employees only), event center (with 50,000 square feet or 1000 seats) and hotel (with 50 rooms or gross receipts of $5 million in 2019) employers in two separate acts.

The first, COVID-19 Laid-off Employees Right of Recall, requires those employers to make an offer to any employee laid off after March 5, 2020 for any position that becomes available for which the employee is qualified.

The second law, COVID-19 Employee Retention, provides that, where there is a change in control, the new employer must make written offers of employment to current employees for any continuing positions, and must rehire those not initially hired if positions later become open. The retained employees may not be discharged, except for cause, during a 90-day transition period.

These laws do not apply to managerial, supervisory or confidential employees or those subject to a collective bargaining agreement containing a right of recall or retention provision. These laws are to be evaluated on or before June 30, 2022 to determine whether they continue to be necessary after the City's recovery from the pandemic.

Executive Order Prohibiting "Divisive" Training by Government Contractors Is Enjoined. A federal district court in California has issued a nationwide preliminary injunction that prevents the OFCCP from enforcing President Trump's Executive Order on "divisive" training by government contractors and subcontractors.

As we discussed in our September 2020 E-Update, President Trump's E.O. prohibits "divisive concepts" such as race or sex stereotyping or scapegoating in diversity training. This order was quite controversial and was immediately challenged in court. The court in Santa Cruz Lesbian and Gay Cmty. Ctr., et al. v. Trump found that the E.O. "impermissibly chills the exercise of the Plaintiffs' constitutionally protected speech, based on the content and viewpoint of their speech" in violation of the First Amendment, and also was so vague as to violate the Plaintiffs' Fifth Amendment right to due process. The court's order is a preliminary one and may be reversed in later proceedings, but the E.O. itself may be rescinded under the incoming Biden administration. For the time being, however, the E.O. will not be enforced.

NEWS AND EVENTS

Honor - We are delighted to announce that eleven of our partners have been selected for inclusion on the 2021 Maryland Super Lawyers list: 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, Elizabeth Torphy-Donzella and Lindsey A. White. In addition, three associates were named to the 2021 Maryland Rising Stars list: Courtney B. Amelung, Paul D. Burgin, and Alexander I. Castelli.

Super Lawyers is a national rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The patented selection process includes independent research, peer nominations, and peer evaluations. The Super Lawyers list recognizes no more than 5 percent of attorneys in each state, while the Rising Stars list recognizes no more than 2.5 percent of attorneys in each state. To be eligible for inclusion in Rising Stars, an attorney must be either 40 years old or younger, or in practice for 10 years or less.

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Honor - Gary L. Simpler has been selected as a member of the 2021 Lawdragon 500 Leading U.S. Corporate Employment Lawyers, consisting of the nation's top talent representing Corporate America defending wage and hour, discrimination and a host of other claims; advising on key matters from immigration to executive compensation and employee benefits; and handling union and other labor-management relation matters. Lawdragon is a legal media company known for its guides to the nation's leading lawyers.

Honor - Gary L. Simpler was ranked as "Recommended" by Who's Who Labour & Employment Law 2020. Who's Who Legal identifies the foremost legal practitioners worldwide in multiple areas of business law.

Victory – Teresa D. Teare and Courtney B. Amelung won dismissal of a federal lawsuit against a hospital asserting failure to promote and retaliation claims under Title VII. The court concluded that the employee's conclusory allegation that she was more qualified than a male co-worker without a disability, who ultimately obtained the promotion, was insufficient to show that her application was rejected for unlawful reasons. Additionally, the court concluded that the 7-month gap between the employee's filing of a Charge of Discrimination against the hospital and her subsequent denial of the promotion negated any inference that the hospital retaliated against her for the filing of that Charge.

Victory – Stephen D. Shawe won an arbitration for a wholesale packaging distributor. The arbitrator found that the company had terminated the employee for just cause in accordance with its attendance policy, and that the employee's absences were unprotected by the Family and Medical Leave Act due to his failure to comply with the FMLA's notice and information requirements.

Victory – Teresa D. Teare and Alexander I. Castelli won a motion to compel arbitration for a nursing care center. Although the employee had filed a lawsuit in court alleging violations of the Americans with Disabilities Act and the Family and Medical Leave Act, the employee had signed an arbitration agreement at the inception of his employment with the company, which required him to arbitrate all employment claims. The court found that the agreement, which was mutually binding on both parties, was enforceable.

Webinar Recording - Parker E. Thoeni, Lindsey A. White, and Chad M. Horton presented a webinar, "The COVID-19 Vaccine is Here: What's Next for Employers?" on December 18, 2020. A recording of the webinar may be accessed here.

Media – Fiona W. Ong was extensively quoted in Wolter Kluwer's *Labor & Employment Law Daily* December 29, 2020 article, "House Passes Additional Stimulus Relief."

TOP TIP: 2021 Brings New Minimum Wage Rates in the Mid-Atlantic and for Federal Contractors and Subcontractors

Although the federal minimum wage remains $7.25, most states in the mid-Atlantic region have implemented higher minimum wage rates. Several of them increase on January 1, 2021, as noted below.

Maryland's minimum wage is subject to an annual increase, with the next increase coming on January 1, 2021 – from $11.00 to $11.75 per hour. The tipped wage rate remains at the federal level of $3.63 per hour. (The tipped wage rate for tipped employees, together with any tip credit, must

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meet the minimum wage. Employers are responsible for making up any shortfall.) Employers must also display the current minimum wage poster, which has yet to be updated on the website, but will be available here.

As we discussed in our April 10, 2019 E-lert on new Maryland laws, this increase comes as the result of legislation that gradually increases the state rate to $15.00 over the next several years. Different schedules of increases apply depending on the size of the employer. Our E-lert provides further details about the law.

Also, **New Jersey** is increasing its rate to $12.00 per hour (from $11.00). Seasonal, and small (fewer than 6 employees) employers in New Jersey are subject to a reduced rate of $11.10 per hour (up from $10.30), while agricultural employers remain at $10.30. New Jersey's tipped wage rate is increased to $4.13 (from $3.13). The required poster is available here.

In addition, the minimum wage rate for certain **federal contractors or subcontractors** increases to $10.95 per hour (from $10.80) for workers performing work on or in connection with covered contracts, with a tipped rate of $7.65 per hour (from $7.55). The covered (sub)contractors are those with one of the following: construction contracts covered by the Davis-Bacon Act; service contracts covered by the Service Contract Act; concession contracts (*e.g.*, contracts to operate souvenir shops in national parks or restaurants in federal buildings); and contracts in connection with federal property or land under which services are offered to federal employees, their dependents, or the general public. The required poster (which has yet to be updated) will be available here.

This is also a good time to remind employers that many other states and local jurisdictions have minimum wage rates above the federal rate, including the following throughout the Mid-Atlantic region:

- **Montgomery County, Maryland**: $14.00 per hour for employers with more than 50 employees, $13.25 for mid-sized and certain other employers, and $13.00 for small employers. The next scheduled increase takes place on July 1, 2021, to $15.00 per hour for employers with more than 50 employees, $14.00 for mid-sized and certain other employers, and $13.50 for small employers Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.
- **Prince George's County, Maryland**: The county's minimum wage rate of $11.50 per hour was higher than the state rate in 2020; however, as of January 1, 2021, the increased state rate will apply. The required Wage-Hour Abstract poster is available here.
- **Delaware**: $9.25 per hour. The required poster is available here.
- **District of Columbia**: $15.00 per hour, with a tipped wage of $5.00 per hour. The required poster is available here.
- **West Virginia**: $8.75 per hour. The required poster is available here.
- **Virginia**: Although Virginia currently uses the federal wage rage, the minimum wage will increase to $9.50 on May 1, 2021 pursuant to a law enacted earlier in 2020, which we discussed in our April 2020 E-Update in an article on the numerous changes to Virginia's employment laws.
- **Pennsylvania**: Applies the federal rate.

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Employers should ensure that they are complying with the applicable minimum wage rates, and also updating the required posters as necessary.

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