SHAWE ROSENTHAL LLP

E-UPDATE

March 31, 2021

RECENT DEVELOPMENTS

The Biden DOL Seeks to Overturn Employer-Friendly Final Rules on Independent Contractor and Joint Employment Status

Continuing its retreat from the Trump administration's pro-business positions on certain issues under the Fair Labor Standards Act, the U.S. Department of Labor has announced its intention to withdraw its recently-issued regulations on independent contractor status and to rescind its joint employment regulations.

The Independent Contractor Rule. 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. As discussed in our January 6, 2021 E-lert, just prior to the change in administration, the Trump DOL joined this fray by issuing a Final Rule that adopted an "economic realities" test. This test, which newly set forth two "core" factors and three additional factors for the analysis, made it easier to achieve independent contractor status under the FLSA. It was scheduled to take effect in March 2021.

Upon assuming office on January 20, 2021, President Biden issued an Executive Order that, in part, directed agencies to consider a 60-day or longer postponement of the effective date of regulations that had been published in the Federal Register but not yet taken effect. On March 4, 2021, the DOL delayed the effective date of the Final Rule to May 7. It then announced this proposed rescission of the regulation on March 11, 2021, asserting that the statutory language of the FLSA and longstanding case law do not support the new test set forth in the Final Rule.

The public may submit comments on the DOL's proposal here until April 12, 2021. Following the comment period, the DOL will consider the comments and issue a Final Rule, which we expect to effectuate the proposed rescission. We also anticipate that the DOL will return to its prior guidance that applies a more restrictive test heavily favoring employee status.

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Joint Employment Status. Another significant topic of interest is when separate companies will be deemed joint employers of a single employee. Under the FLSA, several entities may be the joint employers of a single employee as long as they are "not completely disassociated" with respect to the employment of the employee. These joint employers are then jointly and severally liable for the employee's wages.

In 2016, the DOL under the Obama administration issued an Administrator Interpretation (AI) in which it adopted an expansive "economic realities" test to assess joint employer status. This test heavily favored the finding of such status. The Trump DOL, however, withdrew the AI in June 2017, and issued a new Final Rule in January 2020, as we discussed in our January 13, 2020 E-lert. This rule made findings of joint employer status to be less likely, including in franchise situations. The rule was challenged in court, and on September 8, 2020, a federal judge vacated a significant portion of the rule, as we covered in our September 10, 2020 E-lert.

Thus, even before the DOL's current proposal to rescind the rule, it was largely already not in effect. Nonetheless, the DOL now wishes to formally remove these regulations. The public may submit comments on the DOL's proposal here until April 12, 2021. As with the independent contractor rule above, we expect the DOL to implement this proposed rescission and to return to the more expansive Obama-era standard.

EEOC Announces EEO-1 Filing Period - From April 26 through July 19, 2021

The Equal Employment Opportunity Commission has announced that the filing period for the (typically) annual submission of EEO-1 workforce demographic information (Component 1 data) will be April 26 – July 19, 2021. Because last year's submission was postponed due to the COVID-19 pandemic, those employers subject to the filing requirement will need to submit data for both 2019 and 2020.

Employers who are required to file an EEO-1 form are those with 100 or more employees and federal contractors and first-tier subcontractors with 50 or more employees. The original EEO-1 form sought demographic information regarding the race, ethnicity, and sex of the workforce in 10 job categories (Component 1). In September 2016, the EEOC issued a revised EEO-1 survey form that added the requirement for employers with 100 or more employees (but not federal contractors and subcontractors with fewer than 100 employees) to provide aggregated data for the prior year on pay and hours worked, broken down into 12 pay bands across the 10 job categories, by the same racial, ethnic, and sex groups (Component 2). This latter requirement, which was subject to legal challenge, was in effect only for two years. However, under the new Biden administration, the EEOC has announced a focus on pay equity issues, and it is possible that some version of Component 2 may be resurrected in the future.

Employers may file their EEO-1 data electronically, and obtain more information and assistance about the filing requirements, here.

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Customer Engagement Alone Does Not Justify Banning Union Insignia on Uniform, says NLRB

The National Labor Relations Board recently held that an employer's enforcement of its apparel guidelines to ban the wearing of union insignia violated the National Labor Relations Act (NLRA). In *Indiana Bell Telephone*, the Board found that an employer manager unlawfully directed an employee to remove a union button prior to leaving its garage and going to customer homes, and then threatening the employer with discipline up to termination if the employee failed to comply with the directive.

Facts: The employer employs premises technicians who install high-speed internet services and related products in customer homes. They are subject to a mandatory dress code requiring them to wear branded company apparel. The employees are represented by a union, and the parties' CBA notes that the branded apparel "may not be altered in any way."

Prior to bargaining for a new CBA, the union distributed red buttons that included the union's logo and bargaining-related messages for premises technicians to wear in support of the union. An employer manager directed a premises technician to remove the button from his company-branded shirt as he was leaving the employer's garage. When the employee refused, the manager threatened him with discipline, including termination.

In agreement with the administrative law judge, the Board held that the employer's enforcement of its appearance guidelines violated the NLRA. The employer argued that the enforcement of its policy was justified by its desire to "enhance the customer experience and project a positive public image" of the company to customers. The Board rejected this argument for two reasons. First, employees did not encounter customers while at the employer's garage. Second, and in any event, it is established Board law that customer engagement alone is not a special circumstance justifying the banning of union insignia.

Takeaway: Unionized employers may not enforce dress code policies to prohibit the wearing of union insignia unless permitted by a CBA or justified by a "special circumstance" established by NLRB case law. But these bans will not be upheld, even by a pro-employer Board, where the only justification is related to customer engagement.

TAKE NOTE

OSHA Announces Increased Enforcement Efforts Related to COVID-19. This past month, the Occupational Safety and Health Administration announced a new national emphasis program and an Updated Interim Enforcement Plan as part of its efforts to address workplace safety issues associated with the COVID-19 pandemic.

A national emphasis program is a temporary program focusing OSHA resources on particular hazards and high risk industries – in this case, the COVID-19 pandemic and industries experiencing greater COVID-19 challenges. Through this program, OSHA will focus its enforcement efforts on companies placing the largest number of workers at serious risk of COVID-19 infection, and will prioritize employers who retaliate against whistleblowing employees.

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In May 2020, OSHA issued an Interim Enforcement Response Plan regarding its use of workplace inspections during the pandemic. OSHA has now issued an Updated Interim Enforcement Response Plan, effective March 18, 2021, to prioritize the use of on-site inspections where practical, and a combination of on-site and remote methods otherwise. Remote-only inspections will be conducted only where OSHA determines that on-site inspections cannot be performed safely.

Supreme Court's Seminal *Bostock* Decision "In No Way Altered the Pre-existing Standard for Sexual Harassment." So asserted the U.S. Court of Appeals for the Fifth Circuit in rejecting a female police officer's claim of same-sex harassment, following the Supreme Court's decision in *Bostock v. Clayton County*, in which it ruled that Title VII's prohibition on "sex discrimination" in employment encompasses sexual orientation and gender identity.

In *Newbury v. City of Windcrest*, the police officer complained of sexual harassment by a fellow female officer. Following an investigation into the complaint by an outside law firm, the city concluded that the other officer had been rude, but no harassment had occurred. She then resigned and sued.

In same-sex harassment cases, the Fifth Circuit conducts a two-step inquiry by first determining whether the conduct is sex discrimination, and then whether the conduct meets the standard for a hostile work environment. The Fifth Circuit, relying on Supreme Court precedent, has stated that a plaintiff can meet the first step by showing one of the following: (1) that the harasser is homosexual and motivated by sexual desire; (2) specific evidence that the harasser was motivated by general hostility to a particular gender in the workplace; (3) comparative evidence about how the harasser treated both sexes in the workplace; or (4) evidence of sex-stereotyping.

In the present case, the Fifth Circuit found that the police officer offered no evidence of sex discrimination, as the complained-of conduct was merely rude in nature and not directed at all female co-workers. The police officer argued that, under *Bostock*, a plaintiff's sex need not be the sole – or even main – reason for the conduct. However, as the Fifth Circuit noted, in expanding "sex" under Title VII to encompass sexual orientation and gender identity, the Supreme Court reasoned that an employer's taking adverse action against employees because of those characteristics was inextricably tied to sex, even if sex was not the sole motivating factor for the action. But the Supreme Court's expansion did not alter the legal standard for sexual harassment, and certainly was not intended to shield all sexual harassment claims from summary judgment.

"Regular Worksite Attendance Is an Essential Function of Most Jobs." Some disabilities may prevent employees from showing up regularly for work. According to the U.S. Court of Appeals for the Fifth Circuit, that may mean the employee is not qualified for the position and, therefore, is not entitled to protection under the Americans with Disabilities Act.

In order to sustain a claim under the ADA, a plaintiff must establish that they are qualified for the position, meaning that they can perform the essential functions of the position, with or without a reasonable accommodation. In *Weber v. BNSF Railway Co.*, the employee had numerous attendance violations, and was eventually terminated for them. In his lawsuit, he argued that attendance was not an essential function of his job because the company exercised "managerial leniency" with regard to many of his absences.

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The Fifth Circuit, however, rejected the employee's contention. In determining whether regular attendance is an essential function, the Fifth Circuit looks to the employer's judgment as well as the consequences of not requiring regular attendance. As noted above, the Fifth Circuit asserted that regular attendance is an essential function in most jobs. With regard to this case, a high-level operations official testified to the need for regular attendance, which was bolstered by the company's longstanding attendance policy. In addition, the Fifth Circuit noted that the consequence of the employee's absence was the employer's need to find coverage for the vacancy. The Fifth Circuit found the employee's reliance on past managerial leniency to be without merit, since the employee was provided clear warning before his last five absences that he was being assessed for a one-year period and future absences could result in further disciplinary action, including termination.

This case provides support for the employer's ability to hold employees accountable for attendance, even in some situations where the employee's absences are caused by their disability. Of course, the employer must be able to demonstrate that attendance is, in fact, an essential function of the job in question. But, at least in the Fifth Circuit, this showing may be rather easily met. Other jurisdictions, however, may apply a higher standard, and thus it is important for employers to consult with counsel to verify the legal standard applicable to their location.

The ADA Does Not Prohibit Employers From Asking All Health-Related Questions. Although the Americans with Disabilities Act does circumscribe an employer's ability to make medical inquiries, employers may still ask questions about an employee's health as long as such questions are job-related and consistent with business necessity, as the U.S. Court of Appeals for the Tenth Circuit recently reiterated.

In *Fisher v. Basehor-Linwood Unified School District No.458*, following a teacher's panic attack in the classroom, the principal asked her about her appointment with her psychiatrist. The teacher was subsequently terminated for various performance and conduct issues. She sued, alleging in part that the principal's question was a medical inquiry prohibited by the ADA. The Tenth Circuit stated, however, that such inquiries are permitted "if an employer can demonstrate that a medical examination or inquiry is necessary to determine whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties." In this case, the principal's question sought information about the teacher's capacity to perform her essential functions of teaching and supervising students. Given the panic attack that rendered the teacher unable to supervise her students, the principal's question met the requirements of being both job-related and necessary.

Thus, this cases reinforces the point that employers are entitled to ask questions about an employee's health where those health issues apparently impact the employee's ability to perform their jobs.

And Yes, Employees Really Must Respond to Employers' Questions About Their Medical Status. And, moreover, they cannot insist that their employers communicate only through the employee's attorney. These were the lessons from the U.S. Court of Appeals for the Fourth Circuit in a recent case, *Thomas v. City of Annapolis*.

A police officer sustained an on-the-job injury that required surgery. He then experienced another injury and took a medical leave. The officer filed a charge of discrimination with the EEOC, alleging disability and race discrimination, as well as retaliation. While on leave, the officer failed to provide

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any updates about his medical status and refused to return any calls requesting such updates. He was then terminated for unsatisfactory work performance based on his refusal to return to full duty despite being cleared to do so, as well as his failure to stay in contact with his supervisors. The officer then sued under the Americans with Disabilities Act, among other things.

The Fourth Circuit rejected the officer's contention that his job performance was, in his view, satisfactory. It first noted that it is the employer's – not the employee's – assessment of performance that is relevant. Also irrelevant was the fact that he had not received negative performance reviews or counseling. Rather, the Fourth Circuit found that the employer was entitled to rely on its belief that the employee was unwilling to return to work since he failed to return any calls. In other words, past performance does not outweigh current performance.

It is further worth noting that, although the officer argued that he informed his employer to direct all questions about his medical status to his attorney, the Fourth Circuit asserted that the City was entitled to find that the officer's refusal to communicate directly with it to be unsatisfactory job performance. Many times, employees may wish to involve their attorneys in their disciplinary or other personnel issues with their employer; this case reiterates the principle that employers may continue to insist that they deal directly with their employees with regard to such matters. (Communications about litigation matters, of course, are different).

Retention Raises and Equal Pay Claims. While most equal pay cases involve starting pay and annual salary increases, a recent case focuses on another compensation practice used by many employers – retention raises – and their possible discriminatory impact.

In *Freyd v. University of Oregon*, a female professor alleged that she was being paid less than male colleagues for doing substantially similar work, in violation of the Equal Pay Act and state law. She pointed to the employer's practice of awarding retention raises. Such raises may be awarded as an incentive to remain when an employee is being recruited by another employer.

The U.S. Court of Appeals for the Ninth Circuit found that the professor offered evidence that the employer engaged in retention negotiations less often with female professors than males, and that when it did engage with females, those professors were less successful in their negotiations than their male colleagues. The Ninth Circuit also found that the professor offered a viable alternative practice that would still serve the employer's needs – that when the employer gave a retention raise, it should "evaluate the resulting salary disparity with others in the same rank with comparable merit and seniority and give affected individuals a raise." Whether or not this alternative was adequate was a question of fact that would need to be determined at trial.

As noted by the dissenting judge, retention raises are a market-driven practice often used to retain top talent. Employers utilizing this practice, however, should be mindful that there could be possible liability under pay equity laws, however, if there is a disparate impact on employees of one sex vis a vis the other.

Employees Must Give Employers Reasonable Time to Investigate Harassment Complaints. No liability for a hostile work environment will be found if an employee fails to give the employer a reasonable time to address a complaint of harassment.

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Under Title VII, an employer will be liable for hostile environment harassment where it knew or should have known of the conduct, unless it can show that it took immediate and corrective action. In *Lopez v. Whirlpool Corp*, the employee resigned only four days after making her complaint, which the U.S. Court of Appeals for the Eighth Circuit found to be insufficient time for the employer to address her concerns. Consequently, the employee could not sustain her claim for hostile environment harassment.

Maryland Law Implicitly Adopted the Portal-to-Portal Act. Maryland's intermediate appellate court held that it is unnecessary for the State to specifically express that it has adopted an amendment to a federal statute where the General Assembly has enacted the State's equivalent of the federal statute. Thus, in *Amaya v. DGS Construction, LLC*, the Maryland Court of Special Appeals found that the Fair Labor Standards Act (FLSA) and its amendment, the Portal-to-Portal Act, were incorporated into, and function as part of, Maryland Wage and Hour Law (MWHL).

Specifically, the Court stated that, "[b]ecause the General Assembly chose to graft the definition of employ directly from the FLSA into the MWHL . . . the interpretative guidance and statutory limitations imposed by the existing Portal-to-Portal Act was also grafted into the MWHL." As applied in the present case, the Court determined that the Portal-to-Portal Act operated to make non-compensable the time spent commuting to and from an off-site parking lot to the actual worksite, even if via an employer-provided shuttle bus.

It is worth noting that this issue may be appealed to the State's highest appellate court – the Maryland Court of Appeals, which could either affirm or reverse the Court of Special Appeals' holding.

NEWS AND EVENTS

Victory – J. Michael McGuire won an arbitration for a power company. The arbitrator found that the employer had the right under the collective bargaining agreement to modify the job duties for a specific job position due to technological and/or operational changes, as long as it negotiated the same with the union. Although the union may have rejected the changes, the company had the right to implement the changes.

Victory – Gary Simpler obtained a favorable arbitration award for a chemical manufacturer in a dispute over the company's ability to impose a spousal surcharge when an employee chooses employee and spouse or family healthcare coverage and whose working spouse has access to employer provided group health insurance at their place of employment. The arbitrator agreed with the company's position that the spousal surcharge was not part of the healthcare premium and therefore did not violate the contractual limit on the amount employees were required to contribute towards their health care plan.

Presentation – Teresa D. Teare presented a webinar, "Vaccinations in the Workplace: A Legal Perspective," on March 25, 2021 for the Anne Arundel Economic Development Corporation. You may view the presentation here.

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Victory – Chad Horton successfully defended a lighting manufacturer against its union's claim that it violated the collective-bargaining agreement's (CBA) overtime provisions when it prohibited movement between its North and South plants following the onset of the COVID-19 pandemic. The Arbitrator agreed with the company's argument that it took such actions to ensure the health and safety of employees and the continuous operation of the plant, in accordance with the stated purpose of the CBA.

Podcast – Darryl G. McCallum was a guest speaker on the Employment Law Alliance's podcast series, Episode 228: COVID-19 in the US: Vaccinations and the Workplace, on March 18, 2021.

Article – Fiona W. Ong was quoted in an article by Vin Gurrieri, 3 Employer Takeaways from the Latest Virus Relief Push, published on March 19, 2021, on Law360.com. (Subscription required)

Victory – Chad Horton successfully defended an alcoholic beverage company against claims that it did not have just cause for disciplining an employee driver who concealed that his driver's license had been suspended following an off-duty DUI and failed to keep the company abreast of developments in his court case, including the status of his driving privileges, despite being instructed to do so.

Testimony – On March 4, 2021, Paul D. Burgin testified before Maryland's Senate Finance Committee in support of legislation to revise Maryland's Economic Stabilization Act, which was amended last year to impose new mandates on employers in connection with certain plant closings and mass layoffs. The proposed legislation would better align the state law with already-existing federal mandates. Paul's testimony may be viewed here, starting at 1:53.

Podcast – Mark J. Swerdlin was a guest on the Employment Law Alliance's podcast series, Episode 231: NLRB Developments Impacting Higher Education, on March 25, 2021.

Article – Fiona W. Ong was quoted in a March 17, 2021 Law360.com article by Vin Gurrieri, 4 Questions for Employers as March Madness Bounces Back. (Subscription required)

Victory – Chad Horton won an interest arbitration case on behalf of an alcoholic beverage company. The arbitrator agreed with the company's argument that the parties' course of bargaining established that they had agreed to a percentage of temporary workers for the entire calendar year, despite a typo in the final offer that stated it was for eight months.

TOP TIP: Some Thoughts On Protecting and Bringing Claims for the Theft of Trade Secrets Under the Defend Trade Secrets Act

Several recent cases offer employers some tips on trade secret issues – both in terms of protecting those trade secrets and, if necessary, in filing suit for breach of those trade secrets under the federal Defend Trade Secrets Act (DTSA).

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Protecting Trade Secrets. As the U.S. Court of Appeals for the Second Circuit noted in *Mason v. Amtrust Financial Services, Inc.*, in order to sustain a DTSA claim, a plaintiff must take "reasonable measures" to keep the proprietary information secret. In this case, the plaintiff-employee developed a comprehensive "Pricing Model" prior to becoming employed at the defendant-employer, and contended that there was an unwritten agreement that the employer's use of the Pricing Model was conditioned on his employment. His employment was subsequently termination, and he demanded the employer stop using his pricing model. He sued under the DTSA when it did not do so.

The employee took some actions to protect the Pricing Model, such as referring to the Pricing Model as his personal and proprietary property, insisting that the Pricing Model should not be stored on the employer's central corporate operating system; and denying access to internal auditors and external third-party vendors. However, the Second Circuit nonetheless found that the employee failed to take reasonable measures to protect his Pricing Model. In particular:

- The employee failed to have the agreement regarding the Pricing Model put into writing - either incorporated into his Employment Agreement or set forth in a separate licensing agreement.
- The employee did not have the employer sign a non-disclosure agreement to prevent sharing with internal auditors or external vendors.
- The employee emailed the Pricing Model to his supervisor without designating it as either proprietary or confidential.

Stating a Claim. As for asserting a claim for the theft of trade secrets under the federal Defend Trade Secrets Act, the Maryland federal court noted in *Tech USA, Inc. v. Milligan* that "the plaintiff must allege: (1) it owns a trade secret which was subject to reasonable measures of secrecy; (2) the trade secret was misappropriated by improper means; and (3) the trade secret implicates interstate or foreign commerce." In this case, the plaintiff-employer alleged in its complaint that the defendant-employee disclosed to her prospective employer the identity of certain customers and other information that the plaintiff-employer summarily characterized as "Confidential Information and/or Trade Secrets." The court found this to be insufficient to state a claim under the DTSA for the following reasons:

- The plaintiff did not allege that its customers' identities, alone, were protectable as trade secrets. According to the court, the plaintiff should have alleged which customer identities were disclosed, and that those particular identities and/or contact information were unavailable to the public.
- The plaintiff should have alleged that it took measures to maintain the confidentiality of the customer identities and/or contact information.
- The plaintiff failed to identify the "other" specific proprietary information that the defendant misappropriated (e.g. customers' buying habits, manufacturing information, national product supply funnel information, business and strategic plans, marketing, account strategies, pricing, orders and sales, and pending/potential sales to specific customers), as well as why such information should be protected.

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- The plaintiff also failed to allege what specific actions the defendant took with regard to taking the trade secrets (e.g. copying, printing, downloading, post-termination access).

These cases remind employers (and others) to take specific, documented steps to protect information that it deems to be confidential or proprietary – including the execution of agreements and appropriately labeling the information. And if bringing a DTSA lawsuit, they should be careful to provide specifics about the trade secrets in question (including what they are and why they should be considered trade secrets), how it sought to protect the trade secrets, how such trade secrets were taken.

RECENT BLOG POSTS

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

- The DOL's Tipped Employee Final Rule: What Is Taking Effect and What Is Not by Fiona W. Ong, March 24, 2021

- The CDC's New Guidance on Workplace Vaccination Programs; What Employers Need to Know by Fiona W. Ong, March 22, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- Beyond Paid Leave – The Other Employment-Related Provisions of the American Rescue Plan Act by Alex I. Castelli, March 16, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- Employers May Now Voluntarily Provide Up to 14 Weeks of Paid, Expanded FFCRA Leave and Receive a Tax Credit by Fiona W. Ong, March 12, 2021

- Looser COVID-19 Rules for Vaccinated Individuals? What This Means for Employers by Fiona W. Ong, March 10, 2021

- What to Do About Workplace Masking in the "Open" States by Elizabeth Torphy-Donzella, March 8, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- The EEOC's Very Broad Approach to National Origin Discrimination and English-Only Policies by Fiona W. Ong, March 4, 2021

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