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# E-UPDATE

April 30, 2021

## RECENT DEVELOPMENTS

### The DOL's "Essential Worker, Essential Protection" Initiative

Throughout the COVID-19 pandemic, the U.S. Department of Labor's Wage and Hour Division (WHD) has issued guidance for employers and employees navigating new and unexpected workplace challenges. The "Essential Worker, Essential Protection" initiative is the WHD's latest action. As part of the initiative, WHD has taken the following actions:

- "Essential Protections During the COVID-19 Pandemic" landing page, containing WHD contact information for complaints, as well as links to both new and updated FAQs:
  - COVID-19 and the Fair Labor Standards Act: Questions and Answers (we explore the updated document elsewhere in this E-Update)
  - COVID-19 and Agricultural Workers: Questions and Answers
  - Nursing Mothers and COVID-19: Questions and Answers (yes, you must continue to provide nursing mothers with breaks to express breast milk)
  - COVID-19 and the Family and Medical Leave Act: Questions and Answers (we also discuss this updated document elsewhere in this E-Update)
- National Webinar Schedule**.** WHD hosts informative webinars on laws and regulations applicable to essential workers during the pandemic.
- Blog Article**.** WHD published a blog to highlight this initiative.
- WHD Workers' Rights Webpage. WHD has revamped this page to better share information about essential protections and allow employees to report potential violations.

WHD states that it will continue to release additional resources, including multilingual communications and notices.

### The Fair Labor Standards Act and COVID-19: Updates from the DOL

The U.S. Department of Labor's Wage and Hour Division (WHD) has updated its COVID-19 and the Fair Labor Standards Act: Questions and Answers, initially issued in July 2020, to incorporate additional information that has become relevant as the pandemic has continued.

As we originally discussed in our July 20, 2020 E-lert, this resource affirms that hourly non-exempt employees need only to be paid for the hours actually worked, that exempt employees must be paid a weekly salary that is not subject to deductions for the quantity or quality of work performed, and that individuals may not volunteer to work for a private, for-profit employer. Of particular interest, WHD also specified the following under federal law (state laws may impose different requirements):


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- An employer can require employees to take accrued **vacation or paid time off (PTO)** during office closures.
- Particularly in light of staffing shortages, employees can be required to **perform work outside of their job descriptions.** In addition, exempt employees can temporarily be required to perform non-exempt duties without jeopardizing their exempt status.
- The WHD originally stated that, unless an employee is subject to a collective bargaining or other employment agreement, or telecommuting is being permitted as a reasonable accommodation under the Americans with Disabilities Act (ADA), an employer may **reduce the pay of telecommuting non-exempt employees** as long as they receive at least the applicable minimum wage rate. Although this is still true, the WHD has now backed off such affirmative language, presumably to avoid encouraging employers to make such reductions.
- An employer may **prospectively reduce the salary of exempt employees** due to economic reasons related to COVID-19 or an economic downturn, as long as the employee continues to receive the required minimum weekly salary ($684).
- Employers are not required to cover **additional work-from-home costs** (e.g. internet, equipment, etc.) incurred by employees, as long as those costs do not reduce the employee's hourly rate below the minimum wage. If telecommuting is a reasonable accommodation under the ADA, however, then the employer is responsible for any additional costs.
- **Safe workplace standards** under the Occupational Safety and Health Act do not apply to home offices. Employers must still record any work-related injuries or illnesses incurred in the home office, however.
- In order to accommodate **childcare needs**, an employer that allows employees to telework with flexible hours during the COVID-19 emergency does not need to count as hours worked all the time between an employee's first and last principal activities in a workday. Rather, only those hours actually worked need be paid – but the employee and employer should be very clear as to what the arrangement is.
- **Hazard pay** is not required under the FLSA.

To this information, WHD has now added the following:

- The **time spent performing a temperature check** before an employee begins work may be compensable if it is necessary for the employee to perform their job. In addition, an employee must be compensated for any time required to undergo a temperature check or health screening during the workday.
- The **time spent obtaining a COVID-19 test**, whether it is during the normal workday or during off-duty hours, may be compensable if it is necessary for the employee to perform their job.
- WHD encourages employers to be flexible with employees who are required to **quarantine**, by offering telecommuting and paid leave (including the voluntary FFCRA paid sick leave and paid family and medical leave, if applicable). It also reiterates that employees must be paid for time spent teleworking.
- Non-exempt employees may not **volunteer** services to private, for-profit employers. They may volunteer for public agencies and private not-for-profit employers if very specific criteria are met, and the employee is not volunteering the same services that they also are employed to perform.


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- Direct healthcare employees must be paid for **time spent donning and doffing protective and safety gear** before and after a shift, since it is necessary to perform direct patient care safely and effectively during the pandemic. (Although the Q&A only addresses healthcare employees, we note that it may also apply to employees in other industries where such gear is deemed necessary in the context of the pandemic).
- The WHD asserts that employees must be paid for all time spent working while **telecommuting**, as long as the employer knew or should have known of the work time – even if it wasn't authorized. The WHD reminds employers it is their responsibility to exercise control to prevent unwanted work from being performed, by implementing reasonable time reporting procedures.
- **Incentive payments to get the COVID vaccine** are not included in the calculation of a non-exempt employee's regular rate.
- If paid, **hazard pay** is included in the calculation of the non-exempt employee's regular rate.
- **Child workers** are subject to certain work hours limitations based on age, whether the work is agricultural or non-agricultural, and whether school is in session – which includes schools that are physically closed but engaging in virtual learning.
- The FLSA does not address whether employees may **bring their children to work**, but if they do and the children are assisting the parent in performing work, the children will be considered employees subject to the protections and requirements of the FLSA.

## The Family and Medical Leave Act and COVID-19: More Updates from the DOL

As noted elsewhere in this E-Update, the U.S. Department of Labor's Wage and Hour Division (WHD) has revised its COVID-19 and the Family and Medical Leave Act: Questions and Answers, initially issued in July 2020, to address additional issues of relevance in the context of the continuing pandemic.

As we originally discussed in our July 20, 2020 E-lert, the Family and Medical Leave Act resource reiterates that eligible employees are entitled to FMLA leave for their own or a family member's serious health condition. Note that COVID-19 does not automatically meet the statutory definition of a serious health condition, however, so employers must make a case-by-case determination as to whether the FMLA applies. With regard to COVID-19, the resource makes the following points of interest (note that state family and medical leave and benefits laws may impose additional requirements):

- The DOL states that, "Leave taken by an employee for the purpose of **avoiding exposure to COVID-19** would not be protected under the FMLA." We note, however, that an employee may, in fact, have an underlying serious health condition that may require them to avoid exposure to COVID-19, and therefore might be entitled to FMLA leave on that basis.
- **Regular FMLA does not apply to care for healthy children** who have been dismissed from school or childcare. (FFCRA-covered employers may voluntarily provide up to 14 weeks of paid sick leave and emergency FMLA leave and receive a corresponding tax credit for the COVID-19-related unavailability of a child care provider or the closure of a school/child care facility through September 30, 2021, however, as discussed in our March 12, 2021 E-lert).


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- Employers unable to afford widespread use of sick leave may **change their sick leave policies**, as long as they are not bound by a collective bargaining or employment agreement, and they comply with applicable sick leave laws and the FMLA (which governs only the usage of available sick leave, but does not require employers to provide paid sick leave).
- The FMLA requires in-person visits to a doctor to establish a serious health condition and the DOL will consider **telemedicine appointments to meet the in-person requirement**.
- An employee returning from FMLA may be required to **get a COVID-19 test** as long as all employees returning to the office are so required.

The WHD makes the following additional points with regard to the application of FMLA to the COVID-19 pandemic:

- Apart from any FMLA obligation, WHD encourages employers to be **flexible with leave policies**, and to consider providing the voluntary FFCRA paid leave benefits and receive the corresponding tax credit, if applicable.
- Employees who were eligible for but denied **mandatory FFCRA leave in 2020** may still file complaints with WHD for up to two years following the violation.
- WHD confirms that there is **no federal law currently and generally mandating paid sick leave** for COVID-19 reasons. Government contractors do have paid sick leave obligations that may apply. If the leave qualifies as FMLA leave, employers may require employees to use any existing paid leave concurrently with the FMLA leave. And FFCRA-covered employers may voluntarily provide paid leave and receive a tax credit for those reasons through September 30, 2021.
- Employers may require employees **to provide a doctor's note, submit to a medical exam, or be symptom-free for a specified period of time** before returning to work.
- Employees can be required to submit **a complete and sufficient medical certification** to support a request for FMLA leave because of the employee's own COVID-19 illness or to care for a family member with COVID-19.
- In **selecting employees for layoff**, employers must comply with federal laws that prohibit discrimination on the basis of any protected characteristic, as well as the request for or use of FMLA leave.
- Employees may not be **terminated or laid off** because they have COVID-19 or are needed to care for ill family members if FMLA applies.

## NLRB Unexpectedly Decides to Retain Existing Contract Bar Rule

In a surprising decision, and a disappointing one for employers, the National Labor Relations Board (the Board) decided to retain the Contract Bar in its existing form. In *Mountaire Farms*, the Board was considering whether to (1) rescind the Contract Bar, (2) retain it in its current form, or (3) modify it. It was widely believed that an employer-friendly Board, which for now remains comprised of three Republicans and a single Democrat, would rescind or modify the doctrine that serves to insulate a union from decertification or a petition from a rival union.

**Contract Bar – What is it?** In unionized settings, the Contract Bar prohibits decertification petitions or any other petition challenging a union's status as employees' representative during the term of the collective-bargaining agreement (CBA), for up to three years. The bar prevents the filing


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of a decertification or other petition unless the filing is within a 30-day window toward the end of the CBA – in the healthcare industry, between 120 and 90 days from the expiration of a CBA, and in other industries between 90 and 60 days from the expiration of a CBA (that is three years or less in duration). Employees are often unaware of this narrow "window period."

**Board Decision:** In *Mountaire Farms*, an employee petitioner filed a decertification petition. The union immediately asserted that the Contract Bar required that the petition be dismissed because the petition was filed within the first three years of the CBA and not within the 30-day window period. The Regional Director refused to apply the bar because he concluded that the CBA contained an unlawful union security clause. The Union requested review of the Board. The Board granted the review and requested public briefing regarding whether the Contract Bar should be retained, rescinded, or modified. Typically, when the Board solicits public briefing on an issue where it is considering overruling or modifying existing case law and undertakes the prolonged process of reviewing and considering the extensive briefing, the Board often does overrule or modify the existing precedent.

Here, however, the Board retained the Contract Bar in its current form. While acknowledging that the existing Contract Bar is confusing to employees, the Board concluded that "a sufficiently compelling case has not been made for any particular proposed modification" to the Contract Bar doctrine. Further, the Board reversed the Regional Director and held that the union security clause was lawful. Therefore, the existing Contract Bar rule applied and barred the decertification petition, which was thus dismissed.

**Takeaway:** It is likely that the existing Contract Bar will remain in place for the foreseeable future. The political composition of the Board will be changing in the coming months, and the so-called Biden Board (when the Board is comprised of a Democratic majority) is unlikely to consider changing the Contract Bar rule that, in practice, largely serves to protect a union's representative status from decertification and rival petitions.

## NLRB Acting GC Signals Intent to Take Expansive View of Protected Concerted Activity

In *Memorandum GC 21-03*, National Labor Relations Board Acting General Counsel Peter Sung Ohr addressed employees' right to act together to improve their working conditions, a right granted to employees by Section 7 of the National Labor Relations Act (NLRA). Evident by the subject of the memo, the GC indicated his intention to vigorously enforce employees' right to engage in protected concerted activity. GC Ohr referenced current issues like employee health and safety during the COVID-19 pandemic, social justice initiatives, and the push to raise the minimum wage. Allusions to these charged subjects should put employers on notice that employee activities around these issues will likely be considered protected concerted activity notwithstanding that the activities may not directly implicate an employee's terms and conditions of employment.

**"Mutual aid or protection":** Among other rights, Section 7 of the NLRA endows employees the right to "engage in concerted activities for the purpose of…mutual aid or protection." Citing to Obama Board decisions, GC Ohr posits that employee conduct may be protected where there is a link between the activity and employee workplace concerns. This, according to GC Ohr, includes activities to improve working conditions outside of the typical employer-employee channels. Specifically, GC Ohr cites an employee's interview with a journalist regarding the impact of earning


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only minimum wage, a "solo" strike by an employee to attend a convention where she and others advocated for a $15/hour minimum wage, and "protests in response to a sudden crackdown on undocumented immigrants and the possible revival of workplace immigration aids." GC Ohr continued that employee activities concerning "a variety of societal issues" is likely to be protected by Section 7 of the NLRA. Giving a brief nod to Trump Board decisions narrowing the interpretation of protected concerted activity, GC Ohr highlighted the viable pathways to establish that employee activity implicates Section 7 rights and encouraged regional offices to utilize those pathways to conclude that employees have engaged in activity for "mutual aid or protection," and therefore enjoy the NLRA's protections.

**"Inherently Concerted" Activity:** GC Ohr's memo also signals an intention to find certain employee activity regarding "vital interests" to be "inherently concerted." According to GC Ohr, an employee may engage in "inherently concerted" activity even where group action has not yet been contemplated, or where other employees do not agree with the complaint or join the employee in protest. Noting that the Board has typically confined "inherently concerted" activity to issues such as wages, work schedules, and job security, GC Ohr referenced Division of Advice memos finding that discussions concerning health and safety, racial discrimination, and other subjects to be "inherently concerted" activity. GC Ohr further stated that he will be looking to present to the Board suitable cases to address these actions and other conduct that may be considered "inherently concerted" activity.

**Takeaways:** It should come as no surprise that a more labor-friendly administration will look to broaden what activities constitute protected concerted activity. Employers should prepare for the GC to actively prosecute cases where employee conduct has even an attenuated relationship to "mutual aid or protection," as well as cases that will seek to expand the type of subjects considered "inherently concerted." Employers must be mindful that the current GC and, soon, a majority of the Board is likely to consider employee activity in these areas to be protected and should exercise caution when such issues arise.

## NLRB Looks to Circumstances to Determine Duration of Confidentiality Requirement in Investigation

In *Alcoa Corp.*, the National Labor Relations Board addressed an important issue to both non-union and unionized employers alike concerning workplace investigations. Most importantly, the Board reaffirmed that an employer does not violate the National Labor Relations Act (NLRA) when it instructs employees to keep investigative interviews confidential for the duration of the workplace investigation. Additionally, the Board concluded that the employer violated the NLRA by failing to provide the union with the names of employees who provided witness statements during investigative interviews.

**Confidentiality Instruction:** While investigating allegations that an employee made racially charged and discriminatory national origin-based comments to other employees, the company's labor relations representative reminded employees that their interview was to remain confidential. The company's representative did not specifically advise that the confidentiality directive was limited to the duration of the investigation.


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In *Apogee Retail LLC d/b/a Unique Thrift Store* (which we wrote about here), the Board overruled its precedent and held that employers may lawfully issue written rules restricting discussion of ongoing investigations for the duration of the investigation. The Board in *Apogee* further held, however, that the ruling was not applicable to nonparticipants in an investigation, or to rules prohibiting employees from discussing the events giving rise to an investigation – provided the participant does not disclose information they learned or provided during the investigation. In *Watco Transloading*, the Board held that *Apogee* applies to an employer's one-on-one confidentiality instruction, as well. In *Watco*, the Board concluded that where an employer provides a one-on-one confidentiality instruction limited to a specific investigation, the Board must assess surrounding circumstances to determine what employees would have reasonably understood concerning the duration of the required confidentiality.

In this case, the Board found that the direction was lawful. The Board initially noted that the directive did not apply to nonparticipants in the investigation, and that the directive did not prevent employees from discussing the events giving rise to the investigation. The Board reasoned that the directive was not unlimited in duration simply because the employer failed to clearly state for how long the directive was effective. The Board reasoned that employees would reasonably understand the confidentiality restriction to apply only for the duration of the investigation. For example, after the employee under investigation was terminated, the employer turned over its investigation notes and witness statements (with names redacted). Additionally, the employer did not discipline a witness who had discussed his interview with the union after the employee's discharge.

**Request for Witness Names:** The Board, however, found that the company violated the NLRA by failing to provide the union with the names of employees who provided statements during the company's investigation. The Board reasoned that the names were relevant and necessary to the union's pending grievance, and the company failed to demonstrate a legitimate confidentiality interest that outweighed the union's need for the information. For example, the Board noted that there was no assertion that the union was retaliating against employees for cooperating with the investigation.

**Takeaway:** This is another positive decision in the arena of workplace investigations for unionized and non-union employers alike. Initially, employers should ensure its representatives advise investigation participants that any confidentiality requirement exists only for the duration of the investigation. But if such a qualification is forgotten, the Board will look at the surrounding circumstances to determine if a reasonable employee would understand that confidentiality was required only for the term of the investigation. Finally, unionized employers should consider whether they have legitimate confidentiality interests outweighing the union's need for the names of employees who participated in the investigation. Absent such evidence, it is likely that the employer will have to provide the names to the union.

## TAKE NOTE

**OSHA's Recording Requirements for Adverse Reactions to the COVID-19 Vaccine.** As more employees are being vaccinated, some are experiencing adverse reactions significant enough to impact their ability to work. OSHA has now issued guidance on when such reactions should be treated as recordable events, in accordance with the obligation of many employers to record serious work-related illnesses and injuries.


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A vaccine reaction will be considered recordable if: (1) it is work-related; (2) a new case; and (3) meets one of more of the following recording criteria - requires days away from work, restricted work or transfer to another job, or medical treatment beyond first aid.

Whether the vaccine is considered work-related depends on whether the employer requires or only recommends the vaccine. If the vaccine is required, then adverse reactions that meet the recording criteria must be recorded on OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Report). If the employer only recommends the vaccine, then there is no recording requirement for adverse reactions, even if the employer makes the vaccine available at the workplace or arranges for employees to receive the vaccine at an off-site location. But the choice must be truly voluntary and the employee may not suffer repercussions or fear adverse actions based on their choice.

**President Biden Imposes $15 Minimum Wage Rate on Government Contractors.** On April 27, 2021, President Biden signed an Executive Order increasing the minimum wage rate applicable to government contractors and subcontractors to $15 an hour – a significant increase from the current rate of $10.95. With limited exceptions, the E.O. will apply to: new contracts; new contract-like instruments; new solicitations, extensions, or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments for procurement, services or construction - after January 30, 2022.

The E.O. asserts that, "Raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." Thus, effective January 30, 2022, government contractors and subcontractors must pay workers on covered federal contracts at least the $15 rate. The rate will increase annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers. However, if a federal/state prevailing wage law or a state/local law or ordinance provides for a minimum wage rate that is higher than the E.O., the higher rate applies.

The E.O. also phases out the tipped employee rate. Under current law applicable to federal contractors, an employer of tipped employees can satisfy its obligation to pay those employees the current contractor minimum wage rate of $10.95 by paying those employees a lower direct cash wage (no less than $7.65/hour) and counting the employees' tips as a credit to satisfy the difference between the direct cash wage and the minimum wage. The E.O. sets a new tipped rate of $10.50 effective January 30, 2022, with an increase to 85% of the applicable contractor minimum wage rate the following year, and then the elimination of the tipped rate starting January 30, 2024.

The Secretary of Labor is directed to issue regulations implementing this E.O. by November 24, 2021.

**Remember That Temporary Impairments Can Be Disabilities Under the ADA.** A recent case provides a good reminder to employers that temporary medical impairments can still be disabilities that trigger the protections of the Americans with Disabilities Act.

In *Skerce v. Torgeson Electric Co.*, the employee suffered an elbow injury for which he initially took leave and was then assigned light duty due to lifting restrictions. His doctor released him back to


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duty after three months. He was later terminated in a reduction in force, and brought suit, claiming a violation of his rights under the ADA. The trial court found, however, that his elbow condition did not constitute a disability within the meaning of the ADA because it was temporary in nature.

The ADA has a three-pronged definition of disability: (1) an actual disability; (2) a record of disability; and (3) regarded as a disability. Originally, the ADA was interpreted to exclude temporary conditions – meaning those lasting less than six months – from the overall definition of a disability. However, the ADA was amended in 2008 to broaden its coverage. As the U.S. Court of Appeals for the Tenth Circuit explained, under the amended ADA, temporary conditions can meet the definition of disability under the "actual" and "record of" prongs, as long as they are substantially limiting with regard to a major life activity. The temporary condition exclusion was retained only as to the "regarded as" prong.

**The Burden of Religious Accommodation Should Not Fall on Other Workers**. This was the point made by the U.S. Court of Appeals for the Seventh Circuit, in rejecting a prospective Assistant Manager's demand to be excused from working his Sabbath, which would have required other Assistant Managers to work Saturdays in his stead.

In *EEOC v. Walmart Stores East, L.P.*, the Walmart store was open 7 days a week, 24 hours a day, during which one of eight Assistant Managers should always be present. The Assistant Managers are assigned on a rotating schedule such that each works an average of 6 out of every 10 weekends. After being offered an Assistant Manager position, the plaintiff informed the employer that, as a Seventh Day Adventist, he could not work from sundown Friday to sundown Saturday. The employer determined that providing the requested accommodation would leave the store shorthanded at times, or require it to hire a ninth Assistant Manager, or would require the other Assistant Managers to work more of the less preferable weekend shifts. It withdrew the offer of the Assistant Manager position and instead offered the plaintiff a lower-paid hourly manager position that could have accommodated his Sabbath. He rejected the offer and filed a charge of discrimination with the Equal Employment Opportunity Commission, which then decided to sue on his behalf. The EEOC's suit was thrown out by the trial court, and it appealed.

The Seventh Circuit upheld the trial court's decision. Under Title VII, employers must reasonably accommodate an employee's religious needs absent an undue hardship. Unlike the Americans with Disabilities Act, which imposes a high standard for demonstrating an undue burden, any religious accommodation that requires an employer to bear more than a *de minimis* (i.e. slight) cost is an undue burden.

**A Transfer to a Comparable Position Is a Religious Reasonable Accommodation.** An employer is obligated only to provide a reasonable accommodation that works, not necessarily the one the employee wants – and in this case, the offer of a transfer met that obligation.

In *Bailey v. Metro Ambulance Services, Inc.*, the employee was offered a position as a paramedic. The employer required its emergency transport paramedics to be clean shaven in order to ensure the proper fit for self-contained breathing apparatus masks. The employee had a goatee as part of his Rastafarian religious practice, which he declined to shave. The employer offered him a position as a non-emergency transport paramedic, which did not require the use of masks, at the same pay. The


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employee argued that he could shave in a way that allowed him to keep his goatee while using the mask, insisted he would only work emergency transport, and sued for failure to accommodate.

In rejecting the employee's claim, the U.S. Court of Appeals for the Eleventh Circuit observed that, under Title VII's religious accommodation obligation, an employer must show that it offered a reasonable accommodation or that no reasonable accommodation is available without undue hardship. As long as it offers an accommodation that eliminates the conflict between the employee's religious need and the employment requirement, it has met its obligation under Title VII – and it is not obligated to offer the employee's preferred accommodation. Here, the offer of transfer to the non-emergency position at the same rate of pay and hours was an effective accommodation. Although the employee deemed the position less desirable, he offered no evidence that such, in fact, was the case.

**"Energy," "Stamina," and "Dynamic" Is Not Necessarily Code for Age Discrimination.** The U.S. Court of Appeals for the First Circuit rejected claims under the Age Discrimination in Employment Act and state law, finding that the employer's statement that its ideal candidate would have "energy," be "dynamic," and possess "stamina" was not evidence of age-based animus under the circumstances.

In *Martinez v. Novo Nordisk Inc*., as part of a global reorganization, the employer eliminated the 14-person sales staff servicing its Puerto Rico district and created three new positions, for which the sales employees were invited to apply. Two of the employees, aged 48 and 57, who were not selected for the new positions then sued for age discrimination. The trial court threw out the claims, and the employees appealed.

The First Circuit upheld the trial court's judgment for the employer. First, the First Circuit noted that all three of the successful candidates were age 47, which was only insignificantly younger than the unsuccessful 48-year old employee. Thus, under established caselaw, an inference of age bias could not be drawn.

Although the 57-year old was significantly older than the successful candidates, the First Circuit also rejected his claims, which relied on the employer's asserted desire for those with "energy" and "stamina," and who would be "dynamic." The First Circuit acknowledged that there might be cases in which such language could suggest age bias, but not in the current case where three individuals would be responsible for a territory that was previously serviced by 14. Rather, "it was accurate and relevant to describe the new positions as more demanding." In addition, none of the interviewers made comments to suggest that the 57-year old lacked these attributes; his non-selection was based on the fact that he offered a weaker plan and lacked probing and engaging skills compared with others. The First Circuit also rejected the employee's criticism of the employer's choice of criteria, noting that "Courts may not sit as super personnel departments, assessing the merits – or even the rationality – of employers' nondiscriminatory business decisions."

This case offers support for employers' ability to identify and apply criteria that they deem relevant to a selection decision – although it is important that such criteria should have some rational basis and connection to the job in question.


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**And "Alpha" Is Not Necessarily Code for Sex-Stereotyping Discrimination.** The U.S. Court of Appeals for the Tenth Circuit found that a manager's use of the term "alpha" did not support the gay employee's claim of sex discrimination.

In *Thomas v. Farmers Insurance Exchange*, the employee unsuccessfully applied for an Account Underwriter position as an internal candidate. He then requested a meeting with the hiring manager for feedback. In the course of the meeting, the hiring manager told the employee that he had not displayed the necessary leadership skills. The manager also said that if he were hiring for another position in the future, "I might not need a leader, I might have a bunch of alphas over there." The employee subsequently sued the employer, arguing among other things, that as a gay male he did not conform to the "alpha" male sex-stereotype (sex-stereotyping is a type of sex discrimination claim under Title VII).

The Tenth Circuit found the "alpha" statement was not evidence of sex discrimination because it did not explicitly state anything discriminatory about the employee's failure to conform to male sex stereotypes. Moreover, if a statement could plausibly be interpreted in two different ways – osne discriminatory and one not – then it does not qualify as direct evidence of discrimination. In this case, although there may be gender-based connotations for the term, one interpretation is a benign reference to leadership qualities.

**Time Spent Commuting on an Employer's Mandatory Bus System Is Not Compensable.** The Portal-to-Portal Act and the Employee Commuting Flexibility Act amended the Fair Labor Standards Act to exclude commuting time from being compensable, even where employees are required to use employer-provided transportation to reach the work site, according to the U.S. Court of Appeals for the Fifth Circuit.

Under the FLSA, employees must be paid for all time spent working. The Portal-to-Portal Act clarified that time spent traveling between home and work is not compensable work time. Further clarification was provided by the Employee Commuting Flexibility Act, which provided that traveling to the worksite in an employer's vehicle is not compensable when the use of the vehicle is: (1) within the employer's normal commuting area and (2) subject to an agreement between the employer and employee. The employee will only be paid for the time in the employer's vehicle if they are actually performing work or the commute is connected to the employee's specific work obligations.

In *Bennett v. McDermott International, Inc.*, in order to mitigate traffic in a rural area, the employer implemented a transportation system that required employees to travel to park and ride sites to get on employer-provided buses to the worksite, where they performed welding and pipefitting duties. The park and ride sites were difficult to reach by public transportation, there was limited parking, and the buses were often full, which resulted in employees traveling to another park and ride site. This commuting process could take several hours a day, and the employees sued for wages and overtime based on the unpaid commuting time.

The Fifth Circuit rejected the employees' claims. Based on its precedent, it noted that whether commuting time is compensable depends on whether employees are doing work during the commute – not on the logistics of the travel. The Fifth Circuit also found the fact that the employees were sometimes required to take work calls or discuss job duties for the particular day did not make the


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commute time compensable. The commute was not intertwined with their welding and pipefitter duties. As such, regardless of the inconvenience and length of the commute, it was not compensable.

**Does An Employer Have to Reasonably Accommodate an Employee's Commuting Needs Under the ADA?** Unfortunately, the answer is – it depends. A recent case out of the U.S. Court of Appeals for the 10th Circuit says no, joining several other federal circuits, but the Equal Employment Opportunity Commission, the Job Accommodations Network, and yet other federal circuits say yes.

In *Unrein v. PHC-Fort Morgan*, a hospital dietician became legally blind and could no longer drive herself to work, instead having to rely on others for a ride for the 60 mile trip. She sought several accommodations, including a flexible work schedule and telecommuting. The hospital tried the flexible schedule, but it created issues since her physical presence was unpredictable. She was eventually terminated after her doctor placed her on an indefinite leave and she then sued for failure to provide reasonable accommodations under the Americans with Disabilities Act.

The Tenth Circuit rejected her claims. In addition to finding that an essential function of the dietician job required the employee's physical presence on a set and predictable schedule in order to ensure patient care, the Tenth Circuit noted that the employee was seeking an accommodation for her transportation barrier, which the Tenth Circuit described as "a problem she faces outside the workplace unrelated to an essential job function or privilege of employment." Accordingly, citing cases from the Sixth and Ninth Circuits, the Tenth Circuit found the employer had no obligation to accommodate her transportation barrier. The Tenth Circuit asserted that the employer cannot control where an employee chooses to live, whether public transportation is available, and whether her friends and family can give her rides; rather this was within the employee's control.

Although this is good news for employers in at least the Tenth, Sixth and Ninth Circuits, employers should be warned that at least the Second and Third Circuits have reached the opposite conclusion – and the EEOC and JAN would specifically require such accommodation. Thus, employers should consult with counsel when dealing with a commuting accommodation request.

**OFCCP Updates Hiring Benchmark for Protected Veterans.** The Office of Federal Contract Compliance Programs released its annual update of the hiring benchmark for protected veterans to 5.6%, based on recently-released data from the Bureau of Labor Statistics. Under revised Vietnam Era Veterans' Readjustment Assistance Act regulations issued in 2014, covered government (sub)contractors must set a veterans' hiring benchmark for each of their establishments, either by using the OFCCP's annual benchmark as set forth in its VEVRAA Benchmark Database, or by developing their own individualized benchmarks. The current 5.6% figure represents a slight decrease from the previous year's 5.7% benchmark.

**Virginia Expands Overtime Wage Protections.** Under both federal and state law, non-exempt employees must be paid an overtime premium at 1½ times their regular rate for all hours worked over 40 in a workweek. Effective July 1, 2021, however, Virginia employers will be subject to additional overtime wage obligations beyond those required by the federal Fair Labor Standards Act. The new law includes the following:

- Implements different methods of calculating the regular rate for hourly employees v. those paid on a salaried or other regular basis.


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    - For hourly employees, their regular rate is their normal hourly rate plus any non-overtime wages paid or allocated for the workweek, applying the exclusions under federal law, divided by the total number of hours worked that week.
    - For non-exempt employees paid on a salaried or other regular basis, their regular rate is 1/40 of all wages paid for that workweek.
- Applies the damages provisions under existing state law for violations of these new provisions. These damages exceed those available under federal law.
    - Liquidated damages in an amount equal to actual damages are automatically imposed (not just for willful violations, as under federal law), and prejudgment interest is assessed at 8% per year.
    - "Knowing" violations will result in treble damages.
    - Civil penalties up to $1000 per violation.
- Establishes a three-year statute of limitations to bring claims for violations (not just for willful claims, as under federal law, which otherwise provides a two-year statute of limitations).
- Now permits collective actions for violations.

## NEWS AND EVENTS

**Publication –** We are delighted to announce the publication of The Legal 500's 2021 Employment & Labour Law Country Comparative Guide, for which we authored the U.S. chapter. The Legal 500 is considered one of the premier law firm ranking organizations in the world. Its annually-updated Comparative Guides, which are authored by renowned firms, are intended to provide the in-house community with practical guidance on laws and regulations in key jurisdictions for specific practice areas.

**Victory –** Eric Hemmendinger and Teresa Teare, with the help of Lindsey White and Paul Burgin, were successful in defeating a motion for conditional certification in a lawsuit involving claims of failure to pay wages and overtime to insurance adjusters. The case was brought in the U.S. District for the Eastern District of Virginia. Four named plaintiffs brough suit against an insurance company claiming that they were not paid for all hours worked. They sought to adjudicate their claims on a class and collective basis spanning several states. Even applying the more lenient standard to evaluate conditional certification, the Court found that the claims of each individual were not similar and did not lend themselves to class resolution.

**Presentation –** On April 15, 2021, Mark J. Swerdlin served as moderator/panelist on "Practicing Labor & Employment Law in a Virtual Environment" at Worklaw's Spring 2021 Virtual Meeting. Worklaw is an international alliance of labor and employment boutique firms, of which our firm is the Maryland member.

**Presentation –** On April 15, 2021, Lindsey A. White moderated a panel presentation, "Marijuana in the Workplace," which was part of the American Bar Association National Symposium on Technology in Labor and Employment Law. Lindsey was also one of the organizers for the Symposium.

**Presentation –** Chad M. Horton was a panelist for "Coders of the World Unite: Will Tech Workers Disrupt the NLRA?" along with former National Labor Relations Board chair Mark Gaston Pearce.


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This panel presentation took place on April 16, 2021 as part of the American Bar Association National Symposium on Technology in Labor and Employment Law.

## TOP TIP: Employers – Don't Forget the FMLA When Dealing with Workers' Comp (And Other Medical Leaves)!

A recent case reminds employers of the need to comply with their obligations under the Family and Medical Leave Act in workers' compensation situations. Sadly, there are many instances in which employers do not think or remember to provide the required FMLA notices and designations when an employee is on workers' compensation leave for an on-the-job injury, or some other formal health-related leave like short-term disability. But those medical situations can certainly constitute serious health conditions under the FMLA, and the failure to comply with the FMLA's requirements can lead to liability.

**WC and FMLA May Overlap.** As the U.S. Court of Appeals for the Eleventh Circuit noted, FMLA provides eligible workers with up to 12 weeks of leave to recover from serious injury, and employers may not interfere with, restrain, or deny an employee's FMLA rights. Workers' compensation is required by most states to provide the costs of medical care and lost wages arising from a work-related injury. And "[s]ometimes the benefits of these laws can overlap."

**Case Background.** In *Ramji v. Hospital Housekeeping Systems, LLC*, the employee sustained an on-the-job injury to her knee, which was treated solely as a workers' compensation event. After eleven days of leave, during which she used her sick leave, she then returned to temporary light duty. She was subsequently released to full duty, although her doctor was not fully aware of her job responsibilities. She was required to undergo an essential functions test before returning to her position. Because of her knee, she was unable to pass the test. She was then terminated from employment, despite her request to take additional sick leave or vacation for further recovery. At no time was she informed of her FMLA rights, and she was never given the opportunity to take FMLA leave to fully recover from her knee injury.

The employee sued for interference with her FMLA rights. The employer argued that it was not liable under the FMLA due to its compliance with its workers' compensation obligations. However, as the Eleventh Circuit flatly asserted, "providing workers' compensation benefits cannot absolve an employer of all obligations under the FMLA."

**FMLA Notices Are Required for Any Potentially Qualifying Condition.** The Eleventh Circuit found that the employer certainly had sufficient knowledge that the employee's injury was potentially FMLA-qualifying. That knowledge triggers the employer's obligation to provide notice to the employee of her eligibility for and rights under the FMLA within a certain timeframe. Moreover, under the FMLA regulations, the failure to provide the requisite notices may constitute interference with the employee's FMLA rights. The Eleventh Circuit stated that the employer could not exempt itself from those notice obligations by providing workers' compensation leave, noting that the regulations contemplate that a workers' compensation absence and FMLA leave may run concurrently.

**Employees May Choose Leave in Lieu of Light Duty.** The Eleventh Circuit also rejected the employer's argument that the employee's acceptance of a light duty position relieved it of any


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further FMLA obligation. In fact, the regulations specifically provide that an employer may not require an employee to take a light duty job in lieu of FMLA leave to which they are entitled. An employee who opts for leave over light duty may lose their right to workers' compensation, but their right to the leave continues through the 12 weeks.

**What's the Harm?** Additionally, an employee is entitled to relief for interference with their FMLA rights only where they have suffered harm due to the interference. In this case, had the employee known of her rights, she could have taken leave to get additional treatment before returning to work, rather than failing the essential functions test and being terminated. Moreover, she could have taken the paid leave that she requested and was denied, as it would have run concurrently with her FMLA.

**Lesson for Employers.** The lesson here is for employers to make sure that they provide the required FMLA notices when an employee has a condition that could potentially qualify them for FMLA leave, even if other leaves and benefits also apply – including workers' compensation, short-term disability, and long-term disability.

## RECENT BLOG POSTS

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

- "Taking a Trip Is Not Protected Activity Under the FMLA" by Fiona W. Ong, April 28, 2021
- Small Employers May Receive a Tax Credit for Paid Vaccination Leave by Fiona W. Ong, April 21, 2021
- New Employment Laws in Maryland: Protection for Essential Workers, Bereavement Leave, Workplace Peace Orders, and More! by Fiona W. Ong, April 15, 2021
- DOL Provides Guidance and Model Forms for ARPA's COBRA Subsidy Mandate by Alex I. Castelli, April 12, 2021
- Employers, Make Sure Your Story Makes Sense! (and Is Truthful!) by Paul D. Burgin, April 7, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)
- Employees Don't Get to Telework Just Because They Want To … by Courtney B. Amelung, March 31, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)


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