SHAWE ROSENTHAL LLP

E-UPDATE

January 31, 2023

RECENT DEVELOPMENTS

Hey Employers – This Is What Federal Agencies Are Planning to Do in 2023!

Happy New Year – or is it for employers? The federal agencies are planning a slew of actions that will impact the workplace, some of which may pose interesting challenges for businesses. One such action was the Federal Trade Commission's proposed near-total ban on non-compete agreements, which we discussed previously here, and which we anticipate will be issued in final form at some point this year (and then put on hold while the inevitable lawsuits play out). Beyond that, we thought we would round up some (but certainly not all) of the more significant anticipated developments of interest to employers generally.

The Department of Labor. According to the Biden administration, we can expect the DOL to tackle some rather major issues in this next year. Among them include:

- Overtime Rule and White-Collar Exemptions. Under the current overtime rule, there are three tests which must be met in order for a white-collar employee to be deemed exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act, the employee must: (1) be paid on a salary basis; (2) have a salary of at least $684 per week (the equivalent of $35,568 per year); and (3) meet a duties test specific to the exemption in question – executive, administrative or professional (EAP). The DOL is planning to issue a proposed rule in May that would almost certainly raise the required salary amount, and may also revise the duties test, resulting in fewer employees meeting the exemption.

- Independent Contractor Status. The DOL has issued a proposed interpretation of how to define the distinction between independent contractors and employees, as we discussed previously here and here, and the final version is scheduled to be issued in May. The new interpretation replaces the one issued by the Trump DOL, and would make findings of independent contractor status more difficult with the corresponding liability to employers for wages, taxes, liquidated damages, and attorneys' fees.

The Equal Employment Opportunity Commission. In recent years, the EEOC has typically issued guidance documents rather than regulations, such as the What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws resource, which was vastly expanded and revised over the course of the pandemic. However, as we discussed here, the Pregnant Workers Fairness Act was just enacted as part of the omnibus federal budget bill. The EEOC is required to issue regulations, which will include examples of reasonable accommodations, to implement this new law within a year of enactment.

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For more on the EEOC's plans for the future, please see The EEOC's Proposed Strategic Enforcement Plan - What Employers Can Expect for the Next Four Years.

The National Labor Relations Board. Under the Biden administration, the National Labor Relations Board has already reversed many of the more employer-friendly actions taken during the prior administration, including a flurry of activity in December 2022. But they are not done. These are some of the major actions that we anticipate in the near future.

- Work rules. Under the Trump administration, the NLRB adopted the *Boeing* test, which divides facially neutral work rules into three categories: whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. We anticipate that the NLRB will soon reject this test and return to the previous *Lutheran-Heritage* standard, under which a facially-neutral work rule will be found to violate the NLRA if employees could "reasonably construe" the rule to violate employees' rights to engage in concerted action for their mutual aid or protection (i.e. "protected concerted activity"). This test will result in more arguably reasonable work rules being found unlawful.

- Independent contractor status. For decades, the Board had relied on a common-law test, with multiple factors, to determine whether an individual is an employee, who is subject to the National Labor Relations Act, or an independent contractor, who is not. An important "animating principle" under which the factors are evaluated is "whether the position presents the opportunities and risks inherent in entrepreneurism." In the 2014 case of *FedEx Home Delivery*, however, the Obama Board revamped the independent contractor analysis and severely limited the significance of a worker's entrepreneurial opportunity. The Trump Board, in *SuperShuttle DFW, Inc*., reinstated the prior standard, with its focus on entrepreneurism. We believe the NLRB will flip back to the *FedEx Home Delivery* standard, making findings of independent contractor status less likely.

- Joint employer status. As we previously discussed here, the NLRB has issued a proposed rule that would rescind and replace the Trump Administration's 2020 rule that established the current test for determining whether two entities are joint employers. The final rule, which we expect will result in more findings that two entities are joint employers, is scheduled to be issued in August 2023. Under federal labor law, a joint employer is required to bargain with a union selected by its jointly-employed workers and may be held liable for the unfair labor practices committed by the other employer.

- Increased scrutiny of electronic monitoring. In a prior article, we discussed the NLRB General Counsel's intention to target employers' use of automated technologies and electronic management systems in ways that could arguably violate the NLRA. We expect to see cases that focus on the impact of such technologies on employees' rights to engage in protected concerted activity.

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The EEOC Updates Its Resource Document for Hearing Disabilities in the Workplace

The Equal Employment Opportunity Commission has a series of Q&A documents addressing particular disabilities in the workplace, one of which is an updated Hearing Disabilities in the Workplace and the Americans with Disabilities Act. The document explains the following:

- When an employer may ask an applicant or employee questions about a hearing condition and how it should treat voluntary disclosures. The resource makes the following points:
    - Employers may not ask whether a job applicant has a hearing condition prior to making a job offer. They may ask questions related to the applicant's ability to perform the essential functions of the position, with or without reasonable accommodation, such as whether the applicant can respond quickly to instructions in a noisy, fast-paced work environment or whether they can meet legally mandated safety standards.
    - Applicants are not required to disclose their hearing (or any other) disability prior to accepting a job offer, unless they need a reasonable accommodation for the application process (like a sign language interpreter). They may request accommodations after becoming employed.
    - An employer may not ask questions about an obvious or voluntarily-disclosed hearing condition, unless it reasonably believes the applicant will require an accommodation for the application process or to perform the job. If so, the employer may ask whether the applicant will need an accommodation and what type.
    - After an offer of employment is made, an employer may ask questions about an applicant's health, including about any hearing disability, and require a medical examination as long as it does so for all applicants for the same type of job. It may follow up on any responses, such as by asking: how long the individual has had the hearing condition; what, if any, hearing the applicant has; what specific hearing limitations the individual experiences; and what, if any, reasonable accommodations the applicant may need to perform the job. The employer may withdraw its offer only if the applicant is unable to perform the essential functions of the job or poses a direct threat to themselves or others that cannot be eliminated or reduced with a reasonable accommodation.
    - An employer may ask an employee about a hearing condition or require a medical examination when it reasonably believes the condition (whether reported or observed) is causing performance problems or an inability to safely perform the essential functions of the job.
    - Employers should keep medical information confidential, and may not share with co-workers that an employee is receiving an accommodation.

- What types of reasonable accommodations applicants or employees with hearing disabilities may need.
    - The resource provides a list of possible accommodations, including: a sign language interpreter; assistive technology (e.g. video relay service, hearing-aid-compatible devices, amplifiers, vibrating/strobe lighting for notification systems, close

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captioning, communication access real-time translation (CART) devices, etc.); written memos and notes; note-taking assistance; work area adjustments (e.g. being away from noisy areas, close to alarms with strobe lighting); leave; changing marginal job functions; and reassignment to a vacant position.
    - If the hearing condition is not obvious, the employer may request reasonable documentation about how the condition limits major life activities and why a reasonable accommodation is needed.
    - Employers do not have to grant accommodations that pose an undue hardship, and they do not have to eliminate an essential function of the job, tolerate sub-standard performance, or excuse conduct violations that are job-related, consistent with business necessity and applied consistently.
    - If more than one accommodation would be effective, the employer may choose the accommodation.
    - An employer must provide a reasonable accommodation to an applicant during the application process even if it believes that it will be unable to provide a reasonable accommodation on the job.
    - In addition to providing reasonable accommodations to enable employees to perform the essential functions of the job, employers must also provide them to enable employees to enjoy the benefits and privileges of employment, including access to facilities, access to information communicated in the workplace, and the opportunity to participate in training and social events.

- How an employer should handle safety concerns about applicants and employees with hearing disabilities.
    - Employers may only exclude an individual with a hearing disability from a job (i.e. refuse to hire, terminate, or temporarily restrict duties) for safety reasons when the employee poses a direct threat. This is a significant risk of substantial harm to the employee or others that cannot be reduced or eliminated through a reasonable accommodation.
    - The employer must conduct an individualized analysis that is based on reasonable medical judgment that relies on current medical knowledge and/or the best available objective evidence, considering: the duration of the risk; the nature and severity of the potential harm; the likelihood of occurrence; and the imminence of the potential harm. It cannot be remote or speculative, and must take into account any reasonable accommodations.

- How an employer can ensure that no employee is harassed because of a hearing disability or any other disability.
    - The employer should make clear that it will not tolerate harassment based on disability or any other protected basis, which can be done through a written policy, staff meetings, and periodic training.
    - The employer must also respond promptly and effectively to any complaints of harassment.

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D.C. Circuit Strikes Down Three Provisions of NLRB's 2019 Election Rule

A divided panel of the U.S. Court of Appeals for the D.C. Circuit struck down three provisions of the National Labor Relations Board's ("NLRB") 2019 election rule (the "2019 Rule") that amended policies and procedures related to union elections. In AFL-CIO v. NLRB, however, the D.C. Circuit, upheld two provisions and concluded that the rule, as a whole, was not arbitrary and capricious. The upheld provisions will be remanded to the federal district court where it will hear the AFL-CIO's other arguments against the two provisions.

In March 2020, prior to the 2019 Rule's implementation, the AFL-CIO filed suit to invalidate portions of the 2019 Rule. Ultimately, Judge Ketanji Brown Jackson – then a district court judge – found that five of the provisions violated the Administrative Procedure Act ("APA") because the provisions were "substantive" rather than "procedural," and therefore the APA required a public notice-and-comment period. The 2019 Rule had been issued without a notice-and-comment period.

The D.C. Circuit concluded that three provisions of the 2019 Rule were substantive rather than procedural and struck down the following three provisions:

1. Voter List Submission – The 2019 Rule lengthened the amount of time an employer had to serve the Voter List on the union and NLRB from two days to five days. Because this provision was struck down, employers must continue complying with the previous two-day rule, which remained in effect while this provision was challenged in the courts.

2. Election Observers – The 2019 Rule required that a party use a current voting unit employee as its election observer, or, if unavailable, any non-supervisory employee. Previously, a party could choose anyone to be its observer, subject to certain restrictions imposed by the NLRB. As with the Voter List, the pre-2019 Rule had remained in effect during this legal challenge.

3. Timeline for Election Certification – Under the 2019 Rule, a regional director would be prohibited from certifying the results of an election until after a request for review with the Board had been resolved, or until after the deadline for requesting review had passed. This provision would change the pre-2019 Rule practice – which, again, stayed in effect while this provision was enjoined by the district court in May 2020 – of regional directors certifying election results even while a request for review was pending with the Board.

Having found these provisions to be null and void, they will only go into effect if the NLRB reissues the provisions and provides a public notice-and-comment period. From a practical perspective, reissuance by the current Democratic-majority Board is extremely unlikely given that the 2019 Rule was issued by the so-called Trump Board and was extremely unpopular with big labor.

Two provisions were upheld by the D.C. Circuit:

1. Pre-Election Litigation of Issues – The 2019 Rule permits parties to litigate most issues related to supervisory status, unit scope, and voter eligibility prior to any election. The 2019 Rule departed from the previous practice of deferring such litigation in many cases until the post-election period, thereby expediting the election.

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2. Election Scheduling – The D.C. Circuit also upheld the 2019 Rule's requirement that any election directed by a regional director must occur no earlier than 20 business days after the director's decision directing an election.

While these two provisions were upheld, they were remanded to the district court to address the AFL-CIO's other arguments. Thus, implementation of these provisions of the 2019 Rule is not imminent.

Employer Takeaway: This decision will have no immediate impact on how the NLRB processes representation cases. All of the five provisions had been previously enjoined by the district court and were not implemented when the 2019 Rule ultimately went into effect in 2020. Further, the two upheld provisions will be remanded and likely remain entangled in litigation before the district court for the foreseeable future.

The EEOC's Proposed Strategic Enforcement Plan – What Employers Can Expect for the Next Four Years

On January 10, 2023, the Equal Employment Opportunity Commission ("EEOC") released its draft Strategic Enforcement Plan for 2023-2027, which gives employers valuable insight into the Commission's top priorities in the coming years. While the draft plan is open for comment through February 9, (and you may submit comments here) the final plan is likely to look very similar to the current draft, which outlines four key subject matter priorities, in addition to numerous operational priorities.

In the preamble, the EEOC notes that the plan heavily considered recent current events, including "[t]he tragic killing of George Floyd, Breonna Taylor, and so many other Black and brown people … a painful reminder of systemic racism," other high-profile incidents of violence based on race, religion, national origin, gender identity, and the disproportionate impact of the COVID-19 pandemic on people of color and vulnerable workers. The purpose of the Strategic Enforcement Plan is to help the EEOC operate as "one national law enforcement agency" with consistent priorities across regions and different units.

The four key priorities are:

1. **Eliminating Barriers in Recruitment and Hiring**: This broad category encompasses barriers such as access to applications, the practice of "steering" certain groups into particular jobs, and misclassification. Importantly, the first example under this priority is the use of Artificial Intelligence in recruitment. The EEOC announced an initiative on AI and Algorithmic Fairness in October of 2021, and has since set forth special guidance in this area (which we previously discussed here). We expect the Commission to take particular interest in any Charge of Discrimination involving AI and hiring.

2. **Protecting Vulnerable Workers From Underserved Communities From Discrimination**: This category will focus on a broad spectrum of vulnerable workers, including: immigrant and migrant workers; people with intellectual disabilities; workers with arrest or conviction records; older workers; LGBTQI+ individuals; teenage and other low-wage workers; persons with limited English proficiency; Native Americans and Alaska Natives; and temporary

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workers. This priority will seek to protect all of these workers against discrimination in all aspects of the employment relationship.

3. **Addressing Selected Emerging and Developing Issues**: This priority is rather open-ended, likely to allow the Commission to pivot to address new issues. Currently, the areas of focus include qualification standards, pregnancy-related discrimination, discrimination that arises in backlash as a result of current events (the EEOC notes this currently encompasses discrimination against African Americans, individuals of Arab, Middle Eastern, or Asian descent, Jews, Muslims, and Sikhs), as well as COVID-19 related backlash. This category is likely to develop over the next few years to address new issues.

4. **Advancing Equal Pay for All Workers**: This category has appeared on several versions of the plan. Equal pay charges of discrimination comprise a fraction of overall charges received because, as the Commission notes, most people do not know what their coworkers make. The EEOC will focus on pay secrecy policies and retaliation for sharing information about compensation. The EEOC will rely on directed investigations and Commissioner's charges as needed. These tools allow the EEOC to open an investigation based on outside information but without a charging party coming forward.

TAKE NOTE

Employees May Be Held Accountable for Failing to Follow Employer's FMLA Protocols. In a helpful case for employers, another federal appellate court has reiterated that employees who fail to comply with the employer's notice and information protocol for leave will not be protected under the Family and Medical Leave Act.

The FMLA regulations provide that "an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." In addition, the regulations also state that ""[f]ailure to respond to reasonable employer inquiries regarding [a] leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying." If an employee fails to follow the employer's notice requirements or to provide required information, FMLA leave may be denied.

In *Munger v. Cascade Steel Rolling Mills, Inc*., the employee had a medical incident at work and went to the hospital. He then emailed two doctor's notes to his employer, indicating that he was treated and could return to work, but the notes contained no further information. He was directed to contact the third-party FMLA administrator, but did not do so. He was then told that there was an issue with his leave and instructed to follow up with Human Resources. He also failed to do that. He was then terminated for attendance violations. He sued for violations of his FMLA rights. However, the U.S. Court of Appeals for the Ninth Circuit found that, by failing to contact the FMLA administrator and to respond to the employer's requests for information, he "lost the right to FMLA protection."

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This case reminds employers that they can set up additional notice requirements for FMLA leave, and that they can enforce them. But as we discussed in our November E-update, it is important to make sure that the protocol is clear and consistent.

An Employee Is Protected by the FMLA, Even If the Requested Leave Did Not Actually Qualify. The Family and Medical Leave Act protects employees who request unpaid leave for family illness, even if the request does not lead to actual FMLA leave, according to the U.S. Court of Appeals for the Sixth Circuit.

In *Milman v. Fieger & Fieger, P.C.*, at the beginning of the COVID-19 pandemic, an attorney took paid leave, followed by request for unpaid leave, due to the closure of her child's daycare and the fact that her son, who had respiratory issues, had developed symptoms resembling COVID-19. She was then terminated on the same day as her request for failing to come in to work because of her child's "minor cold." She sued for violation of the FMLA, on the grounds that she was subjected to retaliation for attempting to exercise. The employer argued that she was not actually entitled to FMLA leave since she did not establish that her son suffered from a serious health condition under the FMLA, and therefore was not protected by the law.

The Sixth Circuit, however, rejected the employer's argument. The FMLA protects employees from retaliation for attempting to exercise their FMLA rights. The Sixth Circuit acknowledged that where an employee actually takes leave to which they are not entitled under the FMLA, it is beyond the scope of the FMLA's protection. However, the Sixth Circuit found that the FMLA protects the right of an employee to inquire about and request leave, even if she is not actually entitled to the requested leave. This is because the FMLA, as part of its procedural framework, first requires employees to put their employers on notice of their desire to use unpaid leave by making a formal request. Thus, this initial request for leave, in the Sixth Circuit's view, "must be protected activity" under the FMLA. Any other interpretation could result in rendering the employee unprotected during the first step in the process, which would discourage employees from taking such an authorized initial step.

In finding an employee's notice of need for FMLA leave to be protected conduct under the FMLA, the Sixth Circuit joins several other federal Courts of Appeals. Employers should be aware that they should not take adverse action against an employee for requesting FMLA leave (or leave that could potentially qualify for FMLA), even if they believe the employee is not actually entitled to such leave.

The Job Duties – Not the Job Title – Matter for Equal Pay Claims. The Equal Pay Act requires equal pay for work requiring "equal skill, effort and responsibility" under "similar working conditions," regardless of sex. Two different cases this month make the point that it is an employee's actual responsibilities, and not just the job title, that is critical to a claim of pay discrimination under the EPA.

In *Polak v. Virginia Dept. of Environmental Quality*, the U.S. Court of Appeals for the Fourth Circuit rejected a female Coastal Planner's EPA claim, finding that the male Coastal Planner had specific expertise that the female lacked and was doing different and more complex work than she was. The Fourth Circuit observed that "similarity of work is not enough;" rather, the work must be

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"virtually identical" or "substantially equal." Thus, "it is generally not enough to simply show that the comparator holds the same title and the same general responsibility as the plaintiff."

Similarly, in *Pendergraft v. Board of Regents of Oklahoma Colleges*, the U.S. Court of Appeals for the Tenth Circuit rejected a male coach's EPA claim, noting that the female coach to whom he compared himself performed very different work. In contrast to the male coach's participation in two recruitment tours, the female coach was involved in recruiting, practice, team travel, gameday preparation, and field maintenance.

These cases reinforce that actual differences in responsibilities are a legitimate reason for differential pay. But if employees are performing significantly different responsibilities, employers may wish to consider whether they should share the same job title.

Employers, Do Not Delay in Responding to a Request for Reasonable Accommodation. When dealing with a request for reasonable accommodation, "an indeterminate delay has the same effect as an outright denial," as the U.S. Court of Appeals for the Second Circuit recently noted.

In *Perkins v. City of New York*, a deaf employee requested a reasonable accommodation of a video phone to enable her to perform her essential job functions. She did not receive the phone for several months, and then there were technical issues that were not fully addressed for many months. The employee eventually sued for violation of her right to reasonable accommodations under the Rehabilitation Act (the analog to the Americans with Disabilities Act for government employees, using the same standards of analysis). The federal district court dismissed the case, finding that the employer had made "ongoing, reasonable efforts to accommodate the plaintiff, some of which were at least temporarily successful."

On appeal, the Second Circuit reversed the district court's dismissal, finding that the employee had sufficiently alleged that the employer had refused to make accommodations. Although, as the district court noted, the employer had made some efforts to provide accommodation, the extended delay effectively functioned as a denial of the accommodation. Moreover, the videophone only worked sporadically, and the employee alleged that she was consequently unable to accomplish certain tasks which resulted in assigned work being taken away from her. Thus, the Second Circuit further noted that, "An ineffective accommodation does not satisfy the requirements of the Rehabilitation Act" (or the ADA).

This case warns employers that it is important to respond reasonably promptly to requests for accommodations – both initially, but also to any developing issues with such accommodations. Failing to follow up can create liability.

Inadequate Training May Be an Adverse Action Under Title VII. While discrimination claims under Title VII typically require some "ultimate employment decision," the U.S. Court of Appeals for the Fifth Circuit found that a training decision can constitute an adverse action in violation of the law.

In order to assert a discrimination claim under Title VII, an employee must show, among other things, that they suffered some "adverse employment action." Courts have usually interpreted that to mean some "ultimate employment decision" affecting job duties, compensation, or benefits. In

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Rahman v. Exxon Mobil, the employee contended that he was inadequately trained because of his Black race, as compared to a White co-worker, leading to his termination.

The federal district court found that the alleged inadequate training did not amount to an adverse employment action. However, the Fifth Circuit disagreed, finding that inadequate training can be considered an adverse action "if the training is directly tied to the worker's job duties, compensation, or benefits." In this case, the employee required training in order to pass certain tests, and his inability to pass the tests resulted in his termination.

However, the Fifth Circuit found no inadequate training here. It clarified that "an inadequate training claim must be based on, *in essence*, a failure to provide comparable training." According to the Fifth Circuit, an inadequate training claim will fail if the employee is provided with "a *roughly similar* opportunity to *access* the *necessary* parts of the training program." (All emphases in the original). And that was the case here.

The lesson here is that actions that apparently fall short of "ultimate employment actions" may still form the basis of a viable discrimination claim if they directly impact such a decision.

Reasonable Accommodations Do Not Involve Violating a Collective Bargaining Agreement. A recent case reminds employers that, under the Americans with Disabilities Act, they are not required to grant a reasonable accommodation that would violate the terms of a collective bargaining agreement.

In *Brigham v. Frontier Airlines, Inc.*, the collective bargaining agreement established a bidding system to create schedules for the flight attendants. A flight attendant who was a recovering alcoholic wanted to avoid overnight layovers ("because they tempted her to drink") and asked her employer to excuse her from the bidding system and allow her to choose her flights without the system's limitations. She sued for failure to provide a reasonable accommodation.

The U.S. Court of Appeals for the Tenth Circuit rejected her claim. Citing to the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, the Tenth Circuit asserted that "the duty to accommodate doesn't require an employer to take steps inconsistent with a collective bargaining agreement." In fact, the flight attendant's "requested accommodation would have disrupted the legitimate expectations of other employees relying on the collective bargaining agreement."

So a request for an accommodation that results in a violation of a collective bargaining agreement will not be considered reasonable, and the ADA permits employers to reject such requests.

The DOL's Annual Penalty Increase – the 2023 Edition. The Department of Labor has announced its annual penalty increases. Due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose.

The DOL's announced increases, effective January 15, 2023, include the following:

- **Fair Labor Standards Act.** For repeated or willful violations of the FLSA's minimum wage or overtime requirements, the maximum monetary penalty will increase from $2,203 to $2,374. Penalties for violation of the FLSA's child labor restrictions will increase from a maximum of

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$14,050 per under-18 worker to $15,138, while violations resulting in the child's death will increase from a maximum of $63,855 to $68,801, which may be doubled for repeated or willful violations.

- **Occupational Safety and Health Act.** The maximum penalty for posting, other-than-serious, serious, and daily failure-to-abate violations increases from $14,502 to $15,625. The minimum penalty for willful violations increases from $10,360 to $11,162, while the maximum penalty increases from $145,027 to $156,239. The penalty for repeated violations also increases from $145,027 to $156,239.

- **Family and Medical Leave Act.** The penalty for failing to comply with the posting requirement increases from $189 to $204.

NEWS AND EVENTS

New Partner – We are delighted to announce that Veronica Yu Welsh has been made a Partner at our Firm. Veronica represents employers in a wide range of labor and employment-related matters in federal and state court, as well as before administrative agencies. She recently was recognized by Super Lawyers as a Maryland Rising Star for the sixth year in a row. Veronica graduated from Boston College and the American University Washington College of Law.

Publication – We are pleased to announce the publication of the 2023 edition of the Maryland Human Resources Manual, which we author and update annually on behalf of the American Chamber of Commerce Resources and the Maryland Chamber of Commerce. This comprehensive human resources manual explains, in plain English, the duties of the employer during the entire employment process – everything from pre-hire through post-termination. It also contains hundreds of forms and policies. Purchase of this manual includes one year of online publication access that allows you to search for answers electronically.

Upcoming Webinar – Lindsey White and Veronica Yu Welsh will be presenting a one-hour webinar for HRSimple, "Handling EEOC Investigations and Litigation" on February 9, 2023. The session will provide insight into the Equal Employment Opportunity Commission's investigative and litigation tactics by examining the EEOC's hot button issues. Lindsey and Veronica will provide guidance on how to tell if your company is being eyed for possible litigation, the advantages of mediation, how to approach investigations, and more. The webinar is free for HRSimple members, which includes those who purchased the Maryland Human Resources Manual, and $25 for others. You may register here.

Media – Shawe Rosenthal was featured in the Maryland Chamber of Commerce's "Member Spotlight" in the January 17, 2023 Chamber Update. Shawe Rosenthal partner Fiona Ong, as General Counsel of the Maryland Chamber, commented on the importance of our firm's participation in the Chamber, including the Labor & Employment Committee.

Honor – Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q4 2022. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each

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practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the fifteenth consecutive quarter and sixteenth time overall that Fiona has received this honor.

Presentation – Teresa Teare was a speaker at the Practising Law Institute (PLI)'s full-day program on "Wage and Hour Litigation and Compliance," on January 23, 2023, in New York City. Teresa discussed discovery issues specific to class and collective actions under the Fair Labor Standards Act and state law.

Media – Fiona Ong was quoted in a January 23, 2023 article by Allen Smith for the Society for Human Resource Management (SHRM.org), "ESPN Sued Over COVID-19 Vaccination Requirement." (Subscription may be required for access). Fiona offered comments on vaccination lawsuits and identified factors that courts may find significant in assessing the merits of such suits.

Article – Evan Conder's blog post, "Can Rap Music in the Workplace Create a Hostile Work Environment?" was republished in the December 19, 2022 issue of Native.news, the bi-weekly newsletter of the PIASC, the largest regional printing trade association in the nation.

Article – Paul Burgin authored a Practice Point for the ABA Business Torts & Unfair Competition Committee, "Do Not Assume Your Usernames and Passwords Are Protected Trade Secrets," explaining a growing body of case law holding that user names and passwords do not constitute protected trade secrets.

Presentation – Fiona Ong was a panelist for a presentation to the American Subcontractors Association of Baltimore on "Mental Health, Addiction, and Suicide in the Construction Industry, Part 2: Helping Employees and Protecting the Company," on January 11, 2023. Along with co-presenters from HR, insurance, and safety, Fiona addressed the legal issues involved when dealing with employees with mental health or addiction concerns.

TOP TIP: Why Do You Need a Handbook Disclaimer and What Should Be In It Anyway?

A recent Alabama state court decision offers valuable lessons to all employers with employee handbooks (not just those in Alabama) on the importance of a properly drafted handbook disclaimer.

Now, in all states but Montana, employment is presumed to be at-will (and even in Montana, it exists for the first six months). This means that, absent a contract, either employees or employers may terminate the employment relationship at any time for any reason (except an illegal one), with or without cause or notice. Some employees, however, have successfully argued that certain handbook policies can create a contract that modifies the at-will nature of their employment. Another argument is that other policies – like a discharge procedure or progressive discipline policy – give rise to additional contractual obligations. In other words, the employer is obligated to follow all the steps of their policy before terminating an employee – as opposed to having the discretion to skip steps where it deems appropriate. Many employers rely on a disclaimer to prevent such claims – but a disclaimer must be carefully drafted, or it may not be as effective as the employer hopes.

And this was the situation in *Davis v. Montevallo*. The employee was required to sign a handbook acknowledgement that stated as follows:

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> I understand that nothing in this Handbook can be interpreted to be a contract for employment for any specified period of time or to place a limitation on my freedom or the City's freedom to terminate the employment relationship at any time. I also understand that the City retains the freedom to change the Policies and Procedures with the approval of the Mayor and City Council.

The employee was terminated for violating certain handbook policies, and he sued, arguing that the City had breached its contract with him by failing to follow the detailed discharge procedures in the Handbook. The employer pointed to the disclaimer to rebut his contract claim. But the problem for the employer was that its disclaimer was limited to the issues of preventing a contract of employment for a specific period and preserving the ability to terminate the relationship at any time. It was silent on all other policies, including the actual procedure for termination.

The employer also argued that the disclaimer gave it the ability to change the policies at any time. But as the court noted, the employer is bound by the contractual guarantees under the policies until they are modified or excluded by another valid contract. The court asserted, "Consequently, the ability to later modify handbook provisions does not justify a disregard of currently valid provisions."

But a clear and unambiguous disclaimer can prevent all of these issues. As a preliminary matter, and as courts in some states have held, the disclaimer should be the first thing in the handbook. But what should be in an effective handbook disclaimer? We suggest that it should include the following:

- A statement that employment is at-will, with a definition of what that means. (This, however, does not apply to unionized employees – and that should be recognized in the disclaimer if the employer is unionized).

- We suggest adding that no managers or representative of the company or organization, other than its top official, has the authority to make any promises or commitments contrary to the foregoing. Additionally, any employment agreement will only be valid and binding if set forth in writing and signed by the top official.

- A statement that none of the policies create a contract, whether express or implied, or constitute promises or covenants (for good measure).

- In addition to the general disclaimer and acknowledgment, it is important to include a specific disclaimer in any discipline/discharge policies, and to state clearly that the employer reserves the right to exercise discretion to skip procedural steps.

- A reservation of rights to change the policies in the handbook, in the employer's sole discretion, at any time, with or without notice.

- Many policies may be subject to heightened scrutiny by the National Labor Relations Board – even for non-union employers – as potentially impacting employees' protected rights under

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the National Labor Relations Act. Although the Board has viewed with some skepticism generalized statements disclaiming any intent to violate those rights, we still suggest that it may be useful to have such a general statement in the disclaimer, with more targeted statements in specific policies of interest.

- Multi-state employers may be subject to differing obligations under state law. While some policies may be drafted so as to comply with all applicable laws, there may be others that require some variation in treatment. It may be wise to include a statement that, to the extent a state or locality where the employer operates has workplace obligations unique to a particular location of the country, the employer will apply its policies and procedures in the manner required by such local laws. If the employer chooses to issue a state supplement, it should reference it here.

- Furthermore, employees should be encouraged to bring any questions to Human Resources, a manager, or some other appropriate official.

In addition to the disclaimer up front, employees should be required to sign an acknowledgement that basically reiterates the same information as the disclaimer, in addition to expressing their understanding of their responsibility to read the policies and seek any necessary clarification. This acknowledgement form, as well as any updated forms when the handbook is revised, should be retained in the employee's personnel file.

Finally, because the policies in the handbook are not intended to be an enforceable contract, employers should not include provisions in the handbook that are intended to be enforceable, like arbitration agreements, non-disclosure agreements, and other restrictive covenants. Such provisions should be contained in separate, signed documents.

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