SHAWE ROSENTHAL LLP

E-UPDATE

May 31, 2023

RECENT DEVELOPMENTS

The DOL Provides Additional Guidance on the PUMP Act

Following issuance of Frequently Asked Questions and an updated Fact Sheet on the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act) as discussed in our March 2023 E-Update, the U.S. Department of Labor has now released a Field Assistance Bulletin to provide additional clarification on how this new law should be applied.

The PUMP Act expands existing lactation protections for nursing mothers under the Fair Labor Standards Act, as discussed in our December 2022 E-Update. Under the new law, employers are required to provide nursing mothers with a reasonable amount of break time and private space to express milk for up to one year after the child's birth.

The new guidance provides some interesting detail regarding how the DOL intends to interpret an employer's obligations under the Act, including the following points:

Break Time. The DOL emphasizes that employers may not deny a needed pump break, and notes that the frequency, length and timing of the breaks needed will vary depending on the employee's specific situation, as well as other factors like the location of the private space and pump setup requirements. In addition, while the employer and employee may agree to a schedule of breaks, the employer may not insist that the employee adhere to a schedule that does not meet their needs. Moreover, the schedule may require adjustment as the employee's needs change.

Paid Breaks? Pump breaks need not be paid unless required under Federal, state or local law. The FLSA requires that breaks of 20 minutes or less must be paid, and if the employer provides such breaks to its employees generally, nursing employees may use such paid breaks to pump. If extended time or additional breaks are required beyond any generally-provided break, these need not be paid (although the current guidance does not actually state this, the point is expressly asserted in the Fact Sheet), as long as the employee is entirely relieved from work for the whole break.

If the employee is non-exempt (meaning that they are entitled to the minimum wage and overtime protections of the FLSA), any paid break of 20 minutes or less is considered hours worked for purposes of calculating overtime, regardless of whether the employee is using it to pump or not. Unpaid breaks do not count as hours worked. However, if an employee performs any work during the unpaid pump break, the time spent working is hours worked and must be paid.

Exempt employees (those who meet certain job duties tests and are paid a salary of at least $684 per week) must be paid their entire weekly salary, regardless of any pump (or other) breaks.

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

Private Space. The FLSA requires that an employer provide a space for pumping that is: shielded from view; free from intrusion from coworkers and the public; available as needed; and not a bathroom. The DOL states that a temporarily-created space or one that is made available when needed is sufficient to meet this requirement. The employer can ensure the employee's privacy by providing a lock for the door or displaying a sign when in use. In addition, including when teleworking, employees must be free from observation by computer camera, security camera, or web conferencing platform while pumping.

Functional Space. The pumping space must also be functional, meaning that it has a place for the employee to sit and a flat surface other than the floor, on which to place the pump. Employees must also be able to safely store milk at work – this could mean an insulated container, personal cooler, or refrigerator. The DOL notes that the space should "ideally" include access to electricity and a nearby sink.

Space Options. The DOL suggests options for pumping space, such as a vacant office or storage room with a door and covered windows, or creating a space with partitions. If there is more than one nursing employee, employers should consider whether a dedicated space or more than one space is required, or a larger space with privacy screens between employees.

Small Employer Exemption. In addition to exemptions for certain employees of employers that are air carriers, rail carriers, and motorcoach services, the PUMP Act also has an exemption for employers with fewer than 50 employees if compliance causes them an undue hardship. This assessment is made on an individual employee basis, under the particular circumstances. The employer must establish "significant" difficulty or expense of compliance based on its size, financial resources, nature and structure of its business. Because the pump break/space requirement lasts only for a year after the birth of a child, the DOL warns that the exemption will only apply in "limited circumstances."

Remedies for Violations. According to the DOL, an employee whose rights under the law are violated may receive remedies that include employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.

No Retaliation. Employees are protected from retaliation for engaging in protected activity, including requesting or taking pump breaks, or making internal or external complaints of violations – including to the DOL's Wage-Hour Division – of their PUMP Act rights, among other things. Retaliation is any adverse action that would dissuade a reasonable employee from engaging in any protected activity. An example of retaliation provided by the DOL is requiring an employee to make up the time they took for pump breaks and holding that time against them for determining whether they met a sales (or other production) quota.

Posting Requirements. Employers must post the mandatory FLSA notice, which includes provisions on the minimum wage, overtime, child labor, and the PUMP Act. The DOL has just issued a revised version of this poster, as discussed elsewhere in this E-Update.

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

Reasonable Accommodations Are Required as to Employer-Provided Benefits and Privileges of Employment

A recent case highlights and clarifies an oft-overlooked provision of the Americans with Disabilities Act – that employers must provide accommodations not only to enable employees with disabilities to perform the essential functions of their job, but also to enjoy equal benefits and privileges of employment as non-disabled employees. However, according to the U.S. Court of Appeals for the Eighth Circuit, this requirement is limited to those benefits and privileges that are actually provided by the employer.

Background of the Case. In *Hopman v. Union Pacific R.R.*, a conductor requested to bring his service dog on board moving trains as a reasonable accommodation to mitigate the PTSD and migraine headaches resulting from his prior military service. His request was denied due to the dangers of having a dog in that particular work environment, and he sued, arguing that the freedom from mental or psychological pain caused by his PTSD was a privilege of employment. (He did not assert a claim that the service dog would enable him to perform the essential functions of his job and, in fact, received a promotion during the litigation process, indicating that he was successfully performing his job).

The Court's Ruling. The Eighth Circuit, relying on EEOC regulations and guidance interpreting the ADA, held that the "benefits and privileges of employment" refers only to employer-provided services that are offered to non-disabled individuals in addition to disabled ones. It further found that such benefit or privilege does not include freedom from mental or psychological pain, since, as set forth in the EEOC's Interpretive Guidance, the ADA's reasonable accommodation obligation does not extend to accommodations "that are primarily for the personal benefit of an individual with a disability…. [I]f an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide." Thus, according to the Eighth Circuit, "Providing a service dog at work so that an employee with a disability has the same assistance the service dog provides away from work is not a cognizable benefit or privilege of employment."

Lessons for Employers. This case is a good reminder that the reasonable accommodation obligation is not just limited to situations involving an employee's essential job functions. Employers must keep in mind that they must also provide such accommodations to permit employees to enjoy the general, employer-provided benefits and privileges of employment, which may include fringe benefits, as well as access to facilities and recreational programs.

More Drama and Uncertainty for the DOL's 80/20 Tipped Employee Rule

The U.S. Court of Appeals for the Fifth Circuit has reversed a federal district court decision denying a request to preliminarily enjoin a final rule issued by the U.S. Department of Labor that reinstated the 80/20 rule applicable to tipped employees and further limited the amount of an employee's non-tipped work time for which the employer may take a tip credit. Given this ruling, it is likely the federal district court will soon issue a preliminary injunction that will prevent enforcement of the rule.

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

Tipped Employees and the Tip Credit. Under the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour) and counting a limited amount of its employees' tips (no more than $5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage. (Notably, many states have enacted higher minimum wage rates, including for tipped employees, or have eliminated the tipped rate altogether). This partial credit is known as the "tip credit." Tipped employees are those who customarily and regularly receive more than $30 per month in tips (including servers, bartenders, and nail technicians). The DOL has recognized that many tipped workers serve in a "dual jobs" situation, in which they are employed in both a tipped and non-tipped occupation. The tip credit may be applied only against the time spent in the tipped occupation.

The 80/20 Rule. Prior to the Trump administration, the DOL took the position that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on those duties exceeded 20% of the employee's workweek. This rule, known as the 80/20 rule, was rejected by the Trump DOL, which issued formal regulations providing that an employer may take a tip credit for any amount of time (without limitation) that an employee in a tipped occupation performs related non-tipped duties contemporaneously with their tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

Immediately following the transition, the Biden DOL delayed the effective date of the Trump-era regulations. It then issued a final rule asserting that work that is part of the tipped occupation is the work that produces tips as well as a non-substantial amount of work that assists the tip-producing work. With regard to the assisting work, DOL reinstated the 80/20 rule with some modification. The final rule provided that if an employee performs work that directly supports tip-producing work either exceeding 20 percent of all of the hours worked during the employee's workweek or (this is new) exceeding 30 continuous minutes, the employee is not performing labor that is part of the tipped occupation, and the employer may not take a tip credit for that time.

Background of the Case. Several restaurant associations immediately challenged the new final rule in *Restaurant Law Center v. DOL*. The associations requested a nationwide preliminary injunction to prevent the rule from taking effect while the merits of the case were litigated. The federal district court denied the request for a preliminary injunction, finding that the associations failed to make the necessary showing that they would suffer irreparable harm if the injunction were not granted.

The Court's Ruling. The Fifth Circuit, however, found that the associations had, in fact, demonstrated irreparable harm. Specifically, the DOL had acknowledged that there would be ongoing compliance costs for employers "to ensure that tipped employees are not spending more than 20 percent of their time on directly supporting work per workweek, or more than 30 minutes continuously performing such duties." In particular, the new 30-minute limitation requires additional recordkeeping obligations. The Fifth Circuit went on to state that, "The nonrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm." It then remanded the case to the federal district court with the clear expectation that the district court "will proceed expeditiously" with reconsideration of the request for preliminary injunction in line with the Fifth Circuit's ruling. Thus, we can expect a nationwide preliminary injunction to issue shortly.

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

TAKE NOTE

No Harm, No Foul for Employer's Technical Non-Compliance with FMLA's Notice Requirements. According to the U.S. Court of Appeals for the Eleventh Circuit, "an employee doesn't suffer harm from an employer's technical non-compliance with the Family and Medical Leave Act's notice requirements when she receives all her requested time off and is paid for her absences."

The FMLA provides up to 12 weeks of leave to care for a family member with a serious health condition, among other reasons, and employers are prohibited from interfering with employees' rights under the Act. Employers have various notice obligations to employees under the FMLA. In particular, employers must provide employees with an "eligibility notice" and a "rights and responsibilities notice" (for which the Department of Labor has provided models) when an employee requests leave or when the employer becomes aware that an employee's leave may be for an FMLA-qualifying reason. The employee does not have to specifically mention "FMLA" for the notice obligation to be triggered.

In *Graves v. Brandstar, Inc.*, an employee told her employer that she needed several days of leave to care for her father while he underwent emergency surgery. This leave was FMLA-qualifying, but the employer failed to provide the required notices. The employee argued that this failure constituted unlawful interference with her FMLA rights. In order to sustain an "interference" claim, a plaintiff must show that they were entitled to a benefit under the FMLA, that they were denied the benefit, and that they experienced harm as a result. In this case, because the employee received all the leave she requested, with pay, the Eleventh Circuit found that she suffered no harm from the employer's technical failure to provide the required notices and rejected her claim.

Although the ruling was good news for the employer, we note that the failure to provide notice was still problematic, in that the employer incurred significant costs and spent a great deal of time to defend against the claim. Thus, the real lesson here is that employers must make sure that they understand and recognize when notices are required, and then provide the required notices in a timely manner.

This case also illustrates another point of interest. The employee also sent an email requesting flexibility to prepare her home for her father's move, and she contended that this also triggered the notice requirements. The Eleventh Circuit noted, however, that an employee must actually seek leave of some sort – which did not happen here – in order to trigger the notice requirements.

WARN Act Notice Requirements Apply to Operating Units Within a Single Site of Employment. A recent case from the U.S. Court of Appeals for the Second Circuit provides clarification of when an operating unit exists for purposes of requiring advance notice of job loss under the federal Worker Adjustment and Retraining Notification (WARN) Act.

The WARN Act requires employers of 100+ full-time employees to give 60 calendar days' notice of plant closings and mass layoffs. A "plant closing" is defined as a permanent or temporary shutdown of a single site of employment – the more common situation – but also of an operating unit within a single site of employment. And the regulations further define an "operating unit" as "an organizationally or operationally distinct product, operation or specific work function."

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

Whether workers constitute an operating unit is a fact-specific analysis, for which the critical factor is the organization or operational structure. The obligation to provide notice is triggered when the number of impacted employees exceeds a certain threshold or percentage of the total number of employees at the site or within the unit.

In *Roberts v. Genting New York LLC*, a casino closed its buffet. The impacted workers sued for failure to provide them with a WARN Act notice. The casino argued that the buffet was not a "single site of employment" nor an "operating unit," pointing to the fact that the buffet depended on the casino's centralized services, including supplies, storage, cleaning, human resources, legal issues, payroll, insurance, and accounts payable. The Second Circuit disagreed, rejecting the interpretation that an operating unit encompasses only entities that could exist independently.

Other factors that the Second Circuit also reviewed included the physical location of the buffet, whether it offered an experience distinct from other dining options at the casino, the staffing arrangements, and uniforms. Some of these factors favored a finding of an operating unit and some did the opposite. The Second Circuit noted that other factors could also come into play. On the whole, however, the Second Circuit found it was possible that a fact-finder could determine that the buffet was a distinct operating unit, thereby triggering the WARN Act notice obligation.

Employers that are considering a reduction in force or other mass layoff of particular departments or functions must be careful to consider whether those groups could be deemed an operational unit for purposes of triggering WARN Act obligations.

No Playing Around with Pay Rates to Avoid Overtime Liability! Employers may explore creative ways to reduce staffing costs; however, changing an employee's pay rate to avoid overtime liability is not a legal one, as the U.S. Court of Appeals for the Eleventh Circuit recently emphasized.

As most employers know, the Fair Labor Standards Act imposes an overtime requirement for non-exempt employees, meaning that any hours worked over 40 in a workweek must be paid at 1½ times the employee's regular hourly rate. In *Thompson v. Regions Security Services, Inc.*, a security guard typically worked 40 hours a week. However, after the employer started scheduling him to work overtime, it reduced his hourly rate from $13.00 to $11.15. The result of this was that his effective hourly rate for all hours worked, including overtime, ended up being the same – around $13.00 – as his prior, higher hourly rate. About a year later, the company stopped scheduling the guard for overtime work and restored his hourly pay rate to $13.00. The guard sued, alleging that the employer had adjusted his pay to avoid paying the required overtime rate on his actual rate of pay.

While employers can reduce an employee's pay rate for legitimate business-related reasons, like a loss of business or a downturn in the economy, they cannot do so simply to avoid paying the overtime premium. In fact, the FLSA regulations contain a provision stating that an employee's regular rate cannot" vary from week to week inversely with the length of the workweek." The Eleventh Circuit noted that this provision "prevents an employer from playing with an employee's hours and rates to effectively avoid paying time-and-a-half for an employee's overtime hours. Otherwise an employer could use 'simple arithmetic' to lower an employee's rate and increase his hours so that he could never earn time-and-a-half pay – 'no matter how many hours he worked.'"

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Prescription/Legal Drug Policy Does Not Necessarily Result in Disability Discrimination. In some good news for employers, the U.S. Court of Appeals for the Third Circuit found that a relatively common policy prohibiting the misuse of prescription or over-the-counter (OTC) drugs did not discriminate against employees with disabilities.

In *Lehenky v. Toshiba American Energy Syst. Corp.*, an employee who was using CBD oil to treat a disability tested positive for THC and was fired for using illegal drugs, in violation of the employer's policy. (Although CBD oil is not supposed to contain THC over a certain threshold, because it is unregulated, some oils do contain sufficient levels of THC to trigger a positive test result.) She sued, alleging among other things that the employer's drug policy discriminated against employees with disabilities.

Under the Americans with Disabilities Act (and other employment discrimination laws), a policy or practice that is neutral on its face can still violate the law by impacting those with a disability (or other legally protected characteristic) more severely than those without – i.e. it has a "disparate impact." But an adverse impact does not necessarily result in a violation of the law – as long as the employer can show that the policy or practice is "job-related and consistent with business necessity," and that there is no less discriminatory alternative available.

Here, the employer's policy prohibited the improper use of prescription and OTC drugs, and required employees taking such drugs to be able to provide appropriate documentation to support the proper use. The inability to do so would result in a presumption of illegal use. The Third Circuit found that this requirement applied equally to employees with and without disabilities, and that there was nothing to suggest that employees without disabilities are more capable of producing the necessary documentation. Therefore, the policy did not adversely impact those with disabilities – a helpful finding for employers with similar policies.

As a side note, the policy also required employees to report their use of such drugs to Human Resources, and the failure to do so could result in disciplinary action. While the Third Circuit apparently had no issue with this requirement, employers should be aware that the Equal Employment Opportunity Commission takes a different perspective. According to the EEOC, asking all employees to disclose their prescription medications violates the ADA. While the EEOC's medical inquiries guidance would allow employers to require only public safety employees to report prescription drug use that may pose a direct threat of harm, courts more generally have permitted employers to require reporting of such use where it may impact the employee's ability to safely or effectively perform their job.

No More COVID? NLRB GC Revises Manual Election Procedures. With the declared end of the COVID-19 national and public health emergencies, the General Counsel of the National Labor Relations Board has revised the protocols for manual (i.e. in-person) elections.

In July 2020, the GC issued a memo, GC 20-10, that provided guidelines for conducting elections during the pandemic. Traditionally, manual elections are strongly favored, but mail ballot elections were permitted more often in light of COVID-19. But with the end of the COVID-19 emergency declarations, the GC now suggests the following manual election protocols going forward:

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

- Individuals should not participate in an in-person election or related meetings if they have symptoms of COVID-19.
- If an individual who has participated in an in-person election/meeting develops COVID-19 symptoms within 10 days, they should notify the assigned Board Agent.
- If the CDC or local/state authority determines that masks are necessary in the area where the election takes place, all individuals must wear a mask. If required and the NLRB Region or the employer has masks available, they are encouraged to offer them to the election participants. If masks are not required, participants may choose whether to wear them.
- Participants are encouraged to maintain reasonable physical distance, avoid overcrowding, and use hand sanitizer.

Federal Contractors – There's a New Mandatory Voluntary Self-ID of Disability Form. The Office of Federal Contract Compliance Programs has revised the mandatory (for federal contractors) Voluntary (for applicants and employees) Self-Identification of Disability Form, which must be implemented by July 25, 2023.

Federal contractors are required to invite applicants to self-identify as an individual with a disability prior to making a job offer, as well as after an offer has been extended. The invitations can be made at the same time as the pre-offer invitation to self-identify as to gender and race required by Executive Order 11246 (applicable to service and supply (sub)contractors) and both the pre-offer and post-offer invitations to self-identify as to protected veterans' status under VEVRAA.

In addition to applicants, federal contractors must also invite current employees to voluntarily self-identify as to disability every five years, using the same form.

Unlike the invitations to self-identify as to race, gender, and veterans' status, the OFCCP's disability form must be used exactly as is, with the exception of the "For Employer Use Only" section. Please recall that these forms should not be retained with the application or in a personnel file, but maintained in a separate confidential file.

The DOL Has a New Website to Provide Workplace Mental Health Resources. Mental health issues have become increasingly prevalent in the workplace. In recognition of Mental Health Awareness Month, the U.S. Department of Labor has announced a new website with resources to assist employers in legal compliance and in creating supportive workplaces.

Specifically as to employers' obligations under the law, the website contains links to a factsheet on the use of Family and Medical Leave Act leave for mental health conditions, and various guidance on accommodations for those with mental health conditions, as well as guidance on what questions employers may ask about employees' mental health conditions. In terms of creating a supportive workplace, the website has links to various toolkits, posters, and other resources. The website also provides tools for workers (as well as unions and worker organizations) to address their mental health needs and to educate them on their rights. There are also links to the DOL's videos and blog posts on the topic.

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

NEWS AND EVENTS

Honor – We are delighted to announce that our co-Managing Partner Teresa Teare was selected to be a Fellow of the Maryland Bar Foundation. Fellowship in the Foundation is by invitation only and is restricted to outstanding Maryland attorneys and judges not exceeding two and one-half percent (2.5%) of membership of the MSBA.

Webinar – On May 3, 2023, Fiona Ong and Chad Horton, along with the Maryland Chamber of Commerce's Senior Vice President of Government Affairs Andrew Griffin explained and provided guidance on complying with Maryland's newest employment laws, including an expedited increase of the minimum wage, revisions to the paid family and medical leave program, and an expansion of the ban on non-competes for lower-wage workers. You may view a recording of the webinar here.

Vlog – Chad Horton was the presenter for the Employment Law Alliance's Employment Matters Vlog #25 – New Employment Laws in Maryland. The Employment Law Alliance is a comprehensive global network of leading local labor, employment and immigration attorneys, of which Shawe Rosenthal is the Maryland member.

Appointment – Fiona Ong was re-appointed General Counsel of the Maryland Chamber of Commerce and will serve on the Executive Committee. She is the first minority and second woman to serve in this position, following Elizabeth Torphy-Donzella. The Chamber is the leading voice for businesses in Maryland.

TOP TIP: Employers – It's Time to Update Your Mandatory FMLA and FLSA Posters!

The U.S. Department of Labor has revised its mandatory posters under the Family and Medical Leave Act and the Fair Labor Standards Act, and employers will need to take action to remain in compliance with their posting obligations under these laws.

FMLA Poster. Employers who are covered by the FMLA (meaning private employers with 50 or more employees within a 75-mile radius, as well as public and private schools, among others) are required to display a DOL notice that informs employees of their rights under that law. Failure to do so may result in a fine.

The DOL has revised its mandatory poster, which can be accessed here. However, it states that the February 2013 and April 2016 versions of the poster still fulfill the posting requirement. The information has been reorganized, with the following additions:

- Deletes bonding leave as a reason for leave (which was redundant of the leave for the birth/adoption/foster placement anyway)
- Clarifies that employees are entitled to use leave in a single block (and may be permitted to use it intermittently as medically necessary or otherwise permitted)
- Emphasizes that FMLA is not paid leave (although paid leave may run concurrently, at the option of the employee or as required by the employer)
- Adds that reinstatement to the same or virtually identical job includes shift and location.
- With regard to the eligibility factors, adds that the employee must work for a covered employer, and provides a new definition of who is a covered employer

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

- States that the employee must follow the employer's normal procedures for requesting leave
- Adds a new paragraph for state, federal and Congressional employees.

FLSA Poster. Every employer with employees who are covered by the Fair Labor Standards Act's minimum wage provisions (meaning non-exempt employees) must post a DOL notice explaining the Act, including minimum wage, overtime and child labor provisions. The poster has been revised to include obligations under the new Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act), which expands existing lactation protections for nursing mothers under the Fair Labor Standards Act, as discussed in our December 2022 E-Update. Unlike the FMLA poster, older versions of this poster will not satisfy the posting obligation. A copy of the revised FLSA poster can be downloaded from the DOL's webpage here.

Where to Post. Both the FMLA and FLSA require that the required notices be displayed in a "conspicuous" location in each establishment. In other guidance, the DOL states that electronic posting is sufficient if (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer by electronic means, and (3) all employees have readily available access to electronic posting at all times. In other words, if any employees work on-site, electronic posting alone will not be sufficient.

RECENT BLOG POSTS

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

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- Employers Beware: The End of the COVID-19 Emergency Does Not Mean The End of the EEOC's COVID-19 Guidance by Fiona Ong, May 16, 2023
- Menstrual Leave Redux by Fiona Ong, May 12, 2023
- NLRB Returns to More Lenient Standard for Employees' Abusive and Profane Misconduct by Chad Horton, May 5, 2023

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(410) 752-1040 www.shawe.com