SHAWE ROSENTHAL LLP

# E-UPDATE

August 31, 2023

## RECENT DEVELOPMENTS

### NLRB Decisions Restrict Unionized Employers' Ability to Act Unilaterally

In two companion decisions issued on August 30, 2023, the National Labor Relations Board (the Board) severely eroded unionized employers' ability to unilaterally act in accordance with their past practice. The Board concluded in these cases that an employer will violate Section 8(a)(5) of the National Labor Relations Act (which requires the employer to bargain collectively with the union) if, during bargaining, its actions (1) involve a "large degree" of discretion, or (2) were premised on a right to act unilaterally provided for by a since-expired management-rights clause in a collective-bargaining agreement (CBA). The decisions overruled the Board's 2017 holding in Raytheon Network Centric Systems, which afforded employers the ability to make unilateral changes impacting its unionized workforce during negotiations for a first CBA or during a contractual hiatus when no agreement is in effect.

**Background.** In the 2017 Raytheon decision, a Board majority addressed when a unionized employer may act unilaterally while no CBA is in effect – for example, during negotiations for a first contract or following the expiration of an agreement. There, the Board first held that an employer may unilaterally change employees' terms and conditions of employment even if the decision includes the exercise of discretion, provided the change was "similar in kind and degree" to changes made in connection with the employer's past practice. Second, Raytheon also stands for the proposition that a past practice developed pursuant to a bargained management-rights (or similar) clause permitting an employer's discretionary unilateral action permits further unilateral action even following the expiration of the CBA containing the clause. Put simply, the decision permitted employers to act unilaterally in a way it had previously done so; that is, provided it was consistent with a past practice.

**The Wendt Decision.** In Wendt Corp., the Board overruled the first Raytheon case. The Board majority concluded the kind-and-degree standard is inconsistent with the Supreme Court's 1962 holding in NLRB v. Katz, which the Board majority declared stood for the proposition that unilateral action violates the NLRA if it involves a "large measure" of discretion, even if such a change was part of a longstanding practice.

The Board reinforced that employers relying on established past practice for unilateral action must prove (1) the practice occurs with "regularity" and "frequency" such that employees can reasonably expect the practice to continue or reoccur on a "consistent" basis, and (2) that the established practice relied upon does not involve the exercise of significant managerial discretion. On the latter


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point, the Board will find unilateral change lawful only where it was "fixed by an established formula containing variables beyond the employer's immediate influence… [and] resulted from nondiscretionary standards and guidelines." The Board offered the example of where an employer maintains an 80/20 cost-sharing framework for health insurance, even if the employee's total cost of health insurance increases.

In this case, the Board found that, notwithstanding previous layoffs, the employer's temporary layoff of bargaining unit employees while negotiating a first contract was neither "regular" nor "frequent," and involved significant management discretion. Thus, the Board held that the layoffs, which were imposed during negotiations for a first bargaining agreement, violated Section 8(a)(5) of the Act.

The Board also held that an employer may never rely on a past practice of making a unilateral change that pre-dates union representation of the employees. The Board majority opined that permitting an employer to continue to act unilaterally following recognition or certification of a union is "antithetical" to the NLRA and, if permitted, would tell employees "that choosing union representation changes nothing with respect to the employer's ability to act unilaterally…"

**The Tecnocap Decision.** In Tecnocap LLC, the Board overruled a portion of Raytheon not addressed in Wendt. Specifically, the Board overruled Raytheon's holding that a past practice developed under a bargained management-rights clause authorizing discretionary unilateral action is a term and condition of employment and therefore the past practice would survive the expiration of the CBA. Now, the employer's ability to act unilaterally concerning such subjects will expire with the CBA, and the employer may not rely upon such previous unilateral action as a "past practice" permitting unilateral action after the CBA expires.

Here, the employer unilaterally imposed 11- and 12-hour shifts following expiration of the parties' CBA. The expired CBA's management-rights clause permitted the employer to unilaterally alter shift lengths, times, and days. However, the Board held that the employer did not have the right to unilaterally alter shift lengths following the expiration of the parties' CBA that afforded such a right even when the employer had an established past practice of making such changes.

**Employer Takeaways.** These two decisions provide some guidance to employers:

- When determining whether it should act unilaterally pursuant to a past practice, an employer should soberly assess how "regular" and "frequent" the practice was engaged in by the employer. But even if the practice was regular and frequent, if it involves a "large degree" of discretion – rather than application of a formula or some other automatic trigger – the change will be unlawful if implemented during, for example, bargaining with a union for an initial contract.
- For newly-unionized employers, your past practices prior to becoming unionized are effectively irrelevant. Put simply, that type of past practice argument was confirmed to be foreclosed by the Wendt decision.
- Unionized employers with established bargaining relationships will not be able to rely upon past practice born out of a provision in a management-rights clause when the CBA expires – even if it is the type of change employees would reasonably expect to reoccur.


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There can be no doubt that these decisions hamstring employers' ability to unilaterally act concerning any subject for which it had a past practice if that practice involved the exercise of even a modicum of discretion. A bad week for employers at the Board just got much worse, particularly for unionized employers.

## Immediate Action for Employers After NLRB's Cemex Decision on Union Organizing

The NLRB's August 25, 2023 *Cemex* decision drastically changed the rules concerning union organizing, as we discussed in detail in our August 28, 2023 E-lert. Under the new rules, if an employer does not file an "RM" petition with the NLRB within two weeks of receiving a demand for recognition from a union, the NLRB can order the employer to recognize and bargain with the union as representative of its employees. If you do not know what demand for recognition is, or how to file an "RM" petition with the NLRB, you're not alone. The new rules are a huge pitfall for the unwary. It remains to be seen whether the new rules will survive judicial review. In the meanwhile, non-union employers who want to remain that way should take the following immediate actions.

**Train managers and supervisors on what to do if they receive a demand for recognition.** There is no prescribed format for a demand for recognition. It can be any communication that the union represents a majority of employees and seeks to engage in collective bargaining. If a union organizer makes a demand for recognition, take the document but do not engage in discussion or agree to anything. The demand should be reported to senior management immediately. Just sending an email or leaving a voicemail is not sufficient. Do not rest until the report is received and acknowledged by a senior official. If a union organizer offers to show you authorization cards, do not look at them. This training will need to be given when new supervisors and managers are appointed.

**Establish a channel for reporting union activity to senior management.** The Company should appoint a senior official in HR or the law department to whom any such demands should be reported. Such reports should not be short-stopped by staff. They should go to senior management immediately.

**Train managers and supervisors on the PITS.** Many things that a supervisor or manager would naturally do in response to union organizing are unfair labor practices that could result in unionization, without an election or even if employees rejected the union in an election. The prohibited actions include:

- **Promises**. You cannot promise changes to persuade employees not to support a union.
- **Interrogation**. The NLRB prohibits questions such as who supports the union or why employees support the union.
- **Threats.** You cannot threaten employees about the consequences of supporting the union. Threats include making dire predictions such as if the union gets it, management will probably close this place.
- **Surveillance**. You cannot spy on union activity. You cannot even suggest that you know about it. "Impression of surveillance" is also an unfair labor practice.


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The PITS are the most important rules, but there are others that managers and supervisors must follow. The rules should be covered at greater length in a training session.

**No retaliation.** One way to get into deep trouble fast is to fire or lay off employees in retaliation for union activity. It often happens that the union supporters are problem employees, but disciplinary action against them for performance reasons requires careful consideration and legal review in advance. Other actions, such as layoff and reorganizations, are at risk after a demand for recognition.

**Clean up handbooks and policies**. The NLRB has become unreasonably strict about policies that an employee might read as restricting union activity. The NLRB's reading of policies has become so unnatural that only a labor law specialist would be able to discern the issue. For instance, the NLRB has attacked policies that employees should not discuss complaints of harassment with other employees pending investigation and policies restricting use of cell phones in the workplace.

**Connect with a labor lawyer in advance.** If you are a client of Shawe Rosenthal LLP, you are already in good hands. If not, you should connect with us or another experienced labor law firm that you can call immediately upon receiving a demand for recognition for further advice. Many "employment" lawyers are not versed in practice before the NLRB. You need a law firm with experience handling representation and unfair labor practice cases before the NLRB.

**Follow Up.** The above is not a complete list of best practices to avoid unionization, it is just a list of immediate action items so that the employer is not ordered to bargain with a union without a chance to oppose the union in a secret ballot election. In the long run, the best way to avoid unionization is to provide fair and competitive wages, benefits and working conditions.

## "Ultimate" Employment Actions May Not Be Necessary to Establish Title VII Liability

In order to establish a discrimination claim under Title VII, an employee must show, among other things, that they suffered some "adverse employment action." Traditionally, courts have interpreted that to mean some "ultimate employment decision" (typically involving a direct economic impact, such as a lack of promotion or a termination). But a recent ruling from the U.S. Court of Appeals for the Fifth Circuit, as well as other sister Circuits, has broadened the definition of what constitutes an actionable adverse employment decision. This means that employers may now face greater risk of liability under Title VII.

**Case Background.** In *Hamilton v. Dallas County*, the Dallas County Sheriff's Department allows officers to select two days a week to be off; men were allowed to choose two weekend days while women were not. Nine female officers sued, alleging that the sex-based scheduling policy violated Title VII. But because the scheduling policy did not constitute an "ultimate" employment action under prior Circuit law, a three-judge panel of the Fifth Circuit upheld the trial court's dismissal of the case. In so doing, however, the panel noted that this case was the "ideal vehicle" for the *en banc* (or entire) Fifth Circuit to reconsider its adherence to the "ultimate employment decision" requirement.


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**The Fifth Circuit's Decision.** Taking up the call, the *en banc* court stated:

> Today we hold that a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the "terms, conditions, or privileges" of her employment. She need not also show an "ultimate employment decision," a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias. Here, giving men full weekends off while denying the same to women—a scheduling policy that the County admits is sex-based—states a plausible claim of discrimination under Title VII.

The Fifth Circuit noted that the "ultimate employment decision" analysis was based on a misinterpretation of the case in which it originated and ignores key language in the law. Characterizing it as lying on "fatally flawed foundations," the Fifth Circuit rejected this standard in favor of one in which "a plaintiff need only allege facts plausibly showing discrimination in hiring, firing, compensation, or in the 'terms, conditions, or privileges' of his or her employment." As applied to the current case, the sex-based scheduling policy falls within the catch-all provision, as the hours one works "are quintessential 'terms or conditions' of one's employment.

The Fifth Circuit cautioned, however, that the harm must be more than de minimis, as Title VII is not "a general civility code for the American workplace." The Fifth Circuit chose not to establish at this time the "precise level of minimum workplace harm a plaintiff must allege on top of showing discrimination in one's 'terms, conditions, or privileges of employment.'" Rather it noted that, whether this means the harm must be "tangible," "objective," or "material" (which are standards articulated by other Circuits), the allegations about the sex-based scheduling policy would meet any of these standards.

**Lessons for Employers.** In so holding, the Fifth Circuit joins a number of sister Circuits that have similarly rejected an "ultimate employment decision" standard, including the Second (as we discussed in our April 2023 E-Update), Fourth, Sixth, Ninth, Eleventh and D.C. (as discussed on our June 2022 E-Update) Circuits. The lesson for employers is that the traditional discrimination landscape is changing, and that they may now face liability under more relaxed standards. It is important for employers to ensure that policies are not discriminatory, even if they do not result in "ultimate employment decisions."

## Warning – Cooperation Between Federal Agencies Means More Liability for Employers!

In our January 2022 E-Update, we discussed a memorandum of understanding (MOU) between the National Labor Relations Board and the U.S. Department of Labor to facilitate information sharing, referrals, joint investigations, and enforcement, and predicted that employers would face more aggressive agency activity. And that is the case, as evidenced by a recent NLRB press release.

**Background of the Case.** A worker called the DOL's Wage and Hour Division to complain that he and several other co-workers had not received their wages on their regular payday. Following contact by an DOL-WHD investigator, a supervisor identified the worker responsible for the complaint, stating "there would be consequences." The worker was then summoned to a meeting with a manager and human resources, where he was questioned about a number of issues, including


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the DOL complaint. He was then terminated, ostensibly for violations of various policies about which he had never been previously warned.

**The ALJ's Decision.** The NLRA protects employees' rights to engage in concerted activity about their terms and conditions of employment. The NLRB GC argued, and an NLRB Administrative Law Judge agreed, that the worker engaged in such protected concerted activity, when he called the DOL-WHD to complain about the employer's failure to pay wages. The ALJ further found that the employer failed to show that it would have fired the worker absent his protected concerted activity.

**Lessons for Employers.** As we noted previously, this type of cross-agency cooperation has been rare up until this point. But now, The NLRB's press release specifically noted the coordination between the NLRB and the DOL in this case. Thus, employers should be prepared to face enforcement activity from the NLRB where an employee's complaint to the DOL or other agencies like the Equal Employment Opportunity Commission involve issues impacting more than the one employee.

**Minor Impairments ≠ Disabilities, and Minor Annoyances ≠ Retaliation.** These were the points recently made by the U.S. Court of Appeals for the Fourth Circuit in finding that an employee was not disabled within the meaning of the Americans with Disabilities Act and that he did not experience retaliation for requesting an accommodation.

**Background of the Case.** In *Israelitt v. Enterprise Services LLC*, the employee had an arthritic big toe. But he did not receive medical care for the condition, did not use any assistive device to walk, and walked 30-45 minutes several times a week for exercise. He made two accommodations requests for his toe – for a hotel room at a conference to avoid a commute that might aggravate his toe condition, and to be listed as a driver on a rental vehicle during a proposed work trip. He was subsequently excluded from the conference and trip, and taken off certain daily calls. After he was terminated for performance issues, he sued, alleging discrimination and retaliation in violation of the ADA.

**No Minor Impairments.** The ADA prohibits discrimination on the basis of disability, and defines disability as "a physical or mental impairment that *substantially limits* one or more major life activities," (the court's emphasis) which include walking. This definition had been interpreted restrictively, and in amending the ADA in 2008, Congress directed that it should be "construed in favor of broad coverage of individuals." As the Fourth Circuit noted, however, "Congress made the coverage broad, not universal."

But what are the parameters of that coverage? The Fourth Circuit acknowledged that it had not previously decided that question. But now, applying clear dictionary definitions, it found that "substantially" means "considerable" or "to a large degree" – and certainly does not mean "minor." While it acknowledged that an arthritic toe could substantially limit *someone's* mobility, it did not limit this employee's ability to walk in any "non-minor way," particularly since the record showed he often walked unassisted for lengthy periods of time.

**No Minor Harm.** As for the retaliation claim, the Fourth Circuit noted that, under Supreme Court precedent, it requires a showing that the employee suffered a "materially adverse" action that would have dissuaded a reasonable worker from taking a protected action – such as requesting reasonable


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accommodation or filing a discrimination claim under the ADA. The Fourth Circuit explained that this means that there must be some "significant detriment to the employee," meaning more than "petty slights, minor annoyances and simple lack of good manners." Here, the employee claimed that he was excluded from daily calls and two work trips, which the Fourth Circuit found did not cause him significant harm, and therefore were not adverse enough to qualify as unlawful retaliation.

**No Jury Trial for ADA-Retaliation Claim.** Of interest to attorneys, the Fourth Circuit also ruled that there is no right to a jury trial for an ADA-retaliation claim. The ADA itself provides no right to trial by jury. The Seventh Amendment, however, extends the right to a jury trial to all lawsuits where "legal" rights are involved and legal remedies are available. The Fourth Circuit found, however, that only *equitable* remedies are available for ADA-retaliation claims – meaning that the right to a jury does not apply to such claims. (Note that legal remedies are available for ADA discrimination and failure to accommodate claims, and therefore jury trials are applicable there).

**Lessons for Employers.** This case is helpful in confirming that minor mental or physical impairments do not constitute disabilities that trigger the protections of the ADA. It also reinforces that retaliation claims must be based on actions resulting in significant harm. Not everything that the employee dislikes will be a violation of the law.

## TAKE NOTE

**The NLRB Affirms Its Test for When Adverse Action Is Motivated by Protected Conduct.** In *Intertape Polymer Corp.*, the National Labor Relations Board (the Board) reaffirmed the standard it will apply when determining whether an adverse employment action was motivated by employee conduct protected by the National Labor Relations Act (NLRA). Under the *Wright Line* test, the NLRB General Counsel bears the initial burden of establishing that (1) the employee was engaged in union or other protected activity, (2) the employer knew of that activity, and (3) the employer had animus for the union or other protected activity. If the General Counsel sustains this initial burden, the burden shifts to the employer to establish it would have taken the same action irrespective of the union or other protected activity.

The Board explained that a 2019 decision in *Tschiggfrie Properties, Ltd.* created unnecessary confusion by purporting to clarify the *Wright Line* standard. The 2019 decision suggested that the General Counsel must show that the animus was specifically directed toward the impacted employee's own union or protected activities. The Board's decision in *Intertape Polymer* specifies that either direct or circumstantial evidence can support a finding of animus, and that there is no requirement that the demonstrated animus be specifically directed at the impacted employee's own protected conduct.

**No FMLA Violation for Requiring Employees to Catch Up on Their Assigned Work.** An employee can be required to catch up on work that they did not perform while on FMLA leave, according to the U.S. Court of Appeals for the Third Circuit. But employers should not impose such expectations unreasonably.

Under the FMLA, when an employee returns from leave, they must be restored to the same or equivalent position, meaning one that is virtually identical in terms of pay, benefits, and working conditions. In *Drizos v. PNC Investments LLC*, a financial adviser took a three-month FMLA leave,


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during which time others managed his portfolio of accounts. However, approximately 70 accounts became delinquent. When he returned, he was directed to bring those delinquent accounts up to date. He did not ask for assistance, and his manager gave him multiple extensions to complete the work. Following his termination for multiple violations of the call-in policy, he sued for violations of the FMLA, including a claim that the employer allowed his work to accumulate during his leave and then required him to complete it upon his return, which significantly increased his workload such that he did not return to an "equivalent" position.

The Third Circuit rejected the employee's argument, stating that, "The FMLA provides that an employer must reinstate an employee to an equivalent position after leave, not that their leave has no impact on their work." The Third Circuit found that asking the employee "to perform tasks that he traditionally performed but had accumulated in his absence, while receiving the same pay and in the same position and multiple extensions to complete this work, does not constitute interference under the FMLA."

While this case is good news for employers (in the Third Circuit, but perhaps also elsewhere) in affirming that they do not have to excuse employees from doing work that was left undone during their FMLA leave, they should also be mindful that requiring such catch-up work should be subject to reasonable conditions. It could very well be a violation of the FMLA if the catch-up work meant that the employee had to work longer hours or had some other negative impact on their working conditions. In this case, it was important that the employer provided enough time – with multiple extensions – for the employee to accomplish the work. And had the employee asked for assistance, it would have been sensible for the employer to try to work out some reasonable way to help the employee perform the catch-up work.

**Be Careful – A Time Clock Rounding Policy Can Result in FLSA Liability!** Although the Fair Labor Standards Act regulations permit employers to round off employees' start and stop times for administrative ease, this process may still result in liability for employers, as the U.S. Court of Appeals for the Eighth Circuit recently held.

The FLSA requires employers to pay non-exempt employees for all time worked, and for overtime when the employees work more than 40 hours in a week. Employers must therefore keep accurate records of the actual time worked by non-exempt employees. This can be accomplished through automated timekeeping systems, like time clocks. An FLSA regulation provides as follows:

> It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

In *Houston v. Saint Luke's Health System, Inc.*, the employer used an automated timekeeping system that applied a rounding policy, such that an employee's clocked time within six minutes of a shift's


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scheduled start or end time was rounded to the scheduled time. An employee brought suit on behalf of a class of similarly situated employees alleging that this practice violated the FLSA by failing to fully compensate employees for time worked. The federal district court dismissed the case on the basis that the employer had a facially neutral rounding policy, as permitted under the FLSA regulation.

On appeal, however, the Eighth Circuit found that, although facially neutral, in practice the policy resulted in employees being underpaid more than they were overpaid – and thus the payments did not average out in the long run. The Eighth Circuit declined to resolve whether an employer violates the rounding regulations when it undercompensates any individual employee over time, or only when it undercompensates employees as a whole – instead finding that, here, the rounding policy did both.

What this means is that employers should not blindly rely on a rounding policy for compliance with the FLSA. The regulation itself provides that such a policy cannot result in under compensation over time. Thus, employers with such policies should regularly audit the application of the policy to confirm that they are in fact achieving a neutral average over time. Moreover, as the Eighth Circuit noted, in this day and age of electronic timekeeping systems, it is quite simple to calculate the exact amount of time worked – unlike "the old days of punch cards and hand arithmetic." That begs the question of whether rounding policies should be used at all.

**What Is a Staffing Company's Liability for Harassment of Their Employees by the Client?** A recent case from the U.S. Court of Appeals for the Fifth Circuit provided some guidance on this question – and the answer turns on what the staffing company knew or should have known. (By the way, a client company can be liable for such harassment as a joint employer of the staffing company workers if it exercises sufficient control over their employment).

In *Arredondo v. Elwood Staffing Services, Inc.*, two staffing company workers were assigned to a client company, where both were sexually harassed and one was sexually assaulted by a senior employee of the client company. One of the workers complained to the client employer and was fired following an investigation in which the client company determined the staffing company worker was at fault. She then reported the harassment to the staffing company, who told her to apply for another placement on its website, which she did not do because none of them met her criteria. The other worker resigned, and then told the staffing company of the harassment and assault. The staffing company contacted the client company, which conducted an investigation that resulted in the firing of the harasser. The workers sued both the client company and the staffing company under Title VII. The federal district court found that the staffing company could not be held liable for the harassment, although the client company could.

On appeal, the Fifth Circuit determined that the staffing company did not take any adverse action itself against the first worker, since it was not the one to fire her and it also directed her to apply for another placement. Moreover, the staffing company could only be liable for harassment by a client company employee of which it knew or should have known, and where it failed to take corrective action within its control.


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As to the first worker, the staffing company was notified of the harassment after the worker was terminated by the client. It questioned the client company on the decision to fire the worker, and then directed the worker to apply for another placement, which she declined to do. The Fifth Circuit found that the staffing company was not required to do more than comply with its normal assignment process. The Fifth Circuit noted that there was nothing else the staffing company was legally required to do – it could not create job placements that met the worker's criteria nor did it have the authority to force the client company to rehire her.

As to the second worker, she claimed that the staffing company should have known of the harassment because of the first worker's complaint. However, there was nothing to indicate that the second worker was experiencing the same conduct (and in fact, she was a witness against the first worker in the client company's investigation into the first worker's complaint). She also claimed that she did not complain earlier because it would have been futile, given how the first worker was treated. However, once the second worker made her complaint, the staffing company contacted the client company, and the resulting investigation ended in the harasser's termination – so a complaint was clearly not futile.

So the lessons for staffing company employers is to ensure that they have clear policies against harassment by client company employees that includes a complaint procedure, that they communicate these policies to their own employees, that they do not ignore information from their clients that suggest their employees might be experiencing discrimination or harassment, that they follow up with the client company if their own employee reports discrimination or harassment by a client employee, and that they make available alternative placements for their own employee as appropriate (whether the employee has been fired from the client or no longer wishes to work there).

**OFCCP Audits Will Now Be More Burdensome for Federal Supply and Service Contractors.** The Office of Federal Contract Compliance Programs has released a new version of its Scheduling Letter and Itemized Listing, which sets forth the information and documents that federal supply and service contractors will be required to provide if they are selected for a compliance audit. The new letter vastly expands the required information and data, which must still be submitted within a 30-day timeframe (with extensions rarely granted). In addition, if a potential violation is found, the process for resolving the matter has become less transparent.

Among the more significant changes to the Scheduling Letter and Itemized Listing are the following:

- Additional factors in the availability analyses for females and minorities.
- New documentation to demonstrate the development and execution of action-oriented programs designed to correct any identified problem areas.
- Additional documentation about outreach and recruitment efforts of disabled individuals under Section 503 and protected veterans under VEVRAA.
- Description of steps taken to determine whether and where impediments to EEO exist under Section 503.
- Two years – not just one – of compensation data. Additionally, contractors must also provide information on factors used to determine employee compensation as well as documentation and policies related to compensation practices.


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- New documentation of policies and procedures relating to employment recruiting, screening, and hiring, including the use of artificial intelligence (AI) and other technology-based selection processes.
- New documentation that the contractor has met its obligation to evaluate its compensation systems for disparities based on race, gender, or ethnicity.
- Copies of all EEO policies (e.g. harassment, complaint procedures, arbitration agreement policies, etc.).
- Where a contractor has a campus-like setting, they must produce AAPs for all those campus buildings in the same city – not just that of the establishment selected for audit.

In the course of the compliance review, if the OFCCP identifies preliminary indicators of potential discrimination, regulations require the agency to provide the contractor with a Predetermination Notice (PDN) and allow the contractor to respond prior to the OFCCP issuing a Notice of Violation (NOV). In 2020, these regulations were amended to provide greater transparency in the PDN process and permit early resolution of open audits. However, the OFCCP has just issued revised regulations that dial back much of the transparency.

Given the increasing burden of responding to an OFCCP compliance audit, contractors should take steps now to ensure that they are in compliance with their affirmative action obligations. If they wait until they show up on the Corporate Scheduling Announcement Letters list (the next one is due to be released soon), it may be too late, particularly since some contractors will be scheduled for an audit immediately following issuance of the list.

**The DOL Issues Final Rule "to Modernize the Davis Bacon Act."** Under the Davis-Bacon Act, construction companies are required to pay a federally-set prevailing wage and benefit rate to employees performing work on federal contracts or subcontracts. The U.S. Department of Labor, which enforces the Act, has issued a final rule that drastically revises contractor obligations. According to the DOL's press release, the revised rule:

- Creates new efficiencies in the prevailing wage update system and makes sure prevailing wage rates keep up with actual wages which, over time, would mean higher wages for workers.
- Returns to the definition of "prevailing wage" used from 1935 to 1983 to ensure prevailing wages reflect actual wages paid to workers in the local community.
- Periodically updates prevailing wage rates to address out-of-date wage determinations.
- Provides broader authority to adopt state or local wage determinations when certain criteria are met.
- Issues supplemental rates for key job classifications when no survey data exists.
- Updates the regulatory language to better reflect modern construction practices.
- Strengthens worker protections and enforcement, including debarment and anti-retaliation provisions.

The construction industry, however, notes that these changes have a significant negative impact on contractors and subcontractors. Among the issues identified by the Association of Builders and Contractors, a national construction industry trade association, are the following:


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- Lowers the definition of "prevailing wage" to a wage paid to at least 30% of workers in a locality, down from 50%.
- Allows the DOL to adopt state or local prevailing wage rates as DBA wage rates.
- Makes DBA requirements effective by "operation of law," meaning even if a federal agency fails to include DBA clauses in a contract, contractors are still required to pay prevailing wages.
- Adds new anti-retaliation provisions to DBA contracts.

**The EEOC's Strategic Plan Provides Insight Into Its Priorities, Including Systemic Discrimination.** The Equal Employment Opportunity Commission has released its Strategic Plan for Fiscal Years 2022-2026, effective immediately. This document provides employers with an overview of the EEOC's particular areas of focus. As explained by the EEOC, highlights of the plan include the following:

- Increased focus on systemic discrimination, by expanding the EEOC's capacity to eliminate systemic barriers to equal opportunity in the workplace, including training staff to identify and investigate systemic cases and devoting additional resources to systemic enforcement.
- Improved monitoring of conciliation agreements to ensure workplaces are free from discrimination after the EEOC makes a finding of discrimination.
- Enhanced intake services to potential charging parties, respondents, and representatives. Under the Plan, the EEOC will focus on improving and expanding access to intake services, increasing the availability of intake interview appointments, and improving overall service to the public.
- Leverage technology and innovative outreach strategies to expand the agency's reach to diverse populations; vulnerable communities; and small, new, and disadvantaged or underserved employers.
- Promote promising practices that employers can adopt to prevent discrimination in the workplace.

We note that this document is different than the EEOC's Strategic Enforcement Plan, which identifies the EEOC's top substantive area priorities for enforcement activity. Earlier this year, the EEOC released its draft Strategic Enforcement Plan for 2023-2027, which we discussed in our January 2023 E-Update.

## NEWS AND EVENTS

**Honor –** We are delighted to announce that twelve of our partners were listed in *The Best Lawyers in America*© 2024: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Teresa D. Teare, Parker E. Thoeni, Elizabeth Torphy-Donzella and Lindsey A. White. In addition, two other attorneys were recognized by *The Best Lawyers in America: Ones to Watch*© 2024: partner Veronica Yu Welsh and senior associate Courtney B. Amelung. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation.


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**Honor –** Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q2 2023. 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 practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the 17th consecutive quarter and 18th time overall that Fiona has received this honor.

**Victory** – Parker E. Thoeni and Evan Conder successfully obtained summary judgment for a non-profit organization that serves disabled adults. At issue was the regular rate of pay for employees working in different positions. The organization compensated the Plaintiffs' work in each position at different rates, which the Plaintiffs argued was a way to circumvent paying employees correctly; however, the federal court found the organization's method of calculating pay to be lawful.

**Leadership** – Lindsey A. White was appointed as the management-side Co-Chair of the Technology in the Practice and Workplace Committee for the American Bar Association's Labor and Employment Law Section.

**Media –** Fiona Ong was quoted in an August 3, 2023 article by Don Lee for the Los Angeles Times, "Employers' push to end remote work and return to office is stalling." (Subscription may be required for access). Fiona provided some commentary on employer attempts to reinstate in-person attendance.

**Media –** Parker E. Thoeni was quoted in an August 8, 2023 article by Simon Spichak for Fast Company, "'I'm the only one still masking': What it's like to still be COVID-cautious at work." Parker offered guidance on possible employee protections under the Occupational Safety and Health Act.

**Media** – Fiona Ong was quoted in an August 18, 2023 article by Chris O'Malley for Law.com, "Companies 'Throwing Up Hands' as DEI Risks Loom." (Subscription may be required for access). Fiona discussed possible risks to employer DEI initiatives following the Supreme Court's decision rejecting the use of affirmative action in university admissions.

**Podcast** – Chad M. Horton was a guest speaker for the August 24, 2023 installment of the Employment Law Alliance's podcast series, Episode 516: US Employers – The NLRB Has Just Made Many Common Work Rules Unlawful. The podcast can be accessed on the ELA website or on your favorite podcast streaming service.

**Media –** Fiona Ong was quoted in an August 10, 2023 article by Leah Shepherd for the Society for Human Resource Management (SHRM.org), "Stay Abreast of New Federal Regulations About to Arrive." (Subscription may be required for access). Fiona provided some predictions on the forthcoming overtime, joint employer, and independent contractor rules from the U.S. Department of Labor and the National Labor Relations Board.

## TOP TIP: What to Expect from Maryland's Paid Family and Medical Leave Program

Maryland has enacted a paid family and medical leave insurance program that, starting in 2026, will provide most Maryland employees with 12 weeks of paid family and medical leave, with the


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possibility of an additional 12 weeks of paid parental leave, as we have previously detailed in our E-lerts from April 12, 2023 and April 12, 2022. The Maryland Department of Labor (MDOL) was directed to issue regulations to interpret and implement the Act by January 1, 2024. The MDOL has begun the regulatory process, and its actions provide some insight into what the MDOL might be thinking on a variety of topics of specific interest to employers.

**The Regulatory Process.** The MDOL's newly created Division of Family and Medical Leave Insurance (FAMLI) has established an aggressive and rigorous process to meet the mandated deadline. This process consists of six phases, with each phase dealing with a different topic: Equivalent Private Insurance Plans (EPIP), Optional Self-Employment Plans (OSEP), Contributions, Benefits, Appeals/Enforcement, and Miscellaneous.

Each phase begins with the MDOL's FAMLI Division issuing a discussion document about the topic, soliciting input on particular topic issues. One week after the release of the discussion document, the MDOL holds a virtual public meeting where members of the public may provide their written or verbal input on the issues listed in the discussion document. Several weeks later, the FAMLI Division issues "draft" proposed regulations (which they have termed "Draft Outlines"), and stakeholders may provide written comments to the FAMLI Division. The FAMLI Division has stated that the feedback and input received during public meetings and in response to the draft rules will be considered in its development of the actual proposed regulations. The public will have another opportunity to offer comment on those proposed regulations, before the MDOL issues the final regulations.

Of particular interest to employers, the MDOL has issued Draft Outlines for EPIPs and Claims thus far, as we summarize below. (They also issued one for self-employed individuals, which is not relevant to most employers). We note that these documents are preliminary and may drastically change after stakeholder comments are considered. Nonetheless, we can glean some indication of how the MDOL might interpret and apply the law.

**Equivalent Private Insurance Plans.** A provision in the Act allows employers to forego participation in the State Plan by providing a private Equivalent Private Insurance Plan (EPIP). Any EPIP will have to meet or exceed the standards of the State Plan regarding coverage, reasons for leave, duration and timing of leave (including intermittent leave), benefit amount and contribution amount.

The FAMLI Division released its Draft EPIP Regulatory Outline on July 6, 2023, with written comments due by July 13. The following are some points of particular significance:

- *Decisions, Approvals, and Reconsiderations* – An employer must let the employee know within five (5) business days if their application for paid leave is incomplete and must render a decision of approval or denial within 10 business days. Each decision must be in writing, electronic or hard copy, and must include the amount of leave, reason for denial and appeals process (if applicable), and weekly benefit amount. Additionally, if the employee has worked less than 680 hours for the employer, the employer must provide a statement on how the employee may contact the MDOL for further information on their benefit amount.


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- *Forms and Notices* – Written notices must meet all MDOL requirements. Any forms developed by the employer for use by employees and their healthcare providers must be submitted to the FAMLI Division for approval at least 30 days before use.

- *Employer Application Process for EPIP*- All EPIPs must be approved by the Division before an employer is exempt from participation in the State Plan. EPIPs may be either through a commercially insured product or a self-insured plan. For self-insured plans, special requirements will be added such as proof of solvency, separate accounts, and recertifications. An approval for an EPIP application may take up to 60 days from the date of application to the Division.

- *Proof of Solvency* – Of particular concern, the FAMLI Division proposes that proof of solvency be established with a surety bond equal to one year of expected future benefits. The FAMLI Division may collect the bond if the employer's EPIP approval is terminated, whether voluntarily or involuntarily.

- *Separate Account* – The employer will have to create a separate account from other employee accounts for the collection and distribution of funds for the program.

- *Voluntary Termination of EPIP* - If an employer opts to go with an EPIP, it will be difficult to transition back to the State Plan. Any employer that is approved for an EPIP between October 1, 2024, and January 1, 2026, must remain with an EPIP until at least January 1, 2029. If the employer wishes to leave the EPIP and go with the State Plan, the employer must remit to the FAMLI Division any employee contributions in their possession and past due employer contributions back to October 1, 2024. An employer may not voluntarily terminate an EPIP unless it has been in its EPIP for at least one (1) year. If an employer chooses to terminate an EPIP, they must notify their employees in writing at least thirty (30) days before the effective date of termination.

- *Involuntary Termination of EPIP* - The FAMLI Division will have broad discretion to terminate any EPIP for failure to adhere to the standards set by the State Plan. Termination of an EPIP will be accompanied by a Notice of Termination and may result in civil penalties and/or collection of past-due mandatory contribution debt for a period of one year prior to the date of the Notice of Termination of EPIP approval. An employer may be able to request a higher-level review of the termination.

- *Temporary Provisions* – In the event an EPIP application cannot be timely submitted, and the employer intends to opt into an EPIP, the employer may submit a Declaration of Intent (DOI) to the FAMLI Division. The DOI will allow the employer to be temporarily exempt from paying into the State Plan.

- *Recordkeeping and Reporting* – Any self-insured EPIP will require extensive recordkeeping to collect and maintain applications for benefits, payment dates and amounts, appeals and outcomes, premium contributions, and wage data. Documentation must be retained for at


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least 5 years. The employer must ensure that wage and hour data is submitted to the FAMLI Division on a quarterly basis, and other information, including extensive and detailed individual claims-level data, is submitted annually.

**Contributions.** The FAMLI Division issued its Draft FAMLI Contributions Regulatory Outline on August 11, 2023, with written comments due by August 18. There is less of critical significance in this outline, with much of the information simply reiterating, or slightly expanding on the statutory language in a mostly logical way. However, the following may be of interest to employers:

- Employees are covered if they provide localized service in Maryland, and the FAMLI Division will model this regulation on the unemployment insurance localized service regulations.

- If the employer fails to make the proper deduction of the employee's portion of the premium, the employer will be considered to have elected to pay the employee's contribution. The employer will not be able to recoup those payments from the employee.

**Claims.** On August 18, 2023, the FAMLI Division issued their Discussion Document for Phase 5, Claims. Some of the more significant discussion points are:

- *Who is Covered* – The FAMLI Division is seeking input from stakeholders whether to define a "covered employee" as only an individual who worked 680 hours or more in a localized position in Maryland over the past twelve (12) months, or whether a "covered employee" could include a previous employee who is unemployed but met the 680 hours requirement in the past 12 months. The FAMLI Division may also require those 680 hours to be accumulated while paying into the program. Furthermore, there are employees who will be exempt due to their employer's own EPIP and who then transfer to another employer that participates in the State Plan. The FAMLI Division might discount any hours worked while the employee was not paying into the program.

- *Definitions* - The Act allows leave for "kinship care" of an individual within the first year after birth. The FAMLI Division will have to decide whether to allow informal or formal kinship care for benefits. Formal kinship care is when social services places a child in the 24/7 care of a relative. Informal kinship care is when a relative provides care and custody of the child due to serious family hardship.

  Additionally, the Act's definition of "family member" includes a "domestic partner" of the covered individual. *Id.* The FAMLI Division is leaning towards modeling who is considered a "domestic partner" after definitions already found in Maryland Code.

  To show proof of family membership, the FAMLI Division may require a signed certification, under the penalty of perjury, attesting to a familial relationship or it may require formal proof such as birth certificates or marriage licenses.

  Finally, the FAMLI Division may model what is considered a "serious health condition" after FMLA regulations.


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- *Information Requirements* – The FAMLI Division suggests that it might allow the use of FMLA forms in lieu of state forms where the leave qualifies for both.

- *Intermittent Leave* – Leave benefits will be calculated by dividing the weekly benefit amount by the average number of hours worked per week by the employee for the employer during the qualifying period, and then multiplying by the number of hours used for intermittent leave. Intermittent leave cannot be taken in increments of less than 4 hours a day.

- *Ability of Employers to Verify Claims by Employees* **–** One major concern for employers is possible fraudulent use of leave. The Discussion Document for Phase 5 only suggests that the FAMLI Division may develop a process where employers or members of the public may submit a form to notify the FAMLI Division that an individual has submitted a fraudulent claim.

- *Notice Requirements of Employees to Employers* –If the employee can show "good cause," applications may be approved for those beyond the normal 60-day application period. The FAMLI Division is still determining what may constitute "good cause." Likely, any showing of good cause may involve some degree of incapacitation, natural disaster, or prolonged departmental system outage.

**Looking Ahead.** In addition to providing input during each of the six phases, the public will be able to provide comments when the actual draft regulations are issued. Employers are encouraged to weigh in, so as to ensure that their concerns are taken into account.

## RECENT BLOG POSTS

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- Maryland's Supreme Court Finds "Sex" Discrimination Protections Do Not Include Sexual Orientation (or Gender Identity) by Fiona W. Ong, August 16, 2023

- EEOC Issues Proposed Pregnant Workers Fairness Act Regulations by Fiona W. Ong, August 9, 2023

- Employers – The NLRB Has Just Made Many Common Work Rules Unlawful by Chad M. Horton, August 3, 2023


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