SHAWE ROSENTHAL LLP

E-UPDATE

April 30, 2024

RECENT DEVELOPMENTS

Lessons for Employers from the US DOL's $1.2 Million Settlement Announcement

The U.S. Department of Labor recently announced a $1.2 million settlement with a concrete contractor for multiple violations of the Fair Labor Standards Act, and employers can draw a number of lessons from this announcement as to widely varying topics: misclassification of employees as independent contractors, recordkeeping and payment, misclassification of non-exempt employees as exempt, and travel time.

Lesson #1 – Don't Misclassify Employees as Independent Contractors. The contractor apparently misclassified 29 employees as independent contractors and, in so doing, violated their rights to overtime pay. Many employers would like to classify workers as independent contractors – perhaps it is a longstanding industry practice, or perhaps they are seeking to avoid the creation of an employment relationship and all the obligations that flow therefrom. Often workers would prefer to be designated an independent contractor to avoid having so many deductions from their pay. But calling a worker an independent contractor does not necessarily make them one. Nor does a history of treating them that way.

The DOL recently issued a Final Rule setting forth its standard for determining independent contractor status, as we discussed in our January 9, 2024 E-lert. The DOL uses a six-factor "totality of the circumstances" test, but employers should be warned that other federal and state agencies use other tests. It is important for employers to ensure that any individual it chooses to designate an "independent contractor" will meet the criteria for such a designation.

Lesson #2 – Keep Accurate Time and Pay Records. The Fair Labor Standards Act requires employers to pay non-exempt employees at least the minimum wage and overtime premiums for all hours worked over 40, and further requires employers to keep accurate records of the actual time worked and compensation paid to these non-exempt employees. Here, the contractor apparently failed to keep accurate records of the hours that employees worked or the compensation that it paid them. And even worse, it allegedly falsified records to make it appear that it paid workers overtime. Beyond the obvious lesson that employers should not falsify records, employers must ensure that they are accurately tracking and recording the actual time worked by non-exempt employees, and then paying them appropriately in accordance with those records.

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

Lesson #3 – Remember that Salaried Employees Might Still be Non-Exempt. In order to be properly classified as exempt from the FLSA's minimum wage and overtime requirements, an employee must meet very specific salary and duties tests. One common mistake that employers make is to assume that if they pay an employee a salary, they are automatically exempt – which seems to be what the contractor did here. However, such employees might not be performing exempt duties and, therefore, they would still be found to be non-exempt. And that means an employer must keep accurate records of their hours worked and pay any necessary overtime (see Lesson #2).

Lesson #4 – Don't Forget When Travel Time Must Be Paid. The contractor also apparently violated the rules on when travel time should be compensated. In our November 2020 E-Update, we discussed a DOL opinion letter that set forth these detailed rules. Generally speaking, normal commuting time from the employee's home to their workplace, whether a fixed location or different job sites, is not considered compensable time. But once the workday starts, any travel time between worksites must be counted as hours worked. That includes situations where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools. The 2020 opinion letter provides more details around out-of-town travel, as well as many examples of various travel scenarios that may be either paid or unpaid.

What's the Difference Between a Joint Employer and a Single Employer Anyway?

A recent case from the U.S. Court of Appeals for the Sixth Circuit highlighted the confusion that can occur between these two different mechanisms to hold separate companies liable for the same violation under the National Labor Relations Act (and other employment laws).

In *NLRB v. Bannum Place of Saginaw, LLC*, in the context of a union election, a company was found to have committed unfair labor practices. The Board issued a compliance specification and notice of hearing to both the company and its parent, as the single and/or joint employer. Following the hearing, the Board then issued a decision that ordered remedies against both the company and parent as a single employer. The two companies requested review of the Board's order by the Sixth Circuit, arguing that they were not joint employers. As both the Board and the Sixth Circuit noted, however, the companies ignored the issue of whether they should be considered a single employer.

Joint Employer. Under the Act, two separate (and typically unrelated) entities will be considered to be joint employers of the same employee where the two entities share or co-determine essential terms and conditions of employment for the employee. A joint employer is required to bargain with the union selected by its jointly-employed workers and may be held liable for the unfair labor practices committed by the other employer.

The standard by which joint employer status is determined has been the subject of much contention, shifting with each change between Republican and Democratic presidential administrations (the Democrats favor a much broader interpretation that favors the finding of joint employer status). We explained the NLRB's most recent joint employer rule in our October 26, 2023 E-lert, as well as the court decision blocking the implementation of the rule in our March 11, 2024 E-lert. At the current time, it would appear that the historic common-law test applies, which assesses whether direct and/or actual control is exercised by each potential employer over the worker in question.

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

Single Employer. Under this concept, one entity is so interrelated with the named employer of the workers in question that the two actually constitute a single integrated employer of those workers. The interrelated entity is therefore liable for any unfair labor practices committed by the named employer, and will be bound by the collective bargaining agreement between the named employer and the union.

To determine if two entities are a single employer under the Act, four factors are considered: (1) common ownership, (2) common management, (3) centralized control of labor relations, and (4) interrelation of operations. No one factor is determinative, and not all need to be met, although the Sixth Circuit noted that the third factor is "a central concern."

Applying those factors to the present case, the Sixth Circuit found them to support a single employer status. The company was a wholly owned subsidiary of the parent. There was substantial overlap in management and officers of the parent and subsidiary. The parent had hiring and firing power over the subsidiary's employees, had conjoined payrolls, and shared personnel policies. There were interrelated operations in that the parent owned the facility where the subsidiary was run, the employees' paychecks and W-2s reflected the parent's address, the parent ran the payroll for the subsidiary, the parent facilitated the subsidiary's insurance and retirement plans, and the parent's managers filled in for the subsidiary.

Parent-Subsidiary Liability? There is actually a third mechanism applicable to parent-subsidiary relationships. Under the Act, a parent may be liable for the unfair labor practices of its subsidiary where the parent "directly participated" in the unlawful conduct. In this case, however, the Sixth Circuit declined to weigh in on whether this applied, given that it found liability based on the single employer determination.

Lessons for Employers. As the companies in this case demonstrated, there can be some confusion about the different types of relationships that can trigger liability under the Act. It is important for employers to understand how their relationships with others, including affiliates, parents, subsidiaries, staffing agencies, franchisors and/or franchisees might be viewed by the Board or a Court. It is also important to note that the joint employer and single employer concepts apply in the context of other federal and state laws (including the Family and Medical Leave Act, Title VII, the Americans with Disabilities Act, and the Fair Labor Standards Act), although they may be subject to different tests.

Supreme Court Broadly Defines Transportation Workers for Purposes of Arbitration Exemption

On April 12, 2024, the U.S. Supreme Court issued a decision that significantly broadens the definition of a transportation worker who is exempt from coverage under the Federal Arbitration Act beyond those working only in the transportation industry.

Background of the Case. The Federal Arbitration Act provides that arbitration agreements involving interstate or foreign commerce (which applies to most employment arbitration agreements) are "valid, irrevocable, and enforceable." Under the FAA, courts will enforce arbitration agreements according to their (properly drafted) terms. However, there is an exemption to the FAA's arbitration enforcement mandate for "contracts of employment of seamen, railroad employees, or

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

any other class of workers engaged in foreign or interstate commerce," and this exemption has long been interpreted to apply only to "transportation workers."

In *Bissonnette v. LePage Bakeries Park St.*, two individuals worked as distributors for a bakery company, picking up bread and buns and delivering them to local shops. They sued the company for violating state and federal wage laws. Because their Distributor Agreements included arbitration agreements requiring any claim or dispute to be arbitrated under the FAA, the bakery company moved to compel arbitration. The distributors argued that they were transportation workers exempt under the FAA from enforcement of their arbitration agreements. The company argued that the exemption applied only to those working in the transportation industry, meaning those entities whose primary business is the movement of goods or passengers.

The Supreme Court's Opinion. The Supreme Court held that a transportation worker does not need to work in the transportation industry to be exempt from the FAA's coverage. There is nothing in the FAA that limits the definition in that manner. But to qualify as a transportation worker, they "must at least play a direct and necessary rule in the free flow of goods across borders." (Internal quotations omitted).

Lessons for Employers. Employers outside the transportation industry should not blindly assume that all employees may be bound by arbitration agreements (assuming that such agreements are properly drafted in accordance with any state law requirements). If an employee's duties are directly related to the transportation of good or services – and this extends beyond driving to include activities such as loading and unloading cargo – those employees will be deemed to be "transportation workers" exempt from enforcement of any arbitration agreement.

TAKE NOTE

Union Representatives May Attend OSHA Workplace Inspections. On April 1, 2024, the U.S. Department of Labor issued a Final Rule "clarifying the rights of employees to authorize a representative to accompany an OSHA compliance officer during an inspection of their workplace." Such representatives include union representatives, of course – an unsurprising development under the administration of the self-proclaimed "most pro-union" President.

The Occupational Safety and Health Act allows representatives of employers and employees to accompany the OSHA Compliance Safety and Health Officer (CSHO) conducting a physical inspection of a worksite. Until now, representatives were limited to employees of the company, while third parties such as industrial hygienists or safety engineers (and other formally credentialled experts) would be permitted where the CSHO determined that they were "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace."

Under the Final Rule, however, a third-party employee representative may now accompany the CSHO when, in the CSHO's judgment, good cause has been shown why they are reasonably necessary. This assessment may be based on factors including but not limited to "their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills." Of course, this change in language means that the employee representative no longer needs to be an employee and may be a union representative.

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

The FAQs regarding the new Final Rule provide that the CSHO may ascertain whether employees have such a representative by asking if employees are represented by a union. If so, the highest-ranking union official or union employee representative on-site will designate the employee representative. Additionally, the representative may ordinarily wear clothing with a union name or logo. If the third-party representative is coming from off-site, the CSHO will normally delay the inspection for up to an hour to allow them to attend.

In its FAQs, the DOL acknowledges that employers may still limit entry of employee representatives into areas containing trade secrets. In addition, employer permission is required if the representative wishes to take their own photos or measurements, unless otherwise specified by a collective bargaining agreement. Employers may also require third-party representatives to comply with its established lawful rules and policies, including entry or confidentiality requirements, as long as such compliance is consistently required for all visitors to the workplace. Any confidentiality agreement may not restrict the representative's ability to discuss information with employees affected by the inspection, however.

Hostile Work Environment Harassment May Be Based on Disability. Employees may bring a hostile work environment claim arising from disability, according to the U.S. Court of Appeals for the Ninth Circuit. Although this was the first time the Ninth Circuit addressed the issue, it joined a number of sister Circuits that had previously recognized such a claim.

In *Mattioda v. Nelson*, the employee had disabilities that required him to travel in a premium class for flights over an hour. He alleged that, after he reported his disabilities and requested travel accommodations, he was subjected to derogatory comments from his supervisors, who also inhibited his work opportunities, gave him unwarranted negative job reviews, and resisted his accommodation requests. The employee eventually sued for violations of the Rehabilitation Act (which is the analog to the Americans with Disabilities Act for federally-funded programs), claiming, among other things, that he had been subjected to hostile work environment harassment based on his disability.

Until this case, the Ninth Circuit had not yet decided whether harassment claims could be brought under the Rehab Act or the ADA. But here, the Ninth Circuit found that they could, observing that it was joining "the weight of consensus" by all sister Circuits previously addressing the issue (the Second, Fourth, Fifth, Eighth and Tenth; the First, Third, Ninth, Eleventh and D.C. Circuits have assumed without deciding that such claims are possible). As these other Circuits had reasoned, the ADA uses almost identical language to Title VII, under which hostile environment harassment claims have long been recognized.

This case reminds employers that employees can bring hostile work environment claims based on disability, in addition to the more commonly asserted bases under Title VII of race, sex, religion and national origin. It is critically important that employers respond promptly and effectively to employee complaints of harassment, regardless of the basis.

Deposition Questions May Violate the NLRA. An employer's relevant and legitimate questions during an employee's deposition in a separate lawsuit may still violate the National Labor Relations Act, according to the National Labor Relations Board.

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

In *Chemtrade West US*, the union filed an unfair labor practice charge against the employer based on its questions to an employee during his deposition in a wage and hour case. The employer's counsel had asked questions regarding the employee's discussions with the union and other union members about the matters in the lawsuit, for the stated purpose of understanding the employee's motivation for bringing suit, information about potential witnesses, and why the employee had not invoked the grievance process under the collective bargaining agreement regarding his concerns.

The Act protects workers' rights to engage in concerted (i.e. group) activity for their mutual aid or protection, and further prohibits employers from interfering in those rights – including the right to keep their protected union activity confidential from the employer. Additionally, the Board has held that employees are engaged in protected concerted activity when filing a group lawsuit against their employer and when discussing such a lawsuit concerning working conditions with their co-workers.

The Board recognizes that not all employer deposition questions are illegal, as employers also have rights in the context of an employee lawsuit, including the right to discover relevant evidence. But there may be times when such questions cross the line, and the Board applies a three-part test, established in *Guess?, Inc.*: First, the questions must be relevant, as determined by the law of the forum in which the civil suit is pending. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' confidentiality interests under the Act.

In this case, the Board found that the employer's questions were relevant. However, the Board found that the employee's confidentiality interests outweighed the employer's interests. To some extent, the information sought could have been obtained through other means – like questioning the other employees directly or requesting a witness list. And questions about the employee's prior grievances were not specifically tailored to support the employer's defense. Moreover, such questioning could "chill" employees' desires to speak with their union representatives, if they knew that they may have to disclose their confidential discussions in a public forum.

Now frankly, deposition questions are not typically developed by the employers themselves, but rather by their defense counsel. Thus, when dealing with an employee lawsuit about group interests such as wages or hostile work environment harassment, it is important for unionized employers to ensure that they retain experienced counsel who are aware of the potential pitfalls under the Act when deposing employees who are members of a union.

An Employee Using Marijuana Is Not Protected Under the ADA. Although many states have legalized the use of medical and/or recreational marijuana, it still remains an illegal drug under federal law – and the U.S. Court of Appeals for the Sixth Circuit recently held that a marijuana user was therefore not protected by the Americans with Disabilities Act.

In *Maxson v. Baldwin*, an employee with a back injury was admittedly addicted to prescription medications and alcohol, and also used marijuana to reduce the pain. Shortly after showing up for work with withdrawal symptoms that interfered with his ability to do his job, he was terminated for a positive marijuana test, as well as an arrest and misdemeanor guilty plea for attempting to obtain dangerous drugs. He sued, arguing that the true reason for his termination was his addiction to prescription drugs and alcohol.

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

Under the ADA, alcoholism is considered to be a disability (although employers may still hold alcoholic employees accountable for meeting performance and conduct standards). However, as the Sixth Circuit noted, the ADA provides that an employee who is "currently engaging in the illegal use of drugs" is not entitled to the protections of the law. According to EEOC guidance, drug use is current if it "occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem." Here, the Sixth Circuit found sufficient evidence of current drug use in the employee's admitted use of marijuana, the positive marijuana test, and the withdrawal symptoms. Accordingly, the employee was excluded from coverage under the ADA.

Employers should be aware, however, that even though the ADA will not protect medical marijuana users, the EEOC may still require them to engage in an interactive process with the employee to ascertain if other accommodations may be available based on the employee's underlying disability. In addition, there may be employment protections for medical (and even recreational) marijuana users under state law.

New Discrimination Protections in Maryland's Anne Arundel and Montgomery Counties. Employers with employees in Anne Arundel and Montgomery Counties should be aware of developments that increase the protections for employees against discrimination.

In Anne Arundel County, a new, comprehensive discrimination law has been passed that expands the scope of the existing law beyond housing to include employment. Among other things, the protected categories under the law have been extended to cover an employee's "perceived" protected class and their association with someone in a protected class. The law now specifically prohibits retaliation as well. The law also sets up a mechanism for employees to file complaints with the Anne Arundel County Human Rights Commission, with an investigative and hearing process. (This is similar to existing processes in several other counties). Should the Commission find discrimination, however, the remedies are limited to a cease and desist order and a civil fine of up to $5,000 per offense. Moreover, if an employee also files a complaint under federal or state law, the County complaint will terminate.

In Montgomery County, a new law will prohibit all employers with any employees in the County from asking for or seeking healthcare information unless it is necessary to determine if an applicant meets job qualifications that have been published prior to the acceptance of applications. Employers are also prohibited from asking applicants about sexual or reproductive health information, including information related to abortion care, miscarriage, contraception, sterilization, pregnancy, sexually transmitted diseases, fertility treatment, gender affirming care, or family planning. It is worth noting that, under Maryland law, employers may not require applicants to provide health information that is unrelated to the job, while the Americans with Disabilities Act prohibits employers with 15 or more employees from asking disability-related questions of applicants prior to a conditional job offer. The law will take effect on July 26, 2024.

NEWS AND EVENTS

Complimentary Webinar: Complying with Maryland's New Employment Laws – 2024 –The Maryland Chamber of Commerce and Shawe Rosenthal LLP will be holding a complimentary webinar on **Thursday, May 2, 2024** at noon Eastern Standard Time to review significant new employment legislation in Maryland, including modifications to the new Paid Family and Medical

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

Leave Benefits Program, a wage range posting requirement, paystub notice requirements, and new discrimination protections, among other things.

The Chamber's Senior Vice President of Government Affairs Andrew Griffin will discuss the most recent General Assembly session, and Shawe Rosenthal partners Fiona Ong and Parker Thoeni will explain the obligations of and provide guidance on compliance with Maryland's new employment laws. This program has been approved for 1 SHRM CP or SCP credit. To register, click here.

Resource Guide – We are pleased to announce that the 2024 edition of The Legal 500: Employment & Labour Law Country Comparative Guide, for which we authored the U.S. chapter, is now available. The guide is intended to provide readers with a pragmatic overview of the law and practice of labor and employment law in various countries. A copy of the pdf of our chapter is available here. The Legal 500 is a preeminent international rating organization for law firms and lawyers.

Honor – Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q1 2024. 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 20th consecutive quarter and 21st time overall that Fiona has received this honor.

Article – Fiona Ong and Jamie Salazer authored an article, "Are Employers Liable for Take-Home COVID-19 Claims?", which was published in Vol. 53, No. 1 of The Brief, a publication of the Tort Trial and Insurance Practice Section of the American Bar Association.

Media – Teresa Teare was quoted in a April 25, 2024 Daily Record article by Rachel Konieczny, "MD employment law practitioners, organizations mixed on FTC noncompete ban." (Subscription required for access). Teresa commented on the likely challenges to the Federal Trade Commission's rule, and noted that Maryland courts have provided employers with good guidance on drafting legally sound noncompete agreements under state law.

Presentation – Teresa Teare and Darryl McCallum recently spoke at the Maryland State Bar Association Labor & Employment Section's bi-annual Employment Law Institute (ELI) on April 16, 2024, in Columbia, MD. The ELI was a full-day comprehensive program that included updates on federal and state labor and employment law. Teresa presented an update on Maryland case law and Darryl discussed strategies for successfully mediating employment cases.

Article – Fiona Ong, Mark Swerdlin, and Shawe Rosenthal summer clerk Donald Waldron authored an article, "What to Expect from Maryland Paid Family and Medical Leave Program," published in Vol. 5, Issue 3 of the Maryland State Bar Association Journal.

Presentation – Teresa Teare presented a session on "Hot Topics in Employment Law for Women Attorneys" at the Women's Bar Association of Maryland's annual conference on April 19, 2024.

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

Presentation – On March 29, 2024, Fiona Ong participated on a panel jointly sponsored by Princeton University's Asian American Students Association and the Asian American Alumni Association of Princeton to speak to undergraduate students about legal careers.

TOP TIP: Don't Call It a Job Elimination Unless It's an Actual Job Elimination. A recent EEOC press release warns employers not to assert a job elimination as the reason for an employee's termination unless the job truly is being eliminated.

A "job elimination" may seem like a simple way of dealing with a problem employee. Employers may seek to avoid addressing difficult performance or conduct concerns by relying on this antiseptic, impersonal reason ("it's not you, it's the job"). Or, more malignantly, it may serve as a pretext for an illegal reason, like race discrimination, as the EEOC contends is the case in the lawsuit it just filed against an integrated real estate operating company and asset management firm. According to the EEOC, only a month after terminating a Black employee because his project development manager role was supposedly eliminated, the company promoted a less-qualified White employee into the role – which would clearly undercut the assertion that the role really had been eliminated.

Now, there may legitimately be situations where, after eliminating a role, the employer realizes that they did, in fact, actually need that role. But that is not a plan that should be made at the time that the role is being eliminated – nor is there a magic period of time that must pass before such a determination may be made. (We suggest a month is too soon, however). If this is the case, the employer must be prepared to justify its change of mind, using hard facts and numbers to demonstrate the legitimacy of its position.

In addition, there are situations in which an employer decides to eliminate one role and create another role that may perform similar functions. If the two roles are very similar, the creation of the new role may look like a pretext. If an employer chooses to replace one role with another that has any kind of overlap – and the original incumbent of the first role is not given the opportunity to take on the new role – the employer must be able to explain how and why the new role differs significantly from the eliminated role and further justify why the original incumbent is not qualified for the new role.

The real lesson is there are no shortcuts. If an employee is not performing or is engaging in misconduct, managers need to address those issues – and document them. Relying on a "job elimination" is not a good idea, unless the role truly is no longer required.

RECENT BLOG POSTS

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

- FTC Bans Nearly All Non-Compete Agreements – For Now… by Paul Burgin and Parker Thoeni, April 24, 2024

- DOL Significantly Increases Salary Threshold for Overtime Eligibility by Evan Conder, Chad Horton and Mark Swerdlin, April 24, 2024

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

- Supreme Court Lowers the Bar for Title VII Discrimination Claims by Fiona Ong, April 17, 2024

- The EEOC Releases Onerous Final Rule Implementing the Pregnant Workers Fairness Act by Fiona Ong, April 15, 2024

- New Employment Laws in Maryland – Changes to Paid Family and Medical Leave Insurance, Wage Range Posting Requirements, New Discrimination Protections and More (and a Webinar!) by Fiona Ong and Parker Thoeni, April 15, 2024

- Are Reasonable Accommodations Required for an Employee's Commute? by Fiona Ong April 3, 2024

- You Know That Destroying Evidence Can Get You in Trouble, Right? by Fiona Ong, March 29, 2024

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