SHAWE ROSENTHAL LLP

E-UPDATE

May 31, 2024

RECENT DEVELOPMENTS

US DOL Issues Guidance on AI and the FLSA, FMLA, PUMP Act, and More!

On April 29, 2024 the U.S. Department of Labor issued Field Assistance Bulletin (FAB) No. 2024-1, Artificial Intelligence and Automated Systems in the Workplace under the Fair Labor Standards Act and Other Federal Labor Standards, to provide guidance on the Fair Labor Standards Act, the Family and Medical Leave Act, and other workplace laws in light of the increasing use of artificial intelligence and other automated technologies in the workplace.

Issued pursuant to President Biden's AI Executive Order (discussed in our October 31, 2023 blog post), which directed the Secretary of Labor to provide guidance on the FLSA and AI, the FAB emphasizes that federal laws continue to protect employees regardless of the tools and systems used in the workplace and regardless of where the work is performed. AI and other automated technologies can perform many functions, including tracking work hours, measuring performance, setting work schedules, assigning tasks, and performing certain human resources functions. The FAB identifies specific laws and the issues that may arise under each, as follows:

Fair Labor Standards Act. The FLSA requires employers to pay employees for all hours worked, including overtime. The FAB notes that there are areas of concern with regard to both hours worked and wage payment.

- Hours worked. AI and certain monitoring tools can measure and analyze when workers are "active" or "idle," such as through keystrokes, mouse clicks, website browsing, or camera presence. The FAB warns there must be human oversight of these systems, since these tracking systems are not determinative of hours worked, and any errors by AI in categorizing work time will result in violation of the obligation to pay for all hours worked.

- Break time. Employers may use AI to predict or automatically populate time entries for breaks based on schedules, prior time entries, business rules and other data. But these entries may not necessarily be accurate.

- Waiting time. When an employee is "engaged to wait" to work, the time is considered work hours for which they must be paid, as compared to when they are "waiting to be engaged," which is not work hours. The FAB asserts that AI may have the ability to assign tasks and set work schedules automatically, which may change throughout the day based on changing data. Potential issues can arise when employees are waiting for their next task or an updated schedule – if there is not sufficient time for the employee to use for their own purposes or if

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they must remain nearby, they are "engaged to wait" and must be paid. Employers must accurately account for time spent waiting for the next task.

- Work performed at multiple geographic locations. Some employers use location-based monitoring to track employees and determine if they are "working." This may cause problems if the system fails to account for work performed in different locations – such as when an employee must pick up supplies before reporting to a job site or perform tasks offsite, as well as travel time between worksites.

- Calculating wage rates. Employers may use AI to calculate or adjust wage rates based on a variety of data and metrics, which can include fluctuating supply and demand, customer traffic, geographic location, worker efficiency or performance, or type of tasks. Employers must ensure that these systems are accurately calculating the wage rate, particularly where the employee is paid multiple wage rates.

The Family and Medical Leave Act. The FMLA provides employees with unpaid, job-protected leave for certain family and medical reasons. The FAB identifies particular issues that may arise with the use of AI:

- Processing leave requests. AI may be used to determine eligibility, calculate leave entitlements, or evaluate whether leave is for a qualifying reason. However, there may be errors in calculating hours worked, which could result in incorrect eligibility determinations, or in calculating the amount of leave available.

- FMLA certifications. Employers are strictly limited in what information may be requested to support a request for FMLA leave. AI may request more medical information than allowed. It may also improperly deny leave when a certification deadline is missed, without allowing for circumstances that permit additional time.

- FMLA interference and retaliation. Systems that track leave use may not be used to target employees for retaliation or discourage the use of leave. FMLA leave may not be automatically counted for purposes of disciplinary or other employment actions.

Providing Urgent Maternal Protections for Nursing Mothers Act. The PUMP Act provides nursing employees with reasonable break time and space to express breast milk for a year following the child's birth. The FAB identifies the following concern:

- Scheduling breaks. Automated technologies that limit the frequency, timing, and length of breaks required for pumping may violate the law, since these may vary depending on each employee's needs. Additionally, systems that penalize employees for failing to meet productivity standards will violate the law if they do not take pump breaks into account. It is also a violation if the system requires employees to make up pump breaks or reduces future work schedules because of these pump breaks.

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The Employee Polygraph Protection Act. The EPPA prohibits private employers from using lie detector tests on applicants and employees, except in certain industries under limited circumstances. The FAB notes the following:

- Determining when an employee is lying. Some AI technologies can take certain physical measurements – such as eye movement, voice analysis, or micro-expressions – to determine if an individual is lying. This type of measurement is covered by the EPPA.

Retaliation. An employee's complaints to the DOL about violations of the FLSA or certain other laws are protected from retaliation. The FAB raises certain retaliation issues:

- AI systems cannot be used to penalize or discipline employees for engaging in protected activity under these laws.

- AI systems cannot be used to conduct workplace surveillance for the purpose of identifying protected activity under these laws or targeting employees who have made complaints, and then taking adverse action against employees for engaging in such protected activity.

- Although not within the purview of the DOL, the FAB further notes that AI systems cannot be used to predict the likelihood that certain locations will unionize.

This guidance from the DOL was followed on May 16, 2024 by its Artificial Intelligence and Worker Well-being: Principles and Best Practices for Developers and Employers, as discussed in our May 16, 2024 blog post.

Very Helpful Guidance on Harassment Claims from the Seventh Circuit!

A recent opinion from the U.S. Court of Appeals for the Seventh Circuit provides much useful guidance for employers on unlawful harassment under Title VII, including third-party harassment. In doing so, the Seventh Circuit noted, Title VII "does not ensure that the worker will have wise and skilled superiors with a sharply honed sense of social justice and a mastery of personnel management."

Background of the Case. In *EEOC v. Village at Hamilton Pointe LLC*, the EEOC sued a long-term care facility on behalf of 52 current and former black employees, alleging that they had been subjected to a hostile work environment because of their race. Specifically, employees variously claimed racial preferences in scheduling, racial comments by residents (including the N-word), and harassment by white co-workers.

The federal district court dismissed the claims of most of the employees, finding that they failed to establish a hostile work environment. As to the racial scheduling claims, the federal district court determined that they were not directly applicable to the plaintiffs or were not based on race. Comments and conduct were not sufficiently severe or pervasive to support a harassment claim, or were not directed at the plaintiffs. Some employees failed to report the harassing conduct. An appeal followed.

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Hostile Work Environment Harassment Under Title VII. In affirming the federal district court's decision, the Seventh Circuit provided an excellent summary of the legal standards applicable to harassment claims under Title VII, which prohibits discrimination and harassment in employment on the basis of race, as well as color, sex, religion, and national origin. In order to establish a claim of hostile work environment harassment under Title VII, an employee must show that: (1) they were subject to unwelcome harassment; (2) the harassment was based on the employee's protected characteristic; (3) "the harassment was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment"; and (4) there is a basis for employer liability.

Race-based conduct is required. To establish race-based harassment, the employee does not need to show that the complained-of conduct was explicitly racial, but they must show it had a racial character or purpose. Conduct that may seem neutral can support a hostile work environment claim if there is other evidence that ties the conduct to the employee's race. But there must be some connection - "not every perceived unfairness in the workplace may be ascribed to discriminatory motivation merely because the complaining employee belongs to a racial minority."

Both a subjective and objective test. With regard to the third element of a hostile work environment harassment claim (i.e. whether the harassment was so severe or pervasive as to alter the conditions of employment), courts apply both a subjective (from the employee's point of view) and objective (from a "reasonable person's" point of view) test. An employee's subjective beliefs "are not sufficient alone" to establish a hostile work environment. The Seventh Circuit (as well as most other Circuits) consider the "totality of the circumstances" in determining if the conduct was objectively hostile, including the frequency of the conduct, the severity, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with the employee's work performance. Notably, "[o]ffhand comments, isolated incidents, and simple teasing do not rise to the level of conduct that alters the terms and conditions of employment."

The relationship between the parties matters. "A supervisor's use of racially toxic language in the workplace [is] much more serious than a co-worker's." Additionally, the conduct of a direct supervisor weighs more heavily than that of an indirect supervisor, which is heavier than that of a co-worker.

Whether the employee experienced first-hand harassment matters. Although relevant, "when harassment is directed at someone other than the plaintiff, the impact of [such] second-hand harassment is obviously not as great as the impact of harassment directed at the plaintiff." Specifically, according to the Seventh Circuit, racial comments made directly to the plaintiff carries the most weight. Comments made to non-plaintiffs carried less weight, but showed that the same supervisors made racial comments to other employees in the same positions, and therefore discrimination was likely pervasive. Comments the plaintiffs were told that the supervisor made were weakest, and could be excluded by the court. "Rumors" alone are not evidence of harassment, but may be relevant when coupled with other evidence.

Third parties can create a hostile work environment. This includes customers, vendors, and (specific to healthcare) patients or facility residents. The Seventh Circuit states that, "[i]n such a situation, we

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do not consider the employer's control over the third party, but only the impact of the third-party harassment on the employee's working environment."

The status of the harasser matters. If the harasser is a co-worker or third party, the employer is liable only if they were negligent in failing to discover or to remedy the harassment. If the harasser is a supervisor, the employer is automatically liable unless it can show that (1) it exercised reasonable care to prevent and correct any harassing behavior and (2) that the employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. A supervisor is an individual "with the power to directly affect the terms and conditions of employment. This power includes the authority to hire, fire, promote, demote, discipline or transfer a plaintiff."

The employer must have notice. The employee must show that the employer had enough information to be reasonably aware of the probability of harassment. If the employer established a channel for complaints of harassment, the employee is expected to use that channel, unless it is inadequate. If the channel provides for multiple reporting options, the employee need only use one of the options to put the employer on notice.

But compliance with the employer's reporting channel is not necessarily required if the employer is adequately put on notice. Where the channel is unclear or inaccessible, an employee's complaints to a non-manager will put the employer on notice if the employee reasonably believed that individual had the power to bring the complaint to the attention of someone with the authority to remedy them.

An employer has constructive notice (i.e. notice as a practical matter) if the harassment is sufficiently pervasive and obvious. Where the harassment is public, the employer will be deemed to have knowledge of the harassment. But knowledge of an incident harassing behavior will not create liability unless the behavior is sufficient to support a hostile work environment.

Prompt and effective corrective action. An employer will not be liable for co-worker harassment if they take "prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring." In some instances, "creating physical separation and minimizing time worked together" may be enough.

But race-based assignments are unlawful, even where such assignments are made to avoid racially hostile residents. The existence of a racial preference policy in scheduling can support a racially hostile workplace, particularly when taken in conjunction with other co-worker conduct.

Context matters. There may be "unique circumstances" relevant to the work environment, such as caring for elderly individuals with mental impairments who are unable to control their offensive sexual or racial comments. Such behaviors will not automatically create a hostile work environment – that will depend on the totality of the circumstances.

Protecting employees from third-party harassment. But employers must also protect employees from third-party harassment, where the conduct is so severe or pervasive as to create a hostile work environment. The Seventh Circuit suggested some "reasonable" options short of discharging racially hostile residents, including: warn residents of the facility's non-discrimination policy and obtain the

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resident's acknowledgement in writing; attempt to reform the resident's behavior after admission; and assign staff based on race-neutral criteria that minimize the risk of conflict, such as by advising employees that they can ask for protection from racially harassing residents.

Lessons for Employers. The Seventh Circuit's opinion provides much instructive guidance for employers. Critically, employers must issue a policy that explains and prohibits harassment, with multiple avenues of complaint. They must train supervisors and managers to address harassment and inform management/HR of any potential harassment situations. They must act promptly and effectively to address any harassment complaints and prevent future harassment – including by third parties.

Supreme Court Holds Courts Must Stay, Not Dismiss, Cases Sent to Arbitration

On May 16, 2024, the U.S. Supreme Court unanimously ruled that, when a party to a lawsuit seeks arbitration pursuant to an arbitration agreement, a court must stay – and may not dismiss – the lawsuit. In so holding, the Supreme Court resolved a split among the federal U.S. Circuit Courts of Appeals on this issue.

The Federal Arbitration Act. The Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements. Section 3 of the FAA provides that courts "shall … stay" (i.e. suspend) a lawsuit when there is an arbitration agreement that covers the dispute and one of the parties has requested arbitration under the agreement. The federal Circuit Courts have differed on what to "stay" means. Some courts have determined only that it means the in-court litigation must stop, which can be done through dismissal, while other courts view it as only a temporary suspension of the lawsuit.

Background of the Case. In *Smith v. Spizzirri*, delivery drivers sued a delivery service for violations of state and federal employment laws, claiming that they had been misclassified as independent contractors, and that they had not received the minimum wage, overtime pay, or statutory sick leave. The delivery drivers had signed arbitration agreements and, at the delivery service's request, the court then sent the case to arbitration. The federal district court held, and the U.S. Court of Appeals for the Ninth Circuit agreed, that it had the discretion whether to dismiss or stay the lawsuit pending arbitration. It chose to dismiss the lawsuit. Several judges on the Ninth Circuit noted, however, that sister Circuits were divided on whether courts have such discretion.

The Supreme Court's Decision. On appeal, the Supreme Court found that the statutory language (i.e. "shall … stay"), structure and purpose all supported the conclusion that, "When a federal court finds that a dispute is subject to arbitration, and a party has requested a stay of the court proceeding pending arbitration, the court does not have discretion to dismiss the suit …" As the Supreme Court explained, "shall" is mandatory, while "stay" has a long-established meaning of a "temporary suspension." Additionally, the FAA contemplates that the proceeding may return to court if arbitration breaks down or fails, which would not be available if the lawsuit were dismissed. Moreover, a dismissal triggers the right to an immediate appeal of the ruling – which the FAA specifically does not allow. And finally, according to the Supreme Court, the FAA contemplates a "supervisory role" for the courts in facilitating ongoing arbitration proceedings, which supports keeping the case on the court docket.

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Lessons for Employers. Many employers have implemented arbitration agreements for employees and other relationships, like independent contractors. In some Circuits, they have been able to have lawsuits dismissed if the case fell within the arbitration agreement – but this will no longer be the case.

TAKE NOTE

Employers May Be Required to Provide Paid Short-Term Military Leave Under USERRA

The U.S. Court of Appeals for the Third Circuit has joined several sister Circuits in finding that employers who provide paid leave for short-term absences, like jury duty or bereavement leave, may be required to provide similar paid leave for short-term military purposes under the Uniformed Services Employment and Reemployment Rights Act.

Under USERRA, employers must provide employees on military leave with the same rights and benefits that are provided to employees on other, similar leaves. If the benefits vary, the employee must be given "the most favorable treatment according to any comparable form of leave." In assessing comparability, the applicable regulations set forth factors for courts to consider: the duration and purpose of the leave, as well as the ability of the employee to choose when to take the leave, in addition to any other factors the courts may choose to consider.

In *Scanlan v. American Airlines Group, Inc.*, a group of pilots sued their employer, arguing that they should have received paid military leave under USERRA since the employer provided paid leave for bereavement and jury duty. The Third Circuit held that a jury could find these three types of leave to be comparable. The parties agreed that the duration of the leaves were similar (between 1-3 days), although military leave was used more frequently than the other leaves. All the leaves had a public purpose – the bereavement leave promoted public safety by allowing pilots time to grieve, while jury duty and military leave have a civic duty purpose, although jury duty is compulsory while military duty is not. There is little control over when jury duty or bereavement leave is required, but the parties disagreed over the pilots' ability to schedule their military leave. The Third Circuit held that it was up to the jury to weigh any differences.

This is the third U.S. Court of Appeals (in addition to the Ninth and Seventh Circuits) in recent years to hold that short-term military leave might be sufficiently comparable to other short-term paid leaves such that it should be paid. Employers should be aware that, if they provide paid short-term leaves for other reasons, their generosity may trigger obligations to provide equivalent paid short-term military leave.

The EEOC Has Sued 15 Companies for Failing to File Their EEO-1 Reports! Many companies treat the annual EEO-1 filing requirement with some lack of urgency and, historically, there has been little to no consequence for failing to file the EEO-1 form. But a recent press release from the Equal Employment Opportunity Commission makes clear that those days may be over, as the agency announced that it has filed suit against over a dozen companies across a wide range of industries for repeatedly failing to file those mandatory reports.

The EEO-1 form must be submitted annually by (1) private sector employers with more than 100 employees and (2) government contractors and first-tier subcontractors with more than 50 employees and more than $50,000 in federal contracts or subcontracts. It requires employers to provide

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information regarding the race, ethnicity, sex, and job category of their workforce, broken down into 10 job categories. The EEOC uses the data for enforcement, analytics, and research.

This year's EEO-1 reporting period is currently open until June 4, 2024. Covered employers should ensure that they meet this deadline.

Employers, Leave Those Union Flyers in the Breakroom Alone... In the past, when cleaning employee breakrooms, employers have been able to dispose of any papers left behind – including union flyers. But a recent case from the National Labor Relations Board suggests a hands-off approach to union flyers in employee breakrooms.

In *Apple, Inc.*, an Apple store had a Solicitation and Distribution policy that, in relevant part, prohibited employees from distributing material during work time or in a work area. (The National Labor Relations Act protects employees' rights to distribute union materials during non-working time in non-work areas, absent the showing of "special circumstances" necessary to maintain production or discipline). The store also had an employee breakroom with a large table and chairs, where employees sat to eat, read, and converse. Employees were supposed to clean up their own trash.

Union flyers were placed on the breakroom table one day in connection with a union organizing campaign. Soon after the employees left them on the table, unattended, they were removed by store managers. This happened repeatedly over several days. When asked why the flyers were removed, a manager responded that they were implementing the non-solicitation policy and enforcing housekeeping and cleanliness standards. The union then filed unfair labor practice charges against the employer.

An administrative law judge found, and the Board agreed, that the employer had violated the National Labor Relations Act by removing the union flyers from the breakroom table. The Board held that neither the non-solicitation policy nor the housekeeping standard provided a basis for the removal of the flyers. Although the store tried to analogize the table to a company bulletin board (which an employer can restrict to company-issued communications only) under its non-solicitation policy, it was clear that the table was used for far more than communicating company information. The Board also agreed that the housekeeping and cleanliness standard did not support the removal, since the employer allowed non-union materials (like baskets of fruit, Shake Shack coupons, or newspapers) to remain on the table at other times. It held that the employer unlawfully confiscated union materials in a non-work area and applied its non-solicitation and housekeeping and cleanliness standards in a discriminatory fashion.

What this means for employers is that they must be very careful in dealing with union materials in employee breakrooms. These are non-work areas in which employees have the right to distribute union materials during their non-working time. It may be possible to have a policy that prohibits any materials from being left unattended, but such a policy would need to be consistently enforced for all items – including things like fruit or food coupons.

Those Reasonable Accommodation Requests Can Be Pretty Subtle... And Context Matters! Although employers are required to provide reasonable accommodations only where the employee makes their need for accommodation known, courts have repeatedly held that there are no "magic

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words" in order to trigger their rights under the Americans with Disabilities Act, and a recent case from the U.S. Court of Appeals from the Sixth Circuit reiterates this point.

In *Yanick v. Kroger Co. of Michigan*, a new store manager took over the store the same week the employee, the bakery manager, was diagnosed with breast cancer. From the beginning, the store manager had concerns with the employee's performance, and there were a number of conversations with and about the employee about her performance. The employee then took a four-month leave for breast cancer treatment. One week after her return, there was a meeting where the employee said she "was struggling and needed some time to get back to normal," and that working significant overtime the prior week was "hard for [her] physically." The store manager, however, expressed continued concerns about her performance and told the employee that if things continued, she could be disciplined or fired – or that she could step down. Ultimately, the employee chose to step down to a lower position with less pay and authority. She then sued for failure to accommodate under the ADA, among other things.

The Sixth Circuit held that the employee does not need to actually use the words "disability" or "accommodation." Rather, the question is "whether the employee communicated a need for an adjustment at work because of a disability." The Sixth Circuit specifically noted that "context matters," and "[e]mployers must draw reasonable inferences from what an employee says, bearing in mind the statements' context." Here, the Sixth Circuit found that a jury could conclude that the employee made an accommodation request when, in the context of returning from cancer treatment, she said she was struggling, needed time to return to normal, and wanted the chance to get used to all the work again. According to the Sixth Circuit, this could be reasonably understood as a request for a reduced work schedule, which was tied to her disability since she said the job was "hard for her physically."

The lesson for employers is to consider not only an employee's words, but also the context in which they are uttered. The Sixth Circuit acknowledged that similar words in another situation might not be enough to trigger the ADA, but here, given the employee's recent return from medical leave, they were enough. Wise employers will err on the side of getting more information to confirm whether an accommodation request is (informally) being made.

The OFCCP's AI Guidance for Federal Contractors (and Private Employers?). In addition to the U.S. Department of Labor's AI guidance for employers discussed elsewhere in this E-Update, the DOL's Office of Federal Contract Compliance Programs released Artificial Intelligence and Equal Employment Opportunity for Federal Contractors guidance specifically for federal contractors and subcontractors – but which contains useful tips for all employers.

The OFCCP's guidance is part of a new AI landing page. In the guidance, the OFCCP explains in detail how AI technologies are implicated in a federal contractor's compliance efforts. The guidance notes that contractors are required to maintain certain records (which may have been created in the context of using AI), to provide information on AI systems to the OFCCP upon request, and to make reasonable accommodations for individual with disabilities, including with regard to the use of automated systems. The OFCCP further notes that selection procedures, including those relying on AI, may need to be validated in accordance with the Uniform Guidelines on Employee Selection Procedures. The OFCCP also identifies certain risks of AI, including embedded bias within

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automated systems. The agency warns that it will investigate the use of AI as part of its compliance evaluations and complaint investigations.

Of particular interest to all employers, the OFCCP identifies certain "promising practices" in connection with the use of AI. These include the following categories:

- Providing notice that the employer is using AI. This includes: providing advance notice and appropriate disclosures about the use of AI in the hiring process or employment decisions; identifying what data is being captured and used and how applicants/employees can review/correct/delete such data; informing applicants how to request reasonable accommodations in the hiring process; and implementing and describing safeguards for privacy.

- Use of an AI System. The OFCCP suggests the following: engaging with employees (and their representatives – i.e. unions) in the design, deployment and use of AI systems for employment decisions; standardizing the systems to ensure all applicants go through the same process and establishing procedures for requesting reasonable accommodations; regularly monitoring and analyzing the systems for disparate or adverse impact; ensuring meaningful human oversight; and providing training on the use of AI systems.

- Obtaining a Vendor-Created AI System. Suggested practices include the following: ensuring the vendor maintains records consistent with OFCCP requirements; ensuring the source and quality of data being collected and used; confirming vendor protections and privacy for contractor data; verifying the criteria used to filter and prioritize candidates; identifying differences between the data used in the creation of the AI system and that of the contractor; ensuring that selection processes are validated; ensuring the reliability and safety of the system, as well as the transparency and explainability of the system; verifying results of any assessment of system bias.

- Accessibility and Disability Inclusion. Many of these practices overlap with others, but some additional suggestions include: using a system that is generally accessible to those with disabilities; and if using a vendor, ensuring that they considered the needs of those with disabilities in the development and application of the system to ensure access and equal employment opportunity.

NEWS AND EVENTS

New Partner – We are delighted to announce that Paul D. Burgin has been made a Partner at our Firm. Paul represents employers in a wide range of labor and employment matters in court and before federal and state agencies, including the Equal Employment Opportunity Commission and the Department of Labor. Paul also provides human resources advice and counseling, and prepares and revises employee handbooks, personnel policies and procedures, employment agreements and restrictive covenants.

Prior to joining Shawe Rosenthal as an associate, Paul served as a judicial law clerk for the Honorable Kevin Arthur of the Appellate Court of Maryland. While still in law school, he was a judicial intern for the Honorable Shirley Watts of the Supreme Court of Maryland. Paul graduated

summa cum laude from the University of Baltimore School of Law, where he served as Associate Managing Editor of the University of Baltimore Law Review, competed on the National Moot Court Team, and was a member of the Heuisler and Royal Shannonhouse Honor Societies. Paul received his undergraduate degree from Kenyon College. Paul has been recognized as a *Super Lawyers* Rising Star for the past several years.

Webinar – The Equal Employment Opportunity Commission recently issued its final regulations to interpret and implement the Pregnant Workers Fairness Act (PWFA), which already went into effect last summer. These regulations go into effect on June 18, 2024, and Shawe Rosenthal LLP held a complimentary webinar to help employers understand their obligations under the law and these new regulations. Teresa D. Teare and Jamie L. Salazer provided guidance and examples of how best to comply. This program is valid for 1 PDC for the SHRM CP or SHRM SCP. To view the webinar, click here.

Webinar – Parker Thoeni was the moderator and Paul Burgin was a panelist for the Employment Law Alliance's webinar, "The FTC Rule Banning Noncompetes: Its Impact on Employers and How to Protect Your Business." The ELA is a comprehensive global network of local labor, employment and immigration attorneys, of which Shawe Rosenthal is the Maryland member. The webinar is available on demand here.

Webinar – Fiona Ong and Chad Horton, along with Andrew Griffin of the Maryland Chamber of Commerce, conducted a webinar "Maryland's New Employment Laws 2024: What Employers Need to Know," on May 2, 2024. To view the webinar, click here.

Victory – J. Michael McGuire, with assistance from Jordan F. Dunham, won an arbitration for a global engineering company. The arbitrator denied the grievances filed by the International Association of Machinists and Aerospace Workers and sustained the Company's termination of two employees who failed to follow the Company's procedures and had also falsified time records. The arbitrator agreed that the Company had just cause to terminate the employees despite less severe corrective action options being available.

Victory – Parker Thoeni and Paul Burgin won a motion to dismiss in federal court on behalf of a skilled nursing facility. The plaintiffs had alleged that the client was liable as a successor entity for its predecessor's alleged delinquent employee fringe benefit contributions. The court agreed that Plaintiffs did not allege sufficient facts to establish that the client was on notice of the liability prior to its purchase of its predecessor's assets.

Presentation – Paul Burgin conducted a webinar on recently-enacted employment laws for the Maryland Automobile Dealers Association on May 21, 2024.

Appointment – Fiona Ong was re-appointed General Counsel of the Maryland Chamber of Commerce and will serve on its Executive Committee. She is the first minority and second woman to serve in this position, following Elizabeth Torphy-Donzella. Fiona also serves as the co-Chair of the Chamber's Labor & Employment Committee. The Chamber is the leading voice for businesses in Maryland.

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TOP TIP: An Update on Maryland's Paid Family and Medical Leave Insurance (FAMLI) Law

As Maryland employers should be aware, the General Assembly passed a law in 2022 that set up a paid family and medical leave insurance program (known as FAMLI). The program will apply to all employers with employees in Maryland. It will provide eligible employees with 12 weeks of paid family and medical leave, with the possibility of an additional 12 weeks of paid parental leave (for a possible total of 24 weeks of paid leave). This $1.6 billion program will be administered by the State and funded by contributions from employers and employees. Contributions will begin on July 1, 2025, with benefits starting July 1, 2026.

We summarized the extensive provisions of the original law in our April 12, 2022 E-lert. Last year, the General Assembly passed revisions to the law that delayed implementation, capped the total contribution amount at 1.2% of wages, and split the contribution 50-50 between the employer and employee, as detailed in our April 12, 2023 E-lert. This year, there were additional amendments to the law that further delayed implementation and clarified that employees must perform services under employment located in the State in order to be eligible for benefits, among other things, as we discussed in our April 10, 2024 E-lert.

The Maryland Department of Labor's FAMLI Division is in the process of developing regulations to implement the law. In the interim, it is providing resources to help employers prepare for FAMLI. It has created a website with a specific employer-focused webpage, issued FAQs for employers and, most recently, held a webinar. Among the significant points discussed during the webinar, with further clarification from us, are the following:

- FAMLI regulations: The FAMLI Division previously issued "draft" regulations, as discussed in our January 30, 2024 E-lert. The law was subsequently amended during the 2024 General Assembly Session, as mentioned above, and the FAMLI Division will be issuing an updated version of their "draft" regulations some time in the next few weeks. The public will be able to offer comments, which the FAMLI Division will take into consideration before formally issuing proposed regulations later this year.

- Employer portal: The FAMLI Division is in the process of developing a portal through which employers will register with an email address for communications, and will submit all required information and contributions.

  The FAMLI Division will also provide information to employers about employee claims through the portal. Once an employee fills out an application on the FAMLI portal, the FAMLI Division will immediately notify the employer through the registered email address. The employer then has 5 days to respond and provide information that could impact the benefits determination, such as the employee took employer-provided Alternative FAMLI Purpose Leave (discussed further below) already, or that the employee took FMLA leave and failed to apply for FAMLI benefits although they were notified of their right to do so.

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- Quarterly reports: Employers will submit wage and hour reports for all covered employees on a quarterly basis through the portal. The FAMLI Division will use that information to determine an employee's eligibility and benefit amount upon receipt of that employee's application for benefits.

- Contribution schedule: Contributions will be made on the same schedule as unemployment insurance contributions. These are required quarterly on April 30, July 31, October 31, and January 31.

- Contribution amount: The Secretary of Labor had previously announced that the total contribution amount for the first year of contributions would be .90% of each employee's wages up to the Social Security cap (which is set annually and is currently $168,600). Although the 2024 amendments give the Secretary the ability to re-set that amount, the FAMLI Division stated that this announced rate is unlikely to change before contributions begin in 2025.

- Small employers: Those with fewer than 15 employees will not be required to make the employer contribution, although their employees will still be required to make their contributions and will be eligible for FAMLI benefits/leave. In determining the 15-employee threshold, all employees – including those employed outside of Maryland – are counted. The FAMLI Division will use a 4-quarter average for the prior year, and re-evaluate on an annual basis.

- Employees working outside Maryland, in whole or in part: Only employees who perform services under employment located in the State are covered by the FAMLI program, and the FAMLI Division will apply the localization rules for unemployment insurance to determine if an employee who is physically located outside of Maryland meets this requirement. For the most part, if an employer is paying unemployment insurance contributions in Maryland for an employee, that employee is covered by FAMLI. There may be other employees who are not covered by UI but are still covered by FAMLI, however.

  The UI localization rules cover several different out-of-state situations. For employees who physically work, at least in part, in Maryland, the rules provide that an employee's service is localized within Maryland if it is performed (1) entirely within Maryland or (2) both within and outside Maryland, as long as the non-Maryland service is only incidental (meaning temporary or transitory, or consisting of isolated transactions) to the service performed in Maryland. The factors for determining if service is incidental or transitory are: (1) the intention of the employer and employee as to whether the service is an isolated transaction or a regular part of the employee's work; (2) the intention as to whether the employee will return to Maryland after completing their out-of-state work; and (3) the length of service within Maryland as compared to outside Maryland.

  For employees who physically report to a Maryland location but may then travel outside Maryland to perform work, the UI localization rules provide that they will be covered by FAMLI if their service is not localized in any state, they perform some services in Maryland,

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and their base of operations is in Maryland. The "base of operations" is a more-or-less permanently fixed location from which the employee starts work and to which they customarily return to receive work instructions, obtain supplies, repair equipment, or perform other functions necessary for their job. This can be the employee's business office, or an employment contract may set forth a particular place.

The UI localization rules further provide that a remote employee will also be covered by FAMLI if their employment is not localized in any State and they have no base of operations, or the base is in a state where they perform no service, or the base moves from state to state – but their service is directed or controlled from Maryland.

And if none of the above rules establish where the remote employee's employment is based, the UI rules provide that they will be covered by FAMLI as long as they live in Maryland and perform some services in Maryland.

- Employer-provided leave: The law is clear that employers cannot require employees to use PTO, sick leave, or vacation before or while using FAMLI leave, but employers may permit employees to top off their FAMLI benefits with such leave to reach 100% of their pay.

  If an employer provides "Alternative FAMLI Purpose Leave," which is leave that is specifically limited to a FAMLI purpose (like paid parental leave), the employer may require employees to use that concurrently. In the webinar, the FAMLI Division gave the example that if an employer offers 6 weeks of fully paid parental leave, it can require the employee to take that leave first, and then when the employee applies for FAMLI, they would be eligible for only 6 weeks of FAMLI benefits rather than the full 12.

  As for Short-Term and Long-Term Disability programs, the FAMLI Division asserted that FAMLI is primary, with STD and LTD used only to get up to full wage-replacement. Because that is not how STD and LTD currently operate (with most plans only providing 2/3 of wages), the Division believes the STD and LTD market will evolve to achieve this result.

- Equivalent Private Insurance Plans: Employers must apply and be approved by the FAMLI Division to use an EPIP. There are two options.

  First, employers can purchase a previously-approved plan through a private insurance company. The FAMLI Division noted that insurance code requirements will apply to such plans, and there may be employer obligations under the insurance code that are separate from FAMLI.

  Second, employers may implement a self-insured plan that meets or exceeds the requirements of the FAMLI law, as reviewed and approved by the FAMLI Division. Employers will still be required to submit quarterly wage and hour reports, and will also submit claims information on a quarterly basis that will be audited by the State. In addition, they may be required to pay a fee for having such a plan (in addition to onerous bonding and other requirements as we previously discussed in our January 30, 2024 E-lert on the draft regulations).

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As we have previously noted, the guidance on FAMLI is ever-changing, and we will continue to keep you posted on any developments.

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