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E-UPDATE

October 31, 2024

RECENT DEVELOPMENTS

Employers' Use of AI Tracking or Monitoring Reports May Trigger Obligations Under FCRA

In light of companies' increasing use of AI technologies to track worker productivity and activity, the Consumer Finance Protection Bureau asserts that it is "tak[ing] action to curb unchecked worker surveillance." On October 24, 2024, it issued guidance to warn employers that their use of certain data reports from third-party monitoring and reporting agencies – including surveillance-based, "black box" AI or algorithmic scores about their employees – to make employment decisions could fall within the coverage of the Fair Credit Reporting Act and require compliance with FCRA's technical requirements.

FCRA requires employers to provide certain notices and communications to, and to obtain authorization from, an applicant or employee when using a third-party provider to prepare a consumer report or investigative consumer report. In the employment context, this has traditionally meant a third-party background check, including checks on credit, criminal background, references, education, driving records, and social media activity. Recent technological developments, however, allow the monitoring of employee performance and activity, and the CFPB identifies examples such as monitoring sales interactions, tracking driving habits, measuring time for task completion, documenting web browsing, and measuring keystroke frequency, among other things. In its announcement of the guidance, the CFPB asserts that third-party reports of such monitoring might be used for employment purposes such as:

- Predicting worker behavior, including union organizing or preparing for departures, that could impact management decisions on employee retention and engagement.
- Reassigning workers, based on data about performance, availability and patterns.
- Issuing automated disciplinary actions, where consumer reports flag potential performance issues.
- Evaluating social media activity, and basing hiring or other decisions on such activity.

The CFPB cautions employers that, in such cases, they must comply with FCRA's requirements.

FCRA's General Notice Requirements. Under FCRA, a "consumer report" is any communication containing information about an individual's credit history, character, general reputation, personal characteristics, or mode of living. An "investigative consumer report" is a consumer report in which information is obtained, at least in part, through personal interviews with neighbors, friends, or associates.

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When any consumer report or investigative consumer report is being procured for employment purposes, the employer must do the following:

- Provide the applicant/employee with a clear and conspicuous written advance disclosure in a stand-alone document, stating that a consumer report or investigative consumer report may be obtained for employment purposes.
- Obtain the applicant's/employee's written authorization for the procurement of the consumer report or investigative consumer report, which may be combined with the stand-alone document referred to in the prior paragraph.
- Certify, to the entity providing the report, that the company has complied with the above notice requirements and that the information from the report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.
- If the report is going to be used as the basis, in whole or in part, for any adverse employment action (such as a refusal to hire or a decision to terminate), provide the applicant/employee with a pre-adverse action notice letter, along with a copy of both the report and a copy of the CFPB's "A Summary of Your Rights Under the Fair Credit Reporting Act" before taking the action.
- After waiting a "reasonable" amount of time (not specified by the statute or the CFPB), advise the applicant/employee of the adverse employment action. We recommend at least 5 business days. The letter must explain the adverse action, provide the name and contact information for the consumer reporting agency, state that the consumer reporting agency did not make the decision to take the adverse action and will not be able to provide an explanation for the action, state that the individual has the right to request a free copy of the report from the agency within 60 days, and state that the individual has the right to dispute with the agency the accuracy or completeness of the information in the report.

Additional Requirements for Investigative Consumer Reports. Employers that use third party providers to prepare investigative consumer reports have further obligations, as follows:

- Sometime before but not later than three days after requesting a report, provide the applicant/employee with written disclosure that an investigative consumer report may be obtained. Note that this requirement is satisfied by the initial disclosure/authorization form referenced above, which is provided to the applicant/employee before requesting the report.
- The disclosure must include a statement that the investigative consumer report may include information about the individual's character, general reputation, personal characteristics, or mode of living.
- The disclosure must inform the applicant/employee of their right to request a complete and accurate disclosure of the nature and scope of the investigation.
- The disclosure must also inform the individual that the employer is required to make a written disclosure of the nature and scope of the investigation within five days after receiving the individual's request for disclosure or the date the employer requests the investigative consumer report, whichever is later.
- With the disclosure, provide the CFPB's "A Summary of Your Rights Under the Fair Credit Reporting Act."
- Certify to the third-party reporting company that the Company has and will comply with all notice and disclosure requirements for investigative consumer reports, and further certify that

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the Company will disclose the nature and scope of the investigation to the individual upon request and within the required five-day period.
- Upon written request by the applicant/employee made within a "reasonable time," provide complete written disclosure of the nature and scope of the investigation that was requested, within the five-day period noted above.

Special Rules for Employee Investigations. If an employer uses a third-party consumer reporting agency (such as a human resources consulting firm that regularly does investigations) to conduct an investigation into suspected employee misconduct, or compliance with laws, regulations or the employer's policies, the employer does not need to provide the notices and disclosures or obtain the authorization described above. However, the employer must provide a summary describing the nature and scope of the investigation to the employee if adverse action is taken based on the investigation.

Maryland DOL Adds to Its Guidance on the New Pay Transparency and Paystub Notice Obligations

As of October 1, 2024, employers with Maryland employees are subject to new wage range posting and paystub notice obligations, as detailed in our April 10, 2024 E-lert. In September, the Maryland Department of Labor issued FAQs and other resources to assist employers in complying with the new obligations, which we discussed in our September 11, 2024 E-lert. And now the MDOL has added to those FAQs.

Background on Wage Transparency Requirement. Maryland's Equal Pay for Equal Work Act now imposes more expansive disclosure obligations on employers, including the following:

- Posting Requirement: Employers must include the following in any internal or external job posting:
  - the wage range,
  - a general description of benefits, and
  - any other applicable compensation.

  If the posting is not available to the applicant, it must be provided to the applicant before any discussion of compensation is held with the applicant and at any other time on request of the applicant.
- Record Retention Requirement: Employers must retain records of compliance for at least three (3) years.

"Wage range" is defined as the minimum and maximum hourly rate or salary, set in good faith by reference to one of the following:

- any applicable pay scale;
- any previously determined minimum and maximum hourly rate or salary for the position;
- the minimum and maximum hourly rate or salary for an individual holding a comparable position at the time of the posting; or
- the budgeted amount for the position.

The Wage Transparency Guidance: The MDOL has updated its FAQs to make the following points:

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- The law applies only to postings made on or after October 1, 2024, but employers must comply with the law for any reposted positions after October 1.
- All solicitations, whether internal or external, are covered, including but not limited to the following: newspaper ads and printed flyers; social media posts; and e-mails sent to multiple applicants or through an electronic mailing list.
- The law does not require employers to post all job opportunities; it only requires employers to comply with the law if they post an opening.
- Employers may use a "Help Wanted" sign on a vehicle or building as long as applicants are subsequently provided with or can readily access the required information. A sign could have a website address or QR code that links to the required information. Employers can email the information to online applicants or hand a document with the information to walk-in applicants.
- If the employer is offering a single fixed rate, the posting would include the fixed rate.
- Employers may have a link in a posting to the wage range and benefits, as long as all required information is included in the link and it is easily accessible.

Background on the Paystub Notice Requirement. The physical paystub or the online pay statement must now contain extensive and specific required information, to include the following:

- The employer's name as registered with the State, address and telephone number;
- The date of payment and the beginning and ending dates of the pay period for which the payment is made;
- For non-exempt employees, the number of hours worked in the pay period;
- The rates of pay;
- The gross and net pay earned during the pay period;
- A list of additional bases of pay, including bonuses, sales commissions, or anything else; and
- For piece-rate employees, the applicable piece rates of pay and number of pieces completed at each rate.

The Paystub Notice Guidance: The MDOL has added the following information of significance to its FAQs on the paystub or pay statement notice:

- The law applies to workers subject to a collective bargaining agreement.
- The notice does not need to list the hours worked for employees who are overtime-exempt under federal and state law.
- The paystub law does not require leave balances to be included on the notice, but the Maryland sick and safe leave (SSL) law separately requires employers to provide a written statement of each employee's SSL balance with each paycheck. According to the MDOL, the best practice would be to include the SSL balance on the notice.
- No notice is required if the employee worked no hours during the pay period and will not receive any wages (as paid time off or otherwise).
- A notice generated by a third-party processing company must still include the name of the actual employer.
- In cases involving joint employers or parent-subsidiary companies, employers should consult with legal counsel about which employer(s)'s name should be listed on the notice.

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Maryland's New Heat Stress Standards: What Employers Need to Know

Back in 2020, the Maryland General Assembly enacted a law that required the State Commissioner of Labor and Industry to develop regulations (by October 1, 2022) to protect workers from heat stress. Rather delayed, the Maryland Department of Labor finally issued the heat stress regulations (or standards) on September 20, 2024, effective only 10 days later, on September 30, 2024. These standards, which are quite onerous, cover all employers whose employees, whether working indoor or out, are exposed to a heat index equal to or exceeding 80 degrees Fahrenheit, with some exceptions. Below, we review the requirements for covered employers.

Covered Employers. As noted above, the standards apply to all employers with employees who are exposed to a heat index of at least 80 degrees Fahrenheit, with the exception of:

- emergency operations and essential services that involve protecting life or property (i.e. law enforcement, emergency medical services, firefighting, rescue and evacuation operations, or emergency restoration of essential utilities or telecommunications)
- incidental exposures, lasting 15 consecutive minutes or less per hour
- buildings, structures and vehicles with a mechanical ventilation system or fan that maintains the heat index under 80 degrees

Monitoring the Heat Index. Employers are required to monitor the heat index throughout the work shift in working areas using one of the following methods: direct measurement of temperature and humidity (this method is required if there is no mechanical ventilation system in the building or structure); reported local weather data; or use of the National Institute for Occupational Safety and Health's (NIOSH) Heat Safety Tool application.

Heat-Related Illness Prevention and Management Plan. Employers must have a written plan, available to employees and, upon request, to MOSH, that contains the following:

- How sufficient amounts of drinking water will be provided and how employees will be provided sufficient opportunity and encouragement to stay hydrated.
- How to recognize and respond to symptoms of heat-related illness, including heat exhaustion and heat stroke.
- How employees will be scheduled for and encouraged to take breaks (including considering environmental conditions, workload, required clothing, personal protective equipment (PPE), and alternative control/cooling methods) and provided with shaded or climate-controlled areas.
- How employees will be trained on heat exposure hazards and prevention of heat-related illness.
- The use and maintenance of alternative cooling and control methods.
- Procedures for heat acclimatization (discussed in further detail below).
- Procedures for high-heat conditions (discussed in further detail below).
- The emergency response plan (discussed in further detail below).

Acclimatization. Employers must provide acclimatization for a period of up to 14 days for employees newly exposed to heat in the workplace and those returning to the workplace after an absence of 7 or more consecutive days.

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- Employers must develop a written acclimatization schedule that complies with one of the following: (1) gradually increasing exposure time by no more than 20% per day over a 5-14 day period; (2) using NIOSH recommendations for acclimatization; or (3) using a combination of gradual introduction and alternative cooling and control measures. In developing the schedule, employers must consider the following: acclimated/unacclimated employees; environmental conditions and anticipated workload; impact of required clothing and PPE; an employee's personal risk factors; any necessary re-acclimatization; and the use of alternative cooling and control measures.
- Employers must also monitor those employees during the acclimatization period using a phone or radio, a buddy system, or some other effective means.

Drinking Water and Shade. The standards require employers to provide at least 32 ounces of free drinking water per hour per exposed employee, as close to the work area as practicable. They also require employers to provide shaded areas to exposed employees, again as close to the work area as possible. There are specific requirements for the shaded areas, as follows:

- Be outside, open, and exposed to air on at least three sides;
- Prevent contributing heat sources from reducing effectiveness;
- Be sufficiently sized for the number of employees utilizing the shaded area;
- Be arranged in a configuration that allows employees to sit in normal posture; and
- Accommodate the removal and storage of PPE during periods of use.

If creating the outdoor shade is not possible or is unsafe, employers must utilize alternative cooling and control measures, including an indoor mechanical ventilation system that meets the remaining shade requirements above.

High-Heat Procedures. Employers must implement high-heat procedures when the heat index is 90 degrees or above in the work area, which must be available to employees in writing and in a language/manner that they understand.

- Employers must monitor exposed employees, using the same methods as for acclimatization.
- Unless the employer can demonstrate effective heat management and protection through alternative cooling and control measures, they must provide a rest schedule (which may coincide with scheduled breaks and meal periods) of either: (1) a minimum of 10 minutes for every 2 hours worked above 90 degrees and 15 minutes for every hour worked above 100 degrees, adjusted for environmental conditions, workload, and the impact of required clothing or PPE; or (2) rest periods in accordance with NIOSH recommendations. The rest periods must be taken in the shade. Any alternative cooling and control measures must be readily accessible to employees at all times and documented in writing.

Emergency Response Plan. Employers must implement a plan that includes procedures for: (1) effective and accessible means for employees to communicate with a supervisor or emergency medical services (EMS); (2) responding to signs and symptoms of possible heat-related illness; (3) monitoring and providing care for employees with such symptoms; and (4) contacting EMS and transporting employees to an EMS-accessible location.

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Training. Employers must provide initial training to employees and supervisors before an employee's first heat exposure, as well as re-training of employees and supervisors annually prior to exposure and immediately following any incident involving a suspected or confirmed heat-related illness. The training must be in a language and manner understandable to all, and include the following:

- The work, environmental conditions, and personal risk factors that affect heat-related illness;
- The concept, importance, and methods of acclimatization;
- The importance of frequent consumption of water and rest breaks;
- The types, signs, and symptoms of heat-related illness, and the appropriate first aid and emergency response measures;
- The importance of and procedures for employees immediately reporting signs and symptoms of heat-related illness; and
- The employer's procedures and the requirements for complying with the standards.

The employer must also maintain training records for one year from the date of training, and the records must include the names of those trained, the dates of training, and a summary of the content. These records must be made available to MOSH upon request.

Next Steps. Employers who are covered by the standards should take immediate action to come into compliance. MOSH offers free consultation services, which can be accessed here. In addition, we have been told that MOSH is planning to offer FAQs and additional guidance at some point in the near future.

TAKE NOTE

DOL Releases Tool to Provide Ideas for Disability Accommodations. The U.S. Department of Labor has released a new tool – the Situations and Solutions Finder – that provides more than 700 accommodation ideas for workers with disabilities and their employers.

The tool allows employers to enter a keyword and/or select from Disabilities, Limitations, and/or Occupations drop-down lists to search the database, which is drawn from examples of workplace accommodations that have been shared with the Job Accommodation Network, which is part of the US DOL's Office of Disability Employment Policy. The USDOL cautions that not all examples in the Finder may be appropriate for every person or workplace, but it will provide suggestions that perhaps employers and employees have not considered. Employers should remember that, in considering reasonable accommodations, they may not only address those requested by the employee, but must also consider others – and they should now be aware that employees may utilize the tool to come up with unusual or creative ideas that should be seriously considered.

Unions May Be Entitled to Non-Bargaining Unit Information Based on Unsupported Assertions of Relevance. While employers may acknowledge that a union is entitled to information about bargaining unit members, the NLRB has made clear in a recent case that it believes unions are also entitled to non-bargaining unit information under a "liberal discovery-type standard" that broadly favors unions.

In *CenturyTel of Montana, Inc.*, the employer refused to provide information requested by the union about the work performed by non-bargaining unit employees. The union did not provide any factual

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basis for its request until the unfair labor practice hearing regarding the request; nonetheless, the Administrative Law Judge found that the employer's refusal to provide the requested information was unlawful.

As the NLRB noted, in affirming the ALJ's decision, under the National Labor Relations Act, the duty to bargain includes the duty to provide relevant information, upon request, to the union to enable it to perform its duties as the employees' bargaining representative. Where the requested information is about non-bargaining unit employees, it is not presumptively relevant and the relevance must be established. In order to establish relevance, the NLRB's General Counsel must show that either (1) the union demonstrated such relevance, or (2) the relevance should have been apparent to the employer under the circumstances. Although the NLRB acknowledges that the union cannot rely on "generalized conclusory explanations, hypothetical theories, or mere suspicion," the NLRB noted that the burden of establishing relevance is "not an exceptionally heavy one" and that it uses the afore-mentioned "liberal discovery-type standard" in evaluating the union's showing. The NLRB also emphasized that the union is not required to disclose the facts supporting its claim of relevance at the time of its request, as long as it had a "reasonable belief" of relevance.

In the present case, the NLRB found that the relevance of the requested information should have been apparent to the employer at the time of the request, particularly given a company official's admission that non-bargaining unit workers had been working in the area. The NLRB further found that, regardless of the foregoing, the union demonstrated the relevance of the request – not at the time, but at the unfair labor practice hearing regarding the refusal of the request.

This decision is troubling, in that the NLRB will apparently support a union's request for non-bargaining unit information upon the purported "reasonable belief" of relevance, even without evidentiary support – and that such evidentiary support may be supplied in the context of the unfair labor practice hearing regarding the refusal.

NLRB Cannot Order Elon Musk to Delete Possibly Unlawful Tweet. The U.S. Court of Appeals for the Fifth Circuit vacated the National Labor Relations Board's order that Tesla CEO Elon Musk's tweet, which the Board had found to be an unlawful threat of retaliation against union activity, should be deleted. Rather, the Fifth Circuit found that the Board exceeded its authority in ordering deletion of the tweet, even if the tweet violated the National Labor Relations Act.

In *Tesla v. NLRB*, during a union organizing campaign, Musk and an employee exchanged words over Twitter in which Musk asserted that workers would "give up stock options" if they unionized. The United Auto Workers union filed an unfair labor practice charge, alleging that the tweet was a threat to rescind stock options in violation of the National Labor Relations Act. The Board agreed and ordered Musk to delete his tweet.

On appeal, the en banc Fifth Circuit (meaning all the judges on the court, rather than the usual panel of three) issued a divided opinion in which the majority assumed without deciding both that the NLRA applies to speech on twitter and that Musk's tweet violated the NLRA. But it found that Musk's tweets were constitutionally protected free speech under the First Amendment, and that "[d]eleting the speech of private citizens on topics of public concern is not a remedy traditionally countenanced by American law." Rather, under the First Amendment, the remedy of deletion applies only to communications that are "*not speech at all*" (emphasis in original), and that the appropriate

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remedy is "by punishing the speaker for the wrongful speech, rather than destroying the communication." Thus, according to the Fifth Circuit majority, the Board did not have the authority to order Musk to delete his tweet. (We note that there was a vigorous dissent that would have upheld the deletion order).

This is an interesting case in that it acknowledges an employer's right to free speech – but employers should not feel emboldened to say whatever they wish in the context of a union organizing campaign. Although the speech itself may be protected, the speaker is not insulated from the consequences of such speech, and the NLRB may order remedies other than deletion. And employers should definitely remember that, under *Cemex*, which we discussed in our August 28, 2023 E-lert, if an unfair labor practice is committed following a union demand for recognition, one such remedy may be an order from the Board to bargain with the union even without a union vote.

Employee Not Protected by Post-Termination FMLA Certification. Employers are sometimes frustrated by the expansive scope of protections for employees under the Family and Medical Leave Act, but a recent case makes the point that an employee is not protected until they establish that they have a serious health condition.

In *Rodriguez v. Southeastern Pennsylvania Transportation Authority*, the employee had numerous absences in violation of the attendance policy. His last absence was due to a migraine. Following an informal hearing in which his termination was recommended, the employee requested FMLA leave and obtained an FMLA certification from his doctor. Nonetheless, he was terminated, and he subsequently sued for retaliation and interference with his FMLA rights. At trial, the jury found for the employee on his interference claims and for the employer on his retaliation claim, but the defendant moved for judgment as a matter of law (meaning that, given the facts, the employee had no viable claims under the law). The trial court granted the motion, and the employee appealed.

The U.S. Court of Appeals for the Third Circuit affirmed judgment for the employer. To establish an FMLA interference claim, an employee must demonstrate that they have a serious health condition within the meaning of the FMLA, that they gave appropriate notice of their need to be absent from work, and the employer interfered with their right to leave. The Third Circuit also noted that "the operative time for determining whether a particular condition qualifies as a serious health condition is the time that leave is requested or taken." In this case, the employee could not meet the criteria for a serious health condition at the time of the leave. Under the FMLA, to be a chronic serious health condition (which migraines may be), the employee must make periodic visits (meaning at least twice a year) for treatment by a health care provider. Here, the employee had not visited a health care provider prior to his termination. And even though he visited one afterwards, the certification applied only prospectively. As the Third Circuit observed, "A patient does not have a 'serious health condition' under [the FMLA] if he waits to see a healthcare provider until after the relevant absences."

Thus, this case supports the position that an employer can hold employees accountable for attendance issues – even those caused by a medical condition – if the employee has not requested FMLA leave or obtained certification of a serious health condition to cover those absences. Of course, if an employer is aware that an employee's medical condition might be covered by the FMLA, they have an obligation to inform employees of their FMLA rights and refrain from disciplining them for FMLA-covered absences. But in situations, such as this one, where the

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employer would not have known, it is incumbent upon the employee to trigger the protections of the FMLA; they do not automatically apply.

Employees Cannot Sue for Violations of Maryland's Mini-WARN Act. Maryland, like a number of other states, has a law similar to the federal Worker Adjustment and Retraining Notification Act, requiring employers to give 60 days' notice of certain plant closings and mass layoffs. Compliance with the Maryland Economic Stabilization Act (or mini-WARN Act) had previously been voluntary but was made mandatory in 2020. However, the Maryland federal district court recently ruled that employees do not have a private right of action under the law.

The Law. The Maryland mini-WARN Act applies to employers with at least 50 employees operating an industrial, commercial or business enterprise in the State for more than one year. It is triggered by a reduction in operations, meaning either:

- the relocation of part of its operation from one workplace to another, resulting in the reduction of the total number of employees by the greater of at least 25% or 15 employees; or
- the shutting down of a workplace or a portion of its operations that reduces the number of employees by the greater of at least 25% or 15 employees over a 3-month period.

Under the law, employers must give 60 days' notice of such reduction in operations to affected employees, their union if any, the Maryland Dislocated Worker Unit, and the chief elected official in the jurisdiction where the affected workplace is located. The notice must provide certain specified information. The Maryland law also contains some, but not all, of the federal exceptions to the 60-day notice requirement.

The Court's Decision. In *Teamsters Local Union No. 355 v. Total Distribution Services, Inc.*, approximately 60 employees at an automobile distribution facility were terminated without notice. Several of them sued, alleging that their employer had violated Maryland's mini-WARN Act by failing to provide 60 days' notice. The Maryland federal district court, however, found that the employees had no right to bring suit under the law. The law itself does not provide for a private right of action but does set forth an administrative enforcement procedure through the Maryland Department of Labor. The employees argued for an implied private right of action, but the court rejected their argument. In reviewing the legislative history of the law, the court determined that the General Assembly specifically addressed the enforcement mechanism and "focused exclusively on administrative enforcement to the exclusion of other methods of enforcement."

But No MDOL Enforcement – for Now. This case is good news for employers, in that only the MDOL can enforce the law. Interestingly, at this time, the MDOL is taking the position that it will not enforce the mandatory notice provisions under the law until it has issued final regulations implementing the mini-WARN Act. (This was previously explicitly stated on the MDOL website; although that statement was removed, we have received confirmation of this continuing position in direct communications with the MDOL). Although proposed regulations have been released (as we discussed in our January 3, 2024 E-lert), no final regulations have yet been issued. We will keep you posted on when they are finally released, at which time the MDOL will exercise its enforcement authority.

Prince George's County (MD) Expands Its Ban the Box Law. Effective September 16, 2024, the Prince George's County Ban-the-Box law has become more restrictive. As employers with

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employees in the County hopefully know, the County previously enacted a law that prohibited inquiries about an applicant's criminal history until the end of the first employment interview. (The "Box" refers to the box, contained on many employment applications, that must be checked if the applicant has a criminal record.) The amended law provides expansive new protections to applicants and employees in the County.

Employers with 10 or more employees (down from the original 25) are now prohibited at any time from asking about or considering convictions where the sentence was completed at least 5 years ago for a nonviolent felony or at least 30 months ago for a misdemeanor. In addition, those employers may not ask about or consider arrests that did not result in a conviction, except where the individual received probation before judgment, which would be treated as a misdemeanor under this law. In addition, covered employers may not at any time ask about or consider arrests or convictions for the possession of marijuana, cannabis, or cannabis-related materials or paraphernalia, where the sentence has been completed, unless it was a conviction that included intent to distribute. The law now also specifically prohibits employers from conducting background checks or investigations that do not conform to these restrictions.

As before, employers that are considering disqualifying an applicant based on criminal history must make an individualized assessment of the job relatedness of the conviction, including the nature of the offense, the time that has elapsed since the conviction, and any information bearing on its potential inaccuracy. Where an employer decides to withdraw an offer of employment based on the applicant's criminal history, the applicant must be notified of this intention with the specific items of concern identified, provided with a copy of the criminal history report, and given written notice of their right to provide the employer with notice of the inaccuracy of items on the report within seven days. During this seven-day period, the rescission of the offer must be delayed. The actual withdrawal of the offer must be in writing. Notably, if no offer of employment is made, the employer is not required to provide any notice even if the decision is based on the applicant's criminal history

There are exception to the ban for the following: (1) inquiries that are expressly authorized by Federal, State or County laws or regulations; (2) positions that have access to confidential or proprietary business or personal information, money or items of value, personal homes or residences, facilities that provide personal storage, or involve emergency management; and (3) employers that provide programs, services, or direct care to minors or vulnerable adults.

NEWS AND EVENTS

Victory – Eric Hemmendinger won a motion to dismiss for a heating and cooling contractor on an employee's claims under the D.C. Wage Payment and Collection Law that he was not paid the prevailing wage as required under the Davis-Bacon Act. The D.C. Superior Court agreed that the Act does not give rise to a private cause of action against an employer, and that the plaintiff cannot use the D.C. WPCL to make an "end run around the Davis-Bacon Act."

Victory – Mark Swerdlin successfully defended a professional services firm in a Maryland Occupational Safety and Health Division investigation into a former high-level official's claim that the company terminated her employment in retaliation for raising safety concerns. After a thorough investigation, MOSH determined that there was no merit to the allegations and dismissed the complaint.

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(410) 752-1040 www.shawe.com

Honor – Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for Employment & Immigration - US, most recently for Q3 2024. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology's quarterly "Lexology Content Marketing Awards" recognizes one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the 22nd consecutive quarter and 23rd time overall that Fiona has received this honor.

Presentation – Michael McGuire and Veronica Yu Welsh presented "Critical Updates to Employee Handbooks at the Federal and State Level" to the Associated Builders and Contractors of Greater Baltimore on October 15, 2024.

Presentation – On October 16, 2024, Fiona Ong co-led a discussion panel on "Complicated C-Suite and High-Level Management Issues" at the annual conference of the American Employment Law Council, a global, invite-only group of top labor and employment attorneys, both in-house and outside counsel, practicing on the management side.

TOP TIP: Employers – Remember that the Required Salary Level for FLSA-Exempt Status Will Increase on January 1!

Based on a few conversations with clients, we thought it would be helpful to remind employers that, following the July 1, 2024 increase in the salary threshold to qualify for overtime exemptions under the Fair Labor Standards Act, the required minimum salary will increase again on January 1, 2025 – and employers need to be prepared to comply!

The Fair Labor Standards Act's Overtime Rule. The FLSA provides that covered employers must pay employees an overtime premium of time-and-a-half of the employee's regular rate for hours worked over 40 in a week. Section 13(a)(1) of the FLSA provides that bona fide executive, administrative, or professional employees are exempt from minimum wage and overtime provisions of the FLSA. This exemption is commonly referred to as the "white-collar" exemption. The FLSA also provides a separate exemption for highly-compensated employees ("HCE").

Under the FLSA's overtime rule, three tests must all be met in order for a white-collar employee to be deemed exempt from overtime pay requirements: (1) the employee must be paid on a salary basis; (2) the employee's salary must be at least $844 per week (equaling $43,888 per year); and (3) the employee's primary duties must meet requirements specific to the exemption in question – whether it be executive, administrative or professional (EAP). Under the HCE exemption, an employee is required to earn at least $132,964 per year (in addition to being paid at least the standard salary level per week on a salary or fee basis) and perform at least one exempt duty.

The Last Increase. As we discussed in our April 24, 2024 E-lert, the U.S. Department of Labor released a revised overtime rule that, effective July 1, 2024, increased the standard salary level for the EAP or white-collar exemptions by a significant amount - from $684 per week/$35,568 annually, and the HCE salary level from $107,432, to the levels set forth in the prior paragraph. Although there were lawsuits challenging the rule, thus far they have been mostly unsuccessful and the rule is fully in effect, with the exception only of the State of Texas as an employer.

The Imminent Increase. In addition to the initial increase, the DOL's rule provides for another significant increase on January 1, 2025, when the EAP salary level jumps to $1,128 per week (or $58,656 annually) and the HCE salary level moves to $151,164 per year.

Moreover, the levels will increase again every three years – for the EAP exemptions, the increase will be tied to the 35th percentile of earnings for full-time salaried workers in the lowest income U.S. Census region (currently the South), and for the HCE exemption, the increase will be tied to the 85th percentile of full-time salaried workers nationwide.

What Next? While most salaried exempt employees will remain exempt, this next increase will have some impact, especially on assistant managers in retail, restaurants, non-profit and service industries, especially in rural areas and especially following the recent increase. Employees paid less than the salary requirement must either be paid overtime or have their salaries raised to the required level. Raising wages may, of course, have a ripple effect to avoid wage compression. Employers should begin preparing now to deal with the effects of this impending wage increase.

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