SHAWE ROSENTHAL LLP

E-UPDATE

November 27, 2024

RECENT DEVELOPMENTS

DOL Says that Employees May Use FMLA Leave to Participate in a Clinical Trial

This month, the U.S. Department of Labor released an opinion letter asserting that employees may use leave under the Family and Medical Leave Act for treatment of a serious health condition as part of a clinical trial. Opinion letters respond to an inquiry to the DOL from an employer or other entity, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters for guidance. In addition to this FMLA opinion letter, the DOL also issued an FLSA opinion letter this month, as discussed elsewhere in this E-Update..

Clinical Trials as Treatment Under the FMLA. As the DOL explains in the FMLA opinion letter, a clinical trial is a research study in which participants with a particular medical issue are assigned to interventions that may include a placebo or other controls rather than the experimental treatment. Assuming that the employee's medical issue meets the criteria for a serious health condition (i.e. an overnight stay in a hospital or continuing treatment by a health care provider) that makes them unable to perform their job functions, the DOL asserts that they may take FMLA leave for treatment that is part of a clinical trial. This is because the definition of "continuing treatment" is very broad, and "does not contain any requirement that the treatment meet a certain level of efficacy or that it achieves a certain result." Moreover, the scope of information that an employer may receive as part of the FMLA certification process is limited by regulation, and an employee need not disclose specific details about their precise treatment plan.

To illustrate its point, the DOL offers two examples:

> *Janelle has sarcoidosis, an inflammatory autoimmune disease that affects her breathing. Janelle receives treatment for sarcoidosis at least twice a year and, as such, the condition qualifies as a chronic serious health condition under the FMLA. Janelle meets the FMLA eligibility criteria. Janelle is interested in volunteering to participate in a clinical trial for the treatment of sarcoidosis but is concerned that if she changes her current treatment plan the amount of time she needs to take off work may change. Under the FMLA, Janelle may use FMLA leave to receive treatment in the clinical trial and recover from treatment, including if there are changes in treatment or in her response to treatment due to her participation in the clinical trial.*
>
> *Bernard has cancer and is participating in a clinical trial for a new drug intended to help patients manage side effects from chemotherapy. Bernard meets the FMLA eligibility criteria. In the clinical trial, Bernard does not know whether he has been prescribed the new*

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

drug or a placebo. Bernard may use FMLA leave intermittently for time spent receiving chemotherapy and participating in the clinical trial, including recovery time.

Lessons for Employers. Thus, employers should keep in mind that employees who choose to participate in a clinical trial related to their serious health condition will be entitled to use any available FMLA leave to do so.

DOL Offers Guidance on When Per Diem Expense Reimbursements May Be Excluded from Employee's Regular Rate

This month, the U.S. Department of Labor issued an opinion letter on the issue of when daily expense reimbursements may be excluded from an employee's regular rate of pay under the Fair Labor Standards Act. As discussed in our article on the FMLA opinion letter that was also released this month, the DOL issues opinion letters to respond to an inquiry from an employer or other entity. These letters set forth the DOL's official position and provide guidance to other employers on that particular issue.

Expense Reimbursement Under the FLSA. Under the FLSA, employers must pay non-exempt employees at 1½ times their regular rate for all hours worked over 40 in a workweek. The regular rate includes all compensation that an employee receives for their employment, subject to specific statutory exclusions – one of which is "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of [their] employer's interests and properly reimbursable by the employer," as well as "other similar payments to an employee which are not made as compensation for [their] hours of employment."

In assessing whether per diem or reimbursement payments are excludable, the issue is "whether such payments function as legitimate reimbursements or as compensation for work." If the employee receives expense payments without actually incurring expenses, or if the payment varies with the number of hours worked, the payment must be included in the regular rate. The burden is on the employer to establish that the expense payment is used to offset actual expenses and may therefore be excluded from the regular rate. Moreover, only the actual or reasonably approximate amount of the expense may be excluded; if the reimbursement amount "is disproportionately large, the excess amount will be included in the regular rate." Employers must document any excluded payments, but need not use any specific method to approximate employees' expenses. Whether a particular method provides an approximation of actual expenses will depend on the circumstances of each case.

The Current Case. In the opinion letter, the employer had previously paid $25 per day in tool and equipment payments to its employees for their use of such items in the field. The employer questioned whether it could significantly increase such payments – as high as $150-200 per day – and still exclude them from the regular rate. However, the employer provided no indication that the employees actually incurred such significant expenses. Thus, only the portion of such payment that reasonably approximates the actual expenses incurred could be excluded from the regular rate.

Lessons for Employers. It is important for employers to ensure that any per diem or expense reimbursement is tied to a reasonable approximation of the actual expenses incurred by the employee – if not, then any payment in excess of such actual expense must be included in the regular rate for purposes of calculating overtime. The DOL specifically warns employers that such reimbursements

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

"cannot be used to artificially reduce employees' regular rates of pay, in an attempt to reduce the amount an employer must pay employees for overtime work."

NLRB Restricts Employers' Ability to Comment on the Impact of Unionization

In yet another case that upends decades-long precedent, the National Labor Relations Board issued a decision that significantly limits the ability of employers to make statements about the potential impact of unionization in the workplace.

In 1985, the Board issued *Tri-Cast, Inc.*, under which most employer statements about the impact of unionization were categorically deemed to be lawful. However, in *Siren Retail*, the current Board has now overruled that case and asserted that it will apply another existing test, set forth in the 1969 Supreme Court case of *NLRB v. Gissel Packing Co.*, which is used to assess other potentially threatening or coercive statements. Thus, the Board now asserts that the content and context of such statements must be analyzed on a case-by-case basis, and "to be deemed lawful, employer predictions about the negative impacts of unionization on employees' ability to address issues individually with their employer 'must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'" In applying this new test, the Board found relatively common statements that employee interactions with leadership would be "bound by the contract" and that a third party (the union) would speak for the employees to leadership to be unlawful.

Acknowledging the seismic effect of this ruling, the Board stated that it would apply only prospectively. And this case will have a significant impact going forward on what employers may say to employees about the effects of unionization on the relationship between the employees and management. What was previously allowed will no longer be permitted, and employers should consult with counsel and train managers on how to respond to employee questions about the impact of unionization.

Under the Biden administration, the Board has moved aggressively to reverse many long-standing precedents in order to facilitate unionization, and this is just another instance of that focus, along with the recent ruling that captive audience meetings (i.e. where employers hold mandatory meetings to discuss their views on unionization) are unlawful, as we discussed in a November 22, 2024 blog post. The Biden Board's efforts, however, have not always been received favorably by the courts, and certainly, with the upcoming change in administration, we can expect many of these positions to swing back the other way.

DOL Releases Employer Guide for "Skills-First" Hiring

This month, the U.S. Department of Labor published a guide for employers on "skills-first" or "skills-based" hiring practices, which it defines as "the hiring or promotion of workers around skills, knowledge and abilities that workers can demonstrate they have, regardless of how or where they attained those skills." The guide is intended to assist employers with hiring, promotion and management based on worker skills rather than degree qualifications, with suggestions that are summarized as follows (the guide contains more detail):

- Getting started. The DOL asserts that success requires early buy-in from leadership, hiring managers, human resources, and union representatives. Some considerations identified by the

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

DOL include: understanding why you are using skills-based hiring (e.g. quicker hiring, improved performance, increased retention) and tracking/sharing results; identifying the right job with discrete skills and responsibilities; and creating benchmarks and timelines.

- Identifying a job's skillsets. The DOL suggests the first step is figuring out the "core" skills and "great-to-have" skills, which can be done by asking questions about the purpose, required skills for success, importance of each skill to success, and skills that can be learned on the job. The second step is to use public resources (and the DOL provides some links) to check for other relevant skills for the job. And the third step is to build a scoring tool for grading a candidate's skills.

- How to evaluate skills. The DOL emphasizes the need to perform evaluations consistently for each candidate. It proposes a first step of establishing how to screen for skills, by organizing a list of experiences or credentials that show relevant skills. The next step is picking how to evaluate candidates that make it through screening, using multiple methods such as interviewing (with structured questions), hands-on skills evaluations, simulations and role-playing, and written tests. The DOL also focuses on the need to make the evaluation accessible, in order to expand the talent pool and avoid miscommunications, such as by avoiding technical language, providing access for those of differing physical and technical abilities, diversifying review panelists, offering phone interviews, and sharing interview questions in advance. The third step is scoring skills in a rubric that is personalized to the workplace needs and relevant skills.

- Recruiting. The DOL asserts that job postings should be in plain language, state that skills take priority, invite applicants to share alternative learning experiences, and tell applicants what to expect.

- Hiring and onboarding. The DOL identifies "key considerations" to include focusing on the candidate's skills, valuing those skills in pay, and setting up success by creating inclusive workplaces.

- What comes next? The DOL explains that, following the first skills-based hire, employers should think about what worked well and what could work better. It also cautions employers that seeing the benefits of this approach can take years.

TAKE NOTE

Delayed Training, Denied Vacation, and Job Transfer May Now Be Adverse Employment Actions. In *Muldrow v. City of St. Louis*, the Supreme Court ruled that adverse employment actions need not be "significant" in order to constitute a violation of Title VII's prohibition against discrimination; instead, a plaintiff need show only "some harm respecting an identifiable term or condition of employment." We warned in our April 17, 2024 E-lert on the *Muldrow* case that many employment actions that previously were found insufficient to establish a discrimination claim may now create liability under the Supreme Court's lowered standard. And now, the U.S. Court of Appeals for the Seventh Circuit has fulfilled that prediction.

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

In *Thomas v. JBS Green Bay, Inc.*, the employee alleged that his employer discriminated against him because of his color. In support of his claim, he pointed to a number of actions including delayed training on a particular machine, denied vacation (when requests by others were granted), and a job transfer that caused childcare issues. The case was initially dismissed for failure to state a viable claim by the trial court, which found that the events of which the employee complained, as described in the complaint, were not sufficiently serious to support a Title VII claim and the case need not proceed forward.

Following the trial court's decision, however, the Supreme Court issued *Muldrow*. And, according to the Seventh Circuit, the trial court erred in dismissing the employee's claims based only on the allegations in the complaint, since each of the complained-of actions entailed "some harm" to a term or condition or employment. The Seventh Circuit noted that "deferred training can mean deferred promotions or deferred raises." In addition, "denial of one's preferred vacation schedule can make the vacation less pleasant" due to being off-season or lack of family availability. And finally, the "inability to care for a child is a deeply felt loss for all parents." Thus, the Seventh Circuit found that the employee had alleged sufficient injury for the case to proceed – but whether that injury was enough to establish liability would be determined at a later stage in the case.

So, the lesson for employers is exactly what we said before – employment actions that previously may not have been enough to impose liability under the anti-discrimination statutes, like training, vacation schedules, and job transfers, may now be sufficient to do so. It is critically important for employers to ensure that any actions taken are legitimate business decisions and that all employees are treated consistently.

Independent Investigation Undermines Employee's "Cat's Paw" Discrimination Claim. The U.S. Court of Appeals for the 10th Circuit rejected an employee's claim that the actual decisionmaker in her termination was a "cat's paw" (i.e. an unwitting dupe) for the discriminatory intent of others, based on the decisionmaker's reliance on an independent and thorough investigation that resulted in the employee's termination.

In *Iweha v. State of Kansas*, the employee was terminated following an HR investigation that confirmed her coworkers' complaints that she had violated the employer's policies. The employee sued, alleging two forms of cat's paw – that the investigator herself was biased against the employee based on her race and national origin and/or that the investigation was tainted by her coworkers' discrimination against her – and that the actual decisionmaker uncritically relied on the biased investigation report in making the termination decision.

The Tenth Circuit disagreed. In order to impose cat's paw liability, the plaintiff must establish an unbroken causal chain between the biased employee's actions and the unbiased decisionmaker's "uncritical reliance" on the subordinate's actions, resulting in an adverse employment action (such as termination). An independent investigation by someone other than the biased employee(s), however, breaks that causal chain. As the Tenth Circuit stated, "If the employer independently verifies the facts and does not rely on the biased source – then there is no cat's paw liability." The Tenth Circuit further noted that allowing an employee-plaintiff the opportunity to explain their side of the dispute may be helpful in "bolstering" the independence of the investigation, but such an action is not determinative of independence.

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

As to the employee's cat's paw arguments, the Tenth Circuit first found that the employee offered no evidence to support her contention that the HR investigator was biased against her based on her race or national origin, and therefore this version of the cat's paw theory failed. The Tenth Circuit then rejected the allegation that the investigator uncritically relied on the biased testimony of the employee's coworkers, and that the decisionmaker uncritically relied on the investigator's report. Rather, the Tenth Circuit noted that the investigator not only spoke to the allegedly biased coworkers, but numerous other coworkers and the employee herself. The investigator also reviewed multiple sources of data to confirm the employee's policy violations. The Tenth Circuit concluded that, "Taken together, [the investigator]'s interviews and documentary factchecking undercut any argument that her investigation and resulting termination recommendation lacked independence and uncritically relied on the discriminatorily biased allegations of [the employee]'s coworkers."

This case provides a good reminder to employers of the importance of a neutral and thorough investigation into allegations of employee misconduct. Moreover, although not legally determinative here, we suggest that it is best practice to allow an employee the chance to give their side of the story, even where the employer believes there is nothing the employee can say that would change the outcome. There are times when, unexpectedly, the employee provides a convincing explanation. But even if not, if the case ends up in front of a jury, it is our experience that a jury has a strong sense of fair play and will hold it against the employer if they think the employee has not been given due process.

Federal Contractor Update – Audit List, Mandatory Reporting for Construction Contractors. The U.S. Department of Labor and its Office of Federal Contract Compliance Programs announced several matters of significance to federal contractors and subcontractors this month. These include the following:

- CSAL (Corporate Scheduling Announcement List). The OFCCP has posted its most recent list of upcoming audits of supply and service contractors on its Scheduling List Resources webpage. OFCCP audit Scheduling Letters are already being sent out, and once a contractor receives a letter, it will have 30 days in which to provide the requested information, which will be extensive. We recommend that those on the list take steps now to ensure that they are ready to submit the required information and that they have taken other appropriate actions to demonstrate compliance with the relevant requirements.
- Monthly Employment Utilization Report for Construction Contractors. As of March 1, 2025, the OFCCP is reinstating the requirement that construction contractors and sub-contractors file the Monthly Employment Utilization Report (CC-257) that provides information on monthly work hours and employee count by race/ethnicity, gender, and trade. This requirement had been discontinued in 1995 due to the agency's inability to assess and use the data from the reports, but new technologies may address that issue. This will likely be quite an onerous task for construction (sub)contractors, and it is possible that this decision may be reversed under the Trump administration. In the meantime, the OFCCP intends to provide compliance assistance to covered contractors, including a webinar in early 2025.

EEOC Proposes Rule to Add Recordkeeping Requirements Under the Pregnant Workers Fairness Act. The Equal Employment Opportunity Commission has issued a proposed rule that would amend the existing recordkeeping regulations applicable to Title VII, the Americans with

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

Disabilities Act and the Genetic Information Nondiscrimination Act to add references to the Pregnancy Workers Fairness Act.

As the EEOC notes, "the PWFA requires covered employers to provide reasonable accommodations to a qualified applicant's or employee's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship." The EEOC further notes that "the PWFA adopts by reference the statutory recordkeeping provision of Title VII, which authorizes the existing EEOC recordkeeping regulations." These regulations require private employers and labor organizations to preserve records that were "made or kept" for one year, and public sector employers and apprenticeship programs for two years. If a charge of discrimination is filed, the employer must preserve any relevant records until final disposition. However, those regulations do not specifically reference the PWFA, which was enacted in 2022 and which took effect on June 27, 2023.

Although the EEOC previously issued an interim final rule that revised its administrative and procedural regulations to include references to the PWFA, it did not do so with regard to the recordkeeping provisions for certain technical reasons, including a need for public hearing. At this point, the EEOC is now proposing such revisions. Interested members of the public will have 60 days following publication of the proposed rule in the Federal Register from November 21, 2024 (i.e. until January 21, 2025) to comment on the proposed rule (comments may be submitted on the Federal Register webpage). The EEOC must consider such comments, as well as hold the requisite hearing, prior to issuing a final rule.

NEWS AND EVENTS

Victory – Darryl McCallum won summary judgment for a public school system on an employee's claim of retaliation for his complaint of age discrimination. The federal district court held that the employee could not show that his non-selection for promotion was based on anything other than his lesser qualifications for the role, and that he did not experience any other incidents rising to the level of an adverse employment action.

Media – Fiona Ong was quoted in a November 18, 2024 Bloomberg News article by Patrick Dorrian, "Worker Assistance Program as Adverse Job Act Probed by 10th Cir." Fiona offered some thoughts on whether mandatory referrals to an Employee Assistance Program (EAP) may be an adverse employment action under the new standard set by the Supreme Court in the *Muldrow v. City of St. Louis* case (which we discussed here).

TOP TIP: The Holidays – and the Flu/COVID – Are Coming, and the CDC Offers Tips on Reducing Risk (and We Offer Tips to Employers).

In light of the upcoming holiday season, involving an increase in indoor social events, the Centers for Disease Control and Prevention has issued guidance, Reduce Your Risk from Respiratory Viruses This Holiday Season. Although not specific to the workplace, employers may wish to encourage/remind employees of basic precautions to reduce the risk of infection in the workplace, including the following:

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

- Immunizations: The CDC encourages COVID and flu vaccines for everyone over the age of 6 months, and RSV vaccines for pregnant parents during weeks 32-36 of pregnancy, as well as older adults (age 60 for those at high risk of severe RSV and age 75 for everyone else).

  We note that, unless prohibited by state or local law, employers may mandate immunizations, subject to exceptions as reasonable accommodations for disabilities or religious beliefs under the Americans with Disabilities Act (ADA) and Title VII. However, as the COVID pandemic highlighted, such mandates can be extremely controversial. Nonetheless, employers can certainly encourage – and even incentivize – employees to become vaccinated, and provide resources or support (such as paid leave) for vaccinations.

- Testing and treatment: The CDC states that U.S. households may receive 4 free COVID tests (available to order here). It also recommends that symptomatic individuals at higher risk of developing severe illness talk to their healthcare provider about testing and treatment options. It notes that antiviral treatments for COVID and the flu can lessen symptoms and shorten the illness, and should be started as soon as possible after symptoms occur.

  Whether employers may require employees to be tested for COVID or the flu is governed by the ADA (and analogous state laws). Under the ADA, employers may only require medical tests where they are job-related and consistent with business necessity. While requiring such testing of a symptomatic employee, in order to try to prevent workplace spread, might meet that standard, we also suggest that employers can take steps short of testing – such as allowing symptomatic employees to work from home where possible, encouraging employees to use available sick leave or PTO, or providing unpaid leave for treatment and recovery. It may also be possible for employers to require symptomatic employees to wear masks, unless there are state or local laws that prohibit mask mandates. Employer may certainly encourage the use of masks (and even make them available) or allow employees who prefer to wear masks to do so.

- Everyday prevention steps: The CDC recommends the following actions: staying home and away from others when sick; covering coughs and sneezes; improving ventilation; and washing hands often.

  Employers can post reminders about covering coughs and sneezes and handwashing, and make handwashing facilities and hand sanitizers available. They can also take steps to improve ventilation in the workplace (OSHA previously released COVID-19 Guidance on Ventilation in the Workplace that may still be useful). And, as noted above, employers can encourage workers to stay home when sick, by providing remote work opportunities or leave.

RECENT BLOG POSTS

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

- The NLRB Overturns Decades-Old Precedent by Banning Captive-Audience Meetings by Chad Horton, November 22, 2024

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

- Federal Court Vacates DOL's Overtime Rule by Elizabeth Torphy-Donzella and Mark Swerdlin, November 18, 2024

- NLRB GC to Seek Broad Remedies for Non-Compete and Stay-or-Pay Provisions – Part II by Chad Horton, November 15, 2024

- Sick Leave for Pets? by Fiona Ong, November 7, 2024

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