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E-UPDATE

August 31, 2018

RECENT DEVELOPMENTS

It's About Time! DOL Releases Opinion Letters on the FMLA and FLSA

The Department of Labor (DOL) has released six new opinion letters on the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). Opinion letters respond to a specific wage-hour inquiry from an employer or other entity to the DOL, and represent the DOL's official position on that particular issue. Other employers may then rely on these opinion letters as guidance.

The DOL issued two opinion letters on the FMLA:

- FMLA2018-1-A: The DOL states that an employer's no-fault attendance policy, under which attendance points normally expire after 12 months but are frozen throughout the duration of an FMLA leave, thereby remaining on the employee's record for longer than 12 months, does not violate the FMLA as long as it is applied in a nondiscriminatory manner with regard to other leaves.

- FMLA2018-2-A: The DOL concludes that voluntary organ-donation surgery and post-operative treatment can qualify as a "serious health condition" for which the employee is entitled to FMLA leave.

The DOL also issued four opinion letters on the FLSA:

- FLSA2018-20: The DOL finds that an employee's voluntary participation during the workday in on-site biometric screenings, wellness activities, and benefits fairs – which are not directly related to the employee's job – predominantly benefits the employee, and therefore the time spent in such activities is not compensable worktime under the FLSA. Moreover, because the employee is relieved of all job duties during such activities, that time is also noncompensable "off duty" time.

- FLSA2018-21: Under the FLSA, certain commissioned salespeople of "retail or service establishments" are exempt from overtime. In order to be a "retail or service establishment": (1) the entity must engage in the making of sales of goods or services"; (2) 75% of its sales must be recognized as retail in the particular industry; and (3) not over 25% of its sales may be for resale." The opinion letter makes the following points of general interest: a business may make its sales primarily online; it is irrelevant whether the products are for either commercial or non-commercial use; and the fact that a

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purchaser uses the product to serve its own customers and may even raise prices to recover the purchase price does not make the product "wholesale" instead of "retail."

- FLSA2018-22: The FLSA recognizes that those who freely volunteer time without pressure or coercion to a non-profit organization are not employees, and acknowledges that the non-profit entity may pay for "travel, lodging, meals and other expenses incidental to volunteering without negating [the] volunteer status." In the present instance, the DOL found volunteer status even though the volunteers were members of the non-profit organization who had previously been treated as short-term employees receiving compensation for the same services, given that the volunteers freely offered the services for charitable reasons, were highly compensated executives who continued to be primarily employed by others, and the periods of service were no more than two weeks a year.

- FLSA2018-23: The FLSA exempts employees of motion picture theater establishments from its overtime requirements. The DOL found that the exemption applies to the food services operations of motion picture theaters, including in-theater dining and on-site restaurants that almost exclusively service theater-goers. The food services operations constitute a single establishment with the movie operations, since, as a single unit, they are incorporated, pay taxes, maintain business records, order goods, pay invoices, use the same bank account, use a single name, and the employees perform services in both operations.

This Month's Assortment of NLRB Advice Memos – A Day Without Immigrants, Weingarten Rights, and Picketing

A steady stream of Advice Memoranda from the National Labor Relations Board's Office of the General Counsel (OGC) has continued to issue over the past six months, as we previously discussed in many of our monthly E-Updates. Eight additional memos were issued on August 15, 2018, although some were originally prepared years earlier. Of particular interest are the following:

- *International Warehouse Group* (October 5, 2017). The OGC found that the employer violated employees' rights to engage in protected concerted activities when it terminated and threatened to terminate those employees for participation in the "Day Without Immigrants." Their participation was deemed to be a protected strike for their mutual aid and protection, as the employees' protest was "in large part" due to concerns about mistreatment by their employer, as well as tied to concerns about workplace immigration enforcement, about which the employer could have pledged not to cooperate with immigration authorities.

- *Corona Regional Medical Center* (December 9, 2014). The OGC determined that various rights commence immediately after the union wins an election, even where the employer challenges the election results and before the Board certifies the union as the employees' collective bargaining representative. These include: (1) Weingarten rights, which is the right to union representation in an investigatory interview that could lead to discipline;

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(2) the obligation to bargain over changes to the terms and conditions of employment, specifically including discretionary discipline of individual employees; and (3) the duty to furnish information to the union to enable it to carry out its statutory obligations as the employees' collective bargaining representative.

- *SEIU Healthcare 119NW* (March 30, 2018). The OGC found that the union violated the NLRA by sending picketers to the lobby of a hospice care center that was located on an upper level of a hospital during a strike. The picketers arguably caused an unlawful disturbance, especially given the tranquil environment of the hospice setting.

The OFCCP Issues a Flurry of Directives and Other Resources

It has been an exceptionally busy month at the Office of Federal Contract Compliance Programs (OFCCP), which released five Directives and a publication entitled "What Federal Contractors Can Expect," as well as announcing a new "Contracting Officer Corner" webpage of resources. Directives provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures, but do not establish legally enforceable rights or obligations. We summarize these documents as follows:

- DIR 2018-03 Religious Exemption – Pointing to a trio of Supreme Court decisions that protect religious exercise under the Constitution and federal law, as well as several Executive Orders issued by President Trump that defend religious exercise, this directive is intended to safeguard the rights of "religion-exercising" federal contractors. The agency's staff are directed to take these developments into account when providing compliance assistance, processing complaints, and enforcing Executive Order 11246, by keeping the following in mind:
    - They "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" and must "proceed in a manner neutral toward and tolerant of . . . religious beliefs."
    - They cannot "condition the availability of [opportunities] upon a recipient's willingness to surrender his [or her] religiously impelled status."
    - "[A] federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]."
    - They must permit "faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts."
    - They must respect the right of "religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government."

- DIR 2018-04 Focused Reviews of Contractor Compliance – The OFCCP announced that it will add "focused reviews" to its compliance activities. This involves comprehensive on-site audits regarding the contractor's compliance with one of the particular enforcement authorities under its jurisdiction: Executive Order 11246 (women and

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minorities), Section 503 of the Rehabilitation Act of 1973 (disabled individuals), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (protected veterans).

- DIR 2018-05 Analysis of Contractor Compensation Practices During a Compliance Evaluation – Replacing prior DIR 2013-03, this directive outlines the OFCCP's standard procedures for reviewing contractor compensation practices during a compliance evaluation. It explains the agency's approach to determining similarly-situated employees, creating pay analysis groups, and conducting statistical analysis and modeling, among other things. The OFCCP believes this guidance will also allow contractors to conduct more effective self-auditing, as they are required to do by regulation. The OFCCP issued Frequently Asked Questions regarding this Directive.

- DIR 2018-06 Contractor Recognition Program – In order to encourage contractor compliance, the OFCCP will create a recognition program for "innovative thought leaders" in the contractor community to highlight best or model practices, and a mentoring program to assist peers improve compliance, as well as other unspecified initiatives.

- DIR 2018-07 Affirmative Action Program Verification Initiative – The OFCCP is establishing a program to verify compliance by all contractors with their affirmative action program (AAP) requirements, which include the development of an AAP within 120 days of the contract and annual updates. The program will include the following:
    - Annual certification of compliance with AAP requirements by contractors.
    - Revising the neutral scheduling methodology to increase the likelihood of compliance reviews for contractors that failed to provide certification.
    - Compliance checks to verify contractor compliance with AAP requirements.
    - Requesting the AAP from contractors that request extensions of time to provide support data in response to a scheduling letter for a compliance review.
    - Eventually, the annual collection of AAPs from federal contractors.
- What Federal Contractors Can Expect – This document sets forth the general expectations that are intended to guide the interactions between the OFCCP and federal contractors. While the document provides further elaboration on each expectation, they are listed as follows:
    - Access to accurate compliance assistance material.
    - Timely responses to compliance assistance questions.
    - Opportunities to provide meaningful feedback and collaborate.
    - Professional conduct by OFCCP's compliance staff.
    - Neutral scheduling of compliance evaluations.
    - Reasonable opportunity to discuss compliance evaluation concerns.
    - Timely and efficient progress of compliance evaluations.
    - Confidentiality.

- Contracting Officer Corner – The OFCCP has created a new online central repository of resources for both federal agency contracting officials and federal contractors. The resources include a new pre-award process guide, downloadable workplace posters, a

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link to the applicable regulations, and notice and training links, as well as registries of both contractors who are exempt from the pre-award clearance process and those who are debarred from receiving federal contracts.

TAKE NOTE

Following *Epic Systems*, Collective Action Waivers Are Not Barred by the FLSA. The U.S. Court of Appeals for the Sixth Circuit held that, like the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA) does not provide a bar to arbitration agreements that contain a waiver of the right to bring a collective (or class) action.

As we discussed in an E-lert, earlier this year, in *Epic Systems Corp. v. Lewis*, the Supreme Court held that arbitration agreements containing waivers of the right to bring class or collective actions over employment-related disputes are enforceable under the Federal Arbitration Act (FAA). In so doing, the Court rejected the National Labor Relation Board's position that such waivers violate the NLRA's protections of employees' rights to engage in concerted action.

While the FLSA specifically gives employees the right to bring a collective action, the Sixth Circuit in *Gaffers v. Kelly Services, Inc.* noted that the law does not require such action and that employees can waive that right by agreement. Relying on *Epic Systems*, the Sixth Circuit found that the FLSA does not contain "clear and manifest" congressional intent to make arbitration agreements unenforceable, as required by the FAA. The Sixth Circuit found no policy arguments to rule otherwise, and further rejected the employee's argument that the FAA's savings clause, which allows courts to refuse to enforce arbitration agreements based on law or equity grounds, was applicable here, given the Supreme Court's rejection of the same argument under the NLRA.

Employees Need Not "Tender Back" Severance Pay Before Suing Under Title VII or EPA. In *McClellan v. Midwest Machining, Inc.*, the U.S. Court of Appeals for the Sixth Circuit addressed a question of first impression before the federal appellate courts - whether employees must return a severance payment made in exchange for a release of claims before bringing suit under Title VII and the Equal Pay Act (EPA).

The U.S. Supreme Court in *Oubre v. Entergy Operations, Inc.* has previously stated that employees need not tender back such payments in the context of the Age Discrimination in Employment Act (ADEA). The Supreme Court found that ADEA's enforcement measures are effectuated in part through private lawsuits, and a tender back rule would undermine that feature of the statute as in many instances, the employee is not in a position to return the monies. This may enable the non-compliance with the law of employers who rely on the employee's financial difficulties and consequent ratification of the release to avoid liability.

The Sixth Circuit found that the reasoning of the Supreme Court with regard to ADEA applied equally to Title VII and the EPA. Accordingly, employees are not required to tender back payments received before filing Title VII and EPA claims.

Filing of EEOC Charge Is Not a Jurisdictional Prerequisite in Most Federal Jurisdictions. Overturning nearly four decades of precedent, the U.S. Court of Appeals for the Tenth Circuit in *Lincoln v. BNSF Railway Co.* held that the filing of a charge of discrimination with the Equal

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Employment Opportunity Commission was not a jurisdictional prerequisite to filing an employment discrimination suit. Thus, the failure to file a charge does not prevent a court from assuming jurisdiction over the suit. The employee's failure to file a charge, however, does constitute an affirmative defense for the employer. Such defense is subject to waiver, estoppel and equitable tolling.

Notably, most other jurisdictions have already come to that conclusion – all but the Fourth, Ninth and Tenth Circuits. Accordingly, in these Circuits, employers can still argue that the failure to file a claim and exhaust administrative prerequisites deprives the court of jurisdiction; in almost all other jurisdictions, however, it must be specifically pled as an affirmative defense and employers need to make sure that nothing is done to waive it.

Waiver of Drug Testing Requirement Not Required Under NJ's Medical Marijuana Law. A federal court in New Jersey held that neither the New Jersey Compassionate Use Medical Marijuana Act (CUMMA) nor the New Jersey Law Against Discrimination (NJLAD) requires an employer to waive its drug test requirement for employment.

In *Cotto v. Ardagh Glass Packing, Inc.*, the employee argued that CUMMA's decriminalization of medical marijuana in conjunction with NJLAD required his employer to reasonably accommodate his medical marijuana use. The court found that CUMMA, which specifically states that "Nothing in this Act shall be construed to require … an employer to accommodate the medical use of marijuana in any workplace," excludes employers from its scope, and thus is "essentially agnostic" as to the employee's claims. With regard to the NJLAD, the court noted that no New Jersey state court had yet weighed in on the impact of CUMMA on that law. However, the court noted that, in other states, "most courts have concluded that the decriminalization of medical marijuana does not shield employees from adverse employment actions." Thus, it concluded that the state courts would likely find that the NJLAD does not require employers to accommodate medical marijuana use by waiving a drug test for a federally prohibited drug.

Notably, some courts in other states have come to a different conclusion in interpreting their states' medical marijuana laws, based on non-discrimination language contained in those statutes that was not present in the New Jersey statute. Thus, whether an employer must accommodate the use of medical marijuana is an issue of great uncertainty, depending both on the language of the applicable state statutes and courts' interpretation of those statutes.

NLRB Offers Guidance on Solicitation Policies. In two separate opinions this month, the National Labor Relations Board provided guidance on the lawful parameters of solicitation policies for retail and hospital employers.

We previously discussed the rules that apply to no-solicitation policies in our March 2018 E-Update, and summarize them again as follows: Employees may be prohibited from soliciting other employees during either's working time, which is the time an employee is assigned to or engaged in the performance of job duties, but does not include scheduled breaks or meal periods, or the time before and after the employee's shift. Retail employers may also ban solicitation on the selling floor, and hospital employers may ban solicitation in patient care areas.

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In *EYM King of Michigan, LLC dba Burger King*, (August 15, 2018), the Board rejected the employer's contention that the fast food restaurant's parking lot was a selling area where solicitation could be banned, even though customers drive through or park their cars in the lot. In *UPMC, UPMC Presbyterian Shadyside dba UPMC Presbyterian Hospital*, (August 6, 2018), the Board found that where the employer allowed off-duty employees access to the cafeteria, it could not prohibit them from soliciting other employees in the cafeteria during their non-working time. Moreover, the employer could not show that patients were disturbed by this activity in the cafeteria.

Listen to the Employee, Not Just the Doctor, Regarding the Employee's Disability. The U.S. Court of Appeals for the Seventh Circuit rejected an employer's assertion that the employee was not disabled under the Americans with Disabilities Act because she had been cleared by her doctor to return to work without restrictions, where the employee still complained of physical limitations.

In *Rowlands v. United Parcel Service*, the employee sued her employer under the Americans with Disabilities Act for failure to accommodate her disability, among other things. The employer moved for summary judgment, arguing that the employee was not disabled since she had been cleared to work without restrictions following her multiple knee surgeries. However, the employee had informed her employer that her knee injuries still substantially interfered with her ability to engage in a number of major life activities, including walking, standing, squatting and kneeling, which was sufficient to raise the possibility of a disability.

The court noted that, "it does not follow that [the employee] did not have a disability because her doctor had cleared her to return to work without restrictions." The employer did not request a doctor's note to verify her condition, although it could have done so. It failed to engage in the interactive process. Thus, the court refused to dismiss the employee's claim, noting questions of fact remained about whether the employee actually had a disability and to what extent she required accommodation. This case warns employers to be careful to take into account not only what the doctor says, but also what the employee says – and if it is different than what the doctor says, follow up with the doctor to get more information.

Change in Supervisors Supports Change in Performance Standards. The U.S. Court of Appeals for the Eighth Circuit recently affirmed the proposition that a new supervisor may impose a different set of performance standards.

In *Lindeman v. Saint Luke's Hospital of Kansas City*, the employee, who had a history of positive performance reviews under one supervisor, claimed that his new supervisors discriminated against him because of his disabilities when they issued progressive discipline quickly leading to his discharge. The court noted that, while a single supervisor changing his rating after the employee engages in protected activity is suggestive of discrimination, new supervisors may have "shifting expectations" that constitute a basis other than discrimination for the adverse action. Thus, employers should be reassured that new supervisors can establish new and more demanding performance standards.

Unreasonable Insistence on Compliance with Work Rules Creates ADA Liability. An employer who terminated a diabetic employee for violating its "anti-grazing" policy found itself

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on the wrong side of a jury verdict and liable for almost $450,000 for the employee's attorneys' fees.

The employee in *EEOC v. Dolgencorp, LLC* worked at a discount retailer. Because she often worked alone, she asked her manager if she could keep orange juice at the register in case of a hypoglycemic episode, but was told that was against store policy. Twice, she had such an episode, and each time she took orange juice from the store cooler, drank it, and paid for it. She informed the store manager each time. Subsequently, in the course of a store audit, she also told the district manager and regional loss prevention manager of the two incidents. They then terminated her for violation of the store's anti-grazing policy, which prohibits employees from consuming merchandise before paying for it.

The Eighth Circuit found that the jury reasonably concluded that the employer had failed to provide the employee with reasonable accommodations, as it had denied her request and did not engage in any discussions about other possible accommodations. The anti-grazing policy violation was not a legitimate basis for the termination.

This case serves as a warning to employers to be thoughtful about addressing employees' requests for accommodation, particularly when the accommodations requested are relatively minor in nature.

NLRB Asserts Its Administrative Law Judges Are Validly Appointed. Following the Supreme Court's decision in *Lucia v. SEC*, in which it held that the government-wide system used to appoint administrative law judges (ALJs) violates the U.S. Constitution (as discussed in our June 2018 E-Update), the National Labor Relations Board asserts in a press release that its ALJs are validly appointed. In accordance with the Supreme Court's ruling that ALJs must be appointed by the President, a court of law, or the head of a government department, the NLRB states that its ALJs are appointed by the full Board as the "Head of Department."

NEWS AND EVENTS

We are delighted to announce that nine of our partners have been recognized in *Best Lawyers in America*© 2019. Bruce Harrison, Eric Hemmendinger, J. Michael McGuire, Stephen D. Shawe and Gary L. Simpler were recognized in three categories: Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment. Elizabeth Torphy-Donzella was recognized in Employment Law – Management and Litigation – Labor and Employment. Teresa D. Teare and Darryl G. McCallum were each listed for Litigation – Labor and Employment, while Mark J. Swerdlin was noted in Employment Law – Management. Since it was first published in 1983, *Best Lawyers in America*© has become universally regarded as the definitive guide to legal excellence. *Best Lawyers*® lists are compiled based on an exhaustive peer review evaluation.

J. Michael McGuire will present a session on "Employee Bad Conduct in the Workplace and on Social Media: When is it Protected by Federal Law?" at the LifeSpan Network/Health Facilities Association of Maryland (HFAM)'s annual conference, which will take place October 22-24, 2018 in Ocean City, Maryland. You may register for the conference here.

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Lindsey A. White won dismissal of discrimination and retaliation claims in a matter where the plaintiff never signed her EEOC Charge of Discrimination and therefore failed to exhaust her administrative remedies as a prerequisite to filing suit.

Mark J. Swerdlin authored "Start-up Businesses and Growing Companies: Key Employment Law Issues," a practice note for LexisNexis Practice Advisor. Mark addressed various employment and labor law issues that may arise when opening a start-up or expanding a business.

Mark J. Swerdlin authored "Supreme Court Finds Service Advisors To Be Exempt From Overtime" in the Spring 2018 issue of In Gear, a quarterly publication of the Maryland Automobile Dealers Association.

Darryl G. McCallum moderated a panel on "Medical Marijuana: What Employers Need to Know" for the American Bar Association. The on-demand presentation, which provides 1.5 CLE credits, may be purchased here.

TOP TIP: It's Time to Update Those Federal Forms and Notices – FMLA, FCRA and the ACA!

Employers should be prepared to update certain significant federal forms and notices under the Family and Medical Leave Act (FMLA), the Fair Credit Reporting Act (FCRA) and the Affordable Care Act (ACA).

New FMLA Forms and Notices - The Department of Labor provides model FMLA forms and notices on its website. These documents must be submitted to the Office of Management and Budget for approval every three years. The last batch of documents expired on May 31, 2018, but the DOL continued to extend their expiration date on a month-to-month basis while it awaited approval from OMB. Now finally, the Department of Labor has issued its updated FMLA forms and notices, which expire on August 31, 2021:

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition (PDF)
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition (PDF)
- WH-381 Notice of Eligibility and Rights & Responsibilities (PDF)
- WH-382 Designation Notice (PDF)
- WH-384 Certification of Qualifying Exigency For Military Family Leave (PDF)
- WH-385 Certification for Serious Injury or Illness of Current Servicemember -- for Military Family Leave (PDF)
- WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (PDF)

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Although the forms are essentially unchanged from the prior version, employers should begin using the current forms rather than the expired ones.

New Language for FCRA Notice - As for the FCRA, if employers use a third-party provider to conduct a background check (i.e. consumer report), there are certain required notices and communications. In particular, if the employer is going to take adverse employment action – such as declining to hire the applicant – based on the report, it must provide to the applicant a summary of their rights under FCRA (along with notice of the intent to take adverse action and a copy of the report). The Consumer Financial Protection Bureau ("CFPB") has prepared the required summary, entitled "A Summary of Your Rights Under the Fair Credit Reporting Act."

Effective September 21, 2018, however, the Economic Growth, Regulatory Relief and Consumer Protection Act, which was passed by Congress and signed into law by President Trump in May, requires that the following language be included any time the "Summary of Your Rights" document is provided:

CONSUMERS HAVE THE RIGHT TO OBTAIN A SECURITY FREEZE

> You have a right to place a 'security freeze' on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gets access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding a new loan, credit, mortgage, or any other account involving the extension of credit.
>
> As an alternative to a security freeze, you have the right to place an initial or extended fraud alert on your credit file at no cost. An initial fraud alert is a 1-year alert that is placed on a consumer's credit file. Upon seeing a fraud alert display on a consumer's credit file, a business is required to take steps to verify the consumer's identity before extending new credit. If you are a victim of identity theft, you are entitled to an extended fraud alert, which is a fraud alert lasting 7 years.
>
> A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

We expect that the CFPB will issue a revised "Summary of Your Rights" document that will include the required language, but it is not yet available. Pending the updated document, employers should add the required language as a supplement to the current "Summary of Your Rights" document.

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New ACA Notices of Exchanges – The ACA requires employers to provide a written notice to employees regarding the insurance purchasing exchanges (i.e. the "Health Insurance Marketplace" or the "Marketplace"). The notice must inform employees about the availability of the Marketplace, the availability of a premium tax credit, and the impact of obtaining coverage through the Marketplace. These notices must be provided to employees within 14 days of hire. The Department of Labor has now issued updated model notices for employers that offer health plan coverage to some or all employees and for employers that do not offer health plan coverage.

RECENT BLOG POSTS

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

- Race Discrimination Under Section 1928 – The Lines Are Blurred by Fiona W. Ong, August 29, 2018
- OSHA Pre-empts CBA Drug Testing Provisions? by Fiona W. Ong, August 23, 2018
- Raining Cats and Dogs in the Workplace? It's Pawssible by Courtney Amelung, August 15, 2018 (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Twitter Storms, Flash Floods, No Jobs by Elizabeth Torphy-Donzella, August 8, 2018

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