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E-UPDATE

September 28, 2018

RECENT DEVELOPMENTS

Another Month, Another Release of NLRB Advice Memos – Independent Contractors, No-Recordings and Conflict of Interest Rules

The National Labor Relations Board's Office of the General Counsel (OGC) continues to issue Advice Memoranda, as it has done throughout 2018 and as we previously discussed in many of our monthly E-Updates. Five additional memos were issued on September 14, 2018, one of which was originally prepared years earlier, with the others being more recent. Of particular interest are the following:

- *Blue Cross Blue Shield of Tennessee, Inc*. (August 10, 2018). Utilizing the Board's new balancing test set forth in *The Boeing Company*, which we discussed in a December 2017 E-Lert, the OGC found that the employer's prohibition on workplace recordings was a "Category 1" rule – meaning that it was lawful. Additionally, an employee was not engaged in protected concerted activity under the National Labor Relations Act (NLRA) in making or sharing the recording, because the employee's purpose was to protect only his or her individual interests, and not that of a group of employees. Therefore, the employer lawfully discharged the employee for lying about sharing the recording.

- *Washington Post* (July 6, 2018). The OGC found an ethics policy prohibiting employee-reporters from publishing freelance articles with a competitor to be a lawful Category 1 conflict-of-interest rule, banning disloyal conduct. Although the maintenance of the rule was lawful, the OGC found that the application of the rule to discipline an employee who engaged in protected activity – an article criticizing the employer's treatment of its employees – to violate the NLRA.

- *Telemundo Television Studios* (June 13, 2017). The OGC found that, in accordance with *Pacific 9 Transportation*, the misclassification of employees as independent contractors is a violation of the NLRA. Moreover, the employer studio was derivatively liable for the violation as a joint employer with talent managers who provided the misclassified performer-employees to the studio. As we noted in our February 2018 E-Update, however, General Counsel Peter Robb has indicated an interest in reviewing this controversial misclassification issue, as set forth in his December 1, 2017 memorandum, GC 18-02 "Mandatory Submissions to Advice" and the Board has subsequently invited the public to submit briefs on this issue.

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- *Menards* (April 19, 2018). According to the OGC, independent contractors, and not just employees, are protected by the NLRA from retaliation for their testimony in Board proceedings.

Government Contractor Update: New OFCCP Directives and Minimum Wage Increase

Following last month's flurry of activity, as we discussed in the August 2018 E-Update, the Office of Federal Contract Compliance Programs has issued additional directives of interest to government contractors. In addition, the Department of Labor (DOL) has announced the updated minimum wage rates for certain workers performing work on federal contracts.

- (Proposed) Directive XXXX-XX Functional Affirmative Action Programs: This proposed directive is intended to reduce the burden on contractors who wish to implement affirmative action programs based on functional units (that cross geographic locations), rather than by establishment. This is accomplished by entering into an agreement that is approved by the Director of the OFCCP. The OFCCP proposes the following significant revisions to the current Functional Affirmative Action Programs (FAAPs) directive:
    - Agreements would exist for five years, instead of three.
    - Eliminate the requirement to undergo at least one compliance evaluation during the term of the agreement.
    - Extend the 24-month exemption period following the closure of a compliance evaluation to a 36-month period.
    - Eliminate consideration of the contractor's EEO compliance history in deciding whether to approve a FAAP request.
    - Remove the three-year waiting period to reapply for a FAAP after termination of an FAAP agreement.
    - Eliminate the annual requirement to modify the FAAP agreement.

  This proposed directive is subject to notice and public comment for a 60-day period that closes on November 13, 2018, and comments may be submitted here. The OFCCP will then consider any submitted comments before issuing a final directive.

- Directive 2018-08 Transparency in OFCCP Compliance Activities: This directive is intended to ensure transparency in OFCCP compliance activities "to help contractors comply with their obligations and know what to expect during a compliance evaluation, and to protect workers from discrimination through the consistent enforcement of OFCCP legal authorities." The directive sets forth the following obligations for contractors and the OFCCP:
    - Contractors must:
        - Ensure non-discrimination and affirmative action in the workplace through implementation of EO 11246, Section 503 and VEVRAA requirements;
        - Submit affirmative action plans (AAP) and support data timely when scheduled for a compliance evaluation; and
        - Allow OFCCP access to its records and establishments, in accordance with applicable law and contractual provisions.
    - OFCCP will:

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        - Be transparent and collaborative in educating contractors about how to comply with their requirements;
        - Conduct high quality, consistent, and efficient compliance evaluations;
        - Ensure there is open communication, cooperation, and intent to minimize unnecessary burden;
        - Make considerable efforts to resolve violations through conciliation; and
        - Stand ready to pursue litigation vigorously when necessary.

    The directive then sets forth specific timelines and procedures that the OFCCP will implement in the course of all the stages of a compliance evaluation: scheduling, pre-desk audit, pre-onsite, offsite analysis, and conciliation efforts.

- Directive 2018-09 OFCCP Ombud Service: The OFCCP announces the planned implementation of an Ombud Service to facilitate the resolution of specific types of concerns raised by external stakeholders. According to the directive:
    - The Ombud Service should require the Ombud to:
        - Listen to external stakeholder concerns about OFCCP matters and suggestions for improvements;
        - Promote and facilitate resolution of OFCCP matters at the district and region office level;
        - Work with OFCCP district and regional offices as a liaison to resolve certain issues after stakeholders have exhausted district and regional office channels;
        - Refer stakeholders to the OFCCP Help Desk for routine compliance and technical assistance inquiries;
        - Accept and review matters referred directly by the national office; and
        - Have the discretion to reject a referral in appropriate circumstances.
    - The Ombud Service will not:
        - Advocate for either side of a dispute;
        - Give legal advice, analysis, opinions, or conclusions;
        - Conduct compliance evaluations, complaint investigations or participate in conciliation agreement negotiations; and
        - Have any role in conduct or discipline issues regarding OFCCP staff.

- Executive Order 13658 established a minimum wage rate, increased annually, for all covered workers performing work on construction contracts covered by the Davis-Bacon Act (DBA); service contracts covered by the Service Contract Act (SCA); contracts to provide concessions (*e.g.* food, lodging, fuel, etc.) on federal property; and contracts to provide services (*e.g.* child care, dry cleaning, etc.) in federal buildings. The DOL has announced the applicable minimum wage increase effective January 1, 2019: $10.60 per hour, with a tipped wage rate of $7.40 per hour. In addition, covered contractors must update the required minimum wage poster, available here.

Employers (Including Federal Contractors) Must Permit Off-Duty Medical Marijuana Use Under Connecticut Law

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A federal district court has ruled that a company discriminated against an applicant, in violation of Connecticut's Palliative Use of Marijuana Act (PUMA), when it refused to hire her because of her positive drug test for medical marijuana use.

PUMA provides, in relevant part,

> [U]nless required by federal law or required to obtain funding: . . . (3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.

The Court's Decision. In *Noffsinger v SSC Niantic Operating Company LLC*, the employer first argued that, as a federal contractor, it was subject to federal law that prohibited the applicant's hire – the Drug Free Workplace Act (DFWA). The court rejected this argument, however, noting that the DFWA does not require drug testing or prohibit the employment of individuals using illegal drugs outside the workplace. Although the employer may have chosen a zero tolerance policy to effectuate the required good faith efforts to ensure a drug free workplace, the policy was not actually required by federal law.

The court also rejected the employer's argument that its employment of a medical marijuana user in violation of federal law amounts to a defrauding of the government, in violation of the False Claims Act. The court stated that, because no federal law bars hiring based on an applicant's off-duty use of medical marijuana, there is no fraud.

The employer further argued that PUMA prohibits discrimination only on the basis of an individual's *status* as a medical marijuana use, but not the actual *use* of marijuana. The court found the employer's argument "makes no sense," as "there would be no reason for a patient to seek PUMA status if not to use medical marijuana as permitted under PUMA."

Finally, the court noted that the statutory language only addresses employer's ability to discipline for using or being under the influence of marijuana during work hours – and therefore by negative implication, the statute protects the off-duty use of marijuana.

Lessons Learned. Earlier in this case, the court had ruled that PUMA was not preempted by the federal Controlled Substances Act, under which marijuana is deemed an illegal drug, and that employers may have to permit the use of medical marijuana under state law. Now, this case addresses for the first time the impact of a state medical marijuana law on federal contractors' obligations under the federal Drug Free Workplace Act. Some commentators had argued that federal contractors did not have to allow the off-duty use of marijuana, even pursuant to state medical marijuana laws. This case has undercut that position. Connecticut employers, other than those that are subject to federal laws or rules that specifically prohibit marijuana use by employees, must now tolerate the off-duty use of medical marijuana. Employers in other states with medical marijuana laws should be aware that whether off-duty use is required to be allowed will depend on the specific language of the state statute.

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Ninth Circuit Gives Deference to DOL's Dual Jobs Regulation

The U.S. Court of Appeals for the Ninth Circuit upheld the Department of Labor's dual jobs regulation and Guidance to find that employers may not take a tip credit against the minimum wage for tipped employees who perform non-tipped work during more than 20% of the workweek – an issue that has been the subject of much controversy.

The Dual Jobs Regulation and Guidance. Under the Fair Labor Standards Act, an employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (at least $2.13) and the federal minimum wage ($7.25). The DOL issued a dual jobs regulation, providing that where an employee is employed in two jobs – one tipped and one not – the employer may pay the tipped wage only for the work performed in the tipped occupation. It further clarified the regulation in a Guidance, providing that an employer may not take a tip credit for the time an employee spends performing non-tipped work, if such work exceeds 20% of the employee's regular workweek.

The Court's Ruling. In *March v. J. Alexander's LLC*, the plaintiff argued both that he was performing non-tipped tasks unrelated to his tipped work, and non-tipped tasks related to his tipped work that exceeded 20% of the workweek. The employer argued that the regulation and Guidance exceeded the DOL's authority, but the court held that they were entitled to deference because the DOL had the congressionally delegated authority to promulgate these rules. The court also rejected the argument that they had been issued without sufficient opportunity for notice and comment, noting that such argument was subject to a six-year statute of limitations that had passed decades ago.

The U.S. Supreme Court articulated the test for whether agency regulations are entitled to deference in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* Applying the *Chevron* test, the court found that the statute had not spoken to the precise question at issue, which enables the agency to issue its interpretation of the issue. That interpretation must be given deference unless it is "arbitrary, capricious, or manifestly contrary to the statute." In this case, the court found the regulation to be reasonable.

As to the Guidance, the court applied the U.S. Supreme Court's test set forth in *Auer v. Robbins*, under which an agency's interpretation of its own ambiguous regulation is entitled to deference as long as it is not "plainly erroneous or inconsistent with the regulation." The court found the Guidance to be reasonable and consistent with the DOL's past views on the issue.

Significance of the Ruling. With this decision, the Ninth Circuit joins the Eighth Circuit in granting deference to the DOL's dual jobs regulation and 80/20 or 20% rule. Notably, there is another challenge to the rule pending in a Texas federal court, and the status of the rule remains unsettled in other jurisdictions.

TAKE NOTE

Begin Using the Updated FCRA Notice Now! As we discussed in our August 2018 E-Update, the Fair Credit Report Act (FCRA) was revised to require new language be included in the mandatory notice, "A Summary of Your Rights Under the Fair Credit Reporting Act," and the Consumer

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Financial Protection Bureau (CFPB) has now issued an interim final rule containing the revised notice, which employers should begin using immediately.

Under 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 copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," along with notice of the intent to take adverse action and a copy of the report.

Employees Must Comply with FMLA Notice Requirements. The U.S. Court of Appeals for the Fifth Circuit affirmed the employer's right to condition the grant of leave under the Family and Medical Leave Act on compliance with the employer's "usual notice and procedural requirements."

In *DeVoss v. Southwest Airlines Co.*, the employee had reported that she would be missing four days of work because of illness, and was provided an FMLA eligibility notice. The employer's policy required employees to submit an FMLA application within 15 days of receiving an FMLA eligibility notice. Because the employee failed to submit the application, the court found that she had not provided notice of her need for FMLA leave, which resulted in the dismissal of her FMLA interference claim.

This case supports the right of employers to insist on compliance with appropriate notice and procedural requirements for employees seeking FMLA leave. Ensuring such compliance may help an employer better control the use of FMLA leave and potentially crack down on FMLA abuse.

Reduction in Hours Constituted FMLA Interference. An employee whose hours were reduced upon her return from leave could assert violations of the Family and Medical Leave Act by her employer, according to the U.S. Court of Appeals for the Eleventh Circuit.

Upon returning from FMLA leave, an employee must be placed in the same or an equivalent job, meaning one that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location). In *Jones v. Aaron's Inc.*, the employee was placed on a reduced hour schedule upon her return from leave, which the employer claimed was at her request. However, it could not provide any evidence to substantiate this claim. The court noted that the reduction in hours was a materially adverse employment action giving rise to an FMLA claim.

This case reminds employers to ensure that employees are returned to essentially the same job under essentially the same work conditions upon a return from FMLA leave. It also warns employers that, to the extent that there are any changes that are based on the employee's own wishes, it is important to have confirmatory documentation with the employee.

Retroactive Back Pay Is Mandatory Legal Remedy Under ADEA. The U.S. Court of Appeals for the Fourth Circuit held that back pay is a mandatory legal remedy under the Age Discrimination in Employment Act, which is not subject to the court's discretion.

As the court noted in *EEOC v. Baltimore County*, Congress adopted the enforcement procedures and remedies of the Fair Labor Standards Act into the ADEA. Under the FLSA, an employer who violates the law "shall be liable" for unpaid wages. Accordingly, because back pay is a mandatory

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legal remedy under the FLSA, it must also be a mandatory legal remedy under the ADEA. This differs from Title VII, in which back pay is a discretionary award.

Failure to Provide Copy of Consumer Report Was Concrete Harm Under FCRA, but Failure to Provide Summary of Rights Notice Was Not. Applicants who were denied jobs because of consumer reports that revealed drug-related convictions could sue because they did not receive copies of the reports, as required under the Fair Credit Reporting Act, but not because they did not receive the required "A Summary of Your Rights Under the Fair Credit Reporting Act."

The Supreme Court has held in *Spokeo Inc. v. Robins* that, in order to sue under FCRA, a plaintiff must establish that he has suffered "concrete" harm – meaning real injury, and not simply a "bare procedural violation." In *Long v. Southeastern Pennsylvania Transp. Auth.*, the U.S. Court of Appeals for the Third Circuit applied the *Spokeo* test to find that the applicants had sufficiently alleged that the failure to provide the copy of the consumer report constituted a concrete harm, because they were unable to see or respond to the report before an adverse action – the denial of employment – was taken. The failure to provide the required notice of rights, however, was a "bare procedural violation" as the applicants became aware of their FCRA rights and were able to file suit, and therefore suffered no harm.

Employers should make sure that they are complying with the technical requirements of FCRA – particularly as to the requirement to provide a copy of the consumer report prior to taking any adverse action. Moreover, although the failure to provide the notice of rights was not actionable in this case, it is possible that some other applicant, who missed the filing deadline for a FCRA violation because of the lack of notice, could assert a concrete harm. Employers should also note that the required notice – "A Summary of Your Rights Under the Fair Credit Reporting Act" – has just been updated and must be implemented, as discussed elsewhere in this E-Update.

Seventh Circuit Sets Forth Test for Joint Employer Status Under Title VII. In a case involving a hotel and its management company, the U.S. Court of Appeals identified the proper test for determining if two entities are joint employers for purposes of Title VII liability.

According to the U.S. Court of Appeals for the Seventh Circuit in *Frey v. Hotel Coleman*, the correct test for joint employer status is an "economic realities test," previously articulated in *Knight v. United Farm Bureau Mut. Ins. Co.*, that examines the following factors: (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations. Although this is a balancing test, the court observed that the "right to control" is the most important factor and must be accorded the most weight.

This case warns companies that joint employer status may be found over another entity's employees if the company exercises sufficient control over those individuals and workplace circumstances.

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NEWS AND EVENTS

Mark Swerdlin and Lindsey White won a complete defense verdict following a three-day state court jury trial on a former employee's claims of defamation against her employer and a co-worker, and tortious interference with her employment relationship against the co-worker.

Lindsey White spoke to Women, Leadership, and Equality fellows at the University of Maryland School of Law about careers in labor and employment law on September 12. Lindsey is a former fellow of the WLE program.

J. Michael McGuire won an arbitration for an energy company. The arbitrator found that the union's evidence of past practice was not sufficient to overcome the collective bargaining agreement's clear language on overtime assignments.

Fiona W. Ong was quoted in an article by Gloria Gonzalez, "Workplace safety regulation seen undermining opioids fight," published on WCAuthority.com on September 1, 2018.

TOP TIP: Employers Need To Be Careful About Harassment By Or Of Third Parties!

There has been much focus on manager or co-worker harassment of employees, but several recent cases provide a good reminder to employers that they need to be mindful of harassment by or of customers, clients, vendors, contractors, and other third parties.

In *EEOC v. Costco Wholesale Corp.*, the U.S. Court of Appeals for the Seventh Circuit upheld a jury verdict of $250,000 against the employer for a customer's stalking of an employee. The employee had reported to her supervisors that a customer made her uncomfortable. The customer was told to stay away from the employee, but ignored the instruction. Over the course of 13 months, he continued to approach her, often in front of her supervisor, giving her compliments, asking her questions, touching her, and then videotaping her. She obtained a no contact order from court, and went on a medical leave. At this point, the employer finally told the customer that he was not permitted to shop at the store. His membership at the store was not revoked, however, until he verbally assaulted the employee at another store location. The court found that this behavior, although not "overtly sexual" was "objectively intimidating or frightening," and created a sexually hostile work environment that the employer had failed to address.

In another recent case, *Gardner v. CLC of Pascagoula, L.L.C. dba Plaza Community Living Center*, a certified nursing assistant complained of lewd comments and groping by a patient with cognitive issues. Her supervisor told her to "put [her] big girl panties on and go back to work." The CNA was also refused reassignment. The U.S. Court of Appeals for the Fifth Circuit found that she could bring a claim for a sexually hostile work environment against her employer, who had failed to take action to protect her from the patient's harassment.

On the flip side, an employer can also be held liable to third parties for harassment by its employee. For example, in *Doe YZ v. Shattuck Saint Mary's School*, three students were able to bring suit against a school due to sexual abuse by a teacher, where the school had prior notice of inappropriate conduct by the teacher towards other students.

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These cases demonstrate the need for employers to take appropriate action to stop or prevent the harassment of its employees by third parties. It is not acceptable, particularly in this time of #MeToo, to disregard employee complaints or to tell employees to tolerate inappropriate behavior – even if the complained-of conduct does not appear to be particularly egregious (since repeated low-level behavior can still amount to illegal harassment) or if there are concerns about the ability to control the third party's behavior. Ultimately, the employer's responsibility is to protect the employee from harassment.

Similarly, it is important for employers to ensure that their employees are not engaged in the harassment of third parties. Otherwise the third party may assert tort claims such as negligent hiring, negligent supervision or negligent retention against the employer based on an employee's misconduct toward them.

RECENT BLOG POSTS

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

- What, #MeToo??? by Elizabeth Torphy-Donzella, September 26, 2018 (Selected as a "noteworthy" blog post by the *Employment Law Daily*)
- You Have to Believe It to See It! by Elizabeth Torphy-Donzella, September 19, 2018 (Highlighted as a featured article on lexblog.com)
- Extraordinary Employee Misconduct – Threatening Witnesses Through Facebook by Fiona W. Ong, September 12, 2018 (Selected as a "noteworthy" blog post by the *Employment Law Daily*)
- Extraordinary Employee Misconduct – Giving a Non-Consensual Haircut! by Fiona W. Ong, September 5, 2018 (Selected as a "noteworthy" blog post by the *Employment Law Daily*)

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