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E-UPDATE

November 30, 2018

RECENT DEVELOPMENTS

DOL Releases New Opinion Letters: Tipped Employees and Non-Tipped Work, Hourly/Daily/Shift Compensation for Exempt Employees, and More

The Department of Labor (DOL) has released four new opinion letters on the Fair Labor Standards Act (FLSA). Opinion letters respond to a specific wage-hour 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 rely on these opinion letters as guidance. This batch of opinion letters addresses tipped v. non-tipped work (the 20% or 80/20 rule), as well as various exemptions from the minimum wage and overtime requirements of the FLSA.

FLSA2018-27: Employers of tipped employees may pay a tipped wage of $2.13 and take a tip credit for the difference between the tipped wage and the minimum wage, currently $7.75. (Maryland and many other states and local jurisdictions have a higher minimum wage for both tipped and non-tipped employees). The FLSA recognizes that tipped employees may work dual jobs – one tipped and one non-tipped, and the tip credit may be applied only to the tipped job. It also recognizes that a tipped job may involve both tipped and related non-tipped tasks (such as maintenance and preparatory or closing activities), and the DOL has now reissued a 2009 opinion letter that rejects its previously imposed 20% limitation on the amount of non-tipped tasks that could be performed within a tipped job.

Under the **now-rejected 20% or 80/20 rule for tipped employees**, the DOL had taken the position that employers could not take the tip credit for time spent on non-tipped tasks if the tasks exceeded 20% of the employee's work time. Now, however, the DOL states that, "We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the [FLSA] are met."

The DOL states that "Duties listed as core or supplement for the appropriate tip-producing occupation in the Tasks section of the Details report in the Occupational Information Network (O*NET) http://online.onetcenter.org or 29 C.F.R. § 531.56(e) shall be considered directly related to the tip-producing duties of that occupation. For example, for waiters and waitresses, such tasks include preparing and clearing tables, sweeping and mopping floors, taking out trash, answering phones, rolling silverware, stocking service items, and filling condiment containers, among many others. If the task is not listed in O*NET, the employer may not take a tip credit for time spent performing that task – although such task may be deemed non-compensable under the *de minimis* rule (meaning that such little time is spent on the task that it need not be paid).

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FLSA2018-25: Under the FLSA, employees are exempt from the minimum wage and overtime requirements if they meet the duties tests for the executive, administrative, or professional exemptions and they are paid on a salary basis. **Exempt employees may also receive compensation on an hourly, daily or shift basis** as long as they receive a guaranteed weekly salary of at least the minimum salary level (currently $455 per week) and "a reasonable relationship exists between the guaranteed amount and the amount actually earned."

According to the DOL, "a reasonable relationship exists when the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly rate for the employee's normal scheduled workweek." (Internal quotations and other punctuation omitted). Under the FLSA regulations, such "reasonable relationship" exists when the ratio of actual earnings is in the range of 1.2 to 1.5 times the guaranteed salary. (E.g. weekly earnings of $600-$750 are reasonably related to a guaranteed weekly salary of $500). In the opinion letter, the DOL found that a 1.8 ratio of actual earnings to the guaranteed weekly salary exceeds the permissible ratio and is therefore not reasonably related.

The DOL also offered guidance on how to calculate "usual earnings" where an employee's wages fluctuate widely and unpredictably from week to week. It found that calculating average weekly earnings during a calendar year was a "reasonable method" for determining the "usual earnings" for a "normal scheduled workweek." (The DOL acknowledged that there are other reasonable methods as well, but did not identify them.) The DOL further warned that the "usual earnings" inquiry is employee-specific, and that calculating average earnings for an entire job classification or group of employee may not accurately reflect the earnings for a specific employee.

FLSA2018-26: The FLSA exempts employees of "**seasonal amusement or recreational establishments**" from its overtime requirements. In order to qualify for the exemption, there must be a separate establishment that is frequented by the public and intended for amusement or recreation.

The DOL found that the exemption applies to an operator of swimming pools that are located at hotel, motel, apartment and condominium buildings, provided that the pool facilities are physically separated from the host facility and may be frequented by non-residents, even if access is restricted to paying customers.

FLSA2018-24: The FLSA provides a partial overtime exemption for "**public agencies**," which are defined as an agency of a state or political subdivision. Whether a private party should be considered a public agency depends on whether it is directly responsible to public officials or the general public, and whether the parties' contract designates it as a State agency. In determining whether an entity is directly responsible to the public, the most important factor is whether public officials select and control the entity's board of directors, with another important factor being whether the public officials hire and fire the entity's employees.

Applying this test to non-profit, privately owned fire departments providing firefighting services to the public under contract with municipalities, the DOL found that the fire departments were not public agencies. The departments independently elect their board of directors, as well as purchase their own equipment, and exercise independent judgment and discretion over their operations. Moreover, their contracts designate them as independent contractors rather than state agencies.

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The DOL rejected the proposition that state legislation could grant public agency status, as it would not alter the departments' operational independence. Nor would state declarations necessarily control issues of federal law.

Facebook Posts May Be Protected Concerted Activity

In a recently-released Advice Memorandum, originally prepared in 2016, the National Labor Relations Board's General Counsel reminds employers that Facebook posts may constitute concerted activity that is protected under the National Labor Relations Act, even in a non-union setting.

Background Facts: In *H&M Construction Co. & Georgia Pacific, LLC, as Joint Employers*, in light of the upcoming Veterans Day, Georgia Pacific praised veteran employees on its Facebook page. A non-veteran H&M employee responded to the post by criticizing the company for having a Veterans Day function for its own – but not contractors' - veteran employees. He had also engaged in a verbal discussion with another H&M employee, in which he expressed his anger about the exclusionary event and the other employee agreed. He was then laid off because of his Facebook posts.

The General Counsel's Opinion: The General Counsel found that the employee's Facebook comments were concerted activity for employees' mutual aid or protection, which is protected activity under the NLRA. As noted by the General Counsel, "Conduct is concerted when it is 'engaged in with or on the authority of other employees,' or when an individual employee seeks 'to initiate or to induce or to prepare for group action' or to bring group complaints to management's attention."

Although not a veteran himself, the employee sought to bring complaints about differential treatment of company and contractor veteran employees to management's attention. Because he was advocating for others, and not himself, the comments could not be viewed as an unprotected personal gripe. In addition, the General Counsel found that he sought to induce group action because he initially engaged with another co-worker about his concerns, and then made the comments, which concerned working conditions, publicly on the company's Facebook page. These comments were intended to improve working conditions for contractor employees, and even though they related to matters beyond the immediate employment relationship, they were protected. Finally, although off-duty, offsite use of social media may lose the protection of the Act if it is sufficiently "disloyal, reckless, or maliciously untrue," the General Counsel found that the comments did not rise to that level.

Lessons Learned: This memorandum serves as a reminder to employers – unionized and non-unionized alike – that they must be careful in taking action against an employee for social media activity such as Facebook posts. Even though such activity may be offensive or disrespectful to the employer, it may be protected by the NLRA, depending on the content of the social media communications.

OFCCP Releases Three New Directives for Federal Contractors: Compliance Review Procedures, Early Resolution Procedures, and Opinion Letters and Help Desk

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The Office of Federal Contract Compliance Programs continues its flurry of activity with the announcement of three new directives on November 30, 2018, following the five that were issued in August and discussed in our August 2018 E-Update. 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 new directives as follows:

- DIR 2019-01 Compliance Review Procedures: Noting that it had recently adopted new guidance and procedures intended to increase transparency, increase the number of compliance evaluations, shorten the time to complete desk audits, and conciliate issues more efficiently, the OFCCP announced that there was no longer a need for its Active Case Enforcement Procedures Directive. Accordingly, the OFCCP is rescinding DIR 2011-01, and directing its staff to follow the compliance procedures described in its Federal Contract Compliance Manual and supplemental agency guidance, policies and procedures.

- DIR 2019-02 Early Resolution Procedures: This directive is intended to help remedy violations found during compliance evaluations more quickly by establishing Early Resolution Procedures (ERP) and providing guidelines for their implementation. In particular, the ERP are focused on contractors with multiple establishments to assist with corporate-wide compliance, beyond the establishment under review. The Directive sets forth procedures, ideally to be completed within 60 days, applicable to three types of violations, with the latter two applicable only to contractors with multiple establishments:
    - **Non-Material Violations** – the Compliance Officer should seek to resolve the violation during the desk audit, provide compliance assistance, and issue a closure letter.
    - **Material Violations: Non-Discrimination** – The OFCCP will seek to resolve violations (e.g. record keeping, applicant tracking, failure to implement audit and reporting systems, and failure to conduct self-analysis, among other things) through an Early Resolution Conciliation Agreement with Corporate-Wide Corrective Action (ERCA). The ERCA sets a report monitoring period. The contractor will be required to review all or a part of its remaining establishments for similar violations during that period and will provide progress reports and supporting documentation with specific information. The OFCCP will not conduct any further compliance review at the original establishment for five years, although it may conduct such review at other establishments including those covered by the monitoring requirement.
    - **Material Violations: Discrimination** – The OFCCP will first request additional information and interviews regarding the violation to calculate a monetary remedy. Following receipt of the information, the OFCCP will complete a refined analysis. If discrimination is still indicated, ERP will be offered, during which the contractor may provide additional information to rebut the finding of discrimination. If discrimination continues to be found, the OFCCP will seek make-whole relief for the affected applicants and/or employees. The contractor will be required to review other establishments for similar violations and implement corrective action during a five-year progress report-monitoring period. No compliance review will be conducted of the covered establishments during this monitoring period.

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- DIR 2019-03 Opinion Letters and Help Desk: To enhance its compliance assistance efforts, the OFCCP will make certain Help Desk inquiries and responses dynamically available and searchable on its website. It will also begin issuing Opinion Letters to provide fact-specific guidance, as other Department of Labor agencies have done (like the opinion letters discussed earlier in this E-Update). Either employers or employees may request opinion letters, and the OFCCP will establish a process for doing so.

TAKE NOTE

Supreme Court Finds Small State Entities and Political Subdivisions Covered by ADEA. The Age Discrimination in Employment Act's 20-employee trigger for coverage does not apply to state entities or political subdivisions, according to the U.S. Supreme Court, resolving a federal appellate circuit split on the issue.

Under ADEA, "employer" is defined as "a person engaged in an industry affecting commerce who has twenty or more employees…. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State." In *Mount Lemmon Fire District v. Guido*, a fire district that was a political subdivision argued that ADEA did not apply to it because it had fewer than twenty employees. The Supreme Court, however, found that the twenty-employee limitation did not apply to the latter part of the definition of employer, and therefore all States and political subdivisions are covered by ADEA regardless of size.

Denial of Opportunity for Voluntary Overtime Is Tangible Employment Action. A supervisor's denial of voluntary overtime after learning that his subordinate reported his sexual harassment of her was a tangible employment action for which the employer was liable, according to the U.S. Court of Appeals for the Fourth Circuit.

Under Title VII, an employer is strictly liable for a supervisor's sexual harassment where the harassment culminates in a tangible employment action. Typically, this has involved an event such as a termination, demotion or failure to promote. In *Ray v. Int'l Paper Co.*, however, the Fourth Circuit explained that a "tangible employment action" includes a "significant change in employment status," including a "decision causing a significant change in benefits." Here, the plaintiff worked voluntary overtime almost daily, and the earnings constituted a significant part of her earnings. Thus, the denial of the opportunity to work this voluntary overtime could be considered a significant change in her benefits.

On-Call Work May Be Essential Job Function. A federal court held that overnight on-call work may be an essential job function, and an employee's request to be excused from that work was not a reasonable accommodation.

In *Porter v. Tri-Health, Inc.*, the hospital required its radiology department sonographers to share overnight on-call on a rotating basis. Although this requirement was not included in the job description, it was made clear to the sonographers upon hire and constituted a significant part of their time worked. The employee was placed on a medical restriction that prevented her from taking call after 9 pm, and she was eventually terminated for her inability to take overnight call.

The Ohio federal district court found that the overnight on-call duty was essential. Sonographers had to be available if needed, as medical emergencies could arise anytime, even if the emergencies were

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not routine. The court noted that deference to the hospital's view of the essential nature of the function was warranted under the unique circumstances of a hospital setting. Moreover, the supervisor had difficulty covering the employee's on-call time, and the other employees complained about the extra on-call duty imposed on them.

Of interest, the employer had previously had an optional sonographer who, for a period of about a year, worked most of the on-call hours for all the sonographers, including the employee. Thus, the employee was granted her requested accommodation during that time. However, when the optional sonographer left, the hospital chose not to replace that role. The court found that the fact the hospital had previously provided the accommodation did not mean that it conceded the function was not essential.

General Contractor May Be Cited for Hazardous Condition Affecting Only Subcontractor Employees. The U.S. Court of Appeals for the Fifth Circuit deferred to the Secretary of Labor's interpretation of the Occupational Safety and Health Act enabling the Secretary to issue a citation to a general contractor at a multi-employer worksite for hazards affecting only subcontractors' employees.

Under OSHA's multi-employer policy, a "controlling employer" (meaning one with control over a worksite and that should have detected and prevented a violation through its supervisory authority) may be cited for a violation even if its own employees were not exposed to the hazardous condition. In *Acosta v. Hensel Phelps Construction Co.*, the Fifth Circuit reversed its own prior holding that "OSHA regulations protect only an employer's own employees." Instead, the Fifth Circuit found that deference to the policy was warranted because the Secretary's interpretation of OSHA as authorizing multi-employer workplace citations was reasonable. In so holding, the Fifth Circuit joins seven other Circuits.

Employer Must Bargain Over Safety Clothing Rule. The National Labor Relations Board found that an employer violated the National Labor Relations Act when it implemented a rule requiring employees to wear flame-resistant clothing at all times without providing notice or an opportunity to bargain to the Union.

In *Orchids Paper Products Company and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO*, the employer had electrical cabinets that required an arc flash analysis. The employer ordered arc flash rated protective clothing for its maintenance technicians, and the technicians were directed to wear the clothing at all times, not just when working near the cabinets. The union challenged the unilateral implementation of this rule. Work rules requiring the use of safety and personal protection equipment are mandatory subjects of bargaining, and the employer violated the Act when it instituted the rule without providing the Union with notice or an opportunity to bargain over the decision or its effects.

Tenth Circuit Declines to Adopt DOL Test for Intern/Student Status. Applying a totality of circumstances test to examine the economic reality of the relationship between a for-profit vocational school and its students, the U.S. Court of Appeals for the Tenth Circuit found the students were not employees under the Fair Labor Standards Act.

In *Nesbitt v. FCNH, Inc.*, the Tenth Circuit applied a six-factor totality of the circumstances test that it previously set forth in *Reich v. Parker Fire Protection District*: (1) whether the training received is

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similar to that which would be given in a vocational school; (2) whether the training is for the benefit of the trainee or the employer; (3) whether the trainees displace regular employees, or rather work under close observation or supervision; (4) whether the employer that provides the training derives an immediate advantage from the activities of the trainees; (5) whether the trainees are necessarily entitled to a job at the completion of their training period; and (6) whether the employer and trainees understand that the trainees are not entitled to wages for the time they spend in training. No one factor is dispositive under this test. The Tenth Circuit determined that the students were not employees under the test.

Of particular interest, the Tenth Circuit rejected the opportunity to adopt the "primary beneficiary" test set forth by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.* (as well as by the Sixth, Ninth and Eleventh Circuits in other cases) and now adopted by the Department of Labor. This test examines the "economic reality" of the relationship through the analysis of seven factors to determine which party is the "primary beneficiary." The Tenth Circuit found there was no need to adopt the primary beneficiary test, as its own test similarly "relies on the totality of the circumstances and accounts for the economic reality of the situation."

NEWS AND EVENTS

Elizabeth Torphy-Donzella authored an article, "Is Graffiti Protected Concerted Activity? The NLRB Refuses to Draw A Bright Line," which was published in the November 2018 issue of *Bender's Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Parker E. Thoeni authored an article, "NLRB Notice of Proposed Rulemaking on Joint Employment: 'We Reject Maintaining the Status Quo'," which was published in the November 2018 issue of *Bender's Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Darryl G. McCallum was extensively quoted in an article by Vin Gurrieri, "State Pot Expansions Shift Spotlight To Workplace Drug Bans," which was published in the November 21, 2018 edition of the daily legal newsletter, *Law360*.

Fiona W. Ong was quoted in an article by Fred Hosier, "Medical marijuana user loses job offer: Is that discrimination?" which was published in the October 16, 2018 edition of the weekly e-newsletter, *Safety News Alert*.

TOP TIP: Impact of Written Agreements on At-Will Employment

In *Swift v. University of Maryland, College Park*, the Maryland Court of Appeals (the highest State court) reiterated that at-will employment, which is presumed in Maryland and which allows either the employer or the employee to terminate employment at any time with or without cause, may be modified by written agreement, including a collective bargaining agreement (CBA). This case reminds employers, in Maryland and other at-will States, to ensure that their written agreements – whether private or collectively bargained – do not inadvertently alter an employee's at-will employment status.

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Facts of the Case: The plaintiff was an employee of the University and a member of the Union. The CBA negotiated between the University and the Union acknowledges that its terms function in parallel with non-conflicting University policies. The CBA also provides that employees may only be disciplined for cause and sets forth a progressive disciplinary procedure, including time limits for discipline. The CBA specifically provides that the time limits do not apply to the University's Notice Termination policy. This Notice Termination policy, in turn, states that employees are employed on an at-will basis, and may be terminated at any time. It also provides that employees who are involuntarily separated will be given a notice period, the length of which depends on years of service.

Initially, the plaintiff received a counseling letter that warned him of potential disciplinary action, including termination. Less than three months later, he was terminated in accordance with the Notice Termination policy and provided with six months notice. Before the Court of Appeals, the plaintiff argued that the CBA and University policy could not co-exist, and the CBA altered his at-will status.

The Court's Ruling: The Court of Appeals first reiterated the principle of presumed at-will status in Maryland, and the fact that such at-will status could be altered by agreement. The Court noted, however, "the mere existence of an agreement doesn't transform at-will employees into for-cause employees for all purposes. Instead, the agreement binds the employer to the agreed protections, and the documents, not the label, control." Thus, according to the Court, the existence of certain procedural safeguards does not necessarily change an employee's at-will status.

In the current case, the Court found no conflict between the CBA and the University's Notice Termination policy. The CBA itself recognizes different tracks for discipline and notice terminations. While the University cannot institute disciplinary action without cause, there is no restriction on its ability to execute a notice termination, in compliance with the notice protections, and this is what it did. As the Court noted, "notice termination isn't discipline."

Lessons Learned: At-will employment is presumed in all but one State (Montana). Employers should review their written agreements and policies to ensure that the language is consistent with – and does not unintentionally alter – the employee's at-will status. Handbooks, offer letters, and policies can change an employee to for-cause termination status, if the language is not carefully drafted and/or the document fails to contain a disclaimer that reinforces the premise that it does not modify the employee's at-will employment status.

RECENT BLOG POSTS

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

- Boards of Directors in the Bullseye: #MeToo and the Fiduciary Duty by Elizabeth Torphy-Donzella, November 29, 2018.
- Unions, Proponents of Workers' Rights? Guess Again by Paul D. Burgin, November 21, 2018.
- Employers Beware: What You Say Can and Will Be Used Against You! by Darryl G. McCallum, November 16, 2018 (Featured on hrsimple.com)

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- Extraordinary Employee Misconduct: High-Speed Highway Harassment by Fiona W. Ong, November 7, 2018.
- Does Holding Unions Accountable Help Employers? By Fiona W. Ong, October 31, 2018 (Selected as a "noteworthy" blog post by the *Employment Law Daily*)

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