THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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YOU KNOW HOW SOME BELIEVE FEDERAL AGENCIES CAN'T AGREE ON WHAT DAY IT IS? WELL....

Complying with various state and federal laws and trying to balance all of the requirements can feel like walking a tightrope. On top of that, employers also have to balance the different recent interpretations from federal agencies on a couple of issues in particular: (1) protections for LGBT workers, and (2) the confidentiality of workplace investigations into sexual harassment allegations.

Protections for LGBT Workers. In the first such disagreement, the Equal Employment Opportunity Commission and the Department of Justice disagree over whether federal law protects LGBT workers from discrimination based on sexual orientation. The DOJ asserts that the prohibition of discrimination based on sex under Title VII does not include sexual orientation, while the EEOC holds that sex-based discrimination does include sexual orientation discrimination. Neither agency has indicated a willingness to change its view at this time. So, until the United States Supreme Court weighs in, these differing views are here to stay. Employers may get some relief in the near future regarding how to handle these issues, as there are currently three petitions for a writ of certiorari with the United States Supreme Court on three separate cases. A "writ of certiorari" is when a party requests that the Supreme Court address a particular issue, but the Court is not usually required to hear any case it does not want to hear.

Colorado employers should note that Colorado law specifically prohibits discrimination based on sexual orientation, which Colorado law defines as "a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof." So, Colorado employers also have to balance that law.

Confidentiality of Workplace Investigations Into Sexual Harassment Allegations. The EEOC disagrees with the National Labor Relations Board over whether investigations into sexual harassment allegations should remain confidential. The EEOC argued in a June 2016 report that harassment investigations should be kept as confidential as possible to encourage victims to report harassment and to protect against retaliation. The NLRB, on the other hand, held in a 2015 decision that a workplace investigation could only be kept confidential if the employer could establish a

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"legitimate and substantial business justification" outweighing employees' rights to engage in protected concerted activity and discuss workplace conditions. The EEOC and the NLRB seek to reach a shared opinion to provide clarity to employers and employees.

Practical Tip: Employers should try to comply with all agency guidance as much as possible. For example, regarding protections for LGBT workers, employers should strive to comply with the strictest guidance (i.e., Colorado law and the EEOC's position prohibiting discrimination based on sexual orientation). Regarding confidentiality of investigations, employers should not promise to keep any investigation confidential. Employers may want to ask employees to keep investigations confidential, particularly while they are ongoing, but should also remind employees that they have a right to engage in protected concerted activity. Employers should remember that they can require supervisors to keep investigations confidential because the National Labor Relations Act does not protect supervisors.

A COURT PROVIDES MORE GUIDANCE ABOUT FLSA CLASS AND COLLECTIVE ACTIONS

There's no question that over the last five years, federal courts have handled an increasing number of class and collective-action lawsuits under the Fair Labor Standards Act. Unfortunately, these cases have provided little clarity on what defenses an employer can assert to prevent it from being added to the growing list of employers sued under such a claim. But that may be changing as one federal court recently provided some clarity regarding such actions.

In the case *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115 (3rd Cir. 2018), a group of mortgage loan officers brought an FLSA class and collective action case against their employer, a bank, alleging the bank required the employees to work more than 40 hours per week and "discouraged" the employees from writing down any hours over 40 that employees worked in each workweek. The employees alleged this was the bank's standard practice, even though the bank had a policy that required employees were required to record all their time worked and that management staff must pre-approve any work over 40 hours in a workweek. The policy even explained that employees could be subject to discipline if they did not follow these rules.

After the trial court determined that the employees could proceed as a class, a federal appeals court reversed that decision for a few important reasons.

First, the court explained that it had "to cobble together the parameters" that set out which employees were part of the class action and which employees were not part of the class. In other words, the court thought that the trial court needed to be more specific about which employees were included in the class action. Second, the court stated that in order to have a class, evidence must be presented showing that each potential class member could rely on the same evidence if they had brought the lawsuit in their own name rather than as a class. That is, evidence demonstrating a company-wide policy must apply to each and every proposed class member.

Finally, in explaining what evidence was needed to proceed as a class, the court explained that the employees had to show: (1) that the bank had an "unwritten policy" relating to employees' under-reporting of hours; and (2) that the bank "had actual or constructive knowledge of that policy and of the resulting uncompensated work." In this case, the court noted there was evidence that

contradicted the named plaintiffs' assertions that a policy "encouraging" employees to work off-the-clock existed. As a result, the court reversed the class certification and sent the case back to the trial court with instructions for the trial court to "conduct a 'rigorous' examination" of the evidence and issues in the case.

Practical Tip: This case may evidence a dramatic shift in how class action lawsuits are handled in litigation and before they are certified as a class. First, as this court's analysis showed, be sure your organization has a strong policy in place requiring employees to record all hours worked. If necessary, organizations can require employees to receive approval before working overtime. It is worth noting that employers still have to pay employees the applicable overtime pay for all overtime hours worked, even if those hours were not approved, but employers may discipline employees who work overtime without permission. Second, train managers on this policy and document those training sessions and attendees. Third, check in with managers from time to time to ensure they are complying with the policy. As pointed out in the court's opinion, these steps can reduce liability in wage-and-hour class action cases.

NLRB REVISES INDEPENDENT CONTRACTOR TEST

Earlier this year, the National Labor Relations Board returned to a former, more employer-friendly standard for the independent contractor test under the National Labor Relations Act. That is, in the 2019 *SuperShuttle DFW, Inc.* case, the NLRB re-adopted the common-law, totality of the circumstances standard when determining whether an organization could classify a worker as an independent contractor. *SuperShuttle* overruled a 2014 NLRB decision, *FedEx Home Delivery,* which, quite frankly, was not as "employer friendly."

In the 2014 *FedEx Home Delivery* decision, the NLRB, then in Democrat control, ruled that in addition to the traditional common-law factors (e.g., the extent of control over the individual, the skill required in the occupation, the method of payment, etc.), the independent contractor test should also evaluate "whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." In essence, under *FedEx,* a key part of determining whether an individual is rendering services as part of an independent business should include whether the individual has "actual entrepreneurial opportunity for gain or loss."

The NLRB specifically set forth three factors in determining whether an individual has actual entrepreneurial opportunity: (1) whether the contractor "has a realistic ability to work for other companies"; (2) whether the contractor "has proprietary or ownership interest in her work"; and (3) whether the contractor "has control over important business decisions." The NLRB also wrote that the independent-business factor "supplements—without supplanting or overriding—the traditional common-law factors," and stated that the NLRB would continue to give full consideration to the common-law factors in addition to the independent-business factor.

Since the *FedEx* decision and President Trump's election, the NLRB has shifted to a Republican majority. And, while courts may attempt to give deference to other previous court decisions, the NLRB often gives no such deference to previous Boards and tends to overrule previous Board decisions where a different political party held the majority. Enter the 2019 NLRB decision in the *SuperShuttle* case.

In *SuperShuttle,* the Board determined that the *FedEx* Board improperly overruled the

traditional common-law factors in favor of the independent-business test. The *SuperShuttle* NLRB wrote, "[T]he *FedEx* majority's reformulation of the independent-contractor analysis impermissibly revives an 'economic dependency' standard that Congress has explicitly rejected." Thus, in *SuperShuttle*, the NLRB overruled *FedEx* and stated it would apply the common-law factors, rather than the independent-business test. The NLRB also noted that it "does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative evaluation of those factors based on the particular factual circumstances of each case."

The *SuperShuttle* decision is good news for employers because it aligns more closely with Colorado law (i.e., the Colorado Supreme Court's decision in *Softrock*, which set forth a totality of the circumstances test) and does not put a burden on the employer to ensure that its contractors operate independent businesses. Rather, because a totality of the circumstances test applies, employers shoulder less of a burden in establishing that its contractors are, in fact, contractors.

Practical Tip: Although the *SuperShuttle* decision set forth a more employer-friendly standard, employers should still examine all of their independent contractor relationships to ensure that independent contractors are properly classified because failure to properly classify these individuals can come with heavy penalties.

EEO-1 DEADLINE SET FOR ~~MARCH 31ST, MAY 31ST~~, SEPTEMBER 30TH

Generally, employers that meet any of the following must file an EEO-1 report: (1) employers with at least one hundred employees; or (2) federal contractors or subcontractors with a government contract or purchase order worth $50,000 or more and at least fifty employees.

The EEO-1 traditionally required employers to report data regarding employee race/ethnicity, gender, and job category. Then, the Obama Administration changed the EEO-1 to include a requirement for employers to identify information regarding employee pay and hours worked. The Obama Administration argued that such a reporting requirement would combat discrimination by making pay and working conditions more transparent. But after President Trump came into office in January 2016, the Office of Management and Budget stopped the implementation of this requirement, arguing that the requirement was too burdensome on employers. The OMB's determination to suspend the requirement to report this information then went to court.

On March 4, 2019, a United States District Court judge ruled that the OMB's decision to stop the implementation of the rule was "arbitrary and capricious," and thus, employers must comply with the new requirements. Around the time of the decision, the deadline for filing the EEO-1 was moved from March 31, 2019, to May 31, 2019. Then, on April 4, 2019, that date was extended to September 30, 2019.

The OMB may appeal the decision and ask an appellate court to issue a stay of the lower court's order requiring employers to comply with the pay and hours reporting requirement. Alternatively, the Senate may confirm the nomination of a new chair of the EEOC, which would likely give Republicans enough votes to reverse the decision to require pay information. But as of now, employers required to submit the EEO-1 report must also submit information regarding employee pay and hours worked.

Practical Tip: Although the September deadline seems like a long time from now, they say that time flies when you are having fun, and the deadline will soon be here. Employers required to complete the EEO-1 report should begin collecting the necessary data, including pay and hours worked data, now to ensure timely submission to the EEOC.

NOTHING IS CERTAIN EXCEPT TAXES AND CHANGES IN EMPLOYMENT LAW

That may not actually be the saying, but it's true nonetheless. And at the upcoming Western Colorado Human Resources Association's Spring Conference, which is taking place on April 17th, the Employer's Advisory will be discussing several new laws, three of which merit special note.

That is, the Colorado legislature has proposed three bills that would dramatically alter how employers handle everyday employment issues like hiring, compensating, and providing paid leave. In addition to the Colorado bills, the Federal Department of Labor recently announced that it wants to change how organizations compensate employees. Finally, on what seems like a daily basis, state and federal courts change how various aspects of many employment laws are interpreted, and federal agencies (e.g., the National Labor Relations Board, the Equal Employment Opportunity Commission, etc.) change employees' rights and employers' responsibilities. These are a lot of changes to keep track of!

For employers interested in keeping abreast of these changes, WCHRA is holding its annual Employment-Law Conference on Wednesday, April 17, from 7:30 a.m. to 4:30 p.m., at Colorado Mesa University. The attorneys of Bechtel Santo & Severn will present at the conference, offering keynote and panel discussions, as well as breakout sessions.

The conference is scheduled to begin with breakfast and a morning keynote address offering a legislative and case law update. After that, attendees will participate in sessions (broken out into groups based on the number of employees at each organization) that will discuss ideas, strategies, policies, etc. about how to implement the employment-law changes coming from the Colorado legislature and the courts.

After those two sessions, attendees will be able to attend a talk regarding an overview of forms that employers deal with on a regular basis, as well as those forms employers may not use often but need to know about. The forms discussed will include the I-9, W-4, job applications, job descriptions, medical questionnaires for ADA accommodations, termination letters, and more! These sessions will be followed by a lunch provided by WCHRA.

After lunch, there will be talks regarding how organizations can optimize their efforts to attract, hire, and inspire great employees, and what organizations need to know about the changing virtual workplace. These sessions will be followed by sessions regarding the recent proposed changes to federal wage-and-hour laws and how organizations can implement policies and practices to comply with these proposed changes. After that, CEOs from Grand Junction will present a panel discussion regarding recruiting in today's competitive marketplace. The day will conclude with a question-and-answer session with the attorneys of Bechtel Santo & Severn.

Admission to the conference is $230 for WCHRA members and $290 for nonmembers. SHRM credit will be available for the full day. To register, or for more information, log on to WCHRA's website at www.wchra.org.

Q&A

Q. *We have provided reasonable accommodations to an employee. For a while, we provided one type of accommodation. Then the employee needed another accommodation. Recently, the employee told us she needs the first accommodation again. Do we have to provide it again or do we only have to provide a certain accommodation one time?*

A. Neither the ADA, nor the Colorado Antidiscrimination Act discuss providing accommodations only one time, or any process to "exhaust" a certain accommodation. Rather, the interactive process is meant to cover all circumstances in which a request for accommodation is made. Even though this employee used a particular accommodation for a while and then needed another accommodation, it may be necessary for the employee to use the first accommodation again. So, engage in the interactive process with the employee like you would in any other situation and determine if the first accommodation will again work for this employee.

Q. *My business wants to organize a challenge to encourage employees to volunteer. We plan to pay employees for time spent on volunteer activities during working hours, but many of the volunteer hours will be outside of working hours. At the end of the year, we plan to recognize volunteers. Some volunteers may receive monetary awards for their service. Do we have to pay employees for their volunteer time outside of working hours?*

A. As long as the employees' volunteer service is entirely voluntary, you do not need to pay employees for volunteer time outside of working hours. The FLSA does not seek to discourage volunteer activities, and according to a recent Department of Labor opinion, "An employer may notify employees of volunteer activities and ask for assistance with them as long as there are 'no ramifications if an employee chooses not to participate.'" The DOL also noted that paying employees for volunteer time during working hours "does not jeopardize their status of volunteers when they participate in volunteer activities outside of normal working hours." Employers may also use volunteer time as a factor in determining employee bonuses without having to treat the volunteer time as time working as long as three factors are satisfied: (1) the volunteer service is fully optional; (2) an employee's decision to not volunteer will not have an adverse effect on the employee's working conditions or employment prospects; and (3) there is no guaranteed bonus for volunteering.

Q. *An employee requested FMLA leave to donate an organ to a family member. Does organ donation qualify as a serious health condition under the FMLA?*

A. The Federal Family Medical Leave Act allows certain employees of covered employers to take up to twelve workweeks of leave for things including a serious health condition that prevents the employee from performing the functions of the job. The FMLA defines a "serious health condition" as "illness, injury, impairment, or physical or mental condition" that requires either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Inpatient care includes an overnight stay in a hospital, and continuing treatment includes "conditions requiring multiple treatments." So, if the employee donating an organ requires an overnight stay in a hospital, which seems likely, or the organ donation requires multiple treatments, the employee may be entitled to FMLA leave, assuming the other FMLA requirements are satisfied.