

First & Foremosts

Legal Update
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TITLE VII AND GENERAL DISCRIMINATION PRINCIPLES

EEOC Proposes Updated Workplace Harassment Guidance to Protect Workers

- EEOC Proposed Enforcement Guidance on Harassment in the Workplace
 - https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#_ftnref28
- Guidance on:
 - Covered Bases of Harassment
 - Causation
 - Hostile Work Environment
 - Liability
 - Systemic Harassment
 - EEOC Anti-Harassment Resources

Religious Accommodations- *Johnson v. York Acad. Reg'l Charter Sch.*, No. 1:23-CV-00017, 2023 WL 6448843, at *1 (M.D. Pa. Oct. 3, 2023)

- Employee worked as business manager for school, worked Monday-Friday 8 hours per day during school year, and Monday-Thursday 10 hours per day during summer.
- Employee requested accommodations to observe Lunar Sabbath – which varied depending on when there was a full moon.
- After 4 months, employer denied requested accommodation, claiming it was an undue hardship.
- Employee resigned, sued claiming employer violated Title VII by discriminating against her based on her religion.
- Case survived motion to dismiss.

FLSA & Wage and Hour Law

DOL Proposes New Salary Basis Requirement for Exempt Status

The Proposed Rule:

- Increases the FLSA regulation's standard salary level from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year).
- Increases the total annual compensation requirement for highly compensated employees from \$107,432 per year to \$143,988 per year.
- Restore overtime protections for US Territories where the FLSA minimum wage applies giving them the same overtime protections as other US workers.
- Automatically update earnings thresholds every three years.

DOL and EEOC Sign MOU to Share Information and Coordinate Investigations

The agencies are partnering to further their respective missions by:

- Information sharing of data secured through investigations
- Sharing complaints, referrals and information in investigative files
- Reports filed by employers such as the EEO-1 and summaries of time and payroll records
- Training staff from the other agency to identify issues arising out of the other's jurisdiction
- Advising workers that they can file a complaint with the other agency
- Conduct coordinated investigations of matters arising within both agencies' jurisdictions

Investigations by these agencies will now be more comprehensive.

Employer's Time-Rounding Policy Might Violate FLSA

- The 8th Circuit Court of Appeals recently reviewed whether an Employer's practice of rounding an employee's start and stop times "punched" in on the employer's time keeping software complied with the FLSA.
- The Employer rounded punches 6 minutes before and 6 minutes after the scheduled start and stop times, though the time keeping software recorded the actual punch time.
- The FLSA regulation pertaining to rounding practices for time clocks provides the following:

It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour.

Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is **used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.** 29 CFR 785.48(b) (emphasis added).
- 8th Circuit held that the employee has raised a genuine dispute that the rounding policy does not average out over time as employees fared worse under the rounding policy than had they been paid according to their exact time worked.
- *Houston v. St. Luke's Health Sys. Inc.* , 8th Cir., No. 22-01862, 8/11/23

Final Rule Effective for the Davis-Bacon Act

Effective October 23, 2023, DOL implemented the final rule updating Davis Bacon regulations

- The new rule applies to new contracts entered into after October 23, 2023, existing IDIQ contracts, existing contracts with out-of-scope covered construction added to the contract or where an unobligated time period added to the project.
- New methodology by which the prevailing wage rates are set applied to wage surveys where data collection is completed on or after October 23, 2023. Changes prevailing wage methodology making it easier to adopt wage and fringe benefit rates set forth in union CBA's, may result in increased rates in rural areas as DOL can connect those rates to nearby urban areas.
- Wage determinations must be updated after contract award when the contract is changed to include additional substantial contraction or additional time period.
- Definition of Prime Contractor expanded allowing for additional entities who may be subject to withholdings and cross-withholdings.
- Revised definition of Site of Work to apply at secondary construction sites.
- Upper-tier subcontractors in addition to prime contractors may be liable for lower-tier subcontractors' violations.
- Revised definition of Site of Work to apply at secondary construction sites.
- New Record keeping Requirements – three years worth of payroll and other records must be retained

National Labor Relations Act

NLRB Returns to a More Expansive Joint Employer Standard

- Two or more entities will be held to be joint employers where they *share or codetermine* matters governing employees' *essential terms and conditions of employment*
- “Share or codetermine”= an entity possesses the authority to control (whether directly, indirectly, or both) or exercises the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment
- Essential terms and conditions of employment:
 - wages, benefits, and other compensation;
 - hours of work and scheduling;
 - the assignment of duties to be performed;
 - the supervision of the performance of duties;
 - work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
 - the tenure of employment, including hiring and discharge; and
 - working conditions related to the safety and health of employees.

NLRB Decision Makes Unfair Labor Practices Charges Easier to Bring

- *Intertape Polymer Corp. & Loc. 1149 Int'l Union, United Auto., Aerospace & Agric. Workers of Am. (Uaw), Afl-Cio*, 372 NLRB No. 133 (Aug. 25, 2023)
- To prove an unfair labor practice charge, the General Counsel must show:
 - That the employee engaged in protected activity.
 - The employer knew of the protected activity.
 - And the employer had animus against the union or protected activity.
- General Counsel does not have to set forth evidence to establish a causal nexus between the employer's animus and its actions toward a specific employee.

NLRB GC Issues Guidance Regarding Board Decision Impacting Employer Responses to Demands for Voluntary Recognition

- Demands for voluntary union recognition may be conveyed orally or in writing.
- Demand for voluntary union recognition may be made to ANY representative or agent of the employer.
- Even one “less serious” violation the NLRA after a demand for recognition is made by a union and a petition for an election is filed by an employer may result in a bargaining order.

Two Board Decisions Expand Activities Covered by Section 7

- *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (Aug. 25, 2023), protest by one employee may constitute concerted activity protected under the NLRA.
- *American Federation for Children, Inc.*, 372 NLRB No. 137 (2023). Board held that concerted activity on behalf of nonemployees is protected concerted activity as long as it benefits.

Board Requires Setting-Specific Standards be applied before imposing disciplinary action to comply with NLRA

- *Lion Elastomers, LLC* 372 NLRB 83 (2023) - Various setting-specific standards must, again, be applied to determine whether a relevant disciplinary action is a violation of the NLRA before an employer may discipline a worker for racist, sexist, homophobic, and other profane speech or conduct in the context of workplace activism and union related activity.

Other Laws Section

There is a new Form I-9

- Effective November 1, all employers must use the new I-9 form
- The revised Form I-9:
 - Reduces Sections 1 and 2 to a single-sided sheet;
 - Is designed to be a fillable form on tablets and mobile devices;
 - Moves the Section 1 Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary;
 - Moves Section 3, Reverification and Rehire, to a standalone supplement that employers can print if or when rehire occurs or reverification is required;
 - Revises the Lists of Acceptable Documents page to include some acceptable receipts as well as guidance and links to information on automatic extensions of employment authorization documentation;
 - Reduces Form instructions from 15 pages to 8 pages; and
 - Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHS-authorized alternative procedure rather than via physical examination.
- Employers may remotely examine employees' Form I-9 documents provided they are enrolled in E-Verify.

SEC Concludes Employers' Severance Agreements violate Whistleblower Protection Rule

- The SEC issued enforcement orders against three companies for including in severance agreement terms that employees waive their right to monetary whistleblower awards related to filing claims with or cooperating in investigations by government agencies.
- The Securities Exchange Act of 1942 aka the whistleblower protection rule, prohibits any action that impedes an individual from communicating with the SEC about a potential securities law violation.
- SEC concluded the following provisions in separation agreements dissuaded employees from communications with SEC about possible securities law violations and violated the whistleblower protection rule:
 - *Monolith Resources* (September 8, 2023) – Monolith, a private company, required employees to waive their rights to monetary whistleblower awards related to filing claims with, or cooperating in investigations by government agencies. SEC concluded this dissuaded employees from communications with SEC about possible securities law violations
 - *CBRE, Inc* (September 19, 2023) – CBRE's release required employees to attest they had not filed a complaint against CBRE with any federal agency as a condition to receiving separation pay.
 - *D.E. Shaw & Co.* (September 29, 2023) – D.E. Shaw's release "prohibited them from disclosing confidential information outside the company," and required them to affirm that they had not "filed any complaints with any governmental agency, department, or official."

State and Local Laws

Virginia Passes Organ Donation Leave Law

- Employers with 50 or more employees must provide eligible employees with up to 60 business days per 12-month period of unpaid organ donation leave and up to 30 business days per 12-month period of unpaid bone marrow donation leave.
- Employees are eligible for leave if they have worked for the employer for at least a 12-month period and 1,250 hours during the preceding 12 months.

New Employment Laws in Maryland

- Expedited increase to minimum wage- \$15.00/hour for all employers beginning January 1, 2024.
- Expanded the scope of Maryland non-compete ban for low wage workers.
 - Covers workers earning equal to or less than 150% of the state minimum wage.
- Amended anti-discrimination law to allow Attorney General to investigate and file suit against employers for violations of Maryland's anti-discrimination law.
- Amended FAMILI leave law.
 - Payroll contributions will now begin on October 1, 2024, and employees will be able to apply for and receive benefits from the state beginning January 1, 2026.

Maryland FAMI Contribution Rate Announced

- Contribution rate =0.90% of covered wages
- For employers with 15 or more employees, this contribution rate will be equally divided between employees and employers.
- Employers with 14 or fewer employees are not required to contribute, but will still collect payments from their workers.

California Enacts First-in-Nation Work Violence Law

- Covered employers must:
 - Implement an effective workplace violence prevention plan.
 - Record violent incidents on a violent incident log.
 - Provide training to employees.
 - Keep records.

California's Enacts Leave for Reproductive Loss Events

- Reproductive loss event:
 - Failed adoption
 - Failed surrogacy
 - Miscarriage
 - Stillbirth
 - Unsuccessful assisted reproduction
- Five days of unpaid leave following reproductive loss event.
- If multiple reproductive events occur in a year, eligible for up to 20 days of leave in a 12 month period.

Thank You!

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