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Sexual Harassment Scandals: Time for Employer Self-Examination

It is so strange to see sexual harassment being taken seriously, at long last. It has made me examine my own life, 30 years of swimming under, over and around sharks. What could I have accomplished if I'd been able to put that energy elsewhere? - Laurie Kilmartin, writer for "Conan" and comedian.

Notorious sexual harassment by rich and powerful men in the entertainment industry has brought the nation's focus on the broader scope of sexual harassment in general. For example, according to a 2015 *Cosmopolitan* survey, one third of all women between ages 18 and 34 have been the recipients of sexual harassment. Eighty-one percent of all sexual harassment has been verbal, forty-four percent has included unwelcome touching or advances, and twenty-five percent involved lewd emails or texts. The reason why these percentages far exceed 100% is because harassers engage in multiple approaches. Further, it is a false narrative that the victims of such behavior are weak and uneducated: 93% of those who were recipients of sexual harassment had some college education.

The survey also revealed that 75% of those who are harassed were harassed by male co-workers, 49% by male clients or customers, and 38% by male managers. Ten percent were harassed by female co-workers. On an industry basis, the highest percentage of harassment occurs in retail (42%) while the lowest percent is in medical and health care (21%). Seventy-one percent of those who were recipients of harassment did not report the behavior.

Only 29% actually reported the harassment? It is inherently difficult for a recipient to report harassment. Perceptions from the recipient include: "Will I be believed?" "Will I be told I brought the incident on myself?" "Will I be told that this is just the way things are?" "Won't the company choose to retain a powerful or profitable harasser over me?" "Will reporting it damage my career?" "Will people think I am raising a complaint because of a desire for money?" "Will I be fired?"

How can a culture be sustained where individuals feel comfortable reporting the behavior? Workplace harassment policies and anti-harassment training may be enough to help employers defend sexual harassment claims, but that alone may not be enough to prevent the behavior from occurring. These are our suggestions for employers to do more than what typically may be legally required to prevent or respond to workplace harassment:

1. Have the most senior leaders (President, CEO, CFO, COO) in the company promote, introduce, and attend any anti-harassment or equal opportunity training. These individuals should plan to actively participate in and ask questions during the training. NPR had to admit that its recently-fired news editor and alleged harasser wasn't required to complete the "required" sexual harassment training.

2. Explicitly state in writing to those in leadership positions, including first line supervisors, managers, directors and of course executives, what the organization defines as inappropriate behavior, which includes their behavior toward anyone they come into contact with on behalf of the organization, including employees, customers, vendors and contractors. Organizations must expect their leaders to exceed standards, not merely meet them, in this regard. It is important that supervisors, managers, and executives know that failure to set a professional tone at the top may ultimately result in termination, regardless of performance or profitability.

3. Make it clear to employees that the policies which prohibit harassment, discrimination and retaliation *require* employees to report the behavior even if those who report the behavior are not the targets. A common thread in a number of the recent notorious sexual harassment allegations is that others in the organization knew of the behavior, but did not act. They may have feared retaliation or thought reporting it would be ineffective. Make it clear that it is an individual's obligation to report possible policy violations. Further, supervisors who turn a blind eye to such actions should be informed that the Organization may treat willful ignorance as a punishable or terminable infraction.

4. Provide for options to report harassment to a third party, whether to a hotline or other resource. However, ensure that this third party is familiar with its role to take in harassment reports and relay them promptly (within 24 hours). We recently heard about harassment allegations where the victims tried to call such a third party hotline but were told by the third party that it handled complaints of financial or ethical improprieties only.

5. Be sure the investigation is conducted by a knowledgeable individual or individuals who would not be intimidated or concerned about vulnerability if they investigate someone in a leadership position. This is where an independent third party investigation may be appropriate, or, for a multi-location employer, a representative from outside the location where the harassment occurred.

6. Make it clear that HR and investigators enjoy autonomy and the full support of the Organization, and that the Organization's top priority is people, not profits.

7. If the outcome of an investigation is a "close call" where the harasser is retained rather than terminated, make sure there are economic and other consequences for the alleged harasser. Also, ensure the alleged harasser is separated from the victim, without negative consequence for the victim.

8. Invest in training that doesn't stink. Live, in-house training with case studies, small groups, and role-playing takes more time than a lunch and learn session. But it's a lot more effective than a recorded video that employees can sleep or sleepwalk through. (In the same story where it admitted that its top news editor hadn't attended training, NPR also played an audio clip of that training. Listening to paint dry would have been just as riveting).

9. Include training about the subtlety of potentially harassing behavior, sometimes referred to as "micro-aggression," such comments of a stereotyping nature.

If employers do not perform a critical self-assessment about the sufficiency of their approach to stopping and handling sexual and all harassment, employers should expect legislation to address that issue. For example, New York is considering potential legislation that would nullify confidentiality provisions of separation agreements when the confidentiality may involve a claim of harassment, discrimination, retaliation or failure to pay proper wages. If there is effective employer voluntary action, there may not be sufficient support for legislative action.

Are Your Employees Audiotaping or Videotaping at Work?

Apparently, employees believe that it is a fundamental right to have a cell phone at work and to record freely conversations or videotape during working time. There is no inherent right to (1) have a cell phone at work and (2) audio and/or videotape conversations or activity at the workplace. Many employers quite lawfully tell employees to leave their cell phone in their locker or vehicle, because of employer concerns about texting and other distracting behavior. Eleven states prohibit the tape recording of conversations with another unless all those who are recorded consent to the conversation. Those states, referred to as “all party” consent states are California, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. The remaining states are “one party” consent states, which means that it is not criminal eavesdropping if the person recording the conversation consents to the recording even though the persons recorded do not know the recording is occurring. (This assumes the person doing the recording is present during the recording).

Employers are rightly concerned about an employee during the course of an investigation or disciplinary discussion secretly recording the conversation or conversations with supervisors. An overly broad policy prohibiting recordings violates the National Labor Relations Act, according to the NLRB and upheld by the Second Circuit in the decision of *Whole Foods Market Group, Inc. v. NLRB* (2nd Cir. 2017). In that situation, the court upheld the standard that an anti-recording policy violates the NLRA if employees could construe the language to prohibit protected activity under the Act, the policy is in response to union activity, or the policy has been applied in a manner to restrict the employee’s exercise of rights under the NLRA. A carefully crafted policy prohibiting video or tape recording can be allowed. These are starting points for the employer to consider:

1. No employee may record a conversation with another employee, including conversations of an investigatory or disciplinary nature.

2. Employee videotaping of other employees or company property is strictly prohibited. Many companies have legitimate trade secret, customer information, or patient/health information concerns to support such policies.

3. An employee may not record a conversation with any other employee unless (a) the company approves the recording, (b) the employee recorded is asked in advance for permission and (c) those who are conducting the recording provide a copy to that employee.

Employers to Coordinate Same Day Loans

With low unemployment rates, employers seek creative approaches to help recruit and retain employees. According to an article in the *Wall Street Journal* Saturday, November 4, “More U.S. employers are teaming up with financial institutions such as credit unions to offer small personal loans to their workers, offering employees a way to bridge financial crunches without turning to high-cost payday loans.” The article mentioned that a recent Federal Reserve survey revealed that 44% of American workers could not cover the emergency expense of $400. Many employees have a limited or poor credit history, and thus have virtually no access to affordable credit for small amounts. An employer interviewed for the article provides employees up to $1,000 for a same day loan coordinated with a local credit union. The employee agrees to pay back the loan through payroll deductions. The loan does not require a credit check. The annualized interest rate for the same day loan through employer arrangements with a credit union is 16.99% compared to over 400% with a payday lender. Other employers have also established loan policies, where the employer is the source of the loan and it is without interest. These are usually loans which cover emergency situations and tend to be no more than several hundred dollars.

Department of Labor Appeals Its Overtime Exemption Victory

The United States Department of Labor announced that it will revisit the salary levels for the “white collar” minimum wage and overtime exemptions. The increase from $455 to $913 per week promulgated during President Obama’s administration was enjoined by Judge Amos Mazzant of the Eastern District of Texas. Judge Mazzant granted summary judgment to those who opposed the Obama administration increase, ruling that the Department of Labor exceeded its authority by raising the salary threshold. On Monday, October 30, 2017, DOL announced that it will appeal Judge Mazzant’s decision because it wants the authority to increase the salary level, just not to the level that had proposed on the Obama administration. This appeal is walking a very fine line. On one hand, the Trump administration DOL wants to increase the salary level, just not as significantly as during the Obama administration. Yet, Judge Mazzant’s decision is that the DOL does not have the statutory authority to increase the salary level at all. The problem with the appeal is that if the appellate court reverses Judge Mazzant, then will the $913 weekly salary level become effective until the Trump administration DOL exhausts the rule-making process to change it? If the appeal is unsuccessful, then presumably it will be left to Congress to determine whether the salary level should be raised, and if so, to what amount.

Limits on Incentives for Participation Wellness Programs

Wellness programs are often used by employers to promote healthy lifestyles among their employees and reduce their health care expenditures. There have been several studies over recent years that have found a reduction in health costs for employers who offer wellness programs. Those studies have also found that when employers use incentives like premium reductions, to increase participation, there is a higher percentage of participation. Interestingly, penalties were even more successful at increasing participation rates. Such programs were originally permitted under the Health Insurance Affordability and Accountability Act (HIPAA). Subsequently, the Affordable Care Act (ACA) expressly encouraged the use of employer-based wellness programs and created new incentives for such programs. Essentially, the ACA allows employers to adjust employee premiums upwards or downwards by as much as 30% based on participation in wellness programs.

Over the years, such programs have grown in conflict with some federal laws related to employee health information, like the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), which generally prohibit employers from requesting certain health information from employees. More specifically, the ADA prohibits employers from requiring medical exams to inquire whether an individual has a disability unless it is job related and consistent with business necessity. However, employers are permitted to conduct medical examinations or inquire about employee medical history if participation is voluntary and part of an employee health programs. In light of these regulations, the EEOC promulgated regulations as to what “incentives” employers could offer to employees to participate in an employee health program, that were consistent with the “voluntary” requirement under the ADA.

In light of these issues, in 2016, the Equal Employment Opportunity Commission attempted to blend the ACA’s regulations with those of the ADA and GINA. The EEOC promulgated regulations to allow employers offering wellness programs to provide incentives for participation while still protecting employees’ rights under the ADA and GINA. The final ADA rule that would have gone into effect in 2017 allowed wellness programs that are part of group health plans that request information and medical examinations regarding an employee’s health to offer incentives (upwards or downwards) to employees of up to

30% of the total cost of coverage for an employee. Essentially, EEOC adopted the ACA's same 30% incentive limitation and applied it to both health-contingent and participatory wellness programs, allowing employers to raise premiums up to 30% for workers who do not participate in wellness programs.

Consequently, the AARP filed a lawsuit to challenge the proposed rules in federal court. The AARP argued that the EEOC simply plucked the numbers out of thin air and provided no sufficient reason for allowing potential premium increases of 30% on employees. The AARP also argued that the regulations are essentially forcing employees to disclose personal information or face financial penalties.

The Court found that the EEOC did not consider any factors that spoke to whether a given incentive level was voluntary or coercive. The Court concluded that although the EEOC had administrative discretion to decide on an appropriate incentive level that would be voluntary and not coercive, the EEOC failed to do this on a well-developed, supported basis. Essentially, the EEOC did not sufficiently justify how employers could raise premiums up to 30% for employees that did not participate in wellness programs. However, the Court did not vacate the proposed wellness regulations, but remanded them back to the EEOC to revise. The Court reasoned that employers had already adapted their health plans and policies for 2017 based on these rules and to vacate those rules would potentially make many health plans illegal.

In September of this year, the EEOC submitted its status report to the Court and proposed submitting revisions to the regulations regarding wellness plans to the Court in mid-2018. This date means that any final rules would not take effect until 2021. AARP has requested that the Court block the rules starting in 2018 to prevent any harm to employees and assist employees looking to finalize their health care offerings in 2018. The Judge has not yet entering a ruling on the request to block the rules.

As such, employers are in a murky spot right now. It does not seem that any revised or new regulations will be in place when 2018 health plan and wellness program decisions are made. Many employers are choosing to design their wellness programs to comply with federal regulations currently in place and the EEOC's proposed regulations. It seems unlikely that any federal agencies will challenge such programs as they are aware of the unclear situation. However, private litigation challenging whether a program is "voluntary" is always a concern. During this confusing period, an employer's good faith compliance with all relevant regulations is the best defense. Moreover, it will be crucial (though not necessary exciting) to follow the case and its developments through early 2018.

Miscellaneous NLRB Topics and News Update

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Big Surprise – The Ninth Circuit Court of Appeals (California) Backs the NLRB in Arbitration Deferral Case

In a rare win for an employer, the Court found that the NLRB properly deferred to an arbitrator's decision award that found a utility employee and shop steward was lawfully discharged. The underlying case, *Babcock and Wilcox Construction,* 361 NLRB No. 132 (2014), is the case where the Board changed the rules for applying the NLRB standard articulated under *Olin Mills / Spielberg* line of cases, making it less likely that the NLRB will defer to the arbitrator's decision.

Under the new (*Babcock and Wilcox*) standard, the Board shifted the burden of proof to the party urging deference to the arbitrator's decision. Under the old (*Olin Mills / Spielberg*) rule, a precedent in existence for over 30 years, the burden of proof lay with the party urging no deference to the arbitral decision. We discussed the standards in some detail in the February 2014 ELB.

In addition to the shift of the burden, the party urging deferral must demonstrate that the arbitrator specifically considered the underlying unfair labor practice (ULP) issue, and that the NLRA reasonably permits the award. Both the court and Board only applied the new test prospectively (in the future).

In the instant underlying case, the shop steward ultimately lost her case. Of course, applying the old standard was the key to the outcome, as presumably the Court and Board would have sided with the discharged steward had the new standard been applied retroactively to the matter.

An NLRB Regional Director had already issued a complaint against the company urging non-deferral to the arbitration award, as the Region found that the arbitration award was "repugnant to the Act." It was only until the union steward appealed the underlying case to the circuit court to determine whether the new deferral standard should be applied retroactively, and after the NLRB did not side with the director, that the employer won the case for deferral.

The Board had agreed with the Administrative Law Judge concerning retroactive application of the new rules, but the ALJ admits he would have reached a different "substantive" decision than the arbitration panel reached.

The Circuit Court Decision Agreeing with the Board

The Ninth Circuit granted the NLRB's request that it find that the deferral to the arbitration decision was appropriate. It denied the shop steward's request to apply the new rules retroactively.

Applying a five prong test, the appeals court found that a retroactive application of the new rules regarding deferral would "severely burden" Babcock & Wilcox. Finally, the court found that the arbitration decision could be "interpreted in a manner that is not clearly repugnant to the NLRA (this is part of the old rule), and thus the Board did not abuse its discretion in deferring to the arbitral decision."

The Bottom Line

While this is an apparent victory for the company, it does not bode well for employers in the future. Expect the Trump Board to return to the old standard down the road. The shift in the burden of proof is a potential disaster for employers urging deferral to arbitrations they have already won.

If you are an employer that has had arbitration since 2014, the new rules apply and it will not be as easy to enforce an arbitration that an employer has won. Just make sure you present and can win the underlying ULP issue before the arbitrator, and that the arbitrator, in the decision, specifically addresses the ULP issue. This is sometimes easier said than done.

Five Obama Era Decisions That Could Get Reversed

These issues have previously been identified in LMVT ELBs as ripe for reconsideration by the Trump NLRB.

The *Browning-Ferris* Decision on Joint Employer

In this case, the NLRB loosened the traditional standard for determining who is considered a joint employer. If this decision stands, then look for franchisees and contractors to share jointly unfair labor practice liability and bargaining obligations with the alleged joint employer. If the D.C. Circuit sides with the NLRB, look for the case to be set aside by the Republican dominated Board.

Class Action Waivers and Mandatory Arbitration Agreements (*D. R. Horton* Case)

In *D.R. Horton*, the Board found that the NLRA was violated by requiring employees to sign mandatory arbitration agreements which contained waivers to pursue class-actions. This case is pending in front of the U. S. Supreme Court, which has taken the appeal on whether class-action waivers are legal. If the Supreme Court rules in deference to the NLRB, the current Board can reverse its precedent and ask the appellate courts for deference on its new / old position.

Lutheran-Heritage on the Chopping Block?

In *Lutheran-Heritage,* the NLRB took language in the decision and found that work rules and handbook provisions illegal under the NLRA, under the "reasonably construe" standard. This has fueled an expansion of seemingly legitimate work rules to be invalidated by the NLRB, especially under President Obama's tenure.

Look for now-Chairman Miscimarra's dissent to become the new standard. The new Board will most likely apply the new standard enunciated in *Beaumont Hospital* case, where Miscimarra called for reversal of the standard in *Lutheran-Heritage,* in favor of a standard that takes into account the employers' justification for the rule in question.

Micro-Units Under *Specialty Healthcare*

Under *Specialty Healthcare*, an employer who opposes a particular bargaining unit for being too narrow and excluding some employees has to prove that the excluded worker share an "overwhelming" community of interest with those included in the bargaining unit. The issue would be relatively easy for the current Board to address, as it is an issue prevalent on almost all r-case appeals.

"Quickie" or "Ambush" Elections under NLRB Rulemaking

In 2015, the NLRB streamlined the election process by making, through rulemaking, a number of significant changes to the election process. One example of the change is the shortening of time between a union R-Case petition and the election itself. It would not be shocking if the current Board revisits the election rules and returns to the old standards.

In the News

NLRB General Counsel Nomination

As reported in the September Employment Law Bulletin, management attorney Peter Robb was nominated to replace NLRB General Counsel (GC) Robert Griffin when his term expired in October 2017. Robb was confirmed by the full U.S. Senate on November 8, 2017.

NFL Ezekiel Elliot Suspension Issue – Holiday Party Talk

A U.S. district court judge in New York has re-instituted a temporary restraining order (TRO), thereby at least opening the door for Elliot to stay on the field this season. This happened after the 5th Circuit Court of Appeals vacated the TRO issued by a Texas U.S. district court judge on October 12, 2017. The NFLPA (the union) notified the 5th Circuit on October 13, 2017, that it intends to petition the Court for an *en banc* re-hearing of the issues. Good luck, because after over 200 petitions for re-hearing before the full court (*en banc),* filed in the 5th Circuit last year, the court has only granted six such requests.

Recently, the 5th Circuit predictably refused to vacate the panel mandate, so its order stands vacating the TRO granted in Texas.

The New York judge ordered a hearing for October 30, 2017, to determine whether a preliminary (permanent) injunction should not be issued until the season ends. The New York judge focused primarily on the "due process" (or lack thereof, allegedly) of the case. The TRO was good until Judge Failla returned from vacation and held a hearing on October 30, 2017.

If the Cowboys and NFLPA keep fighting the suspension, all options are on the table according to the union –

> The [5th circuit] court decision focuses on the jurisdictional issues. The failures of due process by the NFL articulated in the [Texas] district court's decision were not addressed.

Since this article was written, it seems that Elliot and the Cowboys are out of appeals and the suspension will stand this season, as the NFLPA was denied a permanent injunction by a New York district court judge when K.P. Failla refused to grant the union its request for an injunction. This will remove the TRO of New York District Judge Crotty, paving the way for Elliot to begin his suspension. You can read Judge Failla's 24-page decision here. In essence, she found that the due process argument failed under the CBA and she had limited authority to review the arbitrator's decision in the case. Elliot did not play against the Atlanta Falcons.

EEO Tips: Lessen Your Chances of Being Accused

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

It seems that another executive, politician, or other person of note is being accused of sexual harassment every day. Some of the victims coming forward allege inappropriate conduct long in the past and some more recent; some believable and some not so much. One thing is for sure: so much news and public outrage over powerful people being accused of sexual misconduct is making those who feel less powerful more comfortable with speaking out. Obviously, no one can be completely insulated from accusations, but is there anything an employer can do to lessen the chances of these allegations in an EEOC charge or lawsuit? Absolutely.

Create a culture of openness. It is not enough just to have the obligatory policy of reporting. Make sure every employee has someone in authority with whom they can have uncomfortable conversations without concern of retaliation, not being believed, or (worse yet) being accused of causing trouble. All levels, from the very top to the very bottom, must understand and believe that having the opportunity to end offensive/unwelcome conduct early on has no downside. It creates a more productive workforce, saves tons of legal fees and, in the end, even saves managers' time dealing with employee issues. There are times that the offender does not realize he or she has offended anyone or the victim perceives the action differently than intended, and open communication can repair a working relationship before it becomes irreparable. At the other end of the spectrum, if a predator is discovered, action can be taken before more harm is done. In my experience, most employees do not want to sue their employers. But, without a positive open atmosphere where they feel free to discuss and resolve important work issues, they will find another forum.

Training is essential at all levels. Most training regarding harassment focuses on avoiding legal liability instead of avoiding conduct that is or may become harassment. Employees need to know what is and is not harassment. They need to know how to report, to whom they should report, and what information the employer will need to take appropriate action. Training in bystander intervention/reporting can be an invaluable tool for employers to become aware of problems before they become charges or lawsuits. Supervisors, managers, and officers need to understand what constitutes harassment, inappropriate conduct, and professional behavior. Train all supervisors, managers, and HR representatives on receiving reports of harassment – how to act, what to say (and not to say), when and how to move the report forward. They need to understand that their actions when receiving the initial report set the tone for the investigation and the reporting employee's cooperation. The investigators (if an in-house investigator is used) and decisionmakers need thorough training on company policies, what information is needed and how to get that information. Decisions need to be made based on facts, policies and law; gut reactions and cover-ups lower employee morale and create liability where possibly none had existed. Before dealing with reports of harassing conduct, training for *everyone* on respect and general civility can go a long way. Effective training and enforcement in this regard can stop inappropriate behavior before is starts, support possible victims, aid in investigation of alleged harassment, and boost morale during legal processes that may result.

Be proactive. In keeping with the first suggestion above, keep communication with employees open. Listen to them. Look for changes in attitude or production of an employee or group of employees. If you have a department/plant/office that never voices any concerns or issues, look closer. Some of the worst harassment or intimidation I have discovered came from work units where no complaints were ever made. Even overly enthusiastic reviews of a supervisor/manager can indicate fear in employees.

Follow through. If you discover a problem, deal with it. Take action consistent with your policies and the law. If your bottom-line concern is liability, dealing with one matter now is better/cheaper/easier than dealing with many down the road. During my career, I have never seen a harasser stop harassing without a reason.

If you do find yourself with an EEOC charge or lawsuit (and sometimes you do, despite your best efforts), remember that the EEOC, judges, and juries usually look favorably on employers who can show that they did their best to accomplish these things.

Wage and Hour Tips: Tipped Employees under the Fair Labor Standards Act

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

Note: Just when we thought the increase in the salary requirements proposed by the previous administration had completely died, we learned that the Department of Labor has filed an appeal of the court order finding the regulations to be invalid. At this time we are not sure of what will happen to the appeal so I suggest that you stay tuned.

Wage Hour continues to devote substantial resources to certain “low wage” industries each year. Among those regularly targeted are fast food, grocery stores, construction and restaurants. According to statistics on the Wage Hour web site, they conducted almost 5,000 investigations of food service establishments during FY 2016 resulting in more than 45,000 employees being due some $40 million in back wages. A large part of these back wages were a result of improper use of the tip credit provisions of the Fair Labor Standards Act. Thus, I felt we should revisit the requirements for claiming the tip credit. While my article will address only the requirements of the FLSA, you should be aware that several states do not allow tip credit and almost one-half of states have their own tip credit regulations (although Alabama does not), that are more stringent than the FLSA. Information regarding the differing state requirements is available on the Wage Hour website.

The Act defines tipped employees as those who customarily and regularly receive more than $30 per month in tips. Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage of $2.13 and the minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is $5.12 per hour (the minimum wage of $7.25 minus the minimum required cash wage of $2.13).

The new regulations, which became effective in April 2011, state that the employer must provide the following information to a tipped employee before using the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour.

2. The additional amount claimed by the employer as a tip credit;

3. That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4. That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5. That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The regulations state that the employer may provide <u>oral or written notice</u> to its tipped employees informing them of the items above. Further, they state that an employer must be able to show that he has provided such notice. They also state that an employer who fails to provide the required information cannot use the tip credit provisions and thus must pay the tipped employee at least $7.25 per hour in wages plus allow the tipped employee to keep all tips received. In order for an employer to be able to prove that the notice has been furnished the employees, I recommend that a written notice be provided.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least $2.13 per hour do not equal the minimum hourly wage of $7.25 per hour, the employer must make up the difference.

The regulations also state that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit. The regulations also prohibit any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. The Department's 2011 final rule amending its tip credit regulations specifically sets out Wage and Hour's interpretation of the Act's limitations on an employer's use of its employees' tips when a tip credit is not taken. Those regulations state in pertinent part:

> Tips are the property of the employee whether or not the employer that has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Yet, they do allow for tip pooling among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, and service bartenders. Conversely, a valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. A factor in who may be included in the tip pool concerns whether the employee has direct interaction with the customer. One positive change is the regulations no longer impose a maximum contribution amount or percentage on valid mandatory tip pools. The employer, however, must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for the actual amount of tips each tipped employee ultimately receives.

When an employee is employed in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent by the employee in the tipped occupation. An employer may take the tip credit for time that the tipped employee spends in duties related to the tipped occupation, even though such duties may not produce tips. For example, a server who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where the tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing non-tipped duties, no tip credit may be taken for the time spent in such duties.

A compulsory charge for service, such as a charge that is placed on a ticket where the number of guests at a table exceeds a specified limit, is not a tip. The service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA. If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit.

Where tips are charged on a credit card and the employer must pay the credit card company a fee, the employer may pay deduct the fee from the employee’s tips. Further, if an employee does not receive sufficient tips to make up the difference between the direct (or cash) wage payment (which must be at least $2.13 per hour) and the minimum wage, the employer must make up the difference. When an employee receives tips only and is paid no cash wage, the full minimum wage is owed.

Deductions from an employee’s wages for walk-outs, breakage, or cash register shortages that reduce the employee’s wages below the minimum wage are illegal. If a tipped employee is paid $2.13 per hour in direct (or cash) wages and the employer claims the maximum tip credit of $5.12 per hour, no deductions can be made without reducing the employee below the minimum wage (even where the employee receives more than $5.12 per hour in tips).

The current regulations state that if a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed all tips he or she contributed to the pool and the full $7.25 minimum wage.

Computing Overtime Compensation for Tipped Employees

When an employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment. The employer may not take a larger tip credit for overtime hours than for a straight time hours. For example, if an employee works 45 hours during a workweek, the employee is due 40 hours X $2.13 straight time pay and 5 hours overtime at $5.76 per hour ($7.25 X 1.5 minus $5.12 in tip credit).

The National Restaurant Association, along with several other groups, filed suit against the Labor Department seeking to overturn the regulations. However, the court allowed the new rules to take effect. According to some information I have seen, there have been 99 Fair Labor Standards Act suits filed in Alabama federal district courts in 2017. As a substantial number of these suits are against restaurants and involve the proper use of tip credit, I suggest that you review your pay policies for "tipped" employees in order to make sure you are paying this group of employees correctly.

If you have questions regarding these rules or other Wage Hour issues do not hesitate to give me a call.

Did You Know…

…that the EEOC will now accept charges filed through an individual's smartphone? On November 1, the EEOC established a process where individuals may make inquiries and file charges digitally. During Fiscal Year 2017, the EEOC received 654,600 inquiries on its toll-free number and contact to district offices. The Commission's objective is to streamline the inquiry and charge handling process so that charging parties will not have to set up appointments or meetings with the Commission in order to proceed with filing a charge.

…that effective January 1, 2018, California will be the fourth state to prohibit salary history inquiries? The California law covers all pre-employment communications with applicants, including the job application, other written or verbal requests for salary information or a request of salary information to a third party, such as a recruiter. Interestingly, the California law also requires employers upon request by the applicant to provide the applicant with the salary level of the position the applicant seeks. The law does not prohibit an employer from considering salary information voluntarily disclosed by an applicant, but rather prohibits the employer directly or indirectly requesting that information.

…that based on U.S. public health statistics, expect ADA, FMLA, and Workers' Compensation claims to increase? 39.7% of all U.S. adults are obese, as are 18.5% of all youth. 42.8% of middle aged adults are obese; 20.6% of those between ages 12-19 (the workforce of the future) are obese. Medical risks of obesity include diabetes, pulmonary issues, bone/joint complications, hypertension, and cardiovascular disease. These medical conditions may qualify as disabilities under the ADA and serious health conditions under the FMLA. Thus, even if an employee does not have one of these conditions, there is a 42.8% probability that an adult family member does.

…that if your organization acquires another, you do not have to wait until the seller's employees begin working before requiring they fill out the Form I-9? According to the United States Citizenship and Immigration Services, "Employers may complete new Forms I-9 before the merger acquisition takes place as long as the employer has offered the acquired employee a job and the employee has accepted the offer." If alternatively the acquiring employer chooses to accept the prior employer's I-9's, the risk with doing so is if the prior employer is not in compliance, then neither will the successor employer. Our recommendation when acquiring another organization is to require those employees who are hired to fill out a new Form I-9. This does not have to be only within 3 days of the date they begin work; it may be within 3 days as of the time the merger is concluded.

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