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Your Workplace Is Our Work®

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Our Best Wishes For 2019

We extend our best wishes to our clients and other relationship partners for a healthy, peaceful and prosperous 2019. As our firm begins its 26th year, we do so with the energy and excitement of when we first started our practice. We look forward to supporting you and your colleagues' effort in making 2019 a successful year.

Employee Who "Goes Public" Reinstated Under NLRA

Employers are rightfully concerned about the public airing of employee comments and complaints on workplace matters, whether those comments are on social media or otherwise. On November 2, 2018, Administrative Law Judge Paul Bogas ruled that a non-union employee of a medical center was wrongfully terminated because she sent a letter to the local newspaper expressing concerns about the hospital's staffing levels. Karen-Jo Young was employed as the Activities Director at Maine Coast Memorial Hospital. She sent a letter to the Hancock County, Maine, newspaper, *The Ellsworth American*, where she expressed concerns that she and fellow employees had about hospital staffing levels. The day the employer became aware of the letter was the day the employer terminated Young for violating the hospital's policy which prohibited employees from speaking to the press about hospital matters without prior permission.

Young filed an unfair labor practice charge with the National Labor Relations Board, alleging that her Section 7 rights under the NLRA were violated by her termination. Section 7 gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." In ordering reinstatement and back pay, the Administrative Law Judge stated that "the [NLRB] has repeatedly held that healthcare facility employees engage in concerted activity protected by Section 7 of the NLRA when, like Young did here, they use a letter to the editor or another third-party channel to protest deficiencies in staffing or other working conditions that have an effect on patient care."

Although this decision involved a healthcare employer, it is an important lesson learned for all private sector employers. An employer has the right to restrict the subjects an employee communicates to the public, but those restrictions should be narrowly defined. Furthermore, employers should emphasize employee options to raise concerns internally. Thus, an employee understands what is prohibited, but also receives information about the various venues within the organization to express what would be considered protected Section 7 activity.

Work from Home: Employer and Employee Compliance?

More employers are considering hiring individuals to work from home. A key motivating factor is that this enables employers to attract talent from a wider geographical area than just those who may be located within a reasonable driving distance to the employer's site. Employees often prefer to work from home, as they essentially eliminate the amount of time they lose traveling to and from work and also have lower fuel and food expenses when working from home. Further, work-at-home arrangements are among the most commonly sought accommodations for applicants and employees with disabiliites. The following are factors for employers to consider if employees are hired to work from home:

1. For employees working in a different locality, determine whether the employee who works from home is protected under the employment laws of the state, county, or municipality where the employee will physically work. This is the equivalent as if the employer opened a one-person office in that location. For example, what postings are required and how will that be communicated to the employee; what rules apply regarding safe working conditions; and what wage and hour considerations might be in play (such as mandatory breaks, overtime rules, etc.)?

2. Be aware of when an employee might be considered an employee of the office to which they report. This is generally the case under the Family Medical Leave Act. An employer should not be quick to deny FMLA leave under the likely-mistaken presumption that a telecommuting employee is not eligible because he or she works from home.

3. It is best to establish a schedule for a non-exempt employee who works from home. What time(s) during the course of the workday does the employer need for the work-at-home employee to perform job duties and be available? Try to avoid the situation where the employee who works from home chooses when he or she will work, which may be convenient for that employee but may limit that employee's interface with those who work from a company location.

4. Relatedly, establish a means of being able to control, monitor, and prove a non-exempt employee's hours of work. Without such controls, remote work arrangements can leave employers with no way to disprove wage and hour claims by subsequently-disgruntled employees who might claim they worked extensive overtime while reporting only forty hours a week worked.

5. What steps will the employer take to protect proprietary and other confidential information?

6. Establish by an agreement with the employee working from home how information will be protected from access by others in the employee's home and also controlled by the employee.

7. Where it is enforceable, we recommend requiring that an employee who works from home in another state to agree to a "choice of forum" and a "choice of law" provision in an employment agreement. That would mean that if there is a dispute regarding the employment relationship, it must be brought in the state of the employer's primary location, rather than where the work-at-home employee is located. The "choice of law" provision also means that the law of the state where the employer is located applies. For example, if your organization is based in Oklahoma and you hire someone who lives in California, you would prefer that the law of Oklahoma apply as well as the venue.

Work at home arrangements can be a mutual enhancement for the employer and the employee. In addition to attracting a greater pool of applicants from a wider geographical area, hiring individuals to work at home saves an employer the cost of space and other

costs incidental to working at a centralized site. Be sure, however, to define the terms of working from home and review local and state compliance requirements.

Court Invalidates Fixed Salary/Fluctuating Workweek Pay System

The fixed salary for fluctuating workweek pay system (FWW) is widely used. Under this pay system, if an employee receives a recurring weekly salary regardless of the number of hours worked, then overtime is paid at a "half time" level rather than time and a half. For example, assume that an employee receives a weekly salary of $600. Under this system, if he works 35 hours, he still receives $600. If he works 40 hours, he also receives $600. If he works 50 hours in a week, then that same $600 covers the base hourly rate for all 50 hours. So, in this example, the hourly rate for all hours worked, 1 through 50, is $12.50 per hour. The amount of overtime owed is one half of that rate ($6.25) times the number of overtime hours (10), for a total of $62.50 of overtime which the employer must pay in addition to the $600. If the employer applies this pay system improperly, then the amount of overtime owed is based upon dividing $600 by 40 hours ($15 a hour) and paying time and a half of that ($22.50) times 10 hours, for $225 hours of overtime owed. So, an employer that inappropriately applies the FWW system runs considerable financial risk.

This is exactly what occurred in the recent case of *Dacar v. Saybolt*. Saybolt employed inspectors of oil field rigs and operations. A certain group of inspectors were paid according to the FWW pay system. In addition to a weekly salary, they were paid incentives based upon working certain hours, such as overtime hours, days when they were scheduled for time off, and holidays. Saybolt included those incentives in the overall overtime calculations, which meant that it paid "half time" for those incentives. Inspectors argued that incentives based upon hours worked were improper under the FWW pay system, and therefore, their total compensation for the week, including incentives, should be divided by 40 hours and they should be paid time and one half of the regular hourly rate for any overtime hours. As noted with the above example between $62.50 and $225, the difference in what an employee may be owed is considerable.

The court agreed with the inspectors that the employer improperly applied the FWW pay method. The court noted that an incentive related to performance, such as commissions, sales or achieving other bonus targets, is appropriate under the FWW pay system. However, time-based bonuses, unlike performance-based commissions, run afoul of the FWW regulations, because they make weekly pay dependent on the type of hours worked. Saybolt's incentives were time-based bonuses, because they depended on the kind of hours worked: days off hours, off-shore hours or holiday hours.

In order for the FWW pay system to be valid, the following must occur:

1. The employee's hours must fluctuate from week to week due to circumstances beyond the employee's or employer's control, such as the weather.

2. The employee's salary on a weekly basis must not vary based upon the number of hours worked.

3. The salary divided by hours worked must equal at least the minimum wage. In other words, an employer may not set the fixed salary for $290 ($7.25 * 40) because when an employee works overtime, his regular rate would be less than the minimum wage.

4. The employer and employee must have a written understanding regarding the FWW pay system and how it will work.

5. This pay system must be valid according to state laws (note that some states prohibit it).

It is permissible to include incentive or performance-based bonuses as part of the FWW pay system. Also, note that there is a variation to this pay system that may be used, which is a daily pay rate. Under this pay system, the general principles and rules of FWW apply, except that the employee is paid a fixed amount per day,

regardless of the number of hours worked during that day.

Are Safety Rules and Requirements Mandatory Subjects of Bargaining?

On November 20, in the case of *Orchids Paper Products Company, Inc*., the NLRB considered an employer's unilateral change to safety procedures. The employer required employees at its manufacturing facility to wear flame-resistant clothing, even if employees did not work in an area where there was a risk of a fire-related accident or injury. Prior to the employer's implementation of the policy, the clothing requirement was limited to only those who worked in an area where there was a fire risk.

The employer changed the policy without notifying the union in advance where the union could request bargaining over the policy. The employer argued that its obligations under the Occupational Safety and Health Act and rights according to contract language permitted the unilateral changes to safety rules. However, the NLRB ruled that an employer's changes to safety procedures and rules are governed by the National Labor Relations Act and thus there is a duty to provide the union with an opportunity to bargain over such a change. An exception to this requirement is if the collective bargaining agreement explicitly gives the employer the unilateral right to make these changes. In such situations, the waiver must be clear and unambiguous.

The Board ruled that the employer violated the NLRA by failing to give the union notice of the change to the policy so the union could raise issues and in essence bargain over those changes. Note that giving a union notice of a change in policy still leaves the employer with the option of implementing the policy it wants. The process requires the union to receive enough advance notice so that it could request bargaining (or meetings to discuss) before implementation. If the employer and union disagree over the policy terms, then where there is an "impasse," the employer retains the right to go forward and implement the policy change. Thus, the incremental step of giving the union notice does not diminish the employer's objective to achieve the policy change it wants.

Employer Fails to Exercise Reasonable Care to Protect Confidential Employee Information

Employers that require employees to provide sensitive personal information have a legal duty to make sure that information is secure. This information includes an employee's Social Security number, legal issues, family information, medical information, and financial information. The case of *Dittman v. UPMC d/b/a University of Pittsburgh Medical Center* involved an issue where the company's internet-connected computer system was hacked and confidential employee information was stolen. This included names, birth dates, Social Security numbers, bank account information and tax information. The hackers used the information to file false tax returns in the employees' names. The outcome was to cause significant financial damage to several employees, let alone the disruption and time required for those employees to work through this issue.

Employees filed a class action lawsuit against their employer on behalf of 62,000 current and former employees whose data was stolen. The employees alleged that their employer "had a duty to exercise reasonable care to protect its employees' personal and financial information from being compromised, lost, stolen, misused and/or disclosed to unauthorized parties." The lawsuit alleged that the employer stored information without taking necessary security precautions, such as encryption, firewalls, and authorization protocols. The lower court dismissed the complaint, stating that the employer owed no affirmative duty of care to maintain the privacy of employee confidential information. In reversing, the Pennsylvania Supreme Court held that an employer requiring and maintaining confidential employee information must take all reasonable steps to secure it. Employers are attuned to protect confidential company and customer/patient/client information but may overlook the requirement to extend the same care to the protection of employee information. Historically, the theory of an

employee's confidential information becoming known to others has been the claim of a negligent maintenance of personnel records. That same theory would apply to employee information that is hacked through the employer's system. Be sure you take all reasonable steps to prevent internal or external access to information that needs to remain private.

NLRB News Topics

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Harvard Law Students Lead Successful Boycott

Harvard Law students have urged their peers to boycott Kirkland & Ellis, LLP due to the firm's use of mandatory arbitration agreements in the firm's regulations. Shortly after the boycott was publicized, the law firm released a statement that it reviewed its policies and would no longer require arbitration of employment disputes by associates and summer associates. The students urging the boycott promised to expand their protest nationwide to other firms employing mandatory arbitration agreements. The organization known as the Pipeline Parity Project was started by two Harvard law students. The students claim to have twenty-four active members and several hundred more on an emailing list. The students intend to make this a nationwide protest.

Expanded Senate Majority Is No Guarantee for President Trump's Labor Nominees

Despite expanding the Senate majority by two seats and having a filibuster-proof upper chamber, President Trump's stalled Republican nominees may remain so. The Trump administration has successfully confirmed some top employment agency nominees, but numerous positions remain unfilled. Notable positions include the OSHA head and the EEOC General Counsel, three other key positions within the EEOC, and the nomination of Mark Gaston Pearce for his third term at the NLRB. Pearce, a Democrat, has been opposed by some conservative groups that say he exhibits a pro-union bias. A conservative pundit stated that Pearce may win confirmation despite the increased Senate majority:

> Given Pearce's polarizing tenure as NLRB chairman, his re-nomination was [somewhat] surprising. But [President Trump] is focused on 2020, and this move can be viewed in part as a recognition of those unions that supported [President Trump] in the last election. Notwithstanding [continued] opposition from a number of groups, if the President maintains his support [for] the nomination, I expect Member Pearce will be confirmed.

The pundit also stated that the EEOC is at risk of losing its quorum if the Senate does not act: "If the Senate does not find a path forward during the 'lame duck' session, there will likely be significant further delay before the EEOC has a functional quorum."

NLRB Plans to Go Slow in Revamping Election Rules

Instead of revising the election rules in their entirety, the Board will release a series of proposed rules that only address certain aspects of the election process. Chairman Ring has stated that the NLRB has discovered that addressing the issues totally under a proposed rule is next to impossible:

> Rather than develop a comprehensive rule that [attempts] to address every potential rulemaking issue, the majority intends to conduct the election rulemaking in a series of smaller rulemaking.

The NLRB intends to release its first regulation this winter, or soon after. The first series of revisions will include changes to the current blocking charge rule and the voluntary recognition bar rule. The blocking rule relates to the NLRB policy of pausing union elections when an unfair labor practice is filed alleging that the unproven violation illegally influenced the vote. The voluntary recognition bar relates to the NLRB practice of prohibiting questioning majority status of a union until the unfair practice is resolved.

Generally, expect the NLRB to tend to vote in future cases for giving employees a vote on union representation in a NLRB sponsored election – as contemplated by the Act - as opposed to artificially encouraging union support.

Kentucky Supreme Court OKs Right-to-Work Law

In mid-November, the Kentucky Supreme Court approved the state's right-to-work law in *Zuckerman v. Bevins*. In a 4-3 decision, the Court stated that:

> . . . the act applies to all collective bargaining agreements entered into on or after January 9, 2017 [the effective date of the Right – to – Work Act], with the exception of certain employees covered or exempted by federal law. With the exceptions required by federal law [the NLRA security ok], it applies to all employers and all employees, both public and private.

In finding the law constitutional, the Court made Kentucky the twenty-seventh state to have a right-to-work law. Right-to-work laws outlaw provisions in collective bargaining agreements between a state employer and union that make workers' pay union dues to stay employed.

Stay tuned for developments in this area. Look for the NLRB to change union security rules down the road, possibly through rule-making. The public's reaction was predictable, with union advocates characterizing the decision as "heartbreaking," while management practitioners lauded the decision.

Seventh Circuit Court of Appeals Denies *En Banc* Hearing on Union Dues Law – Wisconsin Loses

In late November, the Seventh Circuit denied a request by the State of Wisconsin to review *en banc* the state's law governing union dues deduction authorization, saying that the state law is preempted by the NLRA. *International Association of Machinists v. Allen.*

The IAM (Machinists' union) agreed that the law is controlled by the 1971 U.S. Supreme Court decision that the NLRA pre-empts any attempt by the states to legislate easier ways to resign from dues paying. The underlying case involved the IAM's 2016 challenge to Wisconsin's law that was designed to make it easier for an employee to stop paying union dues. The employee in question was allowed to revoke a dues-checkoff authorization, despite the collective bargaining agreement that dues check-off was supposed to be irrevocable for at least one year under the CBA. The State argued that any dues check-off that does not terminate within 30 days written notice is illegal under the NLRA. The Seventh Circuit emphasized the Supreme Court decision in *Sea-Pak,* as preemption has not changed for years, and the state's argument was rejected by the court.

However, look for the Board to continue to make inroads that employees can easily continue to resign dues-check-off, despite Wisconsin's failure here to make a change in the state law. In other words, Wisconsin's attempt to circumvent the collective bargaining process and impose a different dues check-off standard is preempted under the NLRA, which has been the law for a number of years.

EEOC and Employee Wellness Programs: The Saga Continues

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.

With a week to spare before the *AARP v. EEOC* court decision to vacate regulations concerning wellness program incentives goes into effect, the EEOC rescinded parts of its May 2016 rules. We recall that the EEOC published these rules to clear up controversy surrounding the "voluntary" provisions of the Americans with Disabilities Act and Genetic Information Nondiscrimination Act in connection with the Health Insurance Portability and Accountability Act authorizing employee incentives to participate.

HIPAA expressly permits the use of incentives in wellness programs. The ADA and GINA generally prohibit employers from collecting certain health information from employees but make an exception if collected as part of an "employee health program" so long as the employee's (and spouse's) participation is voluntary. Neither defines "voluntary." The EEOC originally opined that such wellness programs were not voluntary, but its 2016 rules allowed employers to offer an incentive of up to 30% of the cost of self-only insurance coverage, the same cap that applied under HIPAA and its ACA amendments.

AARP v. EEOC lawsuit argued that the 30% incentive permitted by the EEOC final rules were inconsistent with the "voluntary" requirements of the ADA and GINA, and the incentive for employees who participate in wellness programs is also a penalty for those who do not and will coerce employees into disclosing protected health information when they otherwise would not choose to do so. The judge first ordered the EEOC to replace its rules because it did not articulate good reasons for allowing the incentive, but he did not immediately vacate them. AARP asked him to reconsider after the EEOC said it might not replace until 2021 and then ordered the rules vacated effective January 1, 2019.

The EEOC has now removed the section of its regulations that permitted incentives. What remains at this point are laws and regulations that neither expressly prohibit or permit employers to offer incentives for employees to participate in wellness programs, require employee participation to be voluntary, and do not define "voluntary."

In March 2018, the EEOC advised the judge in *AARP v. EEOC* that it did "not currently have plans to issue a notice of proposed rulemaking addressing incentives for participation in employee wellness programs by a particular date …" and said it may issue such a notice sometime in the future, noting that two nominees for its Commission (including the chair) were still awaiting confirmation. And those two Commission nominees, along with the EEOC General Counsel nominee are still waiting. And it looks like employers will continue to wait for guidance on these issues.

Application of the Fair Labor Standards Act to Domestic Service

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.

While it has been more than five years since the revised regulations were issued, I find that many employers are still not aware of the revisions and thus are subjecting themselves to potential liabilities relating to household domestic employees.

In September 2013, the Department issued a rule concerning domestic service workers under the Fair Labor Standards Act that makes substantial changes to the minimum wage and overtime protection to workers who, by their service, enable individuals with disabilities and the elderly to continue to live independently in their homes and participate in their communities. The rule, which became effective on January 1, 2015, contains several significant changes from the prior regulations, including: (1) the tasks that comprise "companionship services" are more clearly defined; and (2) the exemptions for companionship services and live-in domestic service employees are limited to the individual, family, or household using the services; and (3) the recordkeeping requirements for employers of live-in domestic service employees are revised.

Below are excerpts from a Wage Hour Fact Sheet that outline the major changes in the regulations.

Minimum Wage and Overtime Protections. This Final Rule revises the definition of "companionship services" to clarify and narrow the duties that fall within the term and prohibits third party employers, such as home care agencies, from claiming the companionship or live-in exemptions.

Companionship Services. The term "companionship services" means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. Under the Final Rule, "companionship services" also includes the provision of "care" if the care is provided attendant to and in conjunction with the provision of fellowship and protection, and if it does not exceed 20% of the total hours worked per person (and per workweek).

Fellowship and Protection. Under the Final Rule, "fellowship" means to engage the person in social, physical, and mental activities. "Protection" means to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being. Examples of fellowship and protection may include: conversation; reading; games; crafts; accompanying the person on walks; and going on errands, to appointments, or to social events with the person.

Care. The definition of companionship services allows for the performance of "care" services if those services are performed attendant to and in conjunction with the provision of fellowship and protection, and if they do not exceed 20% of the employee's total hours worked in a workweek per consumer. In the Final Rule, "care" is defined as assistance with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living. These include tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Household Work. The Final Rule limits household work to that benefitting the elderly person or person with an illness, injury, or disability. Household work that primarily benefits other members of the household, such as making dinner for another household member or doing laundry for everyone in the household, results in loss of the companionship exemption and thus the employee would be entitled to minimum wage and overtime pay for that workweek.

Medically Related Services. The definition of companionship services does not include the provision of medically related services which are typically performed by trained personnel. Under the Final Rule, the determination of whether a task is medically related is based on whether the services typically require (and are performed by) trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants. The determination is not based on the actual training or occupational title of the worker performing the services. Performance of medically related tasks during the workweek results in loss of the exemption and the employee is entitled to minimum wage and overtime pay for that workweek.

Live-In Domestic Service Employees. Live-in domestic service workers who reside in the employer's home permanently (or for an extended period of time), and are employed by an individual, family, or household are exempt from overtime pay, although they must be paid at least the federal minimum wage for all hours worked. Live-in domestic service workers who are solely or jointly employed by a third party must be paid at least the federal minimum wage and overtime pay for all hours worked by that third-party employer. Employers of live-in domestic service workers may enter into agreements to exclude certain time from compensable hours worked, such as sleep time, meal time, and other periods of complete freedom from work duties. (If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.) Under the Final Rule, these employers must also maintain an accurate record of hours worked by live-in domestic service workers. The employer may require the live-in domestic service employee to record his or her hours worked and to submit the record to the employer.

Third Party Employers. Under the Final Rule, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third-party employer and the individual, family, or household using the services. However, the individual, family, or household

may claim any applicable exemption. Therefore, even if there is another third-party employer, the individual, family, or household will not be liable for unpaid wages under the FLSA provided the requirements of an applicable exemption are met.

Paid Family or Household Members in Certain Medicaid or Other Publicly Funded Programs. In recognition of the significant and unique nature of paid family and household caregiving in certain Medicaid-funded and other publicly funded programs, the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services, all care provided by that family or household member is part of the employment relationship. Where applicable, the Department will not consider a family or household member with a pre-existing close personal relationship with the consumer to be employed beyond a written agreement. This written agreement, usually called a plan of care, is developed between the program and the consumer (or the consumer's representative) and reasonably defines and limits the hours for which paid home care services will be provided.

As we begin a new year, the minimum wage in several states will also increase. Nineteen states link their minimum wage to the Consumer Price Index, whose rates are implemented around January 1st each year. Twenty-nine states and the District of Columbia have established a minimum wage greater than the federal rate of $7.25 while there are five states, including Alabama, which do not have a minimum wage statute. If you operate in multiple states, it would benefit you to check with the Labor Department in the individual states to make sure you are paying the correct rate in those states. Please remember that many of the states have a different tip credit from the requirements of the Fair Labor Standards Act.

If you have any questions, do not hesitate to give me a call.

In the News

Twenty States as of January 1 and New York as of December 31 Increase Minimum Wage

This is the time of the year when increases to the minimum wage at the state level tend to go into effect. As of January 1, 2019, twenty states and several cities will have an increase in their minimum wage. Note that New York's minimum wage increases become effective December 31, 2018; every other state's minimum wage increases are as of January 1. This increase has implications not only for those paid hourly, but also for those employees who are paid on a fixed salary for fluctuating workweek basis, where the employee's average hourly rate must equal at least the minimum wage and also for exempt employees. Also, note that with an increase in minimum wage is the requirement to have an updated state Wage and Hour compliance poster.

ACA Ruled Unconstitutional – So What?

A United States District Court judge from the Northern District of Texas on Friday, December 14, ruled that the Affordable Care Act is unconstitutional. The judge did not issue an injunction or take any other action to restrain the continued effectiveness of the ACA. According to the judge, the nature of the unconstitutional provision relates to when Congress in 2017 eliminated the individual mandate. The court stated that according to Chief Justice Roberts, the ACA was constitutional because Congress had "the power to impose a tax on those without health insurance." According to Judge O'Connor, the mandatory requirement to have health insurance was "essential to and inseverable from the remainder of the ACA. Congress stated many times unequivocally – through enacted text signed by the President – that the individual mandate is essential to the ACA." Therefore, the court ruled that while Congress had the power to tax, eliminating the individual mandate created the result where there was no Congressional authority in the Constitution to enact the Affordable Care Act. This decision will be appealed and has been viewed with skepticism by several analysts. For employers, the decision has no impact on issues regarding current

coverage, no impact on coverage during 2019, no impact on state enrollments through the ACA website, and no impact in those eleven states where the states operate their own insurance marketplaces. It is difficult to predict what the long-term effect of this decision will be. Most analysts suspect that it will not be upheld on appeal.

NLRB Strategic Plan – Reducing Delays

The NLRB on December 7 issued its 2019-2022 strategic plan. The Board's plan focuses on four essential objectives: First, the Board wants to decrease by 20% the amount of time it takes to process an unfair labor practice charge from filing to resolution. Second, the NLRB will accelerate the amount of time it takes to investigate and resolve questions regarding employee representation. The third element of the strategic plan is to commit resources to enhance the public trust in the NLRB and knowledge of what the NLRB does. Finally, the Board plans during the next five years to analyze approaches to reduce its size, offices, and office staffing. Out of approximately 19,000 cases filed annually, the Board anticipates a case reduction for fiscal year 2019 (September 30) of up to 1,000 cases.

Lactation Litigation

On December 11, the United States Department of Labor, Wage and Hour Division announced a settlement with the Yuma Regional Medical Center (Arizona) regarding compliance with the FLSA's Break Time for Nursing Mothers requirement. Under Section 7(r) of the FLSA, an employer is required to permit nursing mothers to have a reasonable amount of time for a break to express milk for one year after the child is born and a private, secure place where she may express milk without the risk of intrusion by other employees or members of the public. A restroom is insufficient as a location to express milk. There is a limited exception for those employers with fewer than 50 employees where the need to establish a separate location for expressing milk would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business." The Department of Labor's settlement with Yuma is to provide training to all supervisors regarding their right of a nursing employee to express milk during working time and also provide information to those employees returning from maternity leave about the right to use working time to express milk. Note that several states and municipalities have enacted more stringent legislation, including specifying what the private space must contain, such as access to running water and a refrigerator.

"On-Call" an Essential Job Function?

In the recent case of *Porter v. Tri-Health, Inc*., a United States federal district court judge ruled that the requirement for an employee to be on call is an essential job function. Therefore, it was not a reasonable accommodation for the employer to excuse an employee from on-call duty. In *Porter*, the hospital required its Radiology Department sonographers to work on call on a rotating basis. On-call was considered a significant amount of an employee's overall worktime. Employee Porter, due to a medical restriction, told the hospital that she could not be on call after 9:00pm, so she was terminated because of her inability to work the on-call schedule. The court ruled that the on-call responsibility was an essential job function. The court stated that the uniqueness of a hospital environment necessitated greater judicial deference to the hospital's judgment about whether on-call was an essential job function. Furthermore, the employer tried to accommodate the employee's restrictions by requiring others to work longer on-call hours, but ultimately those employees resisted that request and the employer was left with no other reasonable option than to replace the employee with an employee who could work on-call. The court noted that although for a period of time the hospital accommodated the employee by not scheduling her to work on-call, that temporary accommodation did not mean that on-call was not an essential job function. Thus, if an employer can accommodate on a temporary basis, the fact of the accommodation does not diminish the employer's right to make a decision based upon the need for the employee to perform an essential job function.

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