SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
September 2019

US Department of Labor Announces New Overtime Rule

The US Department of Labor has announced its new final rule updating salary thresholds necessary for an employee to qualify for an exemption from overtime payments as an executive, administrative, or professional employee under the Fair Labor Standards Act. To qualify under one of these exemptions, an employee must perform certain specific duties and be paid on a salary basis at a certain minimum amount. The Department of Labor's rule raises that minimum salary amount to $35,568 per year. This means that exempt workers under the exemptions, commonly referred to as the "white collar exemption(s)", must be compensated at least $35,568 per year to continue to remain exempt from the FLSA's overtime requirement. The rule also changes the minimum salary amount for an employee to qualify for an exemption based on being a "highly compensated employee" from $100,000 per year to $107,432 per year. According to the Department of Labor, employers may, "use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level." The final rule is effective on January 1, 2020, so employers must begin the process now of evaluating their exempt workforce to determine if employees will continue to remain exempt under the new rule and consider restructuring salaries and positions as necessary.

Parent's Attendance at Child's CSE/IEP Meeting Can be a Qualifying Event for Taking Intermittent FMLA Leave

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Leave is only for specified reasons, and the types of events that trigger FMLA protections typically include the arrival of a new child in the family, the care of a family member with a serious health condition, and the employee's own serious health condition that prevents the employee from performing their essential job duties. The DOL recently issued an opinion letter clarifying that a parent's attendance at a CSE/IEP meeting, to address their child's educational and special medical needs, could be a qualifying event for taking intermittent FMLA leave. While not every CSE/IEP meeting may rise to the level of a qualifying event, employers should be aware that these meetings can qualify as care for a family member under the FMLA. The child's doctor does not need to be present at the CSE/IEP meeting in order for the leave to qualify for intermittent FMLA leave.

Even More FMLA News: According to the Department of Labor, Employers May Not Delay Designation of FMLA Leave Even if a Collective Bargaining Agreement Provides Otherwise

According to the United States Department of Labor, an employer may not delay designating leave under the FMLA, even if a collective bargaining agreement provides otherwise. The Department of Labor's Opinion Letter provides that notwithstanding a requirement in a negotiated collective bargaining agreement that other leave must be exhausted prior to triggering the designation of leave under the FMLA, that requirement does not mean that an employer may delay designating such leave as FMLA qualifying. The opinion letter notes that employees and employers may not decline to apply FMLA protection to leave which qualifies for protection under the FMLA. Additional leave benefits may be provided by under the collective bargaining agreement, but such benefits must run concurrently with FMLA leave or subsequent to the exhaustion of FMLA leave according to the Department of Labor. Unionized employers with leave provisions in their collective bargaining agreements and to which the FMLA applies, must be sure to vet their policies and practices and make sure they are following the law.

NLRB Adopts Lower Standard for Unionized Employers to Change the Terms and Conditions of Employment Without First Bargaining with the Union

A recent National Labor Relations Board (NLRB) decision has made it easier for unionized private sector employers to unilaterally change their employees' terms and conditions of employment. In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the NLRB adopted the "contract coverage" standard. Under this standard, employers may change terms and conditions of employment without first bargaining with the union if the terms of the applicable collective bargaining agreement (CBA) can be interpreted to "cover" the change.

Prior to *MV Transportation*, the NLRB had applied a more rigid standard, previously holding the terms of a CBA had to be "clear and unmistakable" in giving permission to change a term or condition of employment. Under this previous standard, without "clear and unmistakable" permission set forth in a CBA, an employer had to bargain with the union before making any change.

"Potential Future Disability" Not Protected by the ADA According to the Eleventh Circuit

The Eleventh Circuit Court of Appeals recently held that employees with a "potential future disability" do not come under the protection of the Americans' with Disabilities Act (ADA). In *Equal Employment Opportunity Comm'n v. STME, LLC*, 18-11121, 2019 WL 4314998 (11th Cir. Sept. 12, 2019), Kimberley Lowe worked as a massage therapist, and her employer fired her after she returned from a trip to Ghana, Africa. Her employer fired her because of concerns she may have contracted Ebola from her trip, which would risk infecting customers. The EEOC contended the employer regarded Ms. Lowe as disabled and fired her because of the perceived disability. The EEOC also argued the employer failed to provide a reasonable accommodation should Ms. Lowe have contracted Ebola. The Eleventh Circuit, however, held "[T]he disability definition in the ADA does not cover this case where an employer perceives a person to be

presently healthy with only a potential to become ill and disabled in the future due to the voluntary conduct of overseas travel."

EEOC Will *NOT* Renew Requirement for EEO-1 Reports to Include Pay and Hour Data

The Equal Employment Opportunity Commission (EEOC) announced this month it would not seek to renew the Component 2 reporting requirement as part of employers' EEO-1 Report. Component 2 required employers with over 100 employees to report pay information (compensation rates and hours worked) along with the remaining information required in EEO-1 reports. *Although not intending to renew the Component 2 requirement in the future, this does not affect employers' obligation to submit Component 2 information as part of their EEO-1 filing for calendar years 2017 and 2018 by the September 30, 2019, deadline.*

The EEOC made the decision not to renew the Component 2 reporting requirement because of the "unproven utility" of pay data in administering its enforcement programs. The EEOC also considered the immense burden on employers to compile pay data. The EEOC, though, will continue its practice of requiring the submission of Component 1 information pertaining to race and sex. The collection of such information has proven utility for the EEOC's enforcement of employment discrimination laws according to the Commission.

Department of Labor Clarifies Civil Rights Protections for Religious Organizations

As a reaction to the recent determinations of the Supreme Court in *Masterpiece Cakeshop, Ltd.v. Colorado Civil Rights Commission*, *Trinity Lutheran Church of Columbia v. Comer*, and *Burwell v. Hobby Lobby Stores*, the Department of Labor has published proposed rules clarifying what organizations may claim a religious exemption to the non-discrimination requirements placed on government contractors. These cases allow a for-profit corporation to otherwise discriminate against an individual so long as it is based on a religious belief.

The proposed regulation, which only applies to federal government contractors, provides for broad religious exemptions. It also recognizes that the exemption can apply to corporations that are not expressly religious in nature, such as churches. The comment period for this proposed ended on September 16, 2018, and the comments are currently in agency review. To review this proposal, see here.

From the Lighter Side: Married Man's Death During Sex on a Business Trip Ruled a Workplace Accident

A married Frenchman died while having sex on a business trip with someone other than his wife was still found by a French appellate court to have suffered a workplace accident and his estate was therefore eligible to receive "victim's family benefits" from both his employer and the state. The late employee was found dead in his hotel room shortly after having sex with a local woman he had just met.

The French appellate court upheld a lower court ruling which opined that "a sexual encounter is an act of normal life like taking a shower or eating a meal". The appellate court went on to note

that an employee is entitled to his employer's protection for an "*accident du travail"* whether or not the accident took place as part of a professional activity or as an act of normal life.

Lawyers for the employer argued that his death was the result of his adulterous sex act which was outside the scope of his employment. The benefits at issue were significant; the ruling entitled any partners and children of the late traveler to a monthly benefit of up to 80 % of his salary until retirement and then a share of his pension.

There was no mention in the article as to how or if the employer established that the employee's death was directly attributable to his "*rendezvous"* with the local lady.

Read more here.

Firm News

Robert J. Sniffen presented "HR Issues During the Period of Employment" at the Big Bend Society for Human Resources Management Employment Law Workshop in Tallahassee.

Past Issues of the Labor and Employment Law Alert Available on Website

You may view past issues of the Labor and Employment Law Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.