HR Law Update

Presented by
David Michael, JD

HR23
5/4/2018
2:15 PM
HR Law Update
Hot Topics in Human Resources and Employment Law: 2018

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1. Harassment Prevention Best Practices
2. EEOC Update
3. Department of Labor Update
4. Sexual Orientation Protection under Federal Law
5. SCOTUS Docket
6. New Paid Sick Leave Laws and Navigating Tricky Leave of Absence Issues
7. I-9 Update
Harassment Prevention Best Practices in Light of the #METOO Movement

#MeToo

If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem."
Harassment Prevention Best Practices 2018

Update Harassment Prevention Policy

- Check your state or local law
- Facebook has published its policy
  - Prohibits harassment across all protected characteristics
  - Provides many examples
  - Includes “Bullying”
  - Detailed Reporting Section
  - Has an FAQ section (e.g., who conducts the investigation?)

Harassment Prevention Best Practices 2018

Conduct Training

- Existing and new (e.g. NY) laws require it annually
- Live training preferred
- 100% involvement (Managing Partner on down)

Use a Hotline

- Calls re: sexual harassment up 11.2% in Q4 2018 (per NAVEX GLOBAL)
- Helps with Faragher/Ellerth affirmative defense
- A hotline can be a deterrent itself
Harassment Prevention Best Practices 2018

Hotline Tips
- Decide if internal or external recipient
- More than one recipient
- Follow-up with any identified caller

New Law Related to Settlement Agreements
- New York
- Bans secrecy or confidentiality regarding the “facts and circumstances of the complaint”
- Bans mandatory arbitration of sexual harassment claims

EEOC Update
### EEOC Update

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<td>Launches new training program on respectful workplaces. Focus on respect, acceptable workplace conduct, inclusive/respectful behaviors</td>
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<td>November 1, 2017</td>
<td>Launches online charge filing service</td>
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<td>January 25, 2018</td>
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### EEOC Charge Statistics
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**EEOC Update**

Current Home Page: What To Do If You Believe You Have Been Harassed at Work

Query, will there be a substantial rise in sex harassment charges?
Department of Labor (DOL) Update

1. Getting PAID
2. Opinion Letters Are Back
3. Overtime Rule on Minimum Salary – Where do we stand?

PAID: Payroll Audit Independent Determination (PAID) program

• Nationwide pilot program to facilitate resolution of potential overtime and minimum wage violations of FLSA

• Goals: Improved compliance, fast resolution, litigation avoidance

• Self-Audit Program, violations such as:
  • Misclassification as exempt
  • Failure to pay OT (or to pay proper amount)
  • Failure to pay for all hours worked
Department of Labor (DOL) Update

PAID: Payroll Audit Independent Determination (PAID) program (cont.)

• Key Program Features
  • No liquidated damages or penalties
  • DOL assistance in determining liability
  • Employer must pay 100% of back wages
  • Employees can choose whether to accept payment (or not)
  • Employers get a tailored, enforceable release from the employees
  • Cannot use for ongoing litigation (or once demand letter received)

Department of Labor (DOL) Update

PAID: Payroll Audit Independent Determination (PAID) program (cont.)

• How to Participate (self-audit)
  • Identify potential violations
  • Identify affected employees
  • Identify timeframe
  • Calculate the amount of back wages
  • Contact your local DOL Office
  • Once DOL reviews and approves, payment by next full pay period
Department of Labor (DOL) Update

OPINION LETTERS ARE BACK

• What are they?
  • DOL’s assessment of how a law it administers (e.g., FLSA or FMLA) applies in a particular situation
  • Both employers and employees may request them

• What happened?
  • DOL issued them for decades
  • Obama administration halted issuance in 2010
  • Trump administration restarted in 2018 (by reissuing 17 letters held from 2009)
  • April 2018, 3 new letters issued

Department of Labor (DOL) Update

OPINION LETTERS ARE BACK (cont.)

• Why significant?
  • Provide guidance on specific factual situations
  • May limit liability or liquidated damages
  • Caution: If DOL disagrees with an employer’s practice, must change it
  • Two new letters of note
Department of Labor (DOL) Update

OPINION LETTER FLSA 2018-19

• Issue: Whether a non-exempt employee’s 15-minute rest breaks (8 hr. day), which are certified by a doctor as intermittent leave under the FMLA, are compensable?

• FLSA:
  • Compensability of employee’s time depends on whether it predominantly benefits the employee or the employer
  • Normal, short rest breaks (up to 20 minutes) primarily benefits the employer so are compensable

Department of Labor (DOL) Update

OPINION LETTER FLSA 2018-19 (cont.)

• FMLA:
  • Provides unpaid leave
  • No exception for breaks

• DOL’s take:
  • The 8 15-minute breaks under the FMLA predominantly benefit the employee
  • Not compensable
  • Caution if have some paid breaks for other employees then must pay for those breaks here
Department of Labor (DOL) Update

OPINION LETTER FLSA 2018-18

• Issue: When is the travel time for hourly technicians compensable under the FLSA?
  • Focus here on determining the employee’s normal work hours (travel time is generally compensable during those hours, 7 days/week)
  • Look at last month, OR average start/stop times, OR via agreement with employee

Overtime Rule and the DOL: Where do Employers Stand?
Department of Labor (DOL) Update

OVERTIME RULE ON MINIMUM SALARY-WHERE DO WE STAND?

• Increase to $47,476 still on hold (so still $23,660 under FLSA)
• Trump administration has abandoned its defense of the rule
• Court process has been stayed
• 2017 DOL issued a Request for Information on a proposed new rule (140k responses)
• Anticipate new rule in 2018 or 2019
• Note, check for your state requirement (some are two times the state’s minimum wage)

Sexual Orientation Protection under Federal Law
Sexual Orientation and Title VII:

- Recall Title VII prohibits discrimination based upon “sex”
- “Sex” not defined
- No mention of sexual orientation or gender identity
- Congress has not amended Title VII to include either term
- 7th Circuit case, Hively v. Ivy Tech, 3–judge panel declines, with reservations, to add to definition
- 11/30/16 Court rehears case with all 12 judges present (“en banc”)
- 3/10/2017 11th Circuit case (Evans v. Georgia Regional Hospital): Court rules discrimination based on sexual orientation is not actionable under Title VII

Sexual Orientation and Title VII (cont.):

- 4/4/2017 Hively Court adopts the EEOC’s position, stating “it would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation’” and holds that Title VII does not prohibit discrimination based upon sexual orientation
- 2/26/2018 2nd Circuit Case (Zarda v. Altitude Express) court rules that Title VII prohibits discrimination based on an individual’s sexual orientation
- Next step: SCOTUS
- Note, many states and municipalities expressly prohibit sexual orientation and/or gender identity discrimination
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SCOTUS Docket
(2 cases of particular note)
Encino Motorcars, LLC v. Navarro

Issue: Are Car Service Advisors exempt from overtime?
- Service Advisors sell repair/maintenance services to car owners
- FLSA Exemption: “any salesman, partsman, or mechanic primary engaged in selling or servicing automobiles, trucks or farm implements”
- Service Advisors argued:
  - We don’t sell cars
  - We don’t service cars
- Dealership argued: “primarily engaged in” expands exemption beyond just salespersons and mechanics

Encino Motorcars, LLC v. Navarro (cont.)
- Second time at SCOTUS (1st time rejected Appellate Court’s reliance on a DOL rule finding no exemption as not sufficiently reasoned)
- This time, SCOTUS rules in favor of dealership
- Court’s Analysis
  - Are Service Advisors “salesman... primarily engaged in...servicing automobiles”?
  - Rejects long-standing approach to interpreting FLSA exemptions “narrowly”
  - Must give each exemption a “fair reading”
NLRB v. Murphy Oil/Epic Systems Corp. v. Lewis

Issue: May employers require employees to sign mandatory arbitration agreements which prohibit employees from pursuing employment-related claims in class or collective actions?

- NLRB argues: Such agreements prohibit workers from engaging in “concerted activity”
- Argument held October 2, 2017
- Obama and Trump Administrations took opposite approaches
- Ruling expected soon
- May breathe new life into mandatory arbitration agreements

New Paid Sick Leave Laws and Navigating Tricky Leave of Absence Issues
Paid Sick Leave Laws

- Not required under federal law
- Some states and many municipalities have laws or ordinances
- Typical requirements
  - One hour of paid sick leave for every 30 or 40 hours worked
  - Applies to all employees (full and part-time)
  - Use for employee's (or close family member's) illness or medical treatment
  - Carry over of unused leave
  - Existing PTO may be sufficient
  - Notice to employees
  - Note, some states passing laws banning local jurisdictions from enacting paid sick leave laws (e.g., Wisconsin)

Tricky Leave of Absence Issues

- More questions on leaves of absence than any other topic
- Factors to consider:
  1. Company policy
     - PTO
     - Paid Sick Leave
     - Short-Term Disability
     - Long-Term Disability
     - Personal Leave of Absence Policy
Tricky Leave of Absence Issues (cont.)

2. Family and Medical Leave Act
   • Is your firm covered? 50 or more employees
   • Is the employee eligible:
     • 12 months of employment
     • Worked at least 1250 hours in last 12 months
     • Works at a location with at least 50 employees within 75 miles
   • FMLA provides 12 weeks of unpaid, job-protected leave

Tricky Leave of Absence Issues (cont.)

• Leave for:
  1. Birth, adoption, foster care placement
  2. Employee’s serious health condition which makes the employee unable to perform his or her essential job duties
  3. To care for a close family member with a serious health condition
  4. Select military reasons

• Leave can be taken all at once, or on an intermittent or reduced schedule basis
• Reinstatement to the employee’s prior position or to an equivalent position (pay, benefits, etc.)
3. The Americans With Disabilities Act
   • Is your firm covered? 15 or more employees
   • Prohibits discrimination against qualified individuals with disabilities
   • Requires employers to provide reasonable accommodations to employees with disabilities that require an accommodation to perform their essential job duties (unless an undue hardship)
   • EEOC: Leave is a reasonable accommodation if it allows an employee to return to work following a period of leave
   • Most Courts: indefinite leave is not a reasonable accommodation
   • Interactive process required
   • Documentation is crucial – consider a checklist

4. Your state’s Workers’ Compensation Law
   • For work-related injuries
   • A no-fault compensation system for workers injured in accidents
   • Covers health care and income replacement
   • Time off may or may not be protected leave

5. Any other leave law in your state
Leave of Absence Case Studies

• Employee hired 11 months ago is injured on the job. Doctor says he needs surgery and 3-4 months off to recover
  Steps to take?
• With 2 weeks left on this employee’s FMLA leave, his doctor sends a note saying he needs 3 more weeks of leave?
  Do you grant the leave?
  When could you refuse to grant the leave?
• OR, with 2 weeks left on this employee’s FMLA leave, he informs us he needs one more month of leave.
  Do you grant his request?

Leave of Absence Case Studies (cont.)

Can you seek additional medical information?
What if he submits a doctor’s note saying he needs 2-3 months of additional leave?
• One week before he is scheduled to return from FMLA leave, his doctor says he is not released to return to work and will be re-evaluated in 2 weeks.
  Do you grant his request for more leave?
  What if he then needs another two weeks? And another?
• The doctor now sends a note allowing the employee to return to work but with certain restrictions on his ability to perform some job functions?
  What steps do you take now?
Leave of Absence Case Studies (cont.)

• Your firm has a 6 month maximum leave of absence policy and an employee has been off for 6 months pursuant to that policy. A week before leave is scheduled to end, he informs you he needs one more week of leave.
  
  Do you grant his request?

• In this scenario, the employee can return to work at the end of the 6-month leave of absence under company policy, but he has permanent restrictions which leave him unable to perform certain job duties. You have a vacant position he can likely perform but were just about to offer it to a highly-qualified candidate.
  
  What do you do?

One Last Update: New Form I-9

• New Form dated 7/7/2017 (replaces the 11/14/2016 form)

• Must use as of 9/18/2017

• Changes
  
  • Some minor wording changes to the form itself
  
  • Addition of Consumer Report of Birth Abroad form to List C documents
Your opinion matters!

Please take a moment now to complete the evaluation.

Thank You!