Vol. 4, No. 11 | November 2023

HRLaws
Mid-Atlantic
Employment Law Letter
Focusing on Delaware, Maryland, New Jersy, Pennsylvania, and Virginia

LITIGATION

DOL investigation of Pennsylvania diner results in $1.3M fine for FLSA violations

DE | MD | NJ | **PA** | VA

by Lisa M. Koblin, Saul Ewing Arnstein & Lehr LLP

On September 14, 2023, the U.S. 3rd Circuit Court of Appeals upheld a $1.3M verdict against a Pennsylvania diner that failed to pay its employees proper tips or overtime as required by the Fair Labor Standards Act (FLSA). The diner asked the appeals court to overturn the substantial verdict that had been handed down by a district court judge, claiming it had acted reasonably and in good faith without any willful violation of the law.

The 3rd Circuit disagreed and affirmed the district court's findings and the $1.3M judgment against the diner. The case illustrates that ignorance of the law and insufficient recordkeeping are a recipe for unlawful payroll practices and costly litigation. Fortunately, employers can avoid these legal pitfalls once they have a proper understanding of their legal obligations.

Background

Mosluoglu, Inc., operates Empire Diner, a 24-hour restaurant in Lansdowne, Pennsylvania. Empire employed servers and paid them the minimum wage permitted for tip credit workers in Pennsylvania ($2.83 per hour). It didn't expressly notify its employees that it was taking a tip credit to ensure they were paid at least $7.25 per hour, including tips, as required by the FLSA. It also didn't record the actual cash tips the servers earned, instead "guesstimating" the amount of cash tips for each shift. Moreover, if a server worked overtime, the restaurant paid the server 1.5 times their tip credit minimum wage of $2.83 for all overtime hours instead of 1.5 times the federal minimum wage ($7.25). In some cases, servers didn't receive any overtime for working more than 40 hours per week.

In 2017, the Department of Labor (DOL) opened an investigation of the diner's pay practices. After concluding its investigation, it filed a lawsuit against Empire, claiming the restaurant had violated the FLSA by failing to pay proper minimum wage and overtime and failed to meet its recordkeeping obligations under the law. The DOL sought back wages and liquidated damages for all affected employees.

The litigation resulted in a 5-day trial in front of a federal district court judge. The district court judge determined Empire willfully violated federal law and found it liable for over $675,000 in back wages, plus liquidated damages (which doubled the total liability to $1.3M), and injunctive relief in the form of continued monitoring to ensure compliance with federal law. Empire appealed the decision.

▼ What's Inside

▼ What's Online

Paid Time Off
How HR teams can create a positive PTO culture
http://bit.ly/3ZUiIN9

Find Attorneys
To find employment attorneys in all 50 states, visit **www.employerscounsel.net**

blr

▼ Employers Counsel Network (ECN) Member Attorneys

DELAWARE

- **Lauren Russell,** Young Conaway Stargatt & Taylor, LLP, Wilmington

MARYLAND

- **Steven E. Bers,** Whiteford, Taylor & Preston, L.L.P., Baltimore
- **David Stevens,** Whiteford, Taylor & Preston, L.L.P., Baltimore

NEW JERSEY

- **John C. Petrella,** Genova Burns LLC, Newark
- **Dina M. Mastellone,** Genova Burns LLC, Newark

PENNSYLVANIA

- **Dena B. Calo,** Saul Ewing Arnstein & Lehr LLP, Philadelphia
- **Lisa M. Koblin,** Saul Ewing Arnstein & Lehr LLP, Philadelphia
- **Carolyn Pellegrini,** Saul Ewing Arnstein & Lehr LLP, Philadelphia

VIRGINIA

- **Jonathan R. Mook,** DiMuroGinsberg P.C., Alexandria
- **Bernard J. DiMuro,** DiMuroGinsberg P.C., Alexandria

Employer must expressly notify employees of tip credit

Pennsylvania employers can pay tipped employees less than the federal minimum wage if they receive at least $2.83 per hour and the remainder of the $7.25 minimum wage ($4.42) in tips. This practice is known as a "tip credit," and it is permissible under the FLSA and Pennsylvania law, so long as the employer properly calculates the tip credit and notifies its employees it is taking the tip credit and the amount.

In this case, the district court found the restaurant didn't inform the servers about the tip credit that would be taken against their wages. Empire argued the employees were on notice of the tip credit based on years of past practice and a "poster" on minimum wage that was allegedly kept in the restaurant but never produced at trial.

Absent evidence to the contrary, the 3rd Circuit agreed with the district court that failure to properly notify servers of the tip credit practices amounted to a violation of the FLSA for which Empire was liable.

Tipped employees' overtime must be based on federal minimum wage

It's no secret that hourly, nonexempt employees who work more than 40 hours in a workweek are entitled to overtime compensation in the amount of one-and-one-half times their regular hourly rate. But what some employers, like Empire, of tipped employees fail to realize is that this calculation isn't as straightforward when you are taking a tip credit against an employee's wages.

As the courts highlighted in this case, when an employee subject to a tip credit works overtime, the overtime rate is calculated based on the minimum wage rate of $7.25 per hour, *not* the employee's hourly rate that is applied before the tip credit is taken (in this case, $2.83 per hour). As a result, Empire violated the FLSA by failing to pay servers the appropriate overtime rate of $10.88 per hour.

'Guesstimated' tips fall short of FLSA's recordkeeping requirements

Section 211(c) of the FLSA requires employers to "make, keep, and preserve records . . . of the wages, hours, and other conditions and practices of employment." This means employers must maintain accurate records to ensure all workers are paid the minimum wage for every hour worked.

When Empire couldn't produce clear and consistent records to verify its employees received sufficient tips each shift to justify the tip credit, it attempted to defend its payroll practices by stating that it "guesstimate[d]" the approximate amount of cash tips servers received. But the court didn't buy this explanation.

The 3rd Circuit opined that "a 'guesstimate' untethered to any actual effort to keep track of tips does not constitute accurate recordkeeping." As a result, the restaurant's failure to track cash tips (including any tips contributed to the tip pool) was inconsistent with the FLSA's recordkeeping requirements.

Individuals can be liable as 'employers' under the FLSA

The court determined that not only was Empire liable for violations of the FLSA, but so was its sole owner and the owner's son, who managed the day-to-day operations of the diner. Under the FLSA, and "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." This means that individuals who exercise "significant control" over employees may be deemed an "employer" and therefore held responsible for violations of the FLSA in addition to the entity that they work for.

A court will consider certain factors to determine whether an individual is a true employer under the law, including: (1) authority to hire and fire the relevant employees; (2) "authority to promulgate work rules and assignments" and to set the employees' conditions of employment; (3) "involvement in day-to-day employee supervision, including employee discipline"; and (4) "actual control of employee records, such as payroll, insurance, or taxes."

In this case, the court determined the manager, like the owner, met the definition of an "employer" under the FLSA because the manager interviewed and hired the servers and was involved in setting schedules, assigning employees to their workstations, and making policy decisions for the restaurant. The manager also worked

with the owner on reviewing employee time sheets, sending information to payroll, depositing tips, and handling employee pay. The manager therefore qualified as an employer even though the owner retained the ultimate authority over business operations.

Hefty verdict upheld

The statute of limitations (lookback period) for the FLSA is generally two years, except when an employee can demonstrate the employer's violation of the law was "willful," in which case the statute of limitations extends to three years. An employer willfully violates the FLSA when it "either knew or showed reckless disregard of the matter of whether its conduct was prohibited."

Here, Empire was found to be in willful violation of the FLSA because the owner admitted he "simply made up a number to account for servers' cash tips" in his payroll calculations to ensure the servers wouldn't appear to be making less than minimum wage. The DOL investigation also revealed that Empire asked certain employees to make inaccurate statements to the DOL about the restaurant's overtime and tip contribution policies.

To combat the willfulness claim and assessment of liquidated damages, Empire asserted that it acted in "good faith" and had reasonable grounds for violating the law. However, the 3rd Circuit found the restaurant couldn't satisfy the good-faith defense because the evidence showed it simply "did not know that there needed to be written records" regarding employee tips and because ignorance of the law doesn't exonerate a party from complying with the FLSA.

Empire also claimed it relied on its accountants to keep in compliance with the FLSA, but hiring a third party doesn't relieve an employer of its obligations under the law. Empire further tried to find relief from liquidated damages by arguing that it immediately rectified its pay practices after it learned of its violations following the DOL investigation. This reasoning didn't prevail because the good-faith defense must be determined based on actions taken at the time of the violation, not after.

For these reasons, the 3rd Circuit affirmed the district court's ruling against the diner and upheld the $1.3M judgment against Empire and the two individual defendants. *Secretary of Department of Labor v. Mosluoglu, Inc., et al.*

Takeaways for employers

If you employ hourly workers—especially tipped employees—now is the time to review your tip credit, overtime, and general payroll practices for compliance with state and federal law. As the *Empire* case illustrates, you are obligated to seek out and confirm that your payroll practices are consistent with applicable law, and you can't rely on sheer guesswork or estimates to make up for an absence of clear recordkeeping.

This case also demonstrates that when FLSA violations occur, the back wages and penalties for which an employer can be liable add up quickly and that individual owners and managers can even be held individually responsible for those penalties. If you have questions about your company's compensation policies, you should contact experienced employment counsel for assistance.

Lisa M. Koblin is an attorney with Saul Ewing Arnstein & Lehr LLP in Philadelphia and can be reached at lisa.koblin@saul.com. ■

LEGISLATION

Change to Maryland's cannabis laws raises questions for employers

DE | **MD** | NJ | PA | VA

by David M. Stevens, Whiteford, Taylor & Preston LLC

As of July 1, Maryland law now permits the possession and use of small amounts of marijuana. Unlike some other jurisdictions that have decriminalized marijuana possession, Maryland's new statute doesn't directly address the law's consequences for employers and employees. In the absence of statutory language clarifying the law's impact on the workplace, many Maryland employers have been left uncertain about their ability to prohibit or test for marijuana use among their employees.

Legal landscape remains unchanged

Prior to the new law's enactment, Maryland employers were free to prohibit the use and possession of marijuana in the workplace, as well as to test for marijuana as part of a drug testing program as long as the testing program complied with procedural requirements set by a state statute. The fact that the new law removing criminal penalties associated with the use of marijuana didn't contain any provisions limiting employers' discretion with respect to drug-related policies means that employers retain the same level of flexibility that was in place prior to the new statute taking effect.

As a result, Maryland employers may continue to enforce policies that prohibit employees from working while under the influence of marijuana or from possessing or using marijuana on the employer's property. Likewise, Maryland employers that engage in drug testing may continue to include marijuana among the substances encompassed by a testing program.

In doing so, employers must continue to comply with the mandatory procedures applicable to such screening programs, including use of a certified testing facility, issuance of required notices, and the opportunity for employees who test positive to obtain a retest at their own expense.

Cutting-Edge HR

Poll finds more employees want a set schedule than leaders think. A recent Gallup poll asked a group of chief HR officers which style of work their employees preferred—splitting or blending. Splitters prefer a set schedule whereby work and life are separated, and blenders prefer to blend work and life throughout the day. The HR executives thought 24% of white-collar employees would be splitters and 76% would be blenders. But Gallup's poll of employees found that 45% of white-collar employees were splitters and 55% were blenders. The HR executives thought 54% of production/frontline employees would be splitters and 46% would be blenders, but the poll of those employees found that 62% preferred being splitters and 38% preferred being blenders. Gallup said the poll results show a "blind spot" that can make employees feel less likely to be respected, less likely to be engaged, more likely to suffer burnout, and more likely to be looking for a new job.

Study finds financial worry a major reason for anxiety among Gen Z. A report from Ernst & Young LLP finds that money is a growing concern for Gen Z. "As the generation moves into our prime workforce and consumer markets, several shifts are happening simultaneously," Marcie Merriman, EY Americas cultural insights and customer strategy leader, said of the findings. "The oldest Gen Z are aging out of their parents' health care plans this year, and they are feeling the impact of financial independence amid economic uncertainty. These factors are shaping their views of work and life and what success looks like." The report says less than a third (31%) of Gen Z feel financially secure, and more than half (52%) say they are very or extremely worried about not having enough money. The study also found that more than a third of the age group said they are very or extremely stressed or worried about making the wrong choices with their money, and 69% rate their current financial situation as only fair or worse.

Survey finds most employees seeking accommodations face hurdles. A survey from AbsenceSoft, a platform for leave-of-absence and accommodations management, finds that 52% of employees seeking workplace accommodations are met with difficulties. The company concluded that employers need to consider a more intentional approach to workplace accommodations. Many frontline employees and managers are unaware of accommodation requirements and programs at their workplace. Having training on accommodations and increasing company awareness helps mitigate many compliance challenges employers face. Training also can create an opportunity to foster a more engaging and supportive workplace for employees of all abilities, AbsenceSoft says. ■

Reevaluating policies

While the new statute doesn't compel a change to existing policies, a number of employers have used the discussion surrounding the new law as an opportunity to reevaluate their current drug testing program. The increasing prevalence of marijuana use among younger segments of the workforce, coupled with a tight labor market, has led some employers to conclude that the potential negative impact of testing programs on their ability to recruit and retain employees outweighs their benefits, at least with regard to positions that don't involve direct safety concerns.

While the hiring and retention considerations that affect the decision of whether to utilize a drug testing program will vary from one business to another, the recent change decriminalizing marijuana use at the state level doesn't require employers to make a particular change in such programs, at least until such time as new legislation or court interpretations emerge.

Further legislation may be on the horizon

Maryland employers shouldn't assume that the current legal outlook will continue indefinitely. As noted above, other jurisdictions that have decriminalized marijuana use have enacted specific provisions that prohibit employers from making employment decisions based on an employee's off-duty use of marijuana, and it's possible that similar legislation may be taken up by the General Assembly in future legislative sessions.

Employers are encouraged to consult with legal counsel both to monitor any future developments on this front and to ensure that their existing policies with respect to drug testing are compliant with current Maryland law.

David M. Stevens is a partner with Whiteford, Taylor & Preston LLC in Columbia. He can be reached at dstevens@whitefordlaw.com. ■

RETALIATION

Retaliation: The most successful discrimination claim

DE | MD | NJ | PA | VA

by Roberta Fields, McAfee & Taft

A retaliation claim can be successful even when the original discrimination claim fails to establish a violation of law. The same laws—federal and typically state laws—that prohibit discrimination based on race, color, sex, religion, national origin, age, disability, or genetic information also prohibit retaliation against individuals who oppose discrimination or participate in an employment discrimination proceeding.

Why are the laws written this way? Well, if employees are unwilling to come forward and speak out or are unwilling to participate when someone else has alleged a complaint, then discrimination cannot be addressed. In other words, retaliation is illegal because it has a "chilling" effect on the willingness of individuals to come forward.

Employment protections

Individuals who file a claim believing they have experienced discrimination are protected. Individuals who are interviewed, give statements, or testify about the alleged wrongful employment action are also protected.

What kind of "participation" activity is protected?

- Filing a charge, an internal complaint, or a lawsuit alleging discrimination;
- Being a witness in an investigation or a formal proceeding of a charge or lawsuit;
- Communicating with a manager or supervisor about discrimination or harassment;
- Answering questions during an employer investigation of discrimination or harassment;
- Refusing to follow company practice, policy, or management orders that would result in discrimination;
- Resisting sexual advances or intervening to protect others;
- Requesting a disability or religious accommodation; and
- Asking managers or coworkers about salary information to uncover potentially discriminatory wages.

This isn't a complete list. Any activity that brings discrimination to light is protected under discrimination laws. Each of these examples describes behavior that must be protected so discrimination in the workplace can be investigated and eliminated.

Examples of retaliatory actions

A company cannot fire, demote, harass, or otherwise retaliate against a person for engaging in protected activity. The following are examples where the Equal Employment Opportunity Commission (EEOC) found retaliation:

- A manager placed information about prior discrimination complaints in an employee's personnel file to prevent her from obtaining a promotion.
- Two panelists who were interviewing candidates for a promotion were involved in either current or prior discrimination complaints filed by one of the employees.
- An employer took away a perk (use of a company car) from an employee who had recently filed a discrimination claim.
- An employee was given a lower performance appraisal than was warranted.
- An employee was transferred to a less desirable position.
- An employee received increased scrutiny.
- Management made work more difficult by purposefully changing a work schedule to conflict with family responsibilities.
- Management engaged in verbal or physical abuse with an employee.

Close proximity in time is also a factor reviewed by courts and the EEOC to determine when an action against an employee is retaliatory. The closer in time the alleged retaliatory behavior is to the charge or the participation in the discrimination proceeding, the more likely it will be found to be retaliation.

If someone files a charge or participates in an investigation, are they protected forever? No. You're free to discipline or fire workers if the reason is nondiscriminatory and nonretaliatory. However, you will carry the burden of proof to establish a nondiscriminatory and nonretaliatory reason for the action.

The EEOC will file suit against companies that allegedly retaliate. In a recent news release, it announced it had filed suit against TCI, a recycler of electrical equipment at a plant in Pell City, Alabama. According to the lawsuit, after a female filed an EEOC discrimination charge for failure to hire based on gender, TCI interviewed a management employee who supported the allegation saying TCI had a longtime practice of not hiring female laborers. When the company was unsuccessful in getting the manager to change his statement, it terminated his employment. The EEOC filed suit on his behalf seeking money damages, compensatory and punitive, and injunctive relief to prevent such unlawful conduct in the future.

Best practices

Here are some best practices you should consider implementing to reduce your liability for retaliation claims:

- Have a policy that your company will not tolerate discrimination or retaliation and that employees who come forward in good faith will be protected.
- Have a policy that provides several ways for employees to complain about discrimination (e.g., hotline, HR, certain executives).
- Investigate every complaint.
- Document performance so that when you want to terminate an employee who has complained or participated, you will have documentation of poor performance before the discrimination charge was filed.

Roberta Fields is an attorney in the Oklahoma City office of McAfee & Taft. She can be reached at roberta.fields@mcafeetaft.com. ■

HARASSMENT

Proposed harassment guidance broadens employers' obligations under EEO law

DE | MD | NJ | PA | VA

by Allison Hawkins and Amy Wilkes, Burr & Forman LLP

On October 2, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register its notice of proposed guidance on "Enforcement Guidance of Harassment in the Workplace." The guidance incorporates updates reflecting current case law governing workplace harassment and addresses the proliferation of digital technology and how social media postings and other off-work conduct could contribute to a hostile work environment. It further illustrates a wide range of scenarios showcasing actionable harassment.

Covered basis

The guidance makes clear that federal equal employment opportunity (EEO) statutes only protect against harassment if it's based on an employee's legally protected characteristics, such as race, color, national origin, religion, sex, age, physical and mental disability, and genetic information.

Building in part on case law over the past 25 years and in part on positions taken by the commission, it goes on to provide that "sex-based" discrimination includes harassment based on pregnancy, childbirth, and other related medical conditions such as a worker's "reproductive decisions," including "contraception or abortion," and that "sex-based" discrimination incorporates protections for LGBTQ+ workers against harassment based on sexual orientation and gender identity. It also provides protections for "sex-based" stereotyping.

Notably, under the proposed guidance, the EEOC would recognize claims for perceptional-based harassment, whereby harassment is based on the perception that an individual has a particular protected characteristic, even if that perception turns out to be incorrect. Moreover, the EEOC would recognize claims under federal EEO law for "association harassment," whereby a complainant associates with someone in a different protected class or suffers harassment because they associate with someone in the same protected class.

Causation

The guidance reaffirms that a causation determination of whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances. It provides numerous examples that reflect a wide range of scenarios wherein causation may or may not be established.

The scenarios reflect findings where the conduct involved alleges facially discriminatory conduct, stereotyping, situational context evaluations, close timing, and comparator evidence.

Narrowing the objective standard

To establish a hostile work environment, an employee must show there's conduct that is both subjectively and objectively hostile. Notably, the guidance states that whether conduct is objectively hostile "should be made from the perspective of a reasonable person of the complainant's protected class."

The traditional "reasonable person" standard wasn't so limited. In the EEOC's view, "personal or situational characteristics," such as age differential or undocumented worker status, also affect both the objective and the subjective reasonableness assessment—a position not shared by all the courts.

Conduct not directed at the employee

The guidance provides that an individual who hasn't personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging they have been harmed by unlawful harassment of a third party.

For example, an employee who is forced to engage in unlawful harassment of another employee may have their own claim under the law, even though they weren't personally subjected to unlawful harassment.

Conduct outside the workplace

The guidance broadly considers conduct occurring in a non-work-related context as part of a hostile work environment. The EEOC provides several examples where an employer may have an obligation to take action against conduct that occurs in a non-work-related context.

In the commission's view, an employer may be liable for harassment if the conduct simply "impacts the workplace." Here are two examples that illustrate this:

- If "a Black employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment."
- If "an Arab-American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly, or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment."

The guidance significantly stretches current case law, which typically only considers outside-of-work conduct when it's carried out by an employee with direct supervisory authority, occurs at a work-related event, or occurs between coworkers who constantly work with and see each other inside the workplace. The guidance notes that the EEOC's broadened stance is in light of the proliferation of digital technology, such as electronic communications using private phones, computers, or social media accounts, that often bleeds into the workplace.

Framework of liability

Consistent with governing case law, the guidance sets forth several frameworks under which harassment claims will be analyzed. Which framework is applicable depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Once the status of the harasser is determined, the appropriate standard will be applied to assess employer liability for a hostile work environment.

Automatic liability. An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.

Vicarious liability. If harassment by a supervisor creates a hostile work environment that doesn't include a tangible employment action, the employer can raise an affirmative defense to liability or damages.

Negligence. If harassment comes from a nonsupervisory employee or nonemployee, the negligence standard is principally applied.

Expansion of liability standards that apply in harassment cases

The guidance also expands on the circumstances in which an employer may be subject to automatic liability. Since the Supreme Court's *Faragher/Ellerth* rulings, the "supervisor" designation often becomes a key issue in determining an employer's liability.

In the EEOC's view, a coworker is a supervisor if the complainant reasonably believed the coworker had the power to recommend or influence tangible employment actions (e.g., hiring, firing, and demotions) against them. This "reasonable belief" approach would allow a coworker to be considered a supervisor even if the coworker had no power to take or influence tangible employment actions against a complainant.

This guidance appears to contradict the Supreme Court's instruction to limit the supervisor's inquiry into whether the harasser actually was empowered by the employer to take tangible employment actions against the complainant.

Employer's reporting mechanism not required

An employer has an affirmative defense to hostile work environment harassment when it can show both that it took reasonable steps to prevent and correct harassment and that the employee unreasonably failed to take advantage of those opportunities or take other steps to avoid the harassment.

The guidance provides that, even if the employee didn't use the employer's reporting mechanism to complain of harassment, other actions—such as filing a grievance with a union—may mean the employer has been notified of the concern, and the affirmative defense cannot be used.

Bottom line

The public is invited to submit comments and view the document via the federal e-regulation website until November 1.

Notably, EEOC guidance doesn't have the force of law, but it provides insight into how the EEOC will interpret and seek to enforce the federal EEO laws.

Regardless of changes, management and HR executives will need to continue antiharassment efforts that have been put into place over the last 25 years. Maintain clear and robust antiharassment policies, provide training, thoroughly investigate complaints of harassment, and take appropriate corrective action when an investigation indicates inappropriate conduct. Burr and Forman attorneys are well versed in antiharassment efforts and are available to assist in this important area.

Allison Hawkins and Amy Wilkes are attorneys with Burr & Forman LLP in Birmingham, Alabama, and can be reached at ahawkins@burr.com and awilkes@burr.com. ■

EXEMPT EMPLOYEES

Is it 2019 or 2016? DOL proposes FLSA exempt salary threshold increase

DE | MD | NJ | PA | VA

by John David Gardiner, Bodman PLC

On August 30, 2023, the U.S. Department of Labor (DOL) announced a much-anticipated notice of proposed rulemaking (NPRM) that, if implemented, would increase the minimum salary for exemption under the Fair Labor Standards Act (FLSA) by over 50% to $1,059 per week (the equivalent of $55,068 per year). The agency is also proposing adding an automatic updating mechanism to the regulations. Because the salary threshold amount referenced in the NPRM is based on 2022 data (which isn't yet finalized), it's likely that the annual salary threshold would be as high as $60,000 by the time a final rule is issued.

Current proposal

This is what we can glean now from the DOL's NPRM:

- It would increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage census region (currently the South), which would be $1,059 per week ($55,068 annually) based on current data.
- It would apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands and increase the special salary levels for American Samoa and the motion picture industry.
- It would increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried employees nationally, which would be $143,988 per year based on current data.
- It would automatically update the earnings thresholds every three years with current wage data to maintain their effectiveness.

Under the FLSA, an employer may elect to treat an otherwise exempt employee as nonexempt. Keep in mind that you may not go the other way and elect to treat a nonexempt employee as exempt.

Nonexempt employees must be paid an hourly wage at or above the minimum wage and time and one-half base hourly pay for time worked in excess of 40 hours in a given workweek. Such an election by an employer is both cumbersome and often unwelcome by existing exempt employees, however.

Past proposals

The DOL last updated the executive, administrative, and professional (EAP) exemption regulations in 2019. That update—which included setting the standard salary level test at its current amount of $684 per week (equivalent to a $35,568 annual salary)—has been in effect since January 1, 2020. In 2016, the DOL attempted to increase the salary threshold, but that initiative was initially blocked at the end of 2017 and subsequently tackled in courts.

The Department is not proposing changes to the standard duties test—consistent with its approach in both the 2016 and 2019 rules.

Public comments

The DOL welcomes public comments regarding the NPRM within 60 days from the publication date in the *Federal Register*, or on or before November 7, 2023, unless the public comment period is extended.

The exact timeline for the DOL's publication of a final rule, or when a final rule might go into effect, is murky. In 2019, the proposed rule and final rule took approximately 10 months. If this rulemaking process follows a similar route, the final rule could be in effect by the second half of 2024.

The DOL also has an acting secretary rather than a permanent, confirmed secretary of labor, which some have indicated violates the Senate's constitutional Advice and Consent powers. It's a virtual certainty that any final rule will be challenged in various courts.

Legal challenges

The current DOL proposal includes a severability provision, which if enforced would have the operative effect of keeping most parts of the rule in place if one piece of the rule is eventually invalidated in court.

Two legal rulings loom large as far as prospective challenges to the DOL's proposed salary-based changes to overtime exemptions under the FLSA:

- In 2017, a Texas-based U.S. district court struck down an attempt by the Obama administration to raise the salary threshold to $47,476. By focusing too heavily on the amount of money workers make instead of their job duties, the Obama DOL expanded overtime protections to workers Congress sought to exclude, Judge Amos Mazzant said in that ruling. Judge Mazzant—an Obama appointee backed by Texas's Republican senators—is still a sitting judge in the Eastern District of Texas.
- From the U.S. Supreme Court, Justice Brett Kavanaugh has recently implied that overtime laws shouldn't consider pay at all. In his dissent in *Helix Energy Solutions Group, Inc. v. Hewitt*, Kavanaugh wrote, "The [FLSA] focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So, it is questionable whether the [DOL's] regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."

The question now is whether the current proposal will share a fate with the 2016 proposal or the 2019 proposal. Keep the DeLorean at the ready; we are in for an interesting start to 2024—and beyond.

John David Gardiner is an attorney with Bodman PLC in Grand Rapids. He can be reached at 616-205-3123 or jgardiner@bodmanlaw.com. ■

PAYROLL DEDUCTIONS

Employers: Take care when recovering overpayments, debt from employees

DE | MD | NJ | PA | VA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

There are three broad categories of deductions employers make from employee paychecks. The first, legally required deductions, comes in the form of income tax and wage garnishments. The second, deductions on employees' behalf, is withholdings for insurance premiums or charitable contributions. The third category—and the focus of this column—is deductions for the employer's benefit. Employers may seek to take deductions for overpayment, employee theft, or docking for cash shortages and breakage. When doing so, you must follow both federal and state law to avoid possible penalties and liquidated damages.

Be proactive

Whether an employer will be successful in recovering an overpayment or a loan from an employee depends in large part on its diligence in implementing and maintaining the right policies and documents. For starters, employers should consider adopting policies that address deductions from pay for overpayments, loans, or employee theft.

The policies should explain that the employer will make deductions from employees' pay under these circumstances. While not required in Arizona, a best practice is to have employees sign an acknowledgment of receipt and understanding of this policy.

If the money an employee owes is a result of a loan, the employer should require the individual to sign a promissory note outlining the terms of the loan, the mechanisms for repayment (during and following employment), and the consequences for failure to repay the loan. The promissory note should also include an authorization to deduct "payments" during employment and that the employer will deduct the full amount permitted by law from the final paycheck if the loan remains outstanding when the employee ends employment.

Deductions must comply with applicable laws

The Fair Labor Standards Act (FLSA) allows employers to deduct wage overpayments from future wages even if the deduction causes the employee's wages to fall below the minimum wage. Depending on the state the employee resides in, some state laws may conflict with the FLSA for the employee's benefit.

Federal Watch

DOL releases report on worst forms of child labor. The U.S. Department of Labor (DOL) on September 26 released its 22nd edition of the "Findings on the Worst Forms of Child Labor," which spotlights child labor abuses globally and reviews progress made by some countries to meet international commitments to eliminate abuses. The situations examined include trafficking, debt bondage, forced labor, hazardous work, commercial sexual exploitation, and the use of children in armed conflict or illicit activities. The International Labor Organization and the United Nations Children's Fund estimate that 160 million children—almost one in 10 children worldwide—toiled in child labor in 2020, which is an increase of 8 million children since 2016. Nearly half work in conditions likely to harm their safety, health, or morals. The report also details how governments are working to eliminate child labor through legislation, law enforcement, policies, and social programs. The report provides more than 2,000 country-specific recommendations for government action in each of those areas.

EEOC announces new Strategic Enforcement Plan. The Equal Employment Opportunity Commission (EEOC) in September announced its Strategic Enforcement Plan (SEP) for fiscal years 2024 through 2028. In addition to continuing to focus on areas like discrimination, equal pay, systemic harassment, and retaliation, the new SEP is aimed at promoting inclusive workplaces and responding to a national call for racial and economic justice. The new SEP also commits the EEOC to supporting employer efforts to proactively identify and address barriers to equal employment opportunity, cultivate a diverse pool of qualified workers, and foster inclusive workplaces.

EEOC and DOL announce partnership to maximize enforcement. The Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in September announced a memorandum of understanding to enhance and maximize the enforcement of federal laws and regulations. The agreement formalizes and increases coordination between the agencies through information sharing, joint investigations, training, and outreach. The document outlines procedures to be followed by both the EEOC and WHD as they together elevate workplace justice issues of mutual interest across the country. "This collaboration will further effective outreach and enforcement with respect to the federal laws that advance equal employment opportunity and fair pay, including the recently enacted PUMP (Providing Urgent Maternal Protections) Act and Pregnant Workers Fairness Act," EEOC Chair Charlotte A. Burrows said. ■

For example, Arizona law only allows deductions from an employee's paycheck for overpayment so long as the deductions don't cause the worker's pay to fall below Arizona's minimum wage. If the deduction for the total overpayment would cause the employee's pay to fall below the minimum wage, the employer would need to take deductions over several pay periods to comply with Arizona law.

Recovering overpayment from former employees

Recovering overpayments from former employees can be tricky. Employers may need to make swift decisions if the final paycheck hasn't been issued. It's best to contact the former employee first to request the money, especially if the overpayment can't be fully deducted from the final paycheck.

Making payment arrangements may increase the likelihood of full recovery of the overpayment. If the employee ignores attempts to collect or refuses to pay back the overpayment, the employer will need to consider the next best course of action. If the final paycheck hasn't been issued, the employer can deduct the maximum amount permitted by law. If overpayment remains, the employer may need to consider whether legal action should be taken or whether to treat the overpayment as bad debt.

In deciding whether to take legal action, employers should consider employees' resources. If an employee doesn't have resources to collect, legal action may be useless and expensive. And this past December, Arizona made it increasingly difficult to collect on a judgment or garnish wages.

A word to the wise

Employers should be prepared to address overpayment, theft, or loans and how to collect the money, especially from a departed employee. Once the overpayment is discovered, priority one is to correct the problem. This will reduce the overpayment that needs to be recovered and prevents the recurrence of recover issues.

When in doubt about what you can deduct from an employee's wages and when, contact qualified legal counsel to obtain guidance on the proper course of action.

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to the Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on human resources matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082. ■

EMERGENCY PREPAREDNESS

Facing the storm: Natural disasters trigger need for employer preparation

DE | MD | NJ | PA | VA

by Tammy Binford

Extreme natural disasters—fires, floods, hurricanes, and more—increasingly dominate news coverage. But the full effect of such tragedies outlasts the headlines. And it's not just fires and storms. Extreme heat events also threaten the health and safety of people all around the world.

Employers are certainly not immune. In fact, the increasing number and severity of natural disasters make it more essential for employers to develop plans that will get them back in business and enable them to help employees recover when disaster strikes.

Making plans

Dangerous weather and other natural disasters often shut down operations, but even after reopening, businesses can expect absenteeism and turnover because employees will continue to suffer a disaster's effects. Also, when employees do manage to return to work, they often will be less productive because of worries about their future.

Employers can cope with the possibility of natural disasters by developing business continuity plans. Writing for *Forbes* in September 2022, Holly Welch Stubbing—CEO of E4E Relief, a company helping businesses respond to crises—advised creating a people-focused plan that includes evacuation planning, data storage and security, internal crisis communications, organizational recovery, and a return-to-work strategy.

Stubbing advised creating a team made up of key stakeholder groups of the organization, including IT and operations. The team should be able to conduct a risk assessment and business impact analysis that will provide the information and insight needed to develop plans for recovery.

Stubbing emphasized the importance of understanding the long-term effects for employees. They may not be able to return to work quickly, and they likely will suffer the effects of unexpected expenses and losses not easily overcome.

"HR leaders are crucial in sustaining the values of the organization and optimizing adaptability for unexpected conditions," Stubbing wrote. "While we can't predict when and where disasters will strike, we can ensure we stand ready to provide a compassionate response to our most important asset—our people."

Legal obligations

Employers also must be aware of legal obligations related to disasters, including some federal laws that are implicated.

Fair Labor Standards Act (FLSA). Even if a business is closed for a time, employees classified exempt under the FLSA must be paid their full salary if the business is closed for less than a full workweek. But the employer can require exempt employees to use accrued leave for that time.

Employees classified nonexempt under the FLSA are required to be paid only for hours they work and, therefore, aren't required to be paid if the employer can't provide work because of a natural disaster.

However, nonexempt employees who work fluctuating workweeks and receive fixed salaries must be paid their full weekly salary for any week in which any work was performed.

Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires employers with at least 100 employees to give at least 60 days' notice of plant closings and/or mass layoffs.

An exception exists when the closing or layoff is a direct result of a natural disaster, but the law still requires employers to give as much notice as is "practicable." If an employer gives less than 60 days' notice, it must prove the exception is justified.

Occupational Safety and Health Act (OSH Act). Because natural disasters can create workplace hazards, the Occupational Safety and Health Administration (OSHA) provides a number of resources outlining emergency preparedness and responses related to weather and other natural disasters. (See osha.gov/emergency-preparedness.)

Far-reaching effects

The effects of disasters go beyond the local level and reach around the world. The United Nations Development Programme—a U.N. agency focused on overcoming poverty and achieving sustainable economic growth and development—published a report in April 2016 titled "Climate Change and Labour: Impacts of Heat in the Workplace."

Among the key findings:

- Excessive workplace heat is an occupational health and productivity danger. High temperatures and dehydration cause heat exhaustion, heat stroke, and even death. Letting workers slow down work and limiting their hours can protect them from heat danger, but those steps also reduce productivity, economic output, and income.
- The southern United States is among the areas around the world identified as a highly exposed zone.
- Future climate change will increase losses.
- Heat extremes affect the habitability of regions, especially in the long term, and may already constitute an important driver of migration internally and internationally.
- Actions are needed to protect workers and employers now and in the future, including low-cost measures such as assured access to drinking water in workplaces, frequent rest breaks, and management of output targets. ■

HIRING

Using social media to screen job candidates? Know the legal, ethical concerns

DE | MD | NJ | PA | VA

by Tammy Binford

Checking job candidates' social media posts has become common practice. Even if an employer enlists a separate company to conduct a formal background check, a hiring manager or an HR professional may take a quick look at the candidate's Internet presence. That practice may seem to be a fast, easy way to get to know a potential employee early in the hiring process, but it also presents legal and ethical challenges.

What employers are doing

In June, ResumeBuilder.com surveyed 1,013 hiring managers and found that most check job candidates' social media accounts at least some of the time.

The survey found that 31% said they always look at candidates' social media, 44% said they sometimes do, and 13% said they rarely do. Just 12% said they never look at candidates' social media as part of the hiring process.

The survey also found that 41% of the survey respondents said checking social media is definitely acceptable at their organization, and 36% think it is.

The survey found 14% of respondents were unsure if checking candidates' social media is an acceptable practice at their company, 6% didn't believe it's acceptable at their employer, and 2% were sure it's not acceptable.

Most of the hiring managers who use social media as part of the candidate evaluation process (57%) said they check before the interview, and 43% said they typically view social media after the interview.

The survey found that Facebook was the most viewed social media, but smaller numbers cited Instagram, Twitter (now known as X), and TikTok. The survey didn't ask about employers' use of LinkedIn.

Dubious practices

The ResumeBuilder.com survey also turned up some risky moves employers make. Sixty-eight percent of the hiring managers responding to the survey admitted they use social media to find answers to illegal interview questions.

Federal, state, and local antidiscrimination laws prohibit employers from considering certain characteristics when making employment decisions. For example, on the federal level, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, national origin, sex, and religion.

The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with a disability, and the Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age over 40. The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination based on an applicant's or employee's genetic information.

Despite those legal protections for candidates and employees, some employers try to use social media to learn about protected characteristics. The ResumeBuilder.com survey found that, in order of frequency, hiring managers admitted to passing up candidates after learning their age, politics, race/ethnicity, sexual orientation, gender identity, marital status, disability status, pregnancy status, and religion.

Why check social media?

ResumeBuilder.com's survey asked hiring managers why they check social media. Signs of unprofessional behavior and illegal activity were the most likely reasons hiring managers cited for rejecting candidates.

But employers cited other reasons for checking social media posts, including to satisfy curiosity and to see if candidates are invested in their careers.

One common reason cited was to ensure a good cultural fit. That can be risky because employers may cite "fit" as a justification to reject candidates for unlawful reasons.

Such legal risks lead some employers to rely on companies that offer expertise and software designed to find information on candidates in legally sound ways.

One background check company, Accurate, says its product finds and analyzes over a dozen risk categories in social media posts, including insults and bullying, toxic language, and threats of violence. Its technology searches the top social media platforms for negative text and images, and human analysts review the results.

Employers aren't just checking social media as part of the hiring process. They also sometimes look at their current employees' activity. Staffing firm Express Employment Professionals in January released a poll it commissioned from The Harris Poll showing 88% of the managers included in the survey would consider firing employees for content found in workers' posts.

The survey showed that offenses considered grounds for firing include publishing content damaging to the company's reputation, revealing confidential company information, showcasing and/or mentioning illegal drug use, violating the company's social media use policy or contract, and showcasing and/or mentioning underage drinking. ■

MID-ATLANTIC EMPLOYMENT LAW LETTER (ISSN 2689-7792) is published monthly for $499 per year by **BLR®—Business and Learning Resources,** 5511 Virginia Way, Suite 150, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to Content Manager Sean Richardson, srichardson@blr.com