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EXEMPT EMPLOYEES

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

IL | IN | MI | OH | WI

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 work week. 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

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1, 2020. In 2016, the DOL attempted to increase the salary threshold, but that initiative was 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.

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EMPLOYMENT LAW

Winds of change in Michigan: Pending statutory changes and proposals

IL	IN	**MI**	OH	WI

by Gary S. Fealk, Bodman PLC

As a result of the 2022 election, the Democratic party took control of the Michigan House and Senate. This, combined with a sitting Democratic governor, set the stage for employee-friendly changes and proposals in employment law in Michigan.

Changes in law

The following measures have already been passed in Michigan in 2023:

- Repeal of right to work, meaning clauses and union contracts that make the payment of dues and fees mandatory are now lawful. This change will go into effect in March 2024.
- Prevailing wage has been reinstituted. Effective March 2024, Michigan will require contractors on state construction projects to pay the "prevailing wage," equivalent to a union-type wage, and report wages to the state to verify compliance.
- Amendments to the Michigan Civil Rights Act. The following protected classifications were added to the Civil Rights Act: sexual orientation, gender identity, abortion, and racial/ethnic hairstyles.

Significant proposals

The following pending bills appear to have support and could significantly alter Michigan's employment law landscape:

- **House Bill (HB) 4023** would prohibit a temporary labor service from providing labor at a jobsite where a strike, lockout, or labor dispute exists.
- **HB 4390** would redefine who is an independent contractor. To qualify as a contactor, an individual would have to be free from the employer's control and direction when it comes to the performance of work; perform work that's outside the usual course of business; and be customarily engaged in an independently established trade, occupation, or business of the same work the individual performs for the employer. There are no exceptions in the bill, and if passed, it will be the most onerous contractor test in the nation.
- **HB 4399** would prohibit employers from requiring employees to agree to a noncompete clause, unless the employer provides applicants with written notice that a noncompete clause is required for the position; before hiring, discloses in writing the terms of the noncompete agreement; and posts the law or summary in a conspicuous place in the worksite. The bill would also prohibit noncompete agreements for low-wage workers (within 138% of the poverty line).
- **HBs 4292** and **4396** would expand whistleblower protection to independent contractors.

Takeaway

The bottom line is that the Michigan Legislature has already made employee-friendly changes to Michigan employment laws, and more employee-friendly regulation is expected.

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WORKER'S COMPENSATION

Mental injury not compensable under Worker's Compensation Act

IL | IN | MI | OH | **WI**

by David C. McCormack, Axley Attorneys

In a recent case before a state appeals court, the Wisconsin Labor and Industry Review Commission (LIRC) appealed a circuit court ruling reversing its determination that an employee hadn't suffered a mental injury compensable under the Worker's Compensation Act.

Background

Timothy Wotnoske was employed by the Wisconsin Department of Corrections (DOC) as a correctional officer. He filed a worker's compensation claim for post-traumatic stress disorder (PTSD), depression, and panic disorder after experiencing several incidents, including working in prisons during two unexpected power outages, working in another when inmates rushed him after a riot, supervisors' accusing him of work rule violations and launching investigations against him, and being sexually harassed by a coworker.

The claim was heard by an administrative law judge (ALJ). At the hearing, Wotnoske presented testimony of an experienced correctional officer who opined that Wotnoske's experiences were unusual. A medical expert testified that Wotnoske suffered from PTSD, major depressive disorder, and panic disorder and that the above incidents caused his mental injury.

In contrast, the DOC presented testimony that Wotnoske's experiences weren't unusually stressful because it trains its correctional officers on how to respond to power outages and unruly inmates in its institutions. It also presented medical expert testimony that his employment wasn't the cause of his behavioral and psychological difficulties, and his underlying personality disorder was long-standing.

Initial ruling

The ALJ ruled in favor of Wotnoske, finding that he suffered a compensable injury as a result of emotional stresses that were greater than those a correctional officer can typically be expected to experience on the job. The DOC petitioned for review before the LIRC.

On review, the LIRC reversed the ALJ's decision, finding that "the incidents the applicant experienced while

employed as a correctional guard for the employer were not of greater dimension than the day-to-day emotional strains and tensions that all correctional guards can be expected to experience in their work."

Wotnoske appealed the LIRC's ruling to the circuit court, and the circuit court reversed the LIRC's decision and upheld the ALJ's finding that his mental injuries were compensable. The DOC appealed.

Appeal

The appeals court noted its narrow basis of review, stating, "The court affirms LIRC's decision unless it acted without proper authority or exceeded its powers, its decision was procured by fraud, or its findings of fact do not support its order or award."

Importantly, the court clarified its role as not reviewing the facts from the beginning but instead accepting the LIRC's factual findings if they're supported by substantial and credible evidence. It noted there was ample evidence to support the LIRC's finding that Wotnoske hadn't met his burden of proving he was subject to situations as a DOC correctional officer that were more stressful than situations a similarly situated DOC employee might experience.

With regard to the medical evidence Wotnoske presented, establishing that unusual work incidents caused him mental injuries, the appeals court observed the DOC also presented medical evidence to the contrary and stated, "It is not our place to weigh the competing medical evidence to reach a different conclusion than LIRC did as long as the evidence LIRC reviewed supports its findings."

It reversed the circuit court and affirmed the LIRC's determination that he didn't suffer a compensable, nontraumatic mental injury. *Wotnoske v. Lab. & Indus. Rev. Comm'n,* no. 2021AP1120 (Wis. Ct. App., Sept. 6, 2023) (unpublished).

Bottom line

Workers claiming worker's compensation for a medical injury must establish that the employment incidents causing the mental injury are greater than those a similar worker can typically be expected to experience on the job.

Judicial review of an LIRC determination is narrow. Upon review of an LIRC ruling, the reviewing court must affirm the LIRC's decision unless it acted without proper authority or exceeded its powers, its decision was procured by fraud, or its findings of fact don't support its order or award.

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RETALIATION

Retaliation: The most successful discrimination claim

IL | IN | MI | OH | WI

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, or give statements, or who testify about the alleged wrongful employment action are also protected.

What kind of "participation" activity is protected?

- Filing a charge, internal complaint, or lawsuit alleging discrimination;
- Being a witness in an investigation or 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 of Alabama, 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.

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WAGE AND HOUR LAW

For the wages of sin is . . . $145,000?

IL | IN | MI | OH | WI

by Jake Crawford, McAfee & Taft

A California employer recently learned the hard way that a competent legal strategy for defending against a Fair Labor Standards Act (FLSA) claim shouldn't include hiring a supposed priest to dupe employees. And, yes, that is easily one of the top five weirdest sentences I have ever written. Let me explain.

Cash or check

In May 2022, the U.S. Department of Labor (DOL) filed a lawsuit against a company, along with its owners and general manager, that operated restaurants in Sacramento and Placer counties in California. The DOL accused the employer of implementing a scheme to avoid recording overtime hours worked by nonexempt employees and to avoid paying them at the overtime rate (time-and-a-half) mandated by the FLSA. Allegedly, the employer paid nonexempt employees by check for time worked up to 40 hours in a workweek but by cash for all time worked in excess of 40 hours to ensure those hours weren't recorded.

Before filing the lawsuit, the DOL's Wage and Hour Division (WHD) conducted an investigation into the employer's pay practices. It alleged the employer attempted to impede the investigation by instructing employees to lie to federal investigators about the

number of hours they worked. The WHD eventually issued findings that the employer had violated the FLSA's recordkeeping and overtime pay requirements. According to some of the employees, it was at this point the employer found religion—just not in the way one might hope.

Father, forgive me

Employees reported to the DOL that after the WHD issued its findings, the employer's general manager arranged for a "priest" to come to the restaurant to hear employees' confessions. Confession is a sacrament observed by many religious persons, particularly adherents to Roman Catholicism, in which a person confesses their sins to a priest to obtain absolution.

Allegedly, the priest provided by the employer only had a real interest in work-related "sins." According to the employees, during confession the priest asked them if they had done anything to harm the employer, had any bad intentions against the employer, or had ever wronged the employer. Unsurprisingly, the DOL took the position that the employer's purpose in bringing in the priest was to intimidate workers who had spoken with the WHD investigators.

Penance

Eventually, the employer agreed to a consent judgment that required it and its owners to pay a total of $145,000, which included $70,000 in back wages, another $70,000 in liquidated damages, and $5,000 in civil penalties based on the willful nature of its violations.

The consent judgment didn't include any admission or finding about the veracity of the employees' allegations involving the priest. Nonetheless, this case, in all its outlandishness, serves as a good reminder that it's a violation of the FLSA to make any attempt to interfere with a DOL investigation or to prevent employees from exercising their rights under the FLSA, speaking with DOL investigators, or participating in an investigation. *Julie A. Su, acting Secretary of Labor, U.S. Department of Labor vs. Che Garibaldi dba Taqueria Garibaldi, a California corporation; Eduardo Hernandez; Hector Manual Martinez Galindo; and Alejandro Rodriguez.*

Takeaway

If the DOL comes knocking, and you develop a strategy that involves going online to purchase a priest costume, maybe resist the urge to go through with it. Instead, contact an attorney who has experience dealing with such investigations.

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HARASSMENT

Proposed harassment guidance broadens employers' obligations under EEO law

IL | IN | MI | OH | WI

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 where 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," where 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 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

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 where 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/front-line 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 front-line 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. ■

harassment and 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.

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PAYROLL DEDUCTIONS

Employers: Take care when recovering overpayments, debt from employees

IL | IN | MI | OH | WI

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.

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 some state laws make 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.

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UNIONS

In major new decision, NLRB authorizes union recognition without election

IL | IN | MI | OH | WI

by Michael J. Moore and Ashley Faulkner, Steptoe & Johnson PLLC

On August 25, the National Labor Relations Board (NLRB) issued a monumental decision in Cemex Construction Materials Pacific, LLC, enacting a new framework for unions to gain recognition without a formal representation election.

The details

Under the *Cemex* ruling, an employer must either recognize and bargain with a union claiming majority support or promptly file a petition seeking an election challenging (1) whether the union has majority status and (2) whether the alleged majority is an appropriate bargaining unit.

Failing to promptly file a petition, when the union hasn't itself filed a petition for an election will result in an unfair labor practice charge against the subject employer. Likewise, if the employer commits any unfair labor practice after the union's request for recognition, the Board will now dismiss the petition for election filed by the employer and order the employer to bargain with the union.

Prior to this 3-1 decision, absent circumstances that support a finding of serious unfair labor practices by the employer, even if an employer was found to have committed a less significant unfair labor practice leading up to an election, a second election would take place. Now, a finding of an unfair labor practice will result in an order from the Board for automatic recognition of the union and the requirement to bargain with that union.

The *Cemex* decision restores certain elements of the *Joy Silk* standard, which has been dormant for more than 50 years. Under *Joy Silk*, an employer was required to bargain with a union if it demanded recognition and advised the employer of its majority status, unless the employer had a "good-faith basis" to doubt the union's majority status. We previously wrote on NLRB General Counsel Jennifer Abruzzo's intention to resurrect *Joy Silk*, which appears to be coming to fruition in part.

Unlike *Joy Silk*, however, the *Cemex* standard doesn't consider whether employers seeking an election have a good-faith doubt about the union's majority status. Rather, the *Cemex* decision holds that any finding of an unfair labor practice after the union's demand of recognition will, in effect, formulaically result in a bargaining order requiring the employer to recognize the union.

Takeaways

Moving forward, employers must be diligent and promptly petition for a union election if a union claims majority support and the employer doesn't want to voluntarily recognize the union. Employers must also work to eliminate risks of conduct that could be considered by the Board to be an unfair labor practice—or face an order to bargain without the benefit of an election.

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EMERGENCY PREPAREDNESS

Facing the storm: Natural disasters trigger need for employer preparation

IL | IN | MI | OH | WI

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). Since 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

IL | IN | MI | OH | WI

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 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 since 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. ■

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