

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE - WHAT WISCONSIN EMPLOYERS NEED TO KNOW

Tuesday, November 8, 2016 is Election Day. While there is no federal law that requires employers to grant employees leave to vote, Wisconsin law does require voting leave. Wis. Stat. § 6.67. What Wisconsin employers need to know:

- All Wisconsin employers are required to give employees who are eligible to vote up to three consecutive hours of leave to vote while the polls are open. Wisconsin's polls are open from 7:00 AM - 8:00 PM.
- Employers cannot deny this leave on the basis that employees would have adequate time outside of their working hours to vote while the polls are open.
- The law does not require that these hours are paid. However, employers should be cautious about reducing an exempt employee's pay.
- The employee must request the time off to vote prior to the election.
- The employer can specify which three consecutive hours an employee is permitted to utilize as voting leave.
- Employees cannot be penalized for utilizing voting leave.

Two other provisions that Wisconsin employers should be aware of are 1) they may not refuse to let employees serve as election officials under Wis. Stat. § 7.30 or make any threats or inducements to prevent employees from doing so; and 2) they cannot distribute printed materials to employees that contain a threat that if a particular party or candidate is elected that the business will shut down, in whole or in part, or that the salaries or wages of employees will be reduced. Wis. Stat. § 12.07(2)-(3).

EMPLOYMENT LAWSCENE ALERT: OSHA DELAYS ENFORCEMENT OF ANTI-RETALIATION PROVISIONS

On October 12, 2016, the Occupational Health and Safety Administration ("OSHA") agreed to further delay the enforcement of the anti-retaliation provisions of the injury and illness tracking rule until December 1, 2016. Enforcement was originally scheduled to begin August 10, 2016 and then delayed until November 10, 2016. OSHA's agreement to once again delay enforcement of its new anti-retaliation provisions is in response to a request from the U.S. District Court for the Northern District of Texas, which is currently considering a motion

challenging OSHA's new rules.

Despite its self-imposed delay in enforcement of its anti-retaliation provisions, last week, OSHA released a memo with examples discussing in more detail how the new anti-retaliation amendments will be interpreted and implemented by OSHA. See [OSHA Memorandum for Regional Administrators \(10/19/2016\)](#).

OSHA explained that its purpose in including the new anti-retaliation provisions is to address workplace retaliation in three specific areas: (1) Disciplinary Policies; (2) Post-accident Drug Testing Programs; and (3) Employee Incentive Programs. Although neither employee disciplinary policies, post-accident drug testing programs, or employee incentive programs are expressly prohibited by the new rules, employers will need to be careful about how their policies or programs are drafted and enforced so as to not, in the eyes of OSHA, discourage or deter employees from reporting work-related injuries or illnesses.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST UPDATE THEIR FLSA POSTERS

On August 1, 2016, the Department of Labor updated its mandatory Fair Labor Standards Act Minimum Wage poster. All employers subject to the FLSA must display this newly revised poster in prominent locations in the workplace where all employees and applicants can readily see it. The updates to the newly revised poster include information on the consequences of incorrectly classifying workers as independent contractors, information relating to the rights of nursing mothers, updated information regarding DOL enforcement, and revised information relating to tip credits.

Employers must post the new poster immediately. Although employers are only required to post the poster in English, there are also versions available in Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, and Korean. The new version of the poster can be found [here](#).

EMPLOYMENT LAWSCENE ALERT: INCREASED OSHA PENALTIES NOW IN PLACE

Last November, we alerted you ([here](#)) that, in August 2016, OSHA penalties would be

increasing significantly. Those new maximum penalties went into effect on August 1, 2016 and can be applied to any citation issued for a violation that occurred after November 2, 2015. The below chart summarizes the previous penalties and the new penalties, which were increased due to a catch-up provision and an additional increase based on the Consumer Price Index:

| Type of Violation | Former Maximum Penalty | Maximum Penalty as of 8/1/2016 |
|-----------------------------|------------------------|--------------------------------|
| Willful Violation | \$70,000 | \$124,709 |
| Serious Violation | \$7,000 | \$12,471 |
| Other-The-Serious Violation | \$7,000 | \$12,471 |
| De Minimis Violation | \$7,000 | \$12,471 |
| Failure to Abate Violation | \$7,000 | \$12,471 |
| Repeat Violation | \$70,000 | \$124,709 |

OSHA penalties will now be increased annually on January 15 based on the Consumer Price Index. Employers must keep a keen eye on safety now more than ever because OSHA's increased enforcement is now coupled with an increase in monetary penalties.

EMPLOYMENT LAWSCENE ALERT: EEOC INTRODUCES PROPOSED CHANGES TO EEO-1 REPORTING THAT COULD REVEAL PAY DISCRIMINATION

Employers, including federal contractors, with 100 or more employees are required to file employer information reports, called an EEO-1 with the U.S. Equal Opportunity Commission ("EEOC"). The data collected currently includes data on race, ethnicity, and gender.

However, under a revised proposal by the EEOC issued on July 14, 2016, as of March 31, 2018, companies will also need to include data on pay ranges and hours worked. This information must be reported by job category and broken down across 12 pay bands. Employers are to gather wage information from W-2 reports from the prior year, and include not only base salaries but also bonuses, incentive compensation payouts, and payments for paid time off. For non-exempt employees, calculation of hours worked will reflect only hours actually worked and not paid time off. Additionally, for exempt employees, employers can choose to either report actual hours worked if that is traced or report 40 hours per workweek for full-time employees and 20 hours per workweek for part-time employees.

Although the first reporting deadline is not until 2018, the reported information will include 2017 wage information. The EEOC plans to use this information to identify pay discrimination. Therefore, companies need to identify whether there are pay gaps between protected classes that the EEOC might consider suspicious. Companies with pay gaps will need to analyze whether these are caused by legitimate, non-discriminatory, job-related factors such as location, education, or experience. If employers cannot justify wage differences, they will need to consider how to fix the pay gap. Otherwise, there is a real possibility that they will face a pay discrimination suit.

A sample of the proposed EEO-1 Form to collect pay data can be found [here](#) and a Q&A from the EEOC regarding the proposed changes can be found [here](#).

YOUR LEASED EMPLOYEES MAY NOW JOIN A UNION WITH YOUR REGULAR EMPLOYEES - AND THEY DON'T NEED TO ASK YOUR PERMISSION

Today, in *Miller and Anderson, Inc. v. Tradesmen International and Sheet Metal Works International Association, Local Union No. 19, AFL-CIO*, the NLRB decided that, pursuant to the NLRA, temporary or leased employees who work for an employer as joint employees under an agreement with a staffing agency or similar entity do not have to have the employer's consent to join the union that covers that employer's regular employees. The full opinion can be found [here](#). This decision overturns a 2004 NLRB decision, *Oakwood Care Center*, which held that employees who were jointly employed by an employer and a staffing agency could not be in the same bargaining unit without the employer's consent. Today's decision revives a 2000 NLRB decision, *M.B. Sturgis*, which held that both temporary and regular workers could be represented by the same union without the joint consent of the employer and the staffing agency. Under *M.B. Sturgis*, temporary staffing employees could be included in a single bargaining unit with regular employees when: (1) the staffing agency and the employer were determined to be joint employers and (2) the temporary staffing employees shared a "community of interest" with the regular employees. The *M.B. Sturgis* decision by a Clinton-appointed Board upended a 1973 NLRB decision that found that a single bargaining unit of regular employees and leased employees to be inappropriate without the consent of both employers.

The political-weighted pendulum of the Obama-appointed Board continues to swing in favor of the unions by continuing to expand the scope of the NLRA to cover additional employees and additional actions, particularly in the area of joint-employers. This inclusion of leased

employees in an employer's bargaining unit is just another step down that road. Employers must be aware of this decision in any situation where they have leased employees in the same or similar positions as regular employees who are represented by a union or wish to be represented by a union.

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EMPLOYMENT LAWSCENE ALERT: YOUR ARBITRATION AGREEMENTS WITH EMPLOYEES MAY BE INVALID

Last week, the Seventh Circuit Court of Appeals issued a decision stating that class waivers in arbitration agreements for employees are invalid. The Court in *Lewis v. Epic Systems Corp.* adopted the controversial position of the National Labor Relations Board (NLRB) and found that a collective and class action waiver in an employer's contract violated Section 7 of the National Labor Relations Act (NLRA) by prohibiting employees from engaging in collective activity and forcing them into individual arbitration for their wage and hour claims.

The Seventh Circuit based its decision on the concept that the NLRA prohibits an employer from barring workers from engaging in concerted activity. The Court's reasoning followed that, because class and collective actions could be considered concerted activity, an agreement that prohibited such activity was a violation of the NLRA. The Court found that individual arbitration was not bargained for by the employees and could not be rejected without penalty to the employees. Because it found that the provision was illegal under the NLRA, the Court held that the Federal Arbitration Act (FAA) did not mandate enforcement because, under the FAA, an arbitration agreement is not valid where grounds exist for the revocation of the agreement. The Seventh Circuit determined that violation of the NLRA constituted such ground for revocation. Use of arbitration agreements with class and collective prohibitions has long been a point of contention with the NLRB, but until now, it had been an issue that the NLRB was finding little success with in the circuit courts. However, the Seventh Circuit's decision gives the NLRB additional standing for its position, particularly in Wisconsin, Illinois, and Indiana, where the decision applies.

This decision creates a circuit split because the Fifth Circuit has ruled in two separate cases (*Murphy Oil and D.R. Horton*) that mandatory individual arbitration clauses in employment agreements are enforceable. The Fifth Circuit found that the NLRB, in determining that collective and class waivers were illegal under the NLRA, did not give proper deference to the FAA because the NLRA does not contain any specific language that prevents arbitration agreements from being enforced pursuant to their terms. The Fifth Circuit found that the NLRB's interpretation that such clauses violated the NLRA by prohibiting concerted activity was not entitled to the level of deference that the Seventh Circuit found it was. The Second and Eighth Circuits have issued rulings similar to those of the Fifth Circuit. Now with a split in the federal circuits, the issue is ripe for consideration by the U.S. Supreme Court. However, with Justice Scalia's recent death, the Court's precarious 4-4 split, and the political balance of the Court dependent upon the outcome of the Presidential election, the outcome on this issue before the U.S. Supreme is anything but certain, even taking into consideration the Supreme Court's recent strong support for the enforceability of arbitration provisions.

Therefore, until this decision is overruled by the Supreme Court, employers in Wisconsin, Illinois, and Indiana should not limit their employees to individual arbitration or should, at the least, allow employees to opt out of mandatory individual arbitration without penalty.

EMPLOYMENT LAWSCENE ALERT: NEW OSHA ANTI-RETALIATION PROVISION REQUIRES EMPLOYERS TO RETHINK THEIR SAFETY-RELATED POLICIES

Last week, the Occupational Safety and Health Administration (OSHA) finalized new record-keeping and reporting rules that require certain employers to electronically submit information about workplace injuries and illnesses to OSHA. The electronic reporting requirements of the rule apply only to employers with 250 or more employees and to employers with between 20 and 249 employees in certain “high-risk” industries, such as construction and manufacturing. A full list of the affected industries can be found [here](#). The full rule (which can be found [here](#)) goes into effect January 1, 2017, while certain provisions, like the anti-retaliation provision, go into effect August 10, 2016. Non-personal injury and illness information reported under the rule will be posted on a publicly accessible OSHA website. The new rule does not change the requirement that employers with 10 or more workers in most industries prepare injury reports, compile a log of these incidents, and complete an annual summary of work-related illness and injuries, which OSHA can access during an investigation.

The new rule further requires employers to inform workers of their right to report work-related injuries and illnesses without fear of retaliation and provides additional information on employees’ rights to access workplace injury data. Moreover, OSHA’s new rule prohibits any workplace policy or practice that could discourage employees from reporting workplace injuries or illnesses. Such policies subject to greater scrutiny under OSHA’s new anti-retaliation rule could include post-accident drug testing policies. Employers will have to review their safety-related policies to determine if their policies or practices run afoul of OSHA’s new anti-retaliation rule or otherwise discourage employees from reporting workplace safety incidents. The anti-retaliation provisions apply to all employers.

OSHA’s stated purpose for the additional reporting and public access are to increase workplace transparency and to encourage employers to increase their efforts to prevent work-related injuries and illnesses. However, employers should be cautioned that such information will make it easier for OSHA to target companies with multiple injuries or illnesses

for compliance and enforcement actions, despite any precautions that are being taken, as well as open up companies with high rates of illness or injury to increased union organization.

Employers of all sizes and in all industries should continue to strive to achieve workplace safety. They should also immediately review their workplace safety policies to make sure that appropriate anti-retaliation provisions are included.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN TO IMPLEMENT DRUG TESTING RULES FOR UNEMPLOYMENT RECIPIENTS

On Wednesday, May 4, 2016, Wisconsin Governor Scott Walker approved an emergency rule submitted by the Wisconsin Department of Workforce Development. Under this emergency rule, certain individuals receiving unemployment benefits will be required to be drug free in order to continue receiving unemployment benefits.

Specifically, the new rule will require individuals who are receiving unemployment benefits to pass a pre-employment drug screen for new employment where such drug screens are a condition of employment if they want to remain eligible to receive unemployment benefits. Those who fail the drug screen must comply with substance abuse treatment and a job skills assessment to remain eligible for unemployment benefits. Also, individuals who refuse to take a pre-employment drug screen as part of an offer of new employment may be denied unemployment benefits. The new rule will take effect upon official publication later this week.