

Employment LawScene Alert: The EEOC has Started Collecting Required Pay Data: Do You Need to Report and Are You Ready?

On July 15, 2019, after a protracted legal battle, the EEOC began collecting employers' EEO-1 2017 and 2018 payroll data, which may be referred to as Component 2 data. The reporting requirement was originally announced by the Obama administration in 2016, but in 2017, the Trump administration stayed the collection of Component 2 data, citing the burden it imposed on employers. However, in March 2019, the U.S. District Court for the District of Columbia issued an order reinstating the requirement.

Therefore, between now and the deadline of September 30, 2019, all employers with 100 or more employees (both full-time and part-time) must submit the requisite information from calendar years 2017 and 2018 for all employees employed during the relevant "workforce snapshot period," which is an employer-selected payroll period between October 1 and December 31 of the reporting year. Employers, including federal contractors, that have less than 100 employees are not subject to these reporting requirements. Subject employers must provide the EEOC with the following data for employees in the workforce snapshot period: the employees' race/ethnicity and sex; the employee's EEO-1 job classification; the actual hours worked by non-exempt employees; actual hours worked by or proxy hours worked (e.g., 40 hours per week for full-time employees) for exempt employees; and Form W-2 payroll information. Such information does not have to be submitted for each individual employee but can be submitted by identifying, based on race/ethnicity and sex, the number of employees in each EEO-1 job category that fall into each of 12 EEO-1 compensation bands and the aggregate number of hours worked by all employees in each EEO-1 compensation band. The EEOC's stated purpose for collecting such information is to identify and remediate unlawful pay disparities in pay that are based on race/ethnicity and/or sex. Therefore, providing complete and accurate information in all categories is essential.

Employers subject to this requirement should have received correspondence via the U.S. mail and an email from NORC, the research group that is conducting the survey on behalf of the EEOC, notifying them of this obligation. Reminders are also scheduled to be sent in August and September. The EEOC has provided resources for filers at <https://eeocomp2.norc.org>.

Employment LawScene Alert:

Employers Should Confirm that their I-9s Are in Order

Recently, President Trump announced that a new round of workplace immigration raids would be postponed until after July 4. Regardless of when or if these raids happen, all employers should take this time to ensure that they are in compliance with federal law by having proper work authorizations for all of their employees. Workplace authorization is governed by the Immigration and Reform Control Act, which allows U.S. companies to hire and employ only U.S. citizens, non-citizen nationals, lawful permanent residents, and aliens authorized to work in the U.S. Employers must have a Form I-9 on file for every current employee hired on or after November 6, 1986. I-9 forms for former employees must be kept until the later of three years from the employee's hire date or one year after their final date of employment. Such forms can be retained on paper or electronically.

To determine compliance with federal immigration laws for lawful work authorization, employers should conduct an audit of their I-9s to confirm, among other things, that each individual who should have an I-9 on file in fact has one on file; that any and all employment authorization documents are current; that all sections of the I-9 form have been fully filled out; and that any changes, such as a name change, have been properly documented. Corrections to I-9 forms must be handled carefully and in compliance with federal law. We have attorneys experienced in assisting employers with I-9 audits. Failure to properly follow the law regarding the maintenance of I-9 forms, including making corrections, can subject an employer to civil and criminal penalties.

Employment LawScene Alert: It's Too Cold to Work - How Employers Should Handle Wage Deductions in Inclement Weather

Employers in Wisconsin may be closed this week due to the extremely cold temperatures that are predicted on Wednesday and Thursday. If an employer makes that decision, they may be wondering whether or not they need to pay their employees for the days they choose to be closed. For non-exempt employees, the answer is simple: employees must be paid only for time worked. Therefore, if the employer closes and the employee does not perform any work, the employee does not need to be paid. However, the answer is a bit more complicated for exempt employees.

Under the Fair Labor Standards Act ("FLSA"), an employee is considered exempt if they meet certain duties tests and receive compensation on a "salary basis." The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must

receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. An employee will not be considered to be paid on a "salary basis" for any week if deductions are made from an employee's salary for any absence occasioned by the employer or by the operating requirements of the business. However, a deduction may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.

So, can an employer deduct the day's wage from an exempt employee's salary when the employer closes its business due to inclement weather (e.g., extreme cold)? The short answer is no. It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary for any week in which work was performed if the employer closes its operations due to a weather-related emergency or other emergency, such as a power outage. The DOL's position is based, in part, on the FLSA's regulation that provides that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of an emergency, including severe weather, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability. If the employer's operation are closed for a full workweek, no salary must be paid.

Employers are permitted to require that employees utilize their available paid time off during an employer-mandated office closure, whether for a full day or a partial day. However, if the employer does not provide paid time off or if the employee does not have available paid time off, the employer may not deduct from the employee's salary for the closure. The employer may not require that the employee have a negative leave balance or make an already negative leave balance more negative as the result of requiring the employee to take paid time off for an office closure.

On the other hand, when an emergency causes an employee to choose not to report to work for the day, even though the employer remains open for business, the DOL treats such an absence as an absence for personal reasons. Consequently, an employer that remains open for business during inclement weather may lawfully deduct one full day's wages from an exempt employee's salary if that person does not report for work for the day due to adverse weather conditions or otherwise require the employee to utilize paid time off. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of weather-related issues, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule.

Employment LawScene Alert: Company Holiday Parties & Tips for Avoiding Liability

The holidays are upon us, and that means holiday parties. While holiday parties are a good time to reflect on the year and gather employees to boost morale and camaraderie, they also have potential employment law pitfalls that employers should plan to avoid. If throwing a company-sponsored holiday party, employers should keep the following in mind:

1. **Prevent Sexual Harassment.** Although the #MeToo movement has not changed the legal requirements related to sexual harassment, it has certainly brought such issues to the top of employer's minds, and it should stay there during the holiday season and any holiday parties. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of the policies and rules of the company apply. If you become aware of inappropriate conduct that occurs at the holiday party, you should deal with it appropriately. Additionally, if you receive complaints about activities related to the holiday party, you must document the incident and do a proper investigation to deal with those issues.
2. **Reduce the Risk of Alcohol-Related Incidents.** Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated.
3. **Minimize the Risk of Workers' Compensation Liability.** Workers' compensation benefits may be available to employees who suffer a work-related injury or illness. To avoid this liability at a company-sponsored holiday party, the employer should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so companies should use licensed third-parties who have their own insurance coverage to provide food and beverages.
4. **Prevent Wage and Hour Claims.** Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, and ensure that no work is performed during the party and that employees are not under the impression that they are performing work.

Employment LawScene Alert: Voting Leave In Wisconsin - What You Need to Know

With the Wisconsin general election coming up next week on November 6, 2018, now is the time for employers to brush up on their obligations surrounding voting.

All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Other than the time being unpaid, employers may not penalize employees for using voting leave. However, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employees must provide their employers with at least seven days' notice of their need for this leave. Other than the time being unpaid, employers may not penalize employees for using election official leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten business shut down, in whole or in part, or reduction in salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

Employment LawScene Alert: Employers Must Review their Background Check Processes to Ensure Compliance with New Rules

The Fair Credit Reporting Act ("FCRA") requires that employers who request "consumer reports," which include background checks, criminal histories, driving records, and credit reports, from a third-party service about employees and applicants follow certain rules. These rules contain specific requirements for notice, disclosure, and consent both in conjunction with obtaining a report and taking adverse employment action because of information in the

report.

One requirement is that an employer must make certain disclosures **before** the employer takes an adverse action based on information discovered in the consumer report. This includes providing the employee or applicant with a written summary of consumer rights under the FCRA. Recently, the Bureau of Consumer Financial Protection updated its model disclosure to reflect recent legislative changes to the FCRA, such as the consumer's right to place a security freeze or fraud alert on their credit report. The new model form can be found [here](#).

Employers must ensure that their authorizations and disclosures meet all FCRA requirements and that they are providing the correct notifications, including the updated summary of rights.

Employment LawScene Alert: Ruling on Marquette Professor Contains Lessons for Private Employers

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required

procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

Employment LawScene Alert: Supreme Court Decides Class-Action Waivers Are Enforceable for Employees

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, **Seventh**, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA “savings clause,” such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA’s protection of employees’ collective rights displaced the FAA’s favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA’s protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA’s protection of collective rights could not override the FAA’s policy of enforcing arbitration agreements as written.

Based on the Supreme Court’s ruling in *Epic*, employers are now free to include arbitration agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.

Employment LawScene Alert: Employers Should Review Their Employee Non-Solicitation Agreements

On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Company, Inc. v. Lanning* affirming a 2016 Wisconsin Court of Appeals ruling that expanded the scope of Wis. Stat. § 103.465, which governs the enforceability of restrictive covenants, to include employee non-solicitation, or anti-raiding, provisions. We previously posted a blog about the Court of Appeals decision [here](#).

John Lanning, a long-term employee of the Manitowoc Company, signed an agreement whereby he agreed, for a period of two years after the termination of his employment, not to solicit, induce, or encourage any employee of the Manitowoc Company to terminate his or her

employment with the company or to accept employment with a competitor, supplier, or customer of the company. After he terminated his employment, he encouraged multiple employees of the Manitowoc Company to terminate their employment and join him at his new employer, which was a competitor of the Manitowoc Company.

The Wisconsin Supreme Court addressed two questions: 1) Whether employee non-solicitation agreements are “covenants not to compete” governed by Wis. Stat. § 103.465; and 2) if they are, was the provision contained in Lanning’s agreement enforceable.

In answering whether non-solicitation agreements are covenants not to compete, the Court acknowledged that the statute has been applied to agreements viewed as restraints on trade, which may take many forms, and opined that the focus of the inquiry about whether a provision is a covenant not to compete should focus on the effect of the restraint, rather than its label. Therefore, the Court found that, because the non-solicitation provision restricted Lanning’s ability to compete fully with the Manitowoc Company by prohibiting him from soliciting employees and competing in the labor market, it was a restriction on his ability to engage in ordinary competition and was governed by the statute.

The Court stated that the purpose of Wis. Stat. § 103.465 is to invalidate covenants that impose unreasonable restraints on employees. The Court found the employee non-solicitation unenforceable under Wis. Stat. § 103.465 because the non-solicitation provision was unnecessarily broad because it restricted Lanning’s ability to compete fully in the marketplace with the Manitowoc Company by prohibiting him from soliciting all employees wherever they might work in the world. Such a restriction does not allow for the ordinary sort of competition attendant in the free market and, as a result, was an unlawful restraint of trade.

In order to be enforceable under the statute, a covenant not to compete must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive to the employee; and 5) not be contradictory to public policy. Because the Court found that the employee non-solicitation provision that Lanning had signed was not necessary for the protection of the employer, they only addressed that portion of the test. Because words are interpreted to have their plain meaning, the Court found that the words “any employee” contained in Lanning’s agreement prohibited him from soliciting every one of the Manitowoc Company’s 13,000 world-wide employees with no limits as to the nature of the employee’s position, Lanning’s personal familiarity with or influence over the particular employee, or the geographical location in which the employee worked. The company’s contention that it had a protectable interest in maintaining its entire workforce was rejected by the Court, which said that, ordinarily, the protectable interest would be limited to top-level employees, employees with special skills or knowledge important to the employer’s business, or employees with a set of skills that are difficult to replace. Because the employee non-solicitation provision was not limited in any way, the Court found that it was overbroad on its face and unenforceable.

Based on this decision, employers must carefully review their restrictive covenants, particularly employee non-solicitation provisions, to ensure that they are carefully drafted to be necessary to protect their interests and no broader than needed. The focus must be on protectable, identifiable interest of the company. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

Employment LawScene Alert: Multi-Month Need for Leave Disqualifies Employee from ADA Protections

Last week, the Seventh Circuit Court of Appeals issued a decision in which it stated that the Americans with Disabilities Act (ADA) does not require employers to give employees more leave after their Family Medical Leave Act (FMLA) allotment runs out. In *Severson v. Heartland Woodcraft Inc.*, the employee had a back condition for which he took twelve weeks of FMLA leave. At the end of his FMLA leave, he requested an additional two or three months of leave to recover from back surgery. The employer denied his request and terminated his employment, telling him that he could reapply once healthy. Instead, the employee filed suit, claiming that the company had violated the ADA by refusing to grant him a leave of absence and by failing to transfer him to a vacant job or a light duty position.

The ADA prohibits employers from discriminating against employees who are “qualified individuals,” meaning that they can perform the essential functions of their jobs with or without accommodation. The Seventh Circuit upheld the district court’s grant of summary judgment to the employer, finding that the employee was not a “qualified individual” with a disability under the ADA because he could not work, as shown by his need for long-term medical leave. Although there is no bright-line rule for what is considered a disqualifying long-term leave, the Court noted that, while a few days or even a few weeks of non-FMLA time would be acceptable, a period of multiple months is too long as leave does not permit the employee to perform the essential functions of his job. Although the EEOC argued in an amicus brief that a long-term leave of absence is a reasonable accommodation if it is definite, requested in advance, and would allow the worker to return at the end of the leave, the Court rejected this argument stating that such a policy would make the ADA into a medical leave entitlement instead of an anti-discrimination law that requires reasonable accommodations. The Court also rejected the plaintiff’s other reasonable accommodation arguments, as he presented no evidence that there were any vacant positions at the time of his termination or that the company provided light duty to employees in any situation.

Although employers should carefully consider their obligations to employees under both the ADA and the Wisconsin Fair Employment Act, determine whether a requested accommodation is reasonable on a case-by-case basis, and engage in the interactive process with employees, this decision will be helpful in guiding employers that are evaluating employees' requests for extended leave.
