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 chose 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 NRLB 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.

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.

U.S. DOL ANNOUNCES THAT IT WILL PUBLISH FINAL RULE TO UPDATE OVERTIME REGULATIONS

Today, the U.S. Department of Labor announced that it will publish on May 23, 2016 its Final Rule to update the federal regulations defining the overtime exemption for executive, administrative, and professional employees or otherwise known as "white-collar" employees. The pre-publication version of the Final Rule is, however, available now. The final rule will become effective December 1, 2016.

The Final Rule focuses primarily on updating the salary level requirement for white-collar employees, increasing the salary level requirement from $455 per week ($23,660 annually) to $913 per week or $47,476 annually for a full-year employee. The Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule also sets the total annual compensation requirement for highly compensated employees (HCE) subject to minimal duties test to $134,004 up from the current $100,000 salary threshold.

The initial increases to the standard salary level from $455 to $913 per week and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on December 1, 2016. Future automatic updates to those salary level thresholds will be automatically updated every three years beginning on January 1, 2020.

Currently, for an employee to be exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA), an employee must be paid on a salary basis meaning that the employee must receive a predetermined amount of at least $455 per week which cannot be subject to a reduction because of variations in the quality or quantity of the work performed. In addition, the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").

The Final Rule is not changing any of the existing job duty requirements for employees to qualify for the white collar overtime exemption. The Final Rule is also not changing the HCE duties test. The DOL expects that the standard salary level set in the Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt.

The effect of the increase in the salary level test from $455 per week to $913 per week will result in certain employees who are now considered exempt under the current regulations to lose their overtime exemption effective December 1, 2016 unless their employers increase their salary level to the new salary level requirement. The DOL estimates that the change in the salary level requirement will permit approximately 4.2 million more employees who are not currently eligible for overtime under the FLSA to be entitled to overtime once the Final Rule becomes effective on December 1, 2016.

O'Neil Cannon will be hosting a seminar on June 8, 2016 at the Country Springs Hotel in Pewaukee, Wisconsin providing important information and insight for employers on the new overtime rules. Please visit our firm website for more information.

EMPLOYMENT LAWSCENE ALERT: DEFEND TRADE SECRETS ACT OF 2016: EMPLOYERS MUST INCLUDE NEW WHISTLEBLOWER IMMUNITY NOTICE IN CONFIDENTIALITY OR

NON-DISCLOSURE AGREEMENTS

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA") which amends the Economic Espionage Act (18 U.S.C. § 1831, *et seq.*).

The DTSA creates a private cause of action for trade secret misappropriation under federal law and opens a direct avenue for trade secret cases to proceed in federal court. While making it easier for employers to bring suits for trade secret misappropriation in federal court, the DTSA does not replace or preempt state trade secrets laws such as the Wisconsin Uniform Trade Secrets Act ("WUTSA") (Wis. Stat. § 134.90 *et seq.*). This means that an employer who believes that one of its trade secrets may have been misappropriated may proceed under either the DTSA or the WUTSA, or both, to enjoin the misappropriation of a trade secret and remedy the harm.

The DTSA has a similar definition of "trade secrets" that is found in the WUTSA. Like the WUTSA, the DTSA defines the term "trade secret" to include all forms and types of financial, business, scientific, technical, economic, or engineering information where reasonable measures are taken to keep such information secret and the information derives independent economic value, actual or potential, from not being generally known to the public. The DTSA also defines the term "misappropriation" relative to the theft of a trade secret identically to the way it is defined by the WUTSA.

While appearing similar, the DTSA, however, differs significantly from the WUTSA on two fronts. First, the DTSA, unlike the WUTSA, permits an owner of a trade secret to obtain an *ex parte* seizure order providing for the seizure of property necessary to prevent the further dissemination or use of a misappropriated trade secret. Similar seizure remedies are found in the Copyright Act and the Lanham Act. Such an order could include, for example, an order seizing an employee's computers or smartphone or even an order seizing an employee's new employer's computers if evidence exists that the misappropriated trade secret was transferred and disseminated by a former employee to his/her new employer. This *ex parte* seizure remedy is only available under extraordinary circumstances. Realizing that such a powerful remedy could be subject to abuse, Congress included a provision within the DTSA that permits a person who is subject to a wrongful or excessive seizure to recover civil damages.

Second, the DTSA has a whistleblower protection provision that is not found in the various Uniform Trade Secrets Acts enacted by various states, like in Wisconsin under the WUTSA. Specifically, the DTSA amends 18 U.S.C. § 1833(b) to provide criminal and civil immunity under any federal or state trade secret law for the disclosure of a trade secret that either is made: (i) in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law; or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

Overlaying this immunity protection under the DTSA is also a notice requirement. Specifically, starting May 12, 2016 employers must give employees, contractors, and consultants notice of this potential immunity in any contract or agreement that governs or protects the use of a trade secret or other confidential information entered into or amended after this date. The DSTA requires that this whistleblower immunity notice be expressly provided in a contract protecting trade secrets or should at least contain a notice provision that cross-references a policy that contains the employer's whistleblower reporting policy for a suspected violation of law. Failure to provide this notice, however, does not invalidate the enforceability of the agreement or preclude an employer from bringing a claim under the DTSA. Rather, failure to provide the required whistleblower immunity notice simply precludes an employer from recovering exemplary damages or attorneys' fees under the DTSA.

To comply with the new whistleblower immunity notice requirement under the DTSA, all employers must include this notice in any contract protecting the use of trade secrets or confidential information entered into or modified on or after the effective date of the DTSA (May 12, 2016) involving any employee or any non-employee individual performing work as a contractor or consultant for the employer. Employers are not required to amend existing contracts. Employers should take immediate action to incorporate the DTSA's new required whistleblower immunity notice in all new or modified confidentiality or non-disclosure agreements entered into on or after May 12, 2016.

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.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES UPDATED FMLA GUIDE FOR EMPLOYERS

Today, the U.S. Department of Labor, Wage and Hour Division, issued an updated guide for employers on the Family and Medical Leave Act. The guide is designed to provide essential information about the FMLA for employers, including the obligations under the law and the options available to employers in administering FMLA leave. The updated guide contains flowcharts, helpful hints, and other information to explain the FMLA process and regulations. The Employer's Guide to The Family and Medical Leave Act can be found here.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF "SUBSTANTIAL FAULT" IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what "substantial fault" means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for "substantial fault by the employee connected with the employee's work." The statute defines "substantial fault" as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment." Wis. Stat. 108.04(5g)(a).

In O*perton v. Labor and Indus. Review Comm’n et al*., 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC’s arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes “substantial fault.” The Court of Appeals found that there had been no evidence presented that the cash handling errors were “infractions” that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee’s cash handling errors fell into the second category of what is not substantial fault because they were “inadvertent,” and it did not matter that warnings had been given because that is not a part of the “inadvertent error” analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.