EMPLOYMENT LAWSCENE ALERT: OSHA PENALTIES TO DRAMATICALLY INCREASE IN 2016

In early November, President Obama signed the Bipartisan Budget Act of 2015. One item that should be of particular note to employers is that, under the Act, OSHA penalties will rise significantly.

Because OSHA penalties have been consistent for over two decades, once the Act goes into place on July 1, 2016, there is an immediate "catch-up" provision that will adjust the penalties as much as 150%. However, OSHA is also required to adjust the penalties on January 15 every year based on the Consumer Price Index ("CPI"). Because the CPI has increased 82% since the OSHA penalties were set in 1990, there is a possibility that the fines could be raised by that amount. The below chart shows the current penalty amounts and the amounts that they may be increased to:

Type of Violation	Current Maximum Penalty	Adjusted Maximum (150%)	Adjusted Maximum (182%)
Willful Violation	$70,000	$105,000	$127,400
Serious Violation	$7,000	$10,500	$12,740
Other-The-Serious Violation	$7,000	$10,500	$12,740
De Minimis Violation	$7,000	$10,500	$12,740
Failure to Abate Violation	$7,000	$10,500	$12,740
Repeat Violation	$70,000	$105,000	$127,400

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EMPLOYMENT LAWSCENE ALERT: CAN

EMPLOYEES USE FMLA TO AVOID OVERTIME?

The FMLA requires that covered employers grant eligible employees twelve weeks of unpaid leave for a serious health condition that prevents them from performing the functions of their job. FMLA leave can be taken on an intermittent basis if medically necessary. A recent case out of the United States District Court for the District of Connecticut shows the importance of correctly identifying your obligations under the FMLA and how they may differ from your obligations under other employment law statutes such as the Americans with Disabilities Act.

In *Santiago v. Department of Transportation, et al.*, the employee was diagnosed with "cluster headaches," which he said were "worse than migraines," "completely disabling," and "can last for hours to days depending on the episode." The employee and his doctor determined that his "excessive work schedule," which was essentially anything over eight hours a day or forty hours per week, was a main trigger of his headaches and suggested that his work schedule be limited. Because the employee's job required mandatory overtime, the employer stated that it could not accommodate him and that, if he could not find another job with the employer, he would either need to apply for disability retirement or be terminated. The employer stated that those were his only options if he could not perform overtime, even if he applied for FMLA leave. The employee submitted FMLA paperwork from his physician that outlined his serious health condition and stated that he could not work over eight hours per day. Because he could not perform overtime, he was placed on leave and eventually terminated.

Although the employer argued that the employee was only entitled to leave when he was actually incapacitated, the court found that "[t]he examples in the regulation specifically provide that an employee can take leave to avoid the onset of illness, noting that 'an employee with asthma may be unable to report for work . . . because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.'" (*citing* 29 C.F.R. § 825.115(f)).

Furthermore, the employer argued that what the employee was requesting was essentially a permanent accommodation that changed the essential functions of the job. The Court acknowledged that while the employee "might not be able to use the ADA to avoid overtime . . . employees can use their yearly allotment of 12 weeks of FMLA leave to significantly alter their schedules." The Court went on to point out that, unlike the ADA, the FMLA does not include an "undue hardship" defense and the employer is required to provide the mandated 12 weeks of leave.

Decisions like this can put employers between a rock and a hard place, where they need employees to be at work because overtime is an essential function of the job and where they have to comply with multiple laws. Employers also need to carefully evaluate their

obligations to make sure that they are properly complying with all relevant employment laws.

EMPLOYMENT LAWSCENE ALERT: NLRB ADOPTS NEW TEST FOR JOINT EMPLOYER STATUS

On Thursday, August 27, 2015, the National Labor Relations Board (NLRB) announced an updated test for determining joint-employer status under the National Labor Relations Act (NLRA), changing decades of precedent and significantly expanding the definition of who can be considered a joint-employer. A split Board decided it was necessary to "revisit and revise" the standard in order to keep up with "changing workplace conditions" in the current economic climate.

In the case at issue, Leadpoint Business Services, Inc. (Leadpoint), a staffing agency, provided workers to Browning-Ferris Industries of California (BFI) at a recycling plant owned by BFI to perform a variety of tasks. The temporary services agreement between the companies stated that Leadpoint was the sole employer and denied any joint-employer relationship. It also gave each company-specific aspects of the employment relationship that each was to control. The union wanted to include the Leadpoint employees in a bargaining unit it represented. A regional director determined that the staffing firm was their sole employer and that BFI, therefore, had no obligation to collectively bargain with Leadpoint employees. The union challenged that decision, and the NLRB deemed the two companies joint-employers under its new standard.

Under the previous standard, an entity needed not only to possess the authority to control the terms and conditions of an employee's employment but had to actually exercise direct, immediate control to be considered an employer. The NLRB claimed that the requirement of direct, immediate control had been added to the joint-employer test over the past thirty years and was not based on prior case law, in common law, or in the text of the NLRA, and unnecessarily narrowed the definition of joint-employer under the NLRA.

The new standard states that two or more entities will be deemed joint-employers if they are both employers within the meaning of common law and "share or codetermine matters governing essential terms and conditions of employment." It is no longer necessary that joint-employers actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately. Under the new standard, the fact that an entity simply has the ability, even if unused, to control the terms and conditions of employment or possesses indirect control through an intermediary will suffice to establish a joint-employer relationship. The NLRB will consider the existence,

extent, and object of the control. The NLRB will broadly define ‘essential terms and conditions of employment’ and include such things as hiring, firing, discipline, supervision, direction, wages, hours, scheduling, seniority, assignment of work, and determination of the manner and method of work performance.

This decision will have a major impact on employers, particularly those who use staffing or subcontracting agreements or contingent employee arrangements. Employers who had previously worked under the impression that their lack of direct control meant that they were not joint-employers could now be subjected to joint bargaining obligations and joint liability for unfair labor practices and breaches of collective bargaining agreements. If found to be a joint-employer, companies will need to collectively bargain with respect to the terms and conditions which it possesses the authority to control. The new standard also takes away much of the certainty with which businesses had interacted with each other.

Companies need to look at their business relationships and see who they could be considered joint-employers with, including vendors, service providers, and other entities with which the company may have indirect control over employees. This decision could also have an impact on how other federal agencies, such as OSHA and the EEOC, look at their joint-employer standards. Employers must keep an eye on any changes in order to avoid unexpected legal pitfalls.

EMPLOYMENT LAWSCENE ALERT: MAKING SURE YOUR WELLNESS PROGRAM COMPLIES WITH THE LAW

Litigation against employers by the EEOC regarding the implementation of wellness programs is ongoing in federal court, but no instructive decisions have been issued by the courts. Employers wishing to implement a wellness program but stay out of litigation may feel like they have little guidance on the issue, but there are some instructions out there on how to avoid, at the very least, disability discrimination lawsuits brought by the EEOC.

In April 2015, the EEOC published proposed interpretive guidance on how employers can run wellness programs without running afoul of the Americans with Disabilities Act (ADA). The EEOC’s guidance is an attempt to balance the ADA’s goal of limiting employer access to medical information and the Affordable Care Act’s goal promoting wellness programs. The proposed rule does not touch on how wellness programs may be affected by any other laws prohibiting discrimination, such as Title VII, the Age Discrimination in Employment Act, and

the Genetic Information Nondiscrimination Act (GINA).

As a brief review, the ADA prohibits discrimination against individuals with disabilities and restricts the medical information employers may obtain from employees and applicants. Wellness programs are generally programs and activities that promote a healthier lifestyle or prevent disease, which in turn attempts to improve employee health and reduce healthcare costs. Wellness programs may also incorporate health risk assessments and biometric screenings that measure an employee's health risk factors. Incentives are usually offered for either participation (participatory wellness programs) or for achieving certain health goals (health-contingent wellness programs). Incentives are both financial and in-kind incentives, such as time-off awards, prizes, and other items of value. These wellness programs, however, must comply with the ADA, among other employment laws.

The focus of the EEOC's attack upon employers' wellness programs has been on whether such programs are voluntary. The ADA generally restricts employers from obtaining medical information from employees through disability-related inquiries or medical examinations. However, the ADA and GINA do permit employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program. Voluntary is defined as neither requiring participation or penalizing employees who do not participate. The main effect of the EEOC's proposed regulations is the extent to which incentives affect the voluntary nature of wellness programs.

In its guidance, the EEOC has decided that it will allow certain incentives related to wellness programs, while limiting others to prevent economic coercion that could render the program involuntary. This can be achieved, according to the proposed rule, by allowing an employer to offer incentives up to a maximum of 30% of the total cost of employee-only coverage to promote participation. Under the proposed rule, employers are not allowed to require participation or deny coverage to or take an adverse employment action against any employee who does not participate. Employers would be further required to provide a notice that clearly explains what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. The proposed rule also allows disclosure of medical information obtained by the wellness program to employers only in aggregate form, except as needed to administer an employer's health plan.

Finally, wellness programs must provide reasonable accommodations to employees with disabilities so that such employees have the ability to participate in wellness programs and earn the incentives offered by the employer. This is in line with the employer's duty to accommodate under the ADA.

Despite the EEOC's guidance, there remain unanswered questions. For example, the

incentive language allows for up to 30% of the cost of employee-only coverage, but there is no guidance on whether incentives can be offered to encourage other family members who are covered under the insurance to participate in wellness programs. It is also expected that separate guidance on how GINA and wellness programs can coexist will be forthcoming.

Although the notice and comment period on the proposed rule has ended, the final rule is not likely to be issued until the fall. Employers should keep apprised of this rule making to make sure that their wellness programs do not find the attention of the EEOC.

EMPLOYMENT LAWSCENE ALERT: DOL MEMO STATES THAT MOST WORKERS ARE EMPLOYEES UNDER THE FLSA

Today, July 15, 2015, the U.S. Department of Labor (DOL) issued a memo regarding the classification of workers as either employees or independent contractors, which stated that most workers qualify as employees under the Fair Labor Standards Act (FLSA). The DOL noted that the FLSA has an expansive definition of employment and that workers who are misclassified may miss out on many protections that they should be given, including minimum wage, overtime, unemployment compensation, and workers' compensation.

Under the FLSA, a worker is an independent contractor if he is genuinely in business for himself; if a worker is economically dependent on the employer, however, the worker is an employee. To determine if the worker is economically dependent on the employer, the DOL looks at the six-factor economic realities test, which must be applied consistently with the broad scope of the FLSA. These factors are 1) the extent to which the work performed is an integral part of the employer's business; 2) the worker's opportunity for profit or loss depending on his or her managerial skill; 3) the extent of the relative investments of the employer and the worker; 4) whether the work performed requires special skills and initiative; 5) the permanency of the relationship; and 6) the degree of control exercised or retained by the employer. None of the six-factors is determinative; instead, the DOL states that they are indicators of the broader concept of economic dependence, which is the ultimate determination. Importantly, neither an employee's job title or an agreement between the worker and the employer factor into the analysis of whether a worker is an employee or an independent contractor. It is the reality of the working relationship that is determinative of an individual's employee or independent contractor status.

The DOL's conclusion is that most workers are employees under the FLSA and are thus

entitled to all of the protections afforded employees. Therefore, employers need to be proactive and regularly revisit and reassess their use and classification of independent contractors to avoid liability for misclassification. If an individual is being treated like an employee, he or she needs to be classified as an employee. Employers who do otherwise are likely to find themselves facing litigation.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES PROPOSED RULE CHANGES TO OVERTIME REGULATIONS

On March 13, 2014, President Obama signed a memorandum that launched the U.S. Department of Labor's (DOL) efforts to update the Fair Labor Standards Act's (FLSA) overtime rules for executive, administrative, professional, outside sales, and computer employees, commonly referred to as the "white collar" exemptions. To be exempt from the overtime regulations, employees must meet both a salary basis test and a job duties test. On Tuesday, June 30, 2015, the U.S. Department of Labor (DOL) released the long-awaited proposed rule regarding the expansion of overtime regulations under the Fair Labor Standards Act (FLSA). It is anticipated that, if these rules are imposed, nearly 5 million additional workers would be eligible for overtime under the FLSA's regulations.

The most drastic difference in the proposed regulations is the raise of the minimum salary requirement to qualify for the white collar exemption. Currently, the minimum salary requirement is $455 per week ($23,660 per year), a number that was set in 2004. The proposed rule would increase the minimum salary requirement to $970 per week ($50,440 per year). This figure is equal to the 40th percentile of weekly earnings for full-time, salaried employees. The proposed rule also includes an automatic adjustment to the salary threshold so that the minimum salary requirement does not become outdated. The DOL is also seeking comment on whether nondiscretionary bonuses can be included to satisfy the salary requirement.

Although the proposed rule does not specifically change any of the job duties requirements, the DOL did invite comment on whether or not these tests are working as intended or should be changed. One suggestion is that the federal job duties test would mirror the job duties test from California in which employees have to spend at least 50 percent of their time on exempt duties to qualify as exempt. The current federal test simply looks at a worker's "primary duty" and whether the employee's primary duty meets the requirements of the particular exemption classification. A change in the duties test could also significantly

decrease the number of employees who qualify for the overtime exemption.

Once the proposed rule is published, likely in the next few days, there will be a sixty-day public comment period. Only after that will the DOL be able to issue a final rule. Although employers do not have to do anything at this time and cannot know exactly how these proposed rule changes will impact them until they become final, they should be staying aware of these changes. Once a final rule is published, employers will likely need to reevaluate their exempt and non-exempt classifications for their employees to make sure that they are in compliance with the final DOL rules.

EMPLOYMENT LAWSCENE ALERT: TRANSGENDER EMPLOYEES AND BATHROOMS—WHAT SHOULD AN EMPLOYER DO?

A few weeks ago, we posted a blog about the protection of transgender employees under Title VII. Since then, Caitlyn Jenner has graced the cover of Vanity Fair, the EEOC has further solidified its position on the matter, and OSHA has weighed in on the issue.

One matter that has come up in many of the transgender discrimination lawsuits that have been filed to date is the use of bathrooms. This is the situation in the most recent lawsuit by the EEOC. It alleges that a Minnesota company discriminated against a transgender employee by not letting her use the women's restroom and subjecting her to a hostile work environment.

Likely in response to these issues, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued "A Guide to Restroom Access for Transgender Workers." OSHA requires, among other things, that employees are provided with sanitary and available restrooms. It is estimated that 700,000 adults in the United States are transgender, and OSHA stated that restricting employees to restrooms that do not conform with their gender identities or by requiring them to use a segregated gender-neutral or other specific restrooms singles transgender employees out and potentially makes them fear for their safety. Therefore, OSHA recommends that all employees should be permitted to use the facilities that correspond to their gender identity, and each employee should determine the most appropriate and safe option for him or herself. OSHA proposed two other optional solutions: 1) single occupancy, gender-neutral facilities for all employees; or 2) use of multiple-occupant, gender neutral restrooms with lockable single occupant stalls for all

employees. Further, OSHA's best practices recommend that employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to appropriate facilities.

Based on the EEOC's current litigation trend and OSHA's best practices recommendation, employers should permit all employees to use the facilities that correspond with their gender identity. For now, the stance of the federal government is that employees should have unrestricted access and use of restrooms according to their full-time gender identity. Employers will need to deal with these situations on a case-by-case basis to find solutions that are safe, convenient, and respectful.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES RELIGIOUS ACCOMMODATION CASE

Today, the U.S. Supreme Court issued its ruling in *EEOC v. Abercrombie and Fitch*. Justice Scalia penned the majority opinion while Justice Alito wrote a concurrence and Justice Thomas concurred in part and dissented in part. The case, which centered around whether employers can be held liable for failing to accommodate a religious practice only after the applicant or employee has informed the employer of the need for an accommodation, was covered by our blog in January. The facts that brought the case to the Supreme Court are that a Muslim job applicant wore a head scarf to her job interview, but because the retailer's Look Policy stated that employees could not wear "caps," she was not hired. The retailer argued, and the Tenth Circuit agreed, that it was the applicant's duty to inform the employer that she was wearing the headscarf for a religious reason and would, therefore, need an accommodation from their policy, which she did not do. The Supreme Court reversed, stating that an applicant would only need to show that the need for a religious accommodation was a motivating factor in the employment decision to prevail.

The Supreme Court drew a distinction between an employer having "actual knowledge" of a need for a religious accommodation and having that need be a "motivating factor" in the employment decision. An employer cannot refuse to hire an applicant based on a desire to avoid providing an accommodation, even if they're only guessing that an accommodation would be necessary. The Supreme Court based this on Title VII's "because of" language, which means a motivating factor, not actual knowledge. Title VII, unlike other antidiscrimination statutes like the Americans with Disabilities Act, does not impose a knowledge requirement. The Court found this important in deciding that it is the employer's

motive that is the essential factor in proving discrimination under Title VII. Although the Court stated that adding a knowledge requirement would be adding words to the law, which is the duty of Congress, not the courts, it did acknowledge that the employer's knowledge may make it easier to infer motive as it would be difficult to prove that motive unless an employee can prove that the employer at least suspects that the practice is a religious practice.

The rule that the Supreme Court came out with, and employers should take care to follow is "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." Additionally, the Court stated that Title VII requires employers to give accommodations from otherwise neutral policies to employees for religious reasons. Therefore, employers cannot take religious beliefs that they either know or suspect exist into account when making employment decisions, and they must accommodate religious beliefs unless such an accommodation would impose an undue hardship.

EMPLOYMENT LAWSCENE ALERT: ARE TRANSGENDER EMPLOYEES PROTECTED UNDER THE LAW?

In April 2015, the EEOC also settled one of the first cases in which it attempted to litigate that transgender discrimination is protected under Title VII. The EEOC filed an amicus brief in a previous case claiming that sex discrimination includes discrimination against those who do not conform to gender stereotypes and, therefore, would include transgender individuals who are either physically male and gender-identify as female or are physically female and gender-identify as male. In March, the U.S. Department of Justice also sued Southeastern Oklahoma State University and the Regional University System of Oklahoma for denying tenure to and eventually terminating an employee because of her gender identity. Although none of these cases have received decisions on the merits of the case, the EEOC has made its position clear, and employers need to take stock of their policies or prepare for litigation.

These and other cases that have been filed raise interesting and challenging questions for employers. Gender expression is not specifically covered under Title VII, but that doesn't necessarily mean that transgender employees can't be covered by the statute. The two Circuit Courts of Appeals that have addressed the issue, the Sixth and the Eleventh, have held that a transgender plaintiff can state a claim for sex bias if the defendant took an adverse action against them because the worker-plaintiff didn't conform to a sex stereotype or norm. However, this does not mean that the law is settled, and district courts across the country may be faced with interpreting the law in these cases sooner rather than later.

Employers should also make sure to take state law into account.

With the backing of the EEOC, discrimination suits by transgender employees could be a rising trend that employers should be aware of. Employers should review their policies and practices as they relate to discrimination and harassment and take complaints of harassment and discrimination of any kind seriously and investigate them thoroughly.

EMPLOYMENT LAWSCENE ALERT: CONTINUED EMPLOYMENT IS RULED VALID CONSIDERATION FOR NON-COMPETES IN WISCONSIN

On April 30, 2015, the Supreme Court of Wisconsin issued its long-awaited decision in *Runzheimer International Ltd. v. Friedlen*, in which it came to the conclusion that the promise of continued at-will employment is valid consideration for a restrictive covenant.

In *Runzheimer*, the employee had worked for his employer for fifteen years when the employer required all employees to sign restrictive covenants or be terminated. The employee signed the restrictive covenant, but after he was terminated more than two years later, he went to work for a competitor in breach of that agreement, and the employer sued. The employee then claimed that the agreement was invalid because it lacked consideration.

In Wisconsin, forbearance in exercising a legal right is valid consideration. The Court reasoned that, because Wisconsin is an employment at-will state, companies have a legal right to terminate employees at any time for a good reason, a bad reason, or no reason at all, as long as it does not violate existing law or public policy. Therefore, giving up the legal right to terminate an employee at that moment in exchange for the employee signing a covenant not to compete is valid consideration.

The court emphasized that its holding in *Runzheimer* is consistent with its 1994 holding in *NBZ, Inc. v. Pilarski* where the Wisconsin Supreme Court held that the promise of continued employment did not provide sufficient consideration to support a restrictive covenant entered into by an existing employee. The Wisconsin Supreme Court distinguished its holding in *NBZ* by finding that, in that case, the employee's employment had not been conditioned upon her signature and the employer did not promise to do anything else in exchange. Without these elements, there can be no consideration to support enforcement of the agreement under Wisconsin law.

Therefore, under the Wisconsin Supreme Court's holding in *Runzheimer*, in order for

continued at-will employment to be valid consideration for a restrictive covenant agreement, employers must condition the employee's continued employment upon the employee actually signing the agreement. In order to maintain that position in any action that might challenge the issue of consideration, an employer must actually terminate any employee who refuses to sign the restrictive covenant for it to validly assert that continued employment was conditioned upon the employee's signature to the agreement.

Wisconsin has now joined the majority of jurisdictions, which hold that a promise to continue an at-will employee's employment is lawful consideration for a restrictive covenant. The *Runzheimer* decision now permits Wisconsin employers to require their existing employees to sign new or modified restrictive covenant agreements without promising employees anything more than continued at-will employment.