EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

$10 Million To Catch Misclassification of Salaried Employees. The Dept. of Labor has given $10 million to 19 states to focus on misclassification or mispayment of exempt employees who should really be hourly and paid overtime. The money will go to Unemployment Compensation units, rather than State Labor Standards operations. This may increase scrutiny and actions against employers. State Labor Standards Units generally depend on a complaint-driven approach, and only catch issues raised by complainants. UC, however, deals with everyone who has lost a job; it is universal. If UC does an additional review of salaried employees who file for UC, it can uncover far more issues and report them to both the DOL and their own State Labor Standards Units for audits and enforcement. This is one more step in DOL's ongoing efforts to involve state agencies in catching improper classifications in salaried exemptions, independent contractors, volunteers, commissioned employees, etc.

LITIGATION

U.S. Supreme Court

Integrity Staffing v. Busk. The Court ruled that waiting in line to pass through a required security check at the end of the day was not compensable. All work was finished, so standing in line was not time worked. The waiting in line took 25 extra minutes, so it was not *de minimus*. It was required, no one could simply choose to bypass the security check. However, the Court ruled that no work was being done, and no pay is due. This decision raises questions as to how it will be interpreted in other FLSA instances. The Department of Labor has generally held that required waiting is "paid-time;" pre and post work donning and doffing of required clothes and equipment is paid-time.

Johnson v. City of Shelby, Miss. is a procedural decision which overturned a lower court's dismissal of a police officer's complaint of Due Process violations because the suit filing was not specific enough in stating the particular constitutional issues. The Supreme Court ruled that "imperfect statements of a legal theory do not countenance dismissal." The pleadings set forth a general statement of a case, and the lower court should have ordered amendment to be more clear and specific rather than dismiss the case.

Fair Labor Standards Act

$11 Million To Settle Exempt Misclassification Suit. A Hewlett-Packard subsidiary has agreed to settle a class action brought by 2,735 employees to challenge their designation as salaried-exempt. H-P will pay back overtime wages to many of the plaintiffs and reclassify them as hourly. *Cunningham v. Electronic Data System Corp.* (S.D. NY, 2014).

Restaurant Settles Waiting Time To Use Changing Room Case For $1 Million. Donning and doffing of required specialized uniforms or equipment is supposed to be paid. In *Trinidan v. Pret A Manager* (S.D. NY, 2014), restaurant workers had to wait in line for a number of minutes before being able to enter the changing room and start putting on their uniforms. The company agreed to settle by compensating for this waiting in line time. Would this be different under the new case? The settlement was reached before the Supreme Court issued the Integrity Staffing decision that waiting in a security check line did not qualify as paid time.

Software Updates May Void Administrative Exemption For Insurance Claims Staff. Insurance claim adjusters generally meet the Administrative Salaried Exemption. However, that can change, as companies change technology. In *Harper, et al v. GEICO* (2nd Cir., 2014), the court found that the company's new software system did a number of functions the adjusters had always performed. It made their jobs easier, and increased efficiency. However, the machine now did significant assessments, and decreased the judgment and discretion of the human beings. The court allowed a class action by the company's claims adjusters, challenging their exempt status and claiming overtime pay for all time since the new system was implemented. [Messages from the case are: (1) do not just adopt new technology without first considering the effects of classification and compensation, (2) do not assume that "once exempt-always exempt." Though the Dept. of Labor may have ruled that a particular job is exempt – things change; especially with software changes.]

Retaliation

Publicizing Identity Of Whistleblower Was Adverse Action Under SOX. A Halliburton accounting manager, Mr. Menendez, raised concerns that the company's accounting practices did not conform to proper standards. The Chief Accounting Officer told the manager that he "was not a team player." The manager persisted, and raised his concerns confidentially to higher management, board members, the SOX Ethics Committee, and eventually the Securities & Exchange Commission, confidentially. The SEC decided to investigate. Then Halliburton sent out an email to accounting department employees announcing that the SEC was investigating due to the "allegation by Mr. Menendez;" naming the manager, breaching confidentiality, and blaming him for the issue. This resulted in the manager being isolated and retaliated against, and then leaving his job due to an increasingly hostile environment. A court awarded economic and punitive damages. *Halliburton v. Administrative Review Board of DOL* (5th Cir., 2014).

VA Hospital Retaliates – Even Refusing To Provide Care To Wounded Veteran - $2 Million Verdict. The VA has agreed to settle a case after a jury found a VA hospital's administration engaged in a pattern of retaliation against employees who raised concerns about discrimination, or witnessed on behalf of a complainant. The jury found that complaints were "blown off"; when a Native American complained of offensive comments by an administrator, "she laughed at him" and told him she did not mean anything offensive and therefore would not stop." Others raised complaints about unwelcome sexual advances. The jury also found a "scheme" to fire those who complained and those who supported them. One of those discharged was a disabled veteran who received his treatments at the hospital (he was fired due to missing work – in order to get treatment the hospital would only provide during his work hours). After discharge he received a letter prohibiting him from coming into the hospital premises even for his medical treatment – and threatening him with criminal action and incarceration if he did so. This effectively eliminated his ability to get medical care. *Atkinson, et al. v. Secy. Dept. of Veterans Affairs* (M.D. Fla., 2014).

Discrimination

Disability

Marshmallow Maker And Union Accused Of Discrimination – Settle EEOC Case. A marshmallow company's collective bargaining agreement set a limit on leave of absence before termination of employment and posting the position for other union members to fill. Disabled union members and the EEOC sued both the company and their own union claiming the policy violated the ADA, since it did not allow exceptions for reasonable extensions of leave to allow for healing and return to work. The parties agreed to pay damages to five employees and modify the contract to allow for reasonable accommodation exceptions to the rigid leave provision. *EEOC v. Doumatic, Inc. & Teamsters Local 703* (N.D. Ill., 2014).

Healthcare Managers Should Not Have Engaged In Lewd Sexual Banter On Bring Your Child To Work Day. A jury awarded $250,000 in back pay, another $250,000 punitive damages plus costs and attorneys' fees to two former employees. They complained about ongoing overt sexual banter in the anesthesia care unit. Instead of stopping, there was a continuation of "constant lewd sexual comments and behavior" by the company executive and male managers. The HR department did not act to address the issue (perhaps because it reported to the executive) and did not document even any efforts to try. The employees were fired, both on the same day, after complaining about the sexually hostile environment. The crowning factor was the crowning factor was that the executive continued the overt comments during Bring Your Child to Work Day, in front of the children, and directly engaged in sexual comments and "banter" with the 15-year old daughter of one of the employees. *EEOC v. EmCare, Inc.* (N.D. Tx., 2014).

Sex

Transgender Is Not A Protected Status On Its Own. In *Eure v. The Safe Corp.* (W.D. Tex, 2014), the court dismissed a case for failing to state a cause of action under Title VII. It alleged that managers made negative comments about transsexuals and created a hostile environment. There were no other alleged statements except about disapproval of transgender status. The court ruled that transgender or other LGBT status by itself is not covered under Title VII. Without more it is a "non-issue" under the law. To qualify under Title VII there must be additional factors, such as comments related to appearance, demeanor, behaviors or other terms related to conformance or non-conformance with gender stereotypes. So, "no LGBTs should apply" would be legal under Title VII. However, additional factors such as "no cross-dressers, non-macho acting men/non-feminine women are welcome here" messages would be illegal stereotyping under Title VII. (Government contractors are under a different standard, since executive order does cover LGBT status.)

Transgender Employee Denied Position Due To Sexual Stereotyping On Appearance Does Have Title VII Case. A transgender hospital clerk has a valid case of sexual stereotyping under Title VII regarding a promotion. The male employee was undergoing gender change hormone therapy to become female, and dressing as a female. The employee had 30 years of excellent performance but was denied the new job. The evidence showed that the deciding factor was the criteria of "presentation" (personal appearance). A supervisor testified that other staff were uncomfortable about a male presenting as a female. This fit within the sexual stereotyping area of Title VII gender discrimination. *Hughes v. William Beaumont Hospital* (E.D. Mich., 2014).

National Labor Relations Act

Companies May Not Prohibit Most Employee Use Of Company E-mail For Concerted Activity. In re: *Purple Communicates, Inc. & Communication Workers of America* (Dec., 2014), the National Labor Relations Board ruled that if a company gives people access to its e-mails, then it cannot restrict their personal use for the purpose of communicating with other workers about their concerns (and gripes) about wages, hours, terms and conditions of employment; the standard "concerted activities" and items covered by the NLRA. This applies to both represented employees and those without a union. Employers can restrict this use to non-work time, if all other personal e-mail and internet use is also restricted to non-work time. Though this ruling overturns prior NLRB opinions, it does seem to be in line with the consistent rules regarding employees' verbal behavior. Employers "anti-solicitation policies" cannot prohibit co-workers from expressing their opinions, or gripes, in break areas, lunch areas, company grounds or other common areas on non-working time. Once you allow personal use and personal communication and chatting between workers on the computer system for any purpose, then it becomes a "common area" for non-work time communication. If you allow general non-work e-mail conversations and personal usage during work time, then labor-related concerted communication will also have to be allowed during work time. This ruling only applies to concerted activity communication under the NLRA. It does not rule that employers must now allow all sorts of personal use of the company system (shopping sites, family chats, dating services, and keeping up a social life). These can still be barred whether on work time or non-work time. Finally, the ruling does not give a right to system usage to any employee who is not already using the system. Many jobs do not have computer e-mail access, and this ruling does not open the door to that.

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