EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

DOL Publishes Proposed New Salary Rule. The long-awaited revision proposal to the salaried basis exemption was published June 30. The new minimum annual salary is $50,440. There is also an "escalator" provision for raising that amount periodically. The new "highly compensated" exemption is $122,000 annually. The rule does not change the other "duties tests" for determining exempt status, though DOL states that it will be asking for comments at a later date. The new proposed rule is not yet in effect. There will be an additional commentary period before anything becomes final.

DOL Posts Revised FMLA Forms. The most recent updates to Federal FMLA forms were posted in June at www.dol.gov/whd/fmla.

DOL Will Issue New Independent Contractor Guidance. The Wage and Hour Division has announced the impending publication of new criteria for determining whether a person is an independent contractor or an employee subject to wage and hour laws. DOL has engaged in an aggressive effort to attack the misuses of Independent Contractors. The new guidance may provide clarity, and probably even tighter standards.

LITIGATION

U.S. Supreme Court

The Court made three decisions with employment consequences during June:

EEOC v. Abercrombie & Fitch Stores – Religious Accommodation. The Court ruled that Ambercrombie & Fitch should not have rejected an applicant because her Muslim religious head covering did not match their style standards. The company had a duty to reasonably accommodate under Title VII. Though the applicant had not stated that the head scarf was for religious purposes, the hiring supervisor told her manager that she believed the applicant wore it "due to faith." The manager said all headgear, religious or otherwise, violated the "look policy," and gave a no hire instruction. The Court ruled that this was sufficient to find that religion and failure to accommodate was a motivating factor in the decision. There was no effort made to consider a reasonable accommodation.

King v. Burwell – Affordable Care Act. The Court upheld the Federal government's ability to give individuals insurance subsidies in states which did not establish their own health care exchanges. This preserves the financial integrity of the insurance exchanges. It also means that employers will continue the compliance process with ACA regulations, as they proceed to become effective over the next few years.

Obergefell v. Hodges – Same Sex Marriage. The Court ruled that states may not prohibit same sex marriages. The employment consequences will be one nationwide standard for FMLA, insurance, retirement and other benefits. Multi-state employers will no longer have to juggle different eligibility rules for locations in different states. It also makes it easier to recruit, or to transfer employees to a different location without creating an undue personal or family hardship.

Standards of Proof

"No Reason" Is Not An Illegal Reason. A university professor took three months of FMLA for family care. Seven months later he was not selected to be Department Chair. He claimed this was in retaliation for his FMLA usage. The Dean stated that he had "no reason" in particular for choosing the person who was appointed; he "had to appoint one," and he just picked one. The Court ruled that this was not evidence of pretext or retaliation. A successful plaintiff must show a tangible connection between the protected activity and the adverse decision, a retaliatory reason. A weak reason is not illegal. Even a "non-reason" does not establish a retaliatory motivation, it is a neutral. The plaintiff must tip the scale with tangible evidence in order to win. *Carter v. Chicago State U.* (7th

Circ., 2015). [Be aware that this sort of defense does not work in all cases. Some sorts of cases impose the burden on the employer to show tangible valid reasons for decisions. "Pleading ignorance" can also be seen as evidence of illegal "pretext" in situations where "I don't know" seems implausible, or where one should clearly have documented. So be cautious about this particular decision.]

Fair Labor Standards Act

Auto Service Advisors May Not Be Exempt Employees. The FLSA has a special exemption from time-and-a-half overtime for salespeople, parts people and mechanics in auto, truck and farm equipment dealerships. They are "hourly exempt," only entitled to straight minimum wage for all hours worked (they generally make far more in commission). Service writers have traditionally been interpreted to be salespeople, since they receive commissions from the repair and service work. The 9th Circuit has now ruled that service writers are not specifically mentioned in the FLSA exemption, so do not fit. They are entitled to full time-and-a-half for overtime work. The Dept. of Labor supported this ruling. *Navarro v. Encino Motorcars LLC* (9th Cir., 2015). This does not have nationwide effect – yet. Several other Federal Circuits have ruled that service writers are salespeople under the exemption. However, dealerships should expect challenges based on the new decision. [Even if not exempt as salespeople, service writers may still qualify for another type of exemption under the general "retail sales exemption," with a properly drafted, and signed, pay agreement. This would diminish or eliminate any harms of removing them from the special dealership salesperson rule.]

Discrimination

Color

Rare Color Case – Too Dark To Handle Money. Title VII prohibits discrimination based on "race or color." These are generally seen as one and the same. However, *Eilienne v. Spanish Truck & Casino Plaza LLC* (5th Cir., 2015) is one of the rare instances in which color stands alone. A dark complexioned African-American waitress was not promoted to supervisor. The majority of supervisors and managers were African-American, including the person who was promoted. So "race" was not a factor. However, there was evidence that the general manager made ongoing comments that certain employees were "too black" to be promoted, or "dark skins" should not handle money. A former manager stated that the GM had a practice of deciding job duties based on skin tone.

Disability

Sleep Issues Casued By Personal Habits – Not Disability. An employee had frequent incidents of poor performance and falling asleep at his desk and in meetings. He claimed to have a "sleep disorder" condition and got only three hours of sleep a night, which caused him to have "micro sleeps" at work, but did not interfere with performance.

Observations showed more than "micro" sleep time at work, which did interfere with work. He did not respond to the company's request to provide medical verification of a sleep disorder. He was eventually fired. In the ADA suit he still could not provide medical documentation. His own specialist's evaluation was that the sleep problems were caused by his own "horrible sleep hygiene" rather than any medical condition. He was "poorly disciplined" in his food consumption and timing of taking certain medications before bedtime. He also failed to cooperate with his doctor's request to keep a sleep log or follow other assessment protocols. The judge ruled that the issue was the employee's own behavior, not a disability. *Neely v. Benchmark Family Services* (S.D. OH, 2015).

Sex/Gender

BFOQ Justified For Jail Positions. A Bona Fide Occupational Qualification is a basis for legal sex discrimination in hiring or assigning positions. A male jail officer sued when he was laid off and a less senior female officer kept in order to retain sufficient female staff to meet the New York law requirement for a female detention officer to be present at any search or transfer of a female detainee. Layoff by seniority would have created a critical shortage of female officers. The male plaintiff argued that a female city police officer could always be called in, if there were no women jail guards present. The court rejected this. Having to delay and wait for a substitute creates safety and security issues. Forcing female police officers to routinely perform the role of lower paid jail officers, away from their main police duties, places an undue burden on women police officers, and creates yet another discrimination issue against them. The BFOQ for female jail officers was justified. *Ferrara v. City of Yonkers* (S.D. N.Y., 2015).

Staffing Agency Placed Women Into A Known Hostile Environment. Though the sexual harassment was committed by employees of a different company, the staffing agency is liable to its own staff for having placed them there. The agency also was charged with several other improper practices: not assigning people to certain customers based on race, categorizing some jobs as male or female only, and asking impermissible pre-employment medical questions. It agreed to pay $800,000 to settle the charges. *EEOC v. Source One Staffing, Inc.* (N.D. Ill., 2015). A placement agency is "jointly" responsible for discrimination its placed employees experience from the companies in which they are assigned to work. Also, a placement agency cannot cater to the discriminatory wishes of its clients in selective assignments or screening out certain types of people.

City Gives Up Right To Investigate Its Harassment Complaints. A city settled a sexual harassment case alleging that a 66-year old senior male manager and former fire chief assaulted an 18-year old part-time employee. There was evidence that he had sexually harassed female employees for years, with no adequate action by the city. He began sexual comments and touching of the teenage employee when she was 17. She complained, but was only told to not reply to the manager's texts, and avoid contact with him as much as possible. No action was taken toward the manager. He proceeded with

his behavior, culminating in the assault. She reported this to the state police, and the manager was arrested (and later convicted). The city then finally conducted an investigation. It found what it already should know – several other women had reported harassment over the years, and the city should have known continuing harassment and assault was simply waiting to happen to other future victims. The senior manager was allowed to resign, in order to keep his retirement benefits. The city was sued by the Dept. of Justice and chose to settle. In addition to paying a substantial amount to the teenage employee, the settlement also provided that for all further harassment complaints the city would retain an outside neutral investigator. This is an extraordinary term, since it gives up the right to internally resolve complaints. All complaints, no matter how small, will require paying an outside specialist to investigate. This will result in many thousands of dollars in extra costs for what should be an internal process. It can be a greater penalty than the damages paid to the harassment victim. *United States v. City of Caribou* (D. Me., 2015).

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