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Law @ Work Employer Newsletter - March 2019

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The Savvy Employer's Guide to Legal Developments & Quirks that Affect the Workplace
Cherry Hill, NJ

Welcome to the fourth edition of the Law @ Work Employer Newsletter (click here in case you missed the earlier additions). For those of you who read the Law @ Work blog, you know that the blog offers an in-depth analysis of important legal developments. This Newsletter fills in the blanks, focusing on the overlooked stories that are entertaining and good fodder for learning. Think of it as an ever-evolving employment manual for employers because it is always better to learn from someone else's mistakes.

U.S. Dept. of Labor Makes Its Move

As long-time readers may recall, since 2015, the U.S. Department of Labor has been trying to update its Fair Labor Standards Act regulations to qualify more employees for overtime pay. For basic exemptions, meaning those that are not industry-dependent such as the administrative, executive and professional exemptions, employers may generally classify as exempt from overtime pay only employees who meet both a duties test and a salary test. Since 2004, federal law allowed employers to designate salaried workers who earn at least $455/week (the equivalent of $23,660/year) and meet certain "white collar exemption" duties-test requirements as exempt from overtime. This month, the DOL issued a proposed rule to increase that salary exemption to $679/week (equivalent to $35,308/year). If adopted, salaried employees who meet an applicable duties test and earn more than $455/week but less than $679/week will no longer be exempt from overtime under the basic exemptions. Importantly, the DOL proposed rule will allow employers to use nondiscretionary bonuses (for example incentive bonuses tied to productivity or profitability) and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the salary test. The DOL is also proposing to increase the exemption that applies to highly compensated employees. Currently, salaried employees who earn at least $100,000/year in salary are exempt from overtime regardless of whether they satisfy the applicable duties test. Under the proposed rule, the highly compensated employee salary threshold will increase to $147,414/year, meaning employees paid less than that threshold amount will be subject to a duties test or other exemption. The proposed rule does not seek a change to any of the duties tests for the basic exemptions.

Savvy employer takeaway: Employers need to evaluate their payroll to identify salaried employees who meet the applicable duties test but may no longer be exempt and assess whether increasing the employee's salary or making the employee overtime eligible makes more sense. Employers also need to consider applicable state law, which may be more restrictive than the exemptions permitted under the FLSA.

Walmart Takes a Seat in California

Walmart reportedly agreed to pay $65 million to settle a case brought on behalf of nearly 100,000 current and former California cashiers who claimed the company violated their rights under a state law dating back to 1911 when it failed to provide them with seating. The workers claimed Walmart, which denied any wrongdoing, breached its duty to make seating available "when the nature of the work reasonably permits."

Walmart claimed that the nature of the cashier job did not reasonably permit seating, because placing stools or chairs at the store's cash registers would pose a safety risk and hinder productivity. However, Walmart had a policy of offering stools to cashiers with medical conditions or disabilities, and store managers had the discretion to provide stools to cashiers on a case-by-case basis.

In a court filing, Walmart and counsel for the cashiers said the settlement, if approved, would be the largest ever under California's unique Private Attorney General Act, which allows workers to sue their employers on behalf of the state and keep a portion of any award.

Curiously, other major retailers in California faced similar lawsuits, but Walmart did not act proactively to address this issue. Even putting aside the anticipated benefit of improved employee relations resulting from voluntary compliance, with the benefit of hindsight, one has to wonder if the cost of compliance, even if it were to result in reduced productivity, would have been less than the cost to settle.

Savvy employer takeaways: Employers need to look carefully at their duty to offer reasonable accommodations to employees and to engage in an interactive process to make sure that the employer can justify any denied accommodation.

IN CASE YOU MISSED IT: NEW JERSEY EXPANDS PAID FAMILY LEAVE: ACTION ITEMS FOR NEW JERSEY EMPLOYERS

Unions Are High On Cannabis

As businesses across the country look to capitalize on the "green rush" from states' expanded medical and adult use cannabis laws, unions are also eager to take advantage of the opportunities presented by this burgeoning, and quickly maturing, industry. For instance, the United Food and Commercial Workers International Union has formed a cannabis-focused division and is actively representing cannabis workers in many states and seeking to expand to others. These unions may also get a boost from legislative action in certain states. Under New Jersey's proposed cannabis expansion law, for example, licensee applicants who have entered into a labor peace agreement or a collective bargaining agreement receive preference in the license competition. Expect unions to seek to represent workers in cannabis-related construction, retail, farming, cultivation, security, and processing.

Savvy employer takeaways: Employers operating in and/or servicing the cannabis industry should consider and plan for the potential impact of labor unions in their industry.

Medical Cannabis Goes to Work

Continued

In the latest salvo in an evolving legal issue, a federal court in Arizona ruled against Walmart in a recent lawsuit for terminating an employee who possessed a valid medical marijuana card after a drug test of the worker came back positive. On the issue of cannabis use by employees, employers are having increasing difficulty reconciling their duty to make reasonable accommodations for employees suffering from disabilities with their drug screening policies. Employers can and should take action to prevent impairment at work. But how should an employer in a state where medical cannabis is legal handle an employee who tests positive in a drug screen but produces a valid authorization for use of medical cannabis? To date, with certain exceptions, most courts have permitted an employer to refuse to hire a candidate or to enforce discipline against an employee who tests positive for cannabis, despite a valid authorization to use it for medical purposes. However, employees and others are challenging that norm regularly on the state and federal level. Stay tuned.

Savvy employer takeaways: Employers who take action against a candidate or employee based on a positive result for cannabis when the employee has a valid medical authorization and no evidence of impairment should be prepared for a fight. Employees and their lawyers are looking for these cases in many states to try to change the law. Employers need to decide if screening out medical cannabis users is worth the risk of a potentially expensive court battle.

For more information, including news, updates and links to important information pertaining to legal developments that affect businesses ranging from cyber security liability arising from electronically-stored information to evolving issues with employees, subscribe to my blog, or follow me on Twitter @AdamGersh.

ATTORNEYS MENTIONED

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