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2018: Employment Law Hot Topics and Update

ACC Luncheon April 2018

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Overview

- Introduction
- FLSA Update
- ADA/FMLA Update

Fair Labor Standards Act Update

DOL Update – Old is New Again

- On June 7, 2017 DOL withdrew guidance previously published during Obama Era (2015 and 2016 guidance)
  - Withdrew guidance regarding expansive definition of "employer" in application of independent contractor and joint employer situations
  - Removed presumption of employment for contractors (no longer guidance that "most workers are employees")
  - Still use "economic realities" test
- DOL announced that it will again issue opinion letters interpreting the Fair Labor Standards Act. On January 5, 2018, re-issued 17 Opinion Letters

DOL Update – Old is New Again

- December 14, 2017 NLRB reverted to pre-*Browning Ferris* standard in evaluating joint employment
  - Existing standard - joint employer if there is proof an entity has the right to exercise control over essential employment terms of another entity's employee
  - New (old) standard, joint employer if there is proof one entity has exercised control over the essential employment terms over another entity's employees
    - Has done so directly and immediately (rather than indirectly)

DOL's Overtime Changes?

- In 2016, a major topic of discussion for all companies was the proposed salary level increase for exempt employees from $455 per week to $913 per week.
- On December 1, 2016 – injunction stopped its implementation
- After Trump election, appeal of injunction to the Fifth Circuit Court of Appeals was delayed, limited (only to DOL authority to implement minimum wage), and then dropped.
- On August 31, 2017 – Judge ruled that the action to increase the salary level to $913 was unconstitutional and invalid.
- Any new changes have to start over at square one – July 26, 2017 a request for information was issued
  - Change to $30,000 range?
  - Now $23,660 annually

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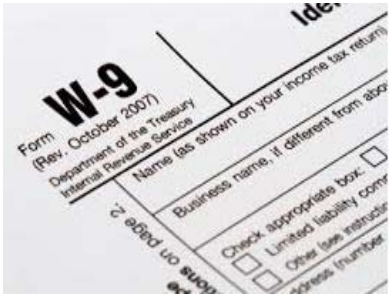
Three Types of Classifications

- 1. Hourly (Non-Exempt) Employees
- 2. Salaried (Exempt) Employees
- 3. Independent Contractors (Not Employees)



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Non-Exempt Employees

- Hourly (Non-Exempt) employees
  - At least $7.25 per hour (minimum wage)
  - Pay employee minimum wage or more, and then time and a half of their regular rate of pay for all hours worked over 40 in an identified work week (can define work week, 7 day period)

Non-Exempt Employees

- Trouble Areas:
  - Must record and pay employee for "all hours worked"
    - Be careful of employees working "off the clock"
    - Be careful of technology and mobile devices
  - Must pay overtime at time and a half of employee's regular rate of pay
    - Per Diems – based on identifiable expenses
    - Bonuses – Non-discretionary or Discretionary Bonuses
- Best Practices
  - Have payroll policies in place about not working "off the clock" and reporting all time worked
  - Train managers to address payroll violations
  - Audit classifications

Fluctuating Work Week (FWW)

- *Hills v. Entergy Operations,* 866 F.3d 610 (5th Cir. 2017)
  - An employer can satisfy overtime obligations through use of FWW
  - To use FWW:
    - A clear and mutual understanding that FWW will be used and employee's salary is intended to cover all straight time (use written agreement)
    - Salary high enough to never drop hourly rate below minimum wage
    - The hours must fluctuate week to week

Exempt Employees

- Exempt employees
  - Must qualify for an identifiable exemption
    - White-Collar exemptions (Administrative, Executive, Professional or Outside Sales)

- To qualify for an exemption, must meet three tests:
  1. Salary Basis Test
  2. Salary Level Test (**$455 per week**, threshold)
  3. Duties Test

DOL PAID Pilot Program

- DOL recently announced its Payroll Audit Independent Determination ("PAID") program that takes steps to provide employers with an incentive to self-correct wage and hour violations
  - Purpose of plan is to resolve such claims expeditiously and without litigation
- Six-month pilot program, unavailable to employers currently under investigation by DOL or addressing threatened litigation (no similar issues for 5 years)
- Resolve violations by self-reporting to the DOL, paying back wages and committing to future compliance
- DOL allows employer to correct violations without paying liquidated damages or civil money penalties
- DOL webinar on April 10, 2018, information at:
  - https://www.dol.gov/whd/paid

ADA/FMLA Update

Why It Matters?

- ADA
  - In 2017, 32% of all EEOC Charges were disability-related complaints.
  - In 2017, EEOC investigated 26,838 disability-related Charges and recovered $135 million.
- FMLA
  - In 2017, the DOL received 1,165 FMLA complaints and found 586 violations.
  - The DOL recovered $1.5 million in back wages for the affected employees.

FMLA Basics

Family Medical Leave Act

- 12 weeks of unpaid leave in a 12-month period
- Eligible employees are those:
  - Worked for at least 12 months.
  - (1) Employee or family member has a serious health condition; (2) birth of child; (3) care for newborn child within 1 year of birth.
    - Serious health condition = inpatient care or continuing treatment.
  - Have worked at least 1,250 hours in the preceding 12- month period.
  - Worked for employer that has 50 or more employees in a 75 mile radius.

ADA/ADAAA

- **Eligibility: Prohibits discrimination against qualified individuals with a disability**
  - Discrimination includes failing to provide reasonable accommodations for qualified individuals with a disability
- **Disability defined as:**
  - An impairment that substantially limits a major life activity
  - Having a record of such impairment, or
  - Being regarded as having such an impairment
- **Reasonable accommodation:** one that allows a qualified individual with a disability to perform the essential functions of a job
- **Exceptions:** (1) undue hardship; (2) direct threat of harm

Requirement to Offer Leave

- FMLA
  - An eligible employee is entitled to a maximum of 12 weeks of job-protected leave per 12-month period.
- ADA
  - Employer is not required to offer leave as a reasonable accommodation if another effective accommodation is provided.
  - However, the employee could be entitled to more than 12 weeks of leave as a reasonable accommodation unless the employer can show undue hardship.
- Workers' Compensation
  - No specific limit for the amount of leave an injured worker may have.
  - Can terminate based on neutral leave of absence policy.

Leave as an Accommodation

- The EEOC has held that you cannot automatically terminate an employee under a neutral leave of absence policy or after exhausting 12 weeks of FMLA if you can provide additional leave that is not an undue burden
  - *Sears* – $6.2 million
  - *JP Morgan Chase* – $2 million
- Fifth Circuit and other circuit courts have held that employers do not have to give indefinite leave, but stop short of saying how much more leave is reasonable.
- EEOC says six more additional months is reasonable.

HOW MUCH ADDITIONAL LEAVE IS REQUIRED AS AN ACCOMMODATION?

Severson v. Heartland Woodcraft, Inc. (7th Cir. 2017)

- Plaintiff worked as a fabricator of retail fixture displays.
- In June 2013, Plaintiff took 12 weeks of FMLA leave to deal with serious back pain. On the last week of leave, he underwent back surgery.
- Plaintiff required 2 to 3 more months of leave.
- Company denied request. Plaintiff was released without restrictions 3 months later. Instead of reapplying, Plaintiff sued under the ADA, claiming D failed to provide a reasonable accommodation of 2 to 3 additional months of leave.
- Seventh Circuit provided long awaited-guidance that 2 to 3 months of additional leave under the ADA is unreasonable if they have already exhausted FMLA leave.

Severson (cont'd.)

- HOLDING: A couple of days or even a couple of weeks is a reasonable accommodation, but not several months.
- The court explained that the ADA is an anti-discrimination statute, not a medical-leave entitlement as opposed to the FMLA, which protects up to 12 weeks of medical leave.
- The ADA prohibits discrimination against a "qualified individual," which is defined as a person with a disability who can perform the essential functions of the job, with or without reasonable accommodation.
- The court held that "an employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA....A multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA."

Cases Citing *Severson*

Golden v. Indianapolis Housing Agency (7th Cir 2017)

- Plaintiff was an 15-year IHA police officer diagnosed with breast cancer.
- On December 11, P received FMLA leave to have mastectomy. She also applied for short-term disability and long-term disability.
- When FMLA expired, IHA gave her an additional four weeks of leave until April 14. IHA told her that if she could not return to work at that time, her employment would be terminated.
- On March 31, her doctor returned an updated form that listed her duration as "ongoing" and her period of incapacity as "until release." She requested additional leave beyond April 14, but the request was denied and her employment terminated.
- Court upheld dismissal of employee's ADA claim. Citing *Severson,* Court held that employee who requires multi-month period of medical leave was not a "qualified individual" under ADA.
- WHAT ABOUT TEXAS?

Ruiz v. Paradigmworks Group, Inc. (S.D. Cal. Feb. 22, 2018)

- Plaintiff was outreach and admissions counselor for PGI.
- Nov. 2015, P fell and broke her ankle.
- 1st Doctor's Note – P disabled from Nov. 16 to 20, 2015
- 2nd Doctor's Note – P disabled from Nov. 20, 2015 to Feb. 22, 2016 (3 months).
- PGI placed P on leave through Feb. 22, 2016.
- 3rd Doctor's Note – P disabled from through April 1, 2016 (almost a total of 5 months).
- PGI terminated P on February 29, 2016. Eligible for rehire.
- P sued under the ADA for failing to accommodate her request for additional leave as a reasonable accommodation.

Ruiz v. PGI (cont'd.)

HOLDING:

- Court granted MSJ in favor or PGI, holding that P failed to meet her burden of proving the accommodation was reasonable. Court rejected P's argument that extending her leave through April 1 would be a reasonable accommodation.
- Court stated P could not offer any evidence that she would have been able to return to work at the end of the other leave periods, thus, PGI had no reason to believe that she would be able to return to work on April 1. Because she could not perform the essential functions of her job, she was not a "qualified individual" with a disability and PGI properly terminated her.
- "Even a finite leave is not a reasonable accommodation unless it is unlikely that at the end of the leave, the employee would be able to perform his or her duties."
- What if she only asked for one more week of leave?

Additional Leave – *Key Takeaways*

- If FMLA does not apply, should have a maximum leave policy.
- Include neutral leave of absence policy.
  - 4, 6, 9, 12 months. There is no set time.
- Document FMLA and medical leave
  - Make sure to run FMLA concurrently with workers compensation leave and paid leave.
- Review medical certification
  - Contact doctor for clarification on duration if necessary.
  - If restrictions permanent and you cannot accommodate, you may terminate employment.
  - If need a few days to a few weeks of additional leave past FMLA or your neutral leave of absence policy, allow the leave. If requesting more than a month, you likely can deny.

Additional Leave – *Key Takeaways*

- Send letter advising employee of FMLA/medical leave expiration date and ask them to contact you about return date.
  - Attach medical certification with job description to determine whether employee can return to work with or without a reasonable accommodation.
- Determine whether employee can return to work with or without an accommodation (including light duty).
  - Do NOT state that employee must have 100% release.
- If employee unable to return at end of FMLA or leave, discuss with employee. May have to give a couple of days or weeks additional leave, but not additional months.
- When terminating employment, encourage employee to apply in future.

Intermittent Leave

- FMLA
  - Eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12-month period — regardless of undue hardship.
- ADA
  - If no other reasonable accommodation is available, part-time or modified work schedule will be required under ADA *if*
    - it allows the employee to perform the essential functions of the job ***and***
    - does not impose an undue hardship on the company.

Wolf v. Lowe's, No. 4:16-CV-01560 (S.D. Tex. March 13, 2018)

- P was a sales associate for Lowe's for 9 years. She had a record of excessive absences and tardies for the entire time, that resulted in having a final warning issued in Dec. 2013 for excessive attendance problems.
- Spring 2014, P informed her supervisors that she had depression, ADD, cerebral palsy, polyarthritis, and fibromyalgia. She provided doctor's notes confirming diagnoses.
- She applied for and received intermittent FMLA.
- She continued to have attendance issues that were not protected by ADA or FMLA. She was placed on multiple PIPs.
- When P failed to improve, Lowe's terminated her employment in August 2014. She sued under ADA and FMLA

Wolf v. Lowe Cos., (cont'd)

- S.D. Texas granted summary judgment on ADA claim.
  - Holding: Regular attendance is an essential function of the job. A person who is excessively tardy and absent from work and unable to complete tasks is not qualified to perform the job.
  - Because P could not establish a *prima facie* case of disability discrimination for failure to accommodate, the court dismissed the claim.
- Court also dismissed P's FMLA retaliation claim, holding that the four months between her being placed on FMLA and her termination alone was insufficient to create a genuine issue of material fact.
  - There must be temporal proximity ***and*** significant evidence of pretext.

Eubank v. Lockhart Independent School Dist. (W.D. Texas 2017)

- A school counselor with depression, anxiety and diabetes presented a doctor's note asking to taking longer meal breaks, have breaks to take medication and be able to wear sneakers.
- School district accommodated her request for more breaks.
- School district repeatedly asked for a more informative doctor's note, but the employee never provided one.
- Meanwhile, she was called to nine meetings on her performance. After she was terminated, she sued under the ADA.
- Claim was dismissed because the note's vague references to "medical documentation" were not sufficient to demonstrate a disability under the ADA.

Intermittent Leave – *Key Takeaways*

- Make sure to obtain medical certification immediately.
- Determine whether you will need to transfer employee to accommodate the need for intermittent leave.
- Monitor that that the employee's absences are in conformity with medical certification.
  - If the employee's absences or tardies are different from certification, ask employee about it.
  - Send doctor explanation of employee's pattern of absences and tardies and ask for recertification. Can get second and third opinion at employer's expense.
  - Employee also required to make appointments and treatments that are the least disruptive to employer's operations.

Intermittent Leave – *Key Takeaways*

- Employee on FMLA must still comply with call-in procedures and obtain authorization before leaving work.
  - Make sure they need to call in an hour before to supervisor and HR (or outside FMLA vendor).
  - Absence or tardy should be counted against FMLA leave.
  - If employee leaves work early without authorization or in direct violation of an order, employer may discipline.
- ASK reason for call-in. If it's to pick up child from school or wait for plumber or go to dentist, not FMLA or ADA protected. Count this as a non-FMLA/ADA absence.

Intermittent Leave – *Key Takeaways*

- If accommodation is for frequent bathroom breaks or rest breaks, monitor to see it is in conformity with certification.
  - Count time against FMLA leave or place back out on leave.
- CAUTION: If employer has a no fault absence policy, it must have a mechanism to allow employee to count absence as ADA or FMLA protected.
  - *Verizon* - $20 million
- ADA and FMLA does not insulate employee from performance or discipline.
  - Employee must still be able to perform essential functions of job, complete assignments on time and attend work regularly. PUT IN JOB DESCRIPTION
  - Document performance issues and discipline for violations of policy, including excessive absenteeism and tardies (that are not protected by ADA or FMLA).

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