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Three Critical Steps Employers Can Take to Reduce Wage-and-Hour Liability

A record-high 7,064 Fair Labor Standards Act (FLSA) suits were filed in federal court during the year-long period ending March 31, 2012, according to figures from the Federal Judicial Center. This follows the decade-long trend of continued increase in wage-and-hour litigation at both the federal and state level. Although the FLSA lags in appropriately meeting the realities of today's workforce and economy, employers looking for proactive approaches to reduce the potential for these costly lawsuits can find solace in recent federal court decisions, which provide guidance as to steps employers can take.

Step 1: Establish a Solid and Reasonable Complaint Procedure

In *White v Baptist Memorial Health Care Corp.*, the U.S. Court of Appeals for the Sixth Circuit followed the lead of the Eighth and Ninth Circuits when it rejected claims brought by a former nurse seeking unpaid wages for missed and unpaid meal breaks.

Under the hospital's policy, employees working shifts of six or more hours receive an unpaid meal break that was automatically deducted from their paychecks. However, the policy also advised employees to report missed or interrupted meal breaks so that the hospital could properly compensate the employee for the additional time worked. Although White occasionally complained to her supervisors that she never received a lunch break, she never told her supervisors or the human resource department that she was not compensated for those missed meal breaks.

The Sixth Circuit held that "if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." In so ruling, the court rejected White's argument that the hospital should have known about the unpaid time because of her complaints to her supervisors. According to the Sixth Circuit, "When an employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA."

What Steps Should Employers Take?

Companies doing business within the Sixth, Eighth and Ninth Circuits, and elsewhere, should review their pay policies to ensure they have a reasonable reporting procedure in place for employees to report unpaid time worked and to report any failure to receive their proper compensation. Such a procedure should also provide a mechanism for investigating and remedying meritorious claims. Asking employees to acknowledge reporting policies will help protect against claims for unpaid working time.

Step 2: Establish a Policy and Procedure to Document and Investigate Oral Complaints

In a case that has led to an uptick of FLSA retaliation lawsuits by employees, on March 22, 2011, the United States Supreme Court held that the FLSA's anti-retaliation provision protects employees who file oral complaints. In *Kasten v Saint-Gobain Performance Plastics Corp.*, an employee alleged that he was discharged after he orally complained to company officials that the placement of time clocks violated the FLSA because it prevented workers from receiving credit for time spent donning and doffing required protective gear and walking to work areas. The FLSA's anti-retaliation provision forbids an employer from "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint…." The district court dismissed the case after concluding that the FLSA did not cover oral complaints.

Reversing the dismissal, the Supreme Court broadly interpreted the phrase "filed any complaint" to include both oral and written complaints. The Court acknowledged, however, that this language "contemplates some degree of formality" and requires that the employer receive "fair notice that a grievance has been lodged." The Court further explained that complaints protected by the FLSA's anti-retaliation provision "must be sufficiently clear and detailed for a reasonable employer to understand it." Notwithstanding its broad interpretation of the phrase "filed any complaint," the Court declined to address whether the statute protects complaints to private employers, as opposed to government agencies. Nevertheless, a majority of the courts to address this issue, including the Sixth and Seventh Circuits, have concluded that the FLSA protects informal complaints to employers.

What Steps Should Employers Take?

Recent Supreme Court decisions have broadly interpreted the anti-retaliation provisions contained in federal employment statutes. The *Kasten* decision continues this trend. Therefore, employers must carefully evaluate any personnel actions that will affect employees who have previously complained (either orally or in writing) of violations of wage-and-hour or anti-discrimination statutes. Perhaps even more importantly, employers should establish a procedure for documenting and responding to oral complaints in conjunction with training frontline supervisors in how to distinguish complaints under *Kasten* versus typical employee gripes.

Step 3: Establish a Policy Regarding Non-exempt Employees' Remote Access and Virtual Workspaces

In *Lewis v Keiser Sch.*, the United States District Court for the Southern District of Florida held that e-mails sent during lunch did not constitute "work" because they "were not lengthy and could not have taken more than a few minutes to draft and send." The court also ruled that Lewis herself had created the record of being at lunch by checking out of work (and thus not working). Further, the fact that certain managers might have received those e-mails during her lunch hour did not demonstrate that the employer understood her to be performing work off the clock, i.e., that it suffered or permitted her to work, the court held.

Lewis follows favorable decisions from other district courts defeating claims brought by non-exempt employees alleging off-the-clock work based on their access to or minimal usage of electronic communication systems, whether e-mail, text message or otherwise. However, in each case the employer had solid policies in place and the use of remote access or smartphones was limited.

What Steps Should Employers Take?

Companies should consider adopting a policy prohibiting non-exempt employees from performing work outside of working hours and specifically prohibiting the use of remote access or smartphones for work outside of normal working hours. Employers should also train management employees to take appropriate action when non-exempt

employees fail to comply with this policy. Other steps employers could take to limit potential liability for compensable off-the-clock work are limiting the hours during which remote access is accessible or limiting remote access to exempt employees only. Training supervisory and management level employees to understand that they should not send non-exempt employees e-mail or text messages after hours or ensure that the message is clear that the employee should not respond until the next working day.

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Hey Employers: Employee Social Media Passwords are (Mostly) None of Your Business (Not that You've Been Inquiring)

"Likes," "tweets," "hashtags," and "wall posts" are all words that have quickly entered our lexicon through the continuing explosion of growth that is social media. By breaking down communication barriers and encouraging interactions amongst each other – often publicly, instantly, and permanently – social media has dramatically changed how humans interact with each other, including within the workplace.

For the most part, employee use of social media has not required a fundamental rewriting of federal and state labor and employment laws. Employers may continue regulating employee use of social media as long as they do so within the traditional parameters of the law. It's the regulation at the edges, however, that has made it more difficult for employers.

One of those "edges" is the extent to which employers may require applicants or employees to disclose login credentials for electronic accounts, including social media accounts. A few well-reported incidents in the past couple of years garnered significant attention from the media, privacy advocates, and state and federal legislators.

In 2011, the Maryland Department of Public Safety and Correctional Services suspended its practice of requiring applicants to provide social media login and password information, instead modifying it to require applicants to log into their accounts and let an interviewer watch while the potential employee clicks through wall posts, friends, photos and anything else that might be found behind the privacy wall. Similarly, a Michigan teacher's aide was suspended in 2012 after failing to provide her school district with access to her Facebook account after a parent complained about a picture on her Facebook page.

Opponents of such practices assert that they are illegal under the Stored Communications Act, constitute an unlawful invasion of privacy and, for public employees, are a violation of constitutional privacy rights. Moreover, Facebook's official position is that requiring the login and password disclosure could not only "potentially expose[] the employer who seeks ... access to unanticipated legal liability," it also "violat[es] Facebook's Statement of Rights and Responsibilities to share or solicit a Facebook password."

Late last year, Michigan joined seven other states in enacting legislation governing such conduct. Effective December 28, 2012, Michigan's Internet Privacy Protection Act (IPPA) prohibits employers from requesting that an employee or applicant grant access to, allow observation of, or disclose information that allows access to or observation of "personal internet accounts," such as Gmail, Facebook and Twitter. Violators of the IPAA are guilty of a misdemeanor punishable by a fine of not more than $1,000. Individuals may bring a civil action to enjoin the violation and may recover not more than $1,000 in damages plus reasonable attorney fees and court costs. The IPPA also regulates educational institutions from engaging in similar conduct towards prospective or current students.

Under the IPPA, an employer may not discharge, discipline, fail to hire, or otherwise penalize an

employee or applicant declining such requests. In contrast to other states, however, the IPPA contains several exceptions when an employer can request such information, including:

- Accessing devices paid for, in whole or in part, by the employer, as well as monitoring, reviewing or accessing data that is either on such devices or travels through/stored on an employer's network;
- Accessing an employer's account;
- Investigating, disciplining or discharging an employee for transferring certain employer information – proprietary or confidential information or financial data – without the employer's authorization;
- Conducting an investigation for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct;
- Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for, in whole or in part, by the employer or while using an employer's network or resources, in accordance with state and federal law;
- Complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self-regulatory organization as defined in the Securities and Exchange Act of 1934; and
- Viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information or that is available in the public domain.

In addition to these exceptions, the IPPA expressly provides that employers do not have a duty to search or monitor the activity of a personal internet account and are not liable for failing to request or require that an employee or applicant grant access to, allow observation of, or disclose information that allows access to or observation of their personal internet account. Finally, an employer can plead as an affirmative defense to an IPPA action that it acted to comply with requirements of a federal law or a law of this state.

Critics of these "Facebook Password" laws argue that the laws are a solution in search of a problem, asserting that with the exception of a few widely reported incidents, employers do not engage in such conduct. A SilkRoad study from late 2012 seemingly validates this argument, finding that 97 percent of employers do not request social media password from employees or applicants. Nonetheless, regulating such conduct has seemingly struck a legislative nerve across the country – at least 23 other states and Congress are considering similar legislation. In short, stay tuned.

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DOL Issues Final Regulations Implementing the 2009 FMLA Amendments

The Family and Medical Leave Act (FMLA) regulations issued by the Department of Labor (DOL) in 2009 addressed the new military leave requirements established in the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA). Earlier this year, the DOL issued its final regulations (Final Rule) and an updated poster for covered employees.

The Final Rule revised the 2009 regulations regarding military leave, incorporates amendments to the military leave provisions made by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA). It also provided regulations for the 2009 Airline Flight Crew Technical Corrections Act. Both the Final Rule and the requirement to display the updated FMLA poster went into effect on March 8, 2013.

Some noteworthy changes are discussed below.

Military Qualifying Exigency Leave

The FY 2008 NDAA created two new categories of leave, one of which was "qualifying exigency leave." Under the FY 2008 NDAA's qualifying exigency leave provision, eligible family members of members of the National Guard and Reserves were entitled to take FMLA leave for "qualifying exigencies" arising out of the military member's deployment in support of a contingency operation.

The 2008 regulations defined qualifying exigency using eight categories:

1. Short notice deployment;
2. Military events and related activities;
3. Childcare and school activities;
4. Financial and legal arrangements;
5. Counseling;
6. Rest and recuperation;
7. Post-deployment activities; and
8. Additional activities to which both the employer and employee agree.

The Final Rule implemented changes by the FY 2010 NDAA, including expanding qualifying exigency leave to include leave for eligible family members of members of the Regular Armed Forces and by adding an active duty foreign deployment requirement. The Final Rule also increased the length of time an eligible family member may take for the qualifying exigency leave reason of rest and recuperation from five days to up to a maximum of 15 days to match the military member's rest and recuperation leave orders. It also created a new qualifying exigency leave category for parental care. Like the qualifying exigency leave for child care, this leave is not for regular parental care, but rather to deal with urgent care needs, time spent placing a parent in a care facility, or time meeting with caregivers.

Military Caregiver Leave

The other new category of leave created by the FY 2008 NDAA was "military caregiver leave." Under the FY 2008 NDAA's military caregiver leave provision, eligible family members of current service members are entitled to take up to 26 work weeks of military caregiver leave in a single 12-month period. The purpose of this leave is to care for a current service member who incurred a serious injury or illness in the line of duty on active duty that renders the service member unable to perform the duties of his or her office, grade, rank, or rating.

The Final Rule implemented the FY 2010 NDAA amendments that expanded the definition of "serious injury or illness" to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty. It also implemented amendments that expanded military caregiver leave to cover care for retired veterans undergoing medical treatment, recuperation, or therapy for a serious injury or illness. In order to qualify for this leave, the veteran receiving care must have been discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for him. The Final Rule interpreted the five-year period of eligibility for covered veteran to exclude the period between the enactment of FY 2010 NDAA on October 28, 2009, and enactment of Final Rule on March 8, 2013. This protects the military leave entitlement for family members of veterans whose five-year period has either expired or has been diminished during that time.

Airline Flight Crew FMLA Eligibility Requirements

The AFCTCA established special hours of service eligibility requirements for airline flight crew members and flight attendants for FMLA leave. The Final Rule implemented the amendments made to the FMLA by AFCTCA, provided special rules applicable only to flight crew employees regarding the calculation of hours worked for purposes of determining eligibility and adopted a uniform entitlement for airline flight crew employees of

72 days of leave for one or more of the FMLA qualifying reasons and 156 days of military caregiver leave.

Other Changes

The Final Rule clarified rules for calculation of intermittent or reduced schedule FMLA leave, including clarifying regulatory language regarding increments of leave and providing additional explanation of the physical impossibility rule. It also expanded the list of authorized health care providers. Previously, only health care providers who were affiliated with the Department of Defense (DOD) were authorized to provide medical certifications for caregiver leave. Also, an employer may now request a second and third opinion for medical certifications obtained from a non-DOD health care provider.

Finally, the Final Rule also updates the FMLA optional use forms to reflect the statutory changes and creates a new optional use form for the certification of a serious injury or illness for a veteran.

The DOL's Final Rule includes other changes.

» See http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=26631&Month=2&Year=2013.

» Also see DOL website for more information including and poster and revised forms at http://www.dol.gov/WHD/fmla/2013rule/.

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Michigan Becomes the 24th "Right-To-Work" State

On March 27, 2013, the "right-to-work" bills, SB 116, now known as Public Act 348 of 2012 and HB 4003, now known as Public Act 349 of 2012, became effective. Also called Michigan's "Freedom-To-Work" laws, the statutes make it unlawful to require private and public sector employees in unionized workplaces to pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative as a condition of employment.

Under Section 14(b) of the National Labor Relations Act (NLRA), a state may enact a law prohibiting union security clauses in union contracts. Section 14(b) provides, "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The laws apply to an "agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date," March 27, 2013.

Public Act 349, pertaining to the public sector, amends Michigan's Public Employment Relations Act (PERA) and specifically excludes public police and fire department employees who are eligible for Act 312 compulsory arbitration. Public Act 348 amends the federal Labor Mediation Act, and applies to most private sector employees in Michigan, with a few exceptions including employees covered under the Railway Labor Act.

Under Public Acts 348 and 349, employees retain the right to organize together to form, join, or assist labor organizations, to engage in lawful protected concerted activity for the purpose of collective negotiation and bargaining, and to bargain with their employers through representatives of their choice.

However, specifically, the laws prohibit any person by force, intimidation, or unlawful threats to compel or attempt to compel any employee to:

» Become or remain a member of a labor organization or otherwise affiliate with or financially support a labor organization or bargaining representative;

» Refrain from becoming a member of a labor organization or otherwise affiliate with or financially support a labor organization or bargaining representative; or

» Pay to any charitable organization or third party an amount in lieu of any portion of dues, fees or assessments, required of union members represented by a labor organization.

Moreover, any requirement that would violate the laws is a prohibited subject of bargaining.

Public Acts 348 and 349 each appropriate $1 million for fiscal year 2012-2013 to the Michigan Department of Licensing and Regulatory Affairs (LARA) to:

» Respond to public inquires regarding the Acts;

» Provide the Employment Relations Commission with staff and resources to implement the Acts;

» Inform public employers, public employees, and labor organizations regarding their rights and responsibilities under the Acts; and

» Carry out any other purpose that is necessary to implement the Acts.

A person, employer, or labor organization that violates Public Act 348 or 349 is subject to a civil fine of not more than $500. And a person who suffers an injury as a result of a violation or threatened violation of the act may bring a civil action for damages, injunctive relief, or both. In addition, an individual that prevails in such an action may recover reasonable attorney fees. Finally, the Michigan Court of Appeals has exclusive original jurisdiction over any action challenging the validity of the Acts.

Notwithstanding these new laws, a union is still legally required to represent employees that decline to join the union or pay union dues but who are part of the collective bargaining unit covered by the union contract. Among other things, this includes the requirement to represent such employees in collective bargaining and grievance and arbitration proceedings. However, in most union charters or constitutions, employees declining to join the union or pay union dues do not have the right to vote in internal union elections or for ratification of collective bargaining agreements.

Michigan joins Indiana, which enacted its own "right-to-work" statute on February 1, 2012, as the only Midwest states to have right to work laws. The other states with "right-to-work" laws include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming. Although the laws are similar in many material respects, there are some differences that should be considered by employers with a presence in one or more of these states.

Some have challenged the legality of the new laws, as well as the scope and meaning of some of the language therein. Accordingly, employers are encouraged to consult with their labor attorneys when considering whether and how the new laws will affect their workplaces. This is particularly important for those employers that will be entering into a new, extended, or renewed agreement, contract, understanding, or practice.

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