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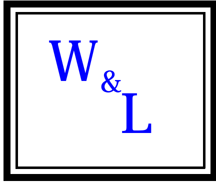
EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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LABOR MARKET COOL DOWN LEADS TO LOWER WAGE GAINS

Several Federal Reserve Bank surveys have reported that U.S. employers expect to hire less in 2024. The Federal Reserve data shows that the government's efforts to slow growth and inflation filtered through into the economy. It appears that the labor supply is coming back into better balance with demand. The surveys indicate that wage expectations have now dropped to a three-year low, and are expected to slow to around 4% for 2024. Aon predicts that businesses will average around 3.7% across all industries during 2024, with Mercer finding raises to drop to around 3.5%.

Regarding benefits, employer-sponsored health plans may resort again in 2024 to passing on many costs to their workers as medical inflation heats up. Healthcare plan costs are forecast to rise over 7% during 2024, according to the Segal Group. If employers don't make any changes to their plans during 2024, the average annual cost would be more than $15,000 per employee. Mercer believes that healthcare costs will rise 5.4% in 2024 after healthplans make changes to lower costs. Some employers are experimenting with affordability for lower-wage workers by having a higher percentage of sharing for higher-wage workers.

It also shows that Americans are quitting their jobs at a significantly lower pace beginning this past summer. Quitting is considered to be a sign not only of unhappiness with the job, but also an indication that the employee believes he or she can find another position easily. The quit rate went up to 2.3% in August, down from the 3% level in April of 2022. The figures cause some to hope that the "great resignation" is over. The current ratio of openings to unemployed people is 1 to 4, whereas at its peak in 2022 the ratio was 2 to 1.

MUSIC AT WORK CLAIMED TO CREATE A HOSTILE ENVIRONMENT

According to the Ninth Circuit Court of Appeals, sexually explicit music played in the workplace can create a hostile environment in violation of Title VII. *Harp v. S & S Activewear, LLC,* 69 F. 4th 974. Eight former employees (seven women and one man) charged the warehouse allowed "sexually graphic, violently misogynistic" music to be played loud such that it permeated the workplace. The workers also claimed that the music encouraged male employees to make sexually explicit remarks, engage in sexually graphic gestures, and the like. The defense was rejected that the music did not constitute discrimination since all employees were exposed to the music, and that both men and women were offended by it. The Eleventh Circuit has previously issued a similar ruling, and the Second Circuit has found that a hostile work environment be created where "sexually offensive comments and graffiti" were commonplace.

The lesson from these type rulings in that employers must police their workplace to maintain its appropriateness, and inappropriate behavior or speech that denigrates people on the basis of a protected class potentially create a legally actionable hostile environment claim regardless of whom it offends. The court particularly found fault that the employer

continued to allow the music to be played because managers felt it motivated employees to work harder, and management had ignored complaints from employees related to the music.

THINGS TO DO IN 2024

1. Update employee handbooks, including review of rules the Labor Board may consider overbroad and thus unfair labor practices.
2. Update reasonable accommodation policies, particularly as regards to new pregnancy-related laws and religious accommodation rulings.
3. Make sure appropriate person in each facility is designated to receive FMLA requests and harassment complaints and employees receive sufficient notice of the designation.
4. Review effectiveness of internal complaint procedures in light of increased employee activism and Labor Board rulings related to card-check situations during union organizing.
5. Review hourly recordkeeping issues that have continued to be litigated over preliminary and postliminary work activities and new ruling casting doubt on "rounding off" timekeeping procedures.
6. Address changes in harassment policies required by new EEOC Guidance.
7. Review non-compete/confidentiality agreements in light of recent legal attacks from state and federal governments.
8. Review contractor agreements with third parties, in light of new standards on joint employment and independent contractor relationships.
9. Review severance agreements to address non-disparagement provisions and other contractual conditions in severance agreements in light of new rulings.
10. Review legal implications of electronic communications, AI and predictive analytics.
11. Review DEI and affirmative action programs in light of new legal rulings.
12. Come up with better procedures to effectively handle employer accommodation obligations.
13. Review your annual safety training agenda and your annual and periodic certification requirements.
14. Conduct an intensive safety and health walk-through of the facilities.

ROUNDING ERROR:
Eighth Circuit Invalidates Longstanding Rule on Timekeeping

The Fair Labor Standards Act (FLSA) is more than 80 years old, a legacy of the bricks-and-mortar, pencil-and-paper era. One wouldn't expect it to hold many surprises. But in Houston v. St. Luke's Health Systems, 75 F.4th 1175 (8th Cir. 2023), the U.S. Court of Appeals for the Eighth Circuit invalidated a longstanding regulation condoning rounding, 29 C.F.R. § 785.48(b), because the rule, though facially-neutral, was determined to be not so even-handed in application, but rather to benefit the employer two times out of three.

The hospital employee plaintiffs in Houston brought a collective action alleging that they had been underpaid over several years due to the employer's timekeeping policy that rounded off time at the beginning and end of shifts. Employees clocked in at the beginning of their shifts and clocked out at the end, using an automated timekeeping system. The employer then applied a rounding policy: clocked times within six minutes of a shift's scheduled start or end get rounded to the next quarter hour for calculating compensation. For example, an employee who clocked in at 8:56 a.m. for a 9:00 a.m. shift would not be paid for those four minutes. Likewise, an employee who clocked out early at 4:54 p.m. for a shift ending at 5:00 p.m. would still be paid for those unworked six minutes.

Rounding systems were commonplace when the FLSA was enacted, for practical reasons: it was enough of a headache to figure quarter-hours of pay, but to do calculations on a minute-by-minute basis would have been maddening. The

FLSA regulations provided that as long as the system was facially neutral and fairly applied, it was okay: the assumption was that unpaid minutes would be canceled out by roughly equivalent overpayments.

Sounds fair, right? Well, as they say, the devil is in the details. In Houston expert witnesses for both parties studied the rule as applied, analyzing time and pay records for thousands of employees. And both experts concluded that the rounding rule benefitted the employer two-thirds of the time, shortchanging the employees. Still, the District Court granted the employer's motion for summary judgment, finding that the rounding policy was facially neutral and did not violate the FLSA, even if there was an adverse impact on the employees over time.
The Eighth Circuit disagreed, and vacated the order for summary judgment:

No matter how one slices the data, most employees and the employees as a whole fared worse under the rounding policy than had they been paid according to their exact time worked. Thus, we need not resolve whether an employer runs afoul of the rounding regulation whenever it under compensates any individual employees over a period of time or only when it under compensates employees as a whole, including those who were overcompensated or neutrally compensated. Here, the rounding policy did both. It resulted in lost time for nearly two thirds of employees, and those employees lost more time than was gained by their coworkers who benefitted from rounding.

The employer argued that this result would upend decades of practice and outlaw a practice - rounding - that had been explicitly approved in the regulations. The Court was unmoved, citing the FLSA's overarching principle of requiring pay for all hours (and minutes) worked, and noting that computerized time and pay systems made a rounding policy unnecessary.

Why this statistical anomaly? The Court of Appeals didn't reach that question. The explanation probably lies in human nature, and most folks' tendency to arrive late and leave early (rather than the other way around). One would think, as the framers of the regulation plainly assumed, that such variations would even out over time. Apparently not.

Bottom line: The sun may have set on the practice of rounding pay to the nearest quarter-hour. Automation has made such old-fashioned shortcuts obsolete - and dangerous. For workers paid on an hourly basis using time clocks or badge scans, the better practice today is to account - and pay for - every minute actually worked.

WAGE AND HOUR ISSUES NEW, OLD RULES FOR CLASSIFYING WORKERS AS EMPLOYEES OR INDEPENDENT CONTRACTORS

On January 10, 2024 the U.S. Department of Labor (DOL) announced a final rule on classifying workers as employees or independent contractors for purposes of the Fair Labor Standards Act (FLSA). These rules have been revised before: the rule just issued by the Biden Administration expressly rescinds the 2021 Independent Contractor Rule implemented during the Trump Administration, which, in turn, had rescinded changes adopted during the Obama Administration.

As the saying goes, the more things change, the more they stay the same.

The new rule provides guidance on classification, which the “gig economy” and innovators like Uber and Door Dash have made contentious in recent years. How an employee is classified affects their rights to minimum wage and overtime pay. These employers treated their drivers as independent contractors largely because the workers, not the company, decide when and how much to work, but their proper status was challenged in numerous lawsuits.

Traditionally, the difference between an employee and an independent contractor turned mainly on direction and control. The new "independent contractor" rule employs a multi factor analysis of a worker's relationship with an employer. These factors include the worker's opportunity for profit or loss; their financial stake in the business; the nature of any resources (i.e., tools and equipment) the worker has invested in the work; the degree of permanence of the work relationship; the degree of control an employer has over the person's work; whether the work the person does is essential to the employer's business; and the impact of the worker's skill and initiative. These criteria will be very familiar to anyone who had experience with the "economic reality" test developed by courts in the 20th Century.

The final rule takes effect on March 11, 2024. Prudent employers will review agreements they have with any workers classified and paid as independent contractors to ensure that they comply with the new rules. An "independent contractor" who only works for a single company and derives most of their livelihood from that work likely should be converted to an employee; but a contractor who provides a particular service that is not the mainstay of the business – for example, a bookkeeping service – or provides services for several companies could continue to be classified as an independent contractor. A written contract defining the relationship can help dispel ambiguity.

As expected, a business group has filed a legal challenge on the independent contractor rule, seeking to revive their previous litigation in which a federal court in Texas blocked the DOL's 2022 effort to revise it. *The Coalition for Workforce Innovation v. Su*, 5th Cir., No. 22-40316. Their argument is that the DOL did not follow the required administrative procedures for passing new federal regulations.

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