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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W&L

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EMPLOYERS FACE COMING DEADLINES ON RAISING SALARY LEVELS FOR OVERTIME EXEMPTION

The U.S. Department of Labor (DOL) announced a final rule to take effect on July 1, 2024, raising the salary levels necessary for the so-called "white collar" overtime exemptions. The exemption pertains to "executive, administrative, and professional" employees, and uses a three-part test that requires an employee to be salaried, make more than a certain amount per year, and have certain job duties in order to be exempt from time and a half overtime. The new rule's first change in the salary threshold will take effect on July 1, 2024, and at that point workers must make at least $43,888.00 per year to meet the salary part of the requirements, from the present $35,568.00 minimum. The next change will occur just six months later, on January 1, 2025, when the salary threshold will increase to $58,656.00. Automatic three-year salary updates will take place starting July 1, 2027.

The final rule exceeds the levels proposed by the Obama Administration in its 2016 rule to raise the salary level threshold to $47,000.00 per year. Before that rule could take effect, however, a Texas federal court invalidated the rule. Some believe that the new rule has the same sort of problems as did the 2016 Obama Rule, with the potential for the new rule to be invalidated as well. The Biden Administration did take some steps to differentiate the new rule from the Obama rule, relying on slightly different methodology.

Some employers may delay in making adjustments until the last minute, since the Obama 2016 rule was blocked by the federal courts only eight days before it was to go into effect, after many employers had already implemented the required salary changes. Further, salary level changes can impact other salaried individuals to maintain pay differentials.

In addition to timing, employers face numerous issues as to strategy, beginning with the timing issue noted above. Some considerations are whether to increase salaries to meet the new salary threshold; classify employees with lower salaries as non-exempt, overtime-eligible employees; make necessary staffing adjustments to avoid overtime, or considerations of converting to a different type of overtime payment known as "fixed pay for fluctuating hours." The latter arrangement is one in which the salary covers all hours worked, so that only an additional half-time is necessary to meet the overtime requirement, rather than time and a half.

Since employees like to be considered as on salary, any adjustments must be communicated in the best manner to avoid disruption. For newly non-exempt employees, special attention must be given to recordkeeping requirements, such as for off-duty phone calls, emails, texting and like. If there is conversion to non-exempt status, employers will

likely consider adjusting pay levels so as to equalize and consider the expected overtime as part of earnings. There may be situations where some personnel in the same position meet the new salary threshold while others do not, so some may get salary adjustments but not others. Larry Stine of our office will be hosting a webinar titled "Strategy for Meeting the New White-Collar Overtime Exemption Requirements" on Friday, July 5, 2024. If you would like to sign up, please go to www.wimlaw.com, and register under "Webinars."

FTC NON-COMPETE RULE HAS AN UNCERTAIN FUTURE CONCERNING ITS SEPTEMBER 4 EFFECTIVE DATE

Many lawsuits have been filed against the Federal Trade Commission (FTC) non-compete rule which is effective 120 days following its May 7, 2024 publication in the Federal Register that will likely delay its effective date pending a final ruling on its legality. It is important to know the important particulars of the rule, so employers can properly plan for the contingencies.

The rule generally bans all new post-employment non-competes and invalidates all existing post-employment non-competes, and prohibits the enforcement of any post-employment non-compete. There is a limited exception for pre-existing non-competes for senior executives, but not non-competes with senior executives entered into after the effective date. A senior executive is defined as "a worker who was in a policy-making position" and who received total annual compensation of at least $151,164.00. Since the rule is not yet in effect, some employers may decide to enter into post-employment non-compete arrangements with senior executives prior to the rule's effective date on September 4, 2024.

The rule also excludes any causes of action accrued before the effective date of the rule, among other important changes in the new rule. The rule excludes all non-competes entered into in connection with a bona fide sale of a business, without regard to the seller's ownership interest, dropping an initial threshold that required a 25% equity threshold. It also removes the de facto non-compete language, and does not necessarily prevent employers from entering into other forms of restrictive covenants such as certain non-disclosure and non-solicitation restrictions, as long as they are not written so broadly as to constitute de facto non-compete clauses. The rule also excludes non-competes in franchisor-franchisee relationships and non-competes imposed by non-profits.

Many companies will make the decision that due to the legal uncertainty, they will in the meantime continue to operate in the ordinary course including continuing to enter into employment non-compete agreements.

Some planning for the future would be prudent. For example, severance plans need to be reviewed containing non-competes, with consideration given to converting them to "garden leave" plans, where a worker continues in employment for a severance period and can thus therefore be prohibited from competing during such employment. Further, more emphasis will be placed on non-disclosure and trade secret agreements, and non-solicitation restrictions, which generally are not covered by the new rule. Some employers as to executives may attempt to structure equity-based non-compete programs as investment-based, rather than employment-based.

SUPREME COURT LOWERS HARM NECESSARY FOR EMPLOYEE TO SUSTAIN DISCRIMINATION CLAIM

The U.S. Supreme Court has made it easier for employees to show some harm that is based on discrimination to constitute a legal claim. *Muldrow v. City of St. Louis*, No. 22-193 (4/17/24). The case involved a lawsuit by a female police sergeant who claimed she was unlawfully transferred from the intelligence division to a less prestigious patrol position because she is a woman. The lower federal courts had dismissed the claim on the basis that Title VII of the Civil Rights Act requires a plaintiff to show she suffered significant harm from the discriminatory act to bring a legal claim.

Reversing the lower federal courts, the Supreme Court unanimously ruled that the claim was established. The Justices ruled that workers can sue employers over a biased transfer decision as long as they can show they suffered some harm related to a job condition, even though the harm need not be significant. Although the Justices focused on job transfers, it is likely that courts will apply the same logic to other employer actions. The Court references employer actions that cause "some harm" that leave the worker "worse off."

Some commentators argue that the following employer actions, previously considered too insignificant to warrant a legal claim, are subject to attack under the *Muldrow* case concepts: Putting an employer on a PIP (Performance Improvement Plan); removing supervisory duties; imposing harsh schedule changes; downgrading job duties or work conditions; or withdrawing perks.

The Court emphasizes that a plaintiff must still show that the employer actions were taken for a discriminatory reason, and the Court distinguished cases involving employee retaliation, suggesting that significant harm may still be required for a plaintiff to state a retaliation claim.

Effect on DEI Programs of Muldrow Decision

The *Muldrow* decision will likely result in more charges of discrimination being filed, and such concepts can impact DEI programs. For example, DEI mentoring programs or employer-sponsored affinity groups only offered to employees based on certain protected traits, and excluding others, are technically now open to attack under the *Muldrow* concept. A plaintiff would still have to show that he or she was losing a benefit or advantage in some employment aspect by not being able to participate in the DEI program. The ruling encourages employers to pay attention to the qualifications for mentoring and other professional development initiatives, avoiding participation qualifications based on protected classifications.

EEO DATA REPORTING DUE IN JUNE

Beginning April 30, 2024, contractors with at least 50 employees, and most private employers with 100 or more employees, are required to file their 2023 EEO-1 Component 1 reports, which comprise workforce demographic data, separated by job category, sex, and race or ethnicity. The reporting structure has undergone minor changes and the EEOC has published a new instruction booklet. There is a June 4 deadline for filing the EEO-1 report.

In a separate requirement for government contractors on April 1, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), opened its third annual contractor portal for a 2024 certification period concerning affirmative action programs. In the period between April 1 and July 1, covered contractors and subcontractors must register and certify their affirmative action plans, thus decreasing the chances they will be selected for an OFCCP audit. Contractors with a plan year beginning at any time in 2024 prior to July 1 should have already developed their 2024 affirmative action plans in order to certify compliance. Certification will not exempt federal contractors from being selected for a compliance audit by the OFCCP, but failure to certify will increase the likelihood of selection.

CONTROVERSIAL NEW EEOC HARASSMENT GUIDANCE IN EFFECT

On April 29, 2024, the Equal Employment Opportunity Commission (EEOC) issued its final Guidance on harassment in the workplace: "Enforcement Guidance on Harassment in the Workplace." The EEOC says its new Guidance updates, consolidates and replaces the Agency's five Guidance documents issued between 1987 and 1999, and serves as a single, unified agency resource on EEOC-enforced workplace harassment law. A third of all discrimination charges received by the EEOC include an allegation of harassment, based on race, sex, disability, or another protected characteristic. A 2017 version of the Guidance was reportedly held up by the Trump Administration because of internal disagreements over LGBTQ+ worker protections and never finalized. The final harassment Guidance was approved by a 3-2 vote on party lines on April 25, 2024, and one of the five-member panel's Republican commissioners addressed the legal challenges the new Guidance will face. Litigation in federal courts in Texas has successfully challenged at least two EEOC initiatives, including a ruling in 2022 that invalidated certain guidance on workplace bathrooms, dress codes, and locker rooms for LGBTQ+ workers. The U.S. Court of Appeals for the Fifth Circuit also blocked guidance on criminal background checks on the grounds that it comprised a "substantive rule" that the EEOC could not promulgate under Title VII.

The EEOC relied heavily on the Supreme Court ruling in *Bostock*, but technically *Bostock* "narrowly held" that firing an employee for being transgender violates Title VII, but the ruling did not address sex-segregated bathroom facilities or the "free speech" issue of pronoun usage at work. The new guidance will be challenged by those who object on religious grounds to using pronouns another worker uses to fit that employee's gender identity. Also, permitting bathroom use that aligns with gender identity might spark religious and other objections.

FINAL EEOC PREGNANT WORKERS RULE EFFECTIVE ON JUNE 18, 2024

When Congress passed the Pregnant Workers Fairness Act (PWFA), which has been in effect since June 27, 2023, it directed the EEOC to issue implementing regulations and provide examples of reasonable accommodations. On April 15, 2024, the EEOC published its 408-page final rule and interpretive guidance, with the final rule to take effect on June 18, 2024.

The EEOC retained its expansive reading of "pregnancy, childbirth, and related medical conditions" to include current pregnancy, past pregnancy, potential pregnancy, lactation, use of contraception, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, having or choosing not to have an abortion, among others. The regulations confirm the physical and mental condition that leads an employee or applicant to request an

accommodation can be modest, minor or episodic, and there is no requirement that conditions arise to a specific severity threshold.

The definition also includes an employee or applicant who cannot perform an essential function of the job for a temporary period, but the person is expected to be able to perform the essential function in the near future, if the inability to perform the essential function can be reasonably accommodated without undue hardship. The final rule finds "in the near future" as generally 40 weeks from the start of the temporary suspension of an essential function, if the accommodation is being sought for a current pregnancy. The final rule does not define "in the near future" for childbirth and related medical conditions, leaving this to be determined on a case-by-case basis, and noting only that "in the near future" does not mean indefinitely.

There will be legal challenges to the rule under the Administrative Procedure Act that the EEOC exceeded its authority by including abortion, as it was not mentioned explicitly in the PWFA and there is some legislative history that the omission was intentional. The EEOC did say in its final rule that individuals may object to abortion's inclusion due to "sincere, deeply held convictions" that are often part of their religious beliefs. Further, the EEOC has said its PWFA rules cannot be used to require employer-sponsored health plans to pay for abortions, and that it expects that accommodations would likely be limited to unpaid time off for workers seeking the procedure. The Commission plans to handle religious exemption requests on a case-by-case basis.

The final rules also include examples of reasonable accommodations for workers, such as water, food, or restroom breaks; telework; temporary reassignment; and time off for healthcare appointments or to recover from childbirth or miscarriage. The rules say that employers should only seek supporting documentation for accommodations when reasonable.

The EEOC emphasizes that the "interactive process" should be a "simple process," and the individual, or their representative, must only identify the relevant limitation and the need for an adjustment at work to trigger an employer's obligation to engage in the interactive process. The EEOC encourages employers to respond expeditiously to employees' requests and to consider granting an accommodation request on an interim basis even if the employer believes it needs additional information.

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