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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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CAN HOSTILE ENVIRONMENT PLAINTIFFS BOLSTER THEIR CASE BY EVIDENCE OF HOSTILE ENVIRONMENT AGAINST OTHER MINORITIES?

In a recent ruling by the Eleventh Circuit Court of Appeals in Atlanta, the court stated that hostile remarks about other minorities could bolster plaintiff's claim because he was part of the "out-group." Thus, in hostile environment claims related to the race of the plaintiff, in this case offensive comments regarding people of other races helped prove there was race-based harassment against the plaintiff, according to the majority in the court ruling. *Melton v. I-10 Truck Ctr., Inc.,* 2026 BL 38968 (11th Cir., 2/6/26).

Editor's Note: While the fact pattern and thus the holding in the current case is fairly unusual, it is a further incentive for employers to be ever mindful of allowing racial or sexual statements and the like to persist in the workplace. Investigations and corrective action should be taken when employers learn of such abusive conduct or language, which could possibly begin with progressive discipline and training.

WHAT TO MAKE OF EEOC RESCISSION OF ITS HARASSMENT GUIDANCE

On January 22, 2026, the Equal Employment Opportunity Commission (EEOC) voted 2-1 to rescind its Enforcement Guidance on Harassment in the Workplace. The EEOC had issued its harassment guidance back in 2024, although a federal court vacated portions of the guidance in 2025 related to sexual orientation and gender identity, finding that the EEOC had exceeded its authority. When the EEOC later amended the harassment guidance, Chair Andrea Lucas stated that the guidance provided an interpretation of Title VII that the federal agency lacked the authority to issue. She stated: "Title VII only provides the EEOC with the authority to issue procedural regulations - basically, quote - unquote 'procedural regulations,' not substantive regulations." "Because I had previously indicated that the EEOC is endangering women by directing employers to let people use workplace facilities that correspond with their gender identity, I also disagree with the EEOC's position that repeatedly misgendering someone could be considered unlawful harassment. " The second EEOC Commissioner who voted to rescind the guidance explained that workplace harassment that violates the laws remain a violation of those laws, with or without the guidance. The single member voting against the rescission argued that the guide provided a comprehensive guidance that clarified the legal standards for harassment and helped employers to know their responsibilities. The third EEOC member also indicated that, instead of adopting a surgical approach to excise the sections they disagreed with, the EEOC was throwing out the "baby with the bath water."

Editor's Note: The rescission of the EEOC guidance does not affect the obligation of employers to comply applicable standards as set forth in the case law, but it does affect enforcement efforts of the EEOC in regard to harassment issues.

ASKING TEAM MEMBERS WHAT SLOWS YOU DOWN OR MAKES IT HARDER TO DO YOUR JOB

Reports indicate that the new Chief Executive Officer of Walmart, John Furner, in his first company-wide memo since taking over, said he had a "simple ask: Tell me one thing that slows you down or makes it harder to do your job." The new Chief Executive said he will spend his first few weeks visiting facilities and talking directly with workers to understand what improvements are needed. Reports indicate that certain other prominent executive officers are taking the same approach.

This writer has long recommended the use of company "roundtables" in which the management meets with varying small groups of workers and ask them how the company can help them better do their job. Such meetings can begin with an update on how the company is doing and significant company developments, followed by a question and answer session. Even when there is no pre-announced goal of asking them how to help them do their job, employees at such roundtable meetings often make such suggestions.

There are enormous advantages to such an approach. First, these steps show the company cares and is interested in its employees, allows the company to ascertain in advance employee reactions and opinions, and also allows the company to gain important information to improve its business as well as its relationships with employees.

IS AN ORAL SETTLEMENT OF AN EMPLOYMENT DISPUTE BINDING?

When employers attempt to settle disputes involving employment, the circumstances vary greatly as to the formality. Most employers will not settle an employment claim with significant potential liability, without a formal, written settlement agreement containing certain legally required as well as widely recognized waivers. For example, specific requirements in settlement agreements which relate in any way to age issues, apply when the person signing the settlement agreement is 40 years old or older. Such specifics must include a statement that the employee has the right to consult with an attorney, that the employee will have 21 days to consider the settlement, and even seven days to revoke the settlement after signing it. Additional requirements are necessary if the agreement deals with an employment action affecting other employees as well. Similarly, employers often like to add provisions on confidentiality, disparagement, rehire, and all the potential claims covered by the settlement.

But in spite of this general practice, in some cases it is easier and simpler to use a rather short-form settlement document. Further, some settlements are made that are intended to have an agreement prepared later, that may or may not occur.

Thus, occasions have arisen as to whether "oral" settlements are enforceable. The simple answer is "it depends." In one recent case, for example, the plaintiff employee accepted a settlement, which included the amount of payment, non-defamation, no-rehire and confidentiality provisions. The plaintiff also stipulated that the case would be dismissed with prejudice and there would be a full release of all claims. But after agreeing to settlement terms during a court-annex conference, the plaintiff later refused to sign the settlement agreement, claiming she felt pressured and that some terms were ambiguous.

In this particular situation, the court found that there was a binding agreement despite the fact that it was not reduced to writing and signed. *Maccarone v. Siemens Industry, Inc.*, No. 25-01219 (1st Cir., 1/29/26).

IS AN EMPLOYER REQUIRED TO CLASSIFY EMPLOYEES AS EXEMPT?

In FLSA Opinion Letter 2026-1, the Department of Labor (DOL) addressed whether an employer may reclassify an exempt worker from salaried exempt to hourly non-exempt, even though this employee met the elements to be exempt, and the employee's duties did not change much. The DOL concluded that employers are not required to classify employees as exempt, even when all exemption criteria are met, provided they comply with the minimum wage and overtime requirements. Such steps may make it more difficult to reclassify the employee as exempt, and could risk discrimination issues if the employer treated other employees in the same position differently.

MUST DISCRETIONARY BONUSES BE INCLUDED IN OVERTIME CALCULATIONS?

In Opinion Letter FLSA 2026-2, the DOL addressed whether an employer was properly excluding performance-based incentive bonuses paid to non-exempt employees from overtime calculations. It concluded that non-discretionary bonuses that include some subjective elements must be factored into the regular rate of pay for overtime calculations.

The DOL concluded that even if some of the criteria for an incentive bonus are left to the employer's discretion, such as if the employer determines whether a vehicle is returned in a clean condition, a bonus is non-discretionary, because by setting the conditions to meet the incentive, the employer abandoned its discretion to not award the bonus.

Editor's Note: This type of issue often arises in compliance reviews, and is one of the most commonly-attacked errors committed by employers.

PROS AND CONS OF ADDITIONAL OVERTIME

The Economist magazine takes a look at the subject of how many hours should employees work. Some studies show the world's employed adult population works an average of 42 hours per week. While some surveys show workers in German and Britain would consider an optimal work week around 37 hours, Americans would like to work longer and get more money.

Another consideration is productivity. A Stanford University professor analyzed the output of British munition workers and found that beyond a threshold of 48 hours, output from each additional hour worked started to decline. Beyond 63 hours per week, the extra time did nothing for total output.

Then there is the issue of cost. Theoretically, it makes sense to increase the hours of existing workers as long as they are adding value. Some fixed costs do not change with additional work hours.

Safety is also a factor. Studies show that safety issues increased in long shifts.

Some would emphasize quality. The balance here may be between whether the fatigue is a price worth paying for more experience.

There are reports that Google is working on AI products where a 60-hour week is the "sweet spot." Elon Musk famously said that no one ever changed the world on a 40-hour work week. But the optimal work week should probably be defined by output, not hours.

TAX CHANGES ON TIPS, OVERTIME AND MEALS

Given recent tax law changes affecting employers, companies will want to ensure as soon as possible that payroll systems and accounting policies are ready to support these changes. In particular, required changes for information reporting and income tax reporting will be effective this year. Although not all employers have these issues, quite a few do.

Starting with 2026 earnings, many employers will need to report tips including cash, credit card and other similar payment forms and tipped occupation codes to employees on Form W-2. Employers should confirm that their payroll providers have systems that can properly identify and segregate this qualified tip information. The Form W-2 for 2026 will have new boxes and codes for reporting qualified tips and each employee's tipped occupation.

Recent IRS guidance clarified that the only overtime eligible for the qualified overtime deduction is the overtime required by the Fair Labor Standards Act for weekly hours worked above 40 hours. The FLSA overtime is almost always the half portion of time-and-a-half overtime. Starting with amounts paid in 2026, an employer that pays overtime will have to report this qualified overtime on Form W-2. An employer that pays various types of overtime, such as double time, required state overtime, and collective bargaining unit overtime, must be able to identify and separate them so that the payroll system can feed the proper FLSA overtime amount into the new Form W-2.

Starting this year, certain employer-provided meals that are treated as non-taxable or partly non-taxable for employees will no longer be tax deductible by the employer. The two main categories of meals are Section 119 meals for the convenience of the employer and the Section 132(e)(2) meals provided at an employer-provided eating facility. To determine the lost deduction for these expenses, employers should review their general ledger items for expenses related to the operation of section 132(e)(2) employer provided eating facility (including labor) or related to the meals provided under section 119.

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