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Changes And Hot Issues In The ADA & FLSA

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Ch . . . Ch . . . Ch . . . Changes and Hot Issues in the ADA & FLSA

Fair Labor Standards Act

I. Fair Labor Standards Act – What to Expect from the New Regulations

A. Hitting the High Points – The DOL Proposed Regulations

In 2015, the Department of Labor announced sweeping changes coming to the FLSA. The proposed changes were published last year, but the new, finalized regulations are expected to take effect in 2016. The 60-day notice and comment period has been completed, and the DOL received a whopping 270,000 comments. The DOL is currently in the process of reviewing the comments, taking testimony and preparing to issue the final rules.

One of the proposed changes seeks to increase the salary threshold for white collar exemptions from $23,660 per year to $50,440 per year – an increase that will make an estimated five million or more additional workers eligible for overtime pay. Additionally, the new regulations would increase the "highly compensated" exemption from $100,000 to $122,148. Possible additional changes include changes to the duties tests and requiring exempt employees to spend a specified amount of time performing primary duties. It is also anticipated there will be examples of occupations to provide guidance. Further, it is anticipated that the rules will allow non-discretionary bonuses and incentive payments to satisfy a portion of the required salary. To prepare for these changes, employers should determine how many employees and which employees may become non-exempt under the new salary test. Employers can also:

- Identify all exempt employees with salaries falling within the $23,660 and $50,440 range.
- Review those employees' job duties and job descriptions to confirm whether they will meet the "duties test" for the relevant exemption.
- Evaluate whether duties can be modified, if possible and/or necessary.
- Evaluate whether you can increase certain employees' salaries to meet the threshold. If not, evaluate the hours and determine a rate that will approximate current compensation, taking overtime into account.
- Determine whether it is possible to reallocate duties, i.e., use part-time employees or redistribute certain duties if necessary.
- Implement new policies to ensure that all employees in similar positions are treated the same way. For instance, in many cases, an employee with an advanced degree but doing the same work as an employee without the same degree should not be classified differently.
- Require and/or emphasize that all overtime must be preapproved. Employees can be disciplined for failure to seek preapproval.

Once the regulations take effect, it is anticipated that employers will have as little as 30 days to bring their workforce into compliance. Accordingly, it is important to evaluate your company now and prepare for the changes well in advance.

B. The Fluctuating Workweek

There is an under-utilized method of paying salaried, non-exempt employees that can significantly reduce the cost of overtime. The Fourth Circuit, joining several other courts and the Department of Labor, has held that salaried employees may only be entitled to be paid half-time for overtime. See generally, Desmond v. PNGI, Charles Town Gaming, L.L.C., 630 F.3d 351 (4th Cir. 2011). This is known as the "fluctuating workweek" method of compensation. It allows an employer to pay an employee, whose hours fluctuate from week to week, half-time for overtime, assuming the employee is paid a fixed salary regardless of the number of hours worked. To use this method of compensation, the employee must meet the following requirements:

- First, the employee's hours must fluctuate from week to week.
- Second, the employee must receive a fixed salary that does not vary with the number of hours worked during the week.
- Third, the first salary must be sufficiently high so that an employee does not receive less than the federal minimum wage in any given workweek.
- Finally, the employee and employer must share a "clear and ***mutual*** understanding" that the employer will pay the fixed salary regardless of the number of hours worked.

It is unclear what exactly is meant by "mutual understanding." Some courts have been far more liberal and almost ignored the need for a "mutual understanding." Other courts, as well as the Department of Labor, have indicated that the fluctuating workweek method cannot be used when bonuses violate the requirement that employees receive a "fixed salary." Employers should also be mindful of the different state laws that may restrict the use of the fluctuating workweek.

Another favorable wrinkle to consider about the fluctuating workweek is that the method of calculating the rate of overtime actually goes further in favor of the employer because the more hours the employee works, the lower the rate of pay. This is because the employer divides the weekly salary by the number of hours worked in a given week and calculates the overtime based on that hourly rate. Thus, the more hours worked, the lower the hourly rate.

II. Tip Pooling – What You Don't Know *Will* Hurt You

A recent decision by a federal appeals court has sent minor, if not significant, shockwaves into the restaurant and hospitality industry that use tip pooling as part of their employees' income.

Under Section 203(m) of the Fair Labor Standards Act ("FLSA"), restaurants and other hospitality industry employers are permitted to utilize a limited amount of employees' tips as a credit against their minimum wage obligations by using tips as "wages." This practice is known as taking a "tip credit." An employer can pay tipped employees (1) a cash wage of $2.13, plus (2) an additional amount in tips that brings the total wage to the federal minimum wage. If the employer uses tips to help meet the minimum wage requirement for its employees, the employee must be informed of this fact and the employee must also be permitted to keep the tips, unless the employee is part of a tip pool with other employees who regularly receive tips. Therefore, if an employee earns $5.12 an hour in tips, it is permissible for a restaurant/hotel to only pay the employee $2.13 an hour in cash wages in order to meet the $7.25 federal minimum wage. In some states (not Virginia), employers are not permitted to take a tip credit because the particular state law requires them to pay employees the state or federal minimum wage regardless of the tips the employees receive.

Many employers have instituted tip pooling programs. Under these programs, employers sometimes require employees to share the tips they receive with workers in customarily <u>non-tipped</u> positions (such as back of the house staff, cooks, dishwashers, hostesses, etc.). Many courts have held that the FLSA permits these types of tip pooling arrangements so long as the employer does not take tip credits against the employee's wages.

An ongoing hot issue in tip pooling arises when the employer decides (or is legally required) to pay the employees the federal or state required minimum wage and does <u>not</u> seek a tip credit. If the employer does not seek a tip credit, can the employer require its employees to contribute their tips to a tip pool that includes employees who are <u>not</u> regularly or customarily tipped? The Department of Labor says no. In 2011, the DOL issued a formal rule interpreting Section 203(m) that extended the tip pool restrictions of Section 203(m) to all employers, not just the ones who take a tip credit. Stated differently, the DOL says it can also regulate tip pooling arrangements of employers that do not take a tip credit because tips are the property of the employee. The DOL's logic being that if an employer could require its employees to contribute their tips to a tip pool that included employees who were not regularly tipped, the employer would have no reason to ever elect the tip credit because instead of using only a portion of the employees' tips to fulfill its minimum wage obligations, it could use all of its employees' tips to fulfill its entire minimum wage obligations to the tipped employees, as well as the non-tipped employees.

The meaning of Section 203(m) of the FLSA and the validity of the DOL's 2011 interpretation are currently the subject of live debate in the federal courts. Most recently, the Ninth Circuit Court of Appeals (which includes several states in the West) in *Oregon Rest. & Lodging Association v. Perez* ruled in favor of the DOL's 2011 interpretation of Section 203(m). The 2-1 decision, however, had a vigorous dissent and an en banc appeal to the full Ninth Circuit is expected.

Americans with Disabilities Act

ADA lawsuits continue to be a hot spot for the EEOC. In 2015 alone, 53 of the 142 lawsuits filed by the EEOC concerned ADA claims.[1] Of the 155 lawsuits that the EEOC resolved in 2015, 61 of them concerned ADA claims.[2] The ADA prohibits employers from discriminating against "qualified individual[s] on the basis

[1] U.S. Equal Employment Opportunity Commission, Fiscal Year 2015 Performance and Accountability Report, note 19, at 34.
[2] *Id.*

of disability."[3] The EEOC must establish that the individual has a disability that qualified under the ADA, the individual is qualified for the job at issue, and the individual was discriminated against on the basis of his or her disability. Employers should guard themselves against these suits by developing a healthy understanding of what qualifies as a disability under the ADA and how to implement policies and procedures to avoid finding themselves in a difficult situation where an employee could claim discrimination.

I. The Digital Frontier of ADA Litigation: Website Access Litigation

A. History

Title III of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in places of public accommodation including restaurants, retail establishments, hotels and recreational facilities. 42 U.S.C. § 12181 *et seq*. Enacted in 1990, the ADA does not specifically address or provide guidelines for website accessibility since the first website did not go live until August 6, 1991.

Website access litigation first made public news in 2006 when a federal district court in the Northern District of California ruled that Target Corporation could be sued because federal and state civil right laws do apply to websites such as Target.com. Nat'l Fed'n of the Blind (NFB) v. Target Corp., 452 F.Supp.2d 946

[3] 42 U.S.C. 12112(a).

(N.D. Cal., Sept. 6, 2006). In its decision, the District Court stated the ADA applied because "Target.com also allows a customer to perform functions related to Target stores. For example, through Target.com, a customer can access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store." Nat'l Fed'n of the Blind (NFB, 452 F.Supp.2d at 949.

There is some split in authority, but it is clear that traditional hospitality and retail companies are required to make their web sites accessible to those with disabilities. The First, Second and Seventh Circuits have construed "place of public accommodation" broadly to encompass physical locations and electronic spaces (websites) equally. In Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1994), the First Circuit ruled that a medical plan was a public accommodation because "[n]either Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity." Carparts Distribution Ctr., Inc., 37 F.3d at 19–20; see also Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999) (noting that owners and operators of all facilities, whether in physical or electronic space, are within the plain language of the ADA). The United States District Court for the District of Massachusetts applied this reasoning to Netflix in National Ass'n of the Deaf v. Netflix, Inc., 869 F.Supp.2d 196 (D. Mass. 2012), noting "the legislative history of the ADA makes it clear that Congress intended the ADA to adapt to changes in technology." National Ass'n of the Deaf, 869

F.Supp.2d at 200. The Ninth Circuit has applied the ADA more narrowly. In Cullen v. Netflix, 600 F.Appx. 508 (9th Cir. 2015), the Ninth Circuit ruled that Netflix did **not** have to comply with the ADA because its streaming video service is not a place of public accommodation. Following its prior ruling in Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (Ninth Cir. 2000), the Ninth Circuit stated "[w]e have previously interpreted the statutory term 'place of public accommodation' to require 'some connection between the good or service complained of and an actual physical place.'" Cullen, 600 F.Appx. at 509. In National Federation of the Blind v. Target Corp., 452 F.Supp. 946 (N.D. Cal. 2006), the Northern District of California found a nexus existed between Target's web site and their "brick and mortar" stores where its web site allowed customers to access information about locations and hours, advertise merchandise for sale at the store or print coupons. Nat'l Fed'n of the Blind, 452 F.Supp. at 949.

B. In the Absence of Direct Regulation What is Compliance?

Department of Justice (DOJ) Proposed Rulemaking.

On July 26, 2010, the DOJ issued an Advance Notice of Proposed Rulemaking (2010 ANPRM) titled Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. (DOJ-CRT-2010-0005 (July 26, 2010)). This was supposed to be a precursor to Title III regulations which would apply to businesses. Since then, the DOJ issued a series of notices of delayed rulemaking until April 28, 2016 when it withdrew its notice all together and issued a

Supplemental Advance Noticed of Proposed Rulemaking (2016 SANPRM) titled Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities (RIN 1190-AA65). The DOJ cited various reasons for restarting the public comment and rulemaking process that boil down to one issue: The internet and technology have changed so much in the six years since the rulemaking process started that rules that would apply to technology that existed six years ago may not have a place in today's web sites and mobile applications. This highlights one of the main challenges in regulating this industry. The rate of growth and technological advance may make a "one size fits all" regulation obsolete before it can be implemented.

C. Web Content Accessibility Guidelines (WCAG) 2.0

Based upon several settlements entered into with the DOJ, Level 2 Success Criteria of the WCAG 2.0 appears to be the current standard for web site accessibility.

WCAG are part of a series of web accessibility guidelines published by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), the main international standards organization for the internet. The current version, WCAG 2.0, was published in December 2008 and became an ISO standard, ISO/IEC 40500:2012 in October 2012. WCAG can be found online and is free to use at https://www.w3.org/TR/WCAG20/.

Imbedded in a web site’s code, WCAG provides disabled users with assistive computer devices and software aid in using computers and mobile devices. Just one example is embedded code that allows screen readers to convert text and icons into speech or braille, change font or text size and change non-text content into symbols. Costs of implementation and upkeep vary depending on the size and type of web site, whether it is dynamic or static, and whether the web site is newly developed or needs to be retrofitted. Initial build-out costs can vary from several thousand dollars to nearly six figures, with maintenance costs conservatively estimated at one to two percent of total web site maintenance costs per year.

D. DOJ Litigation

The lack of rulemaking has not stopped the DOJ from initiating compliance reviews and pursuing settlements with several companies over the accessibility of their web sites. Some of the companies which have settled with the DOJ include peapod.com, H&R Block, and Louisiana State University (LSU). The complaint against H&R Block alleged that its website failed to code its website in a manner that would make it accessible to individuals who have vision, hearing and physical disabilities. Under the terms of the five year settlement decree, H&R Block’s website, tax filing utility, and mobile apps must conform to the Level AA Success Criteria of the WCAG 2.0 beginning for the tax filing term of Jan. 1, 2015, with additional accessibility deadlines over the following years of the decree.

E. Private Lawsuits

Almost uniformly, complaints and settlements filed by the disabled seek compliance with WCAG 2.0. Since January 2015 over 60 lawsuits alleging that an inaccessible website violates Title III have been filed or removed to federal court. Of those, 50 have been filed against retailers, restaurants and hospitality corporations. All the cases have been filed in California, Massachusetts, New York, Pennsylvania and Washington. Almost uniformly, all known settlements have required compliance with WCAG 2.0 Level AA.

II. 100% Heal Policies? A 100% No-No

A “fully healed” or “100% healed” policy requires an individual to bring documentation from his or her physician stating that he or she is able to return to work with no restrictions. Most all courts that have examined this issue have determined that such requirements are *per se* unlawful under the ADA. According to the Ninth Circuit, 100% healed policies permit employers to forgo assessing whether a qualified individual is able to perform the essential functions of his or her job with or without accommodation. <u>McGregor v. Nat’l. R. R. Passenger Corp.</u>, 187 F.3d 1113, 1116 (9th Cir. 1999).

III. GINA and Wellness Plans

On October 30, 2015, the EEOC issued a Notice of Proposed Rulemaking to amend the regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) relating to employer wellness programs.[4] The proposed rule would permit employers who offer wellness programs as part of their group health plans to provide limited financial and other incentives in exchange for an employee's spouse providing information about his or her current or past health status.[5]

GINA protects job applicants, current and former employees, labor union members and apprentices and trainees from employment discrimination based on their genetic information and prohibits employers from using genetic information in making decisions about employment.[6]

The total incentive for an employee and spouse to participate in the program may not exceed 30 percent of the total cost of the plan in which the employee and any dependents are enrolled.[7] The incentive provided to the employee may be either financial or in-kind (time-off awards, prizes, etc.).[8]

[4] EEOC Issues Proposed Rule to Amend Title II of GINA, Oct. 29, 2015, https://www1.eeoc.gov//eeoc/newsroom/release/10-29-15.cfm.
[5] Id.
[6] Id.
[7] EEOC's Qs &As, https://www.eeoc.gov/laws/regulations/upload/qanda-gina-wellness.pdf. (last accessed April 17, 2016).
[8] *Id.*

IV. Pregnancy - What to Expect When Your Employees are Expecting

A. *Young v. United Parcel Service*

On March 25, 2015, the U.S. Supreme Court issued its decision in Young v. United Parcel Service. In its opinion, the Court provided a framework for pregnant employees to follow when challenging workplace accommodation policies and practices under Title VII.

The plaintiff, Peggy Young, worked for UPS as a driver. She became pregnant in 2006 and was given light duty restrictions of no lifting greater than 20 pounds during her first 20 weeks of pregnancy and no lifting greater than 10 pounds thereafter. UPS told Ms. Young she could not work because they required drivers to lift packages weighing up to 70 pounds. As a result, UPS placed her on unpaid leave and she lost her benefits coverage. Of importance was the fact that UPS gave other employees light duty work for workplace injuries. Further, the company provided light duty or other accommodations to other employees, such as those with disabilities under the ADA.

In a 6-3 decision, the Court held that a pregnant employee can establish a *prima facie* case of disparate treatment under Title VII and the Pregnancy Discrimination Act by using the well-known McDonnell Douglas burden-shifting framework to show that (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others in similar situations. If the employee meets her burden, the burden then shifts to the employer to show a legitimate, nondiscriminatory reason for denying the requested accommodation. If it can do so, the burden shifts back to the employee to show that the employer's demonstrated reasons were merely pretextual. The Supreme Court made it clear that an employer's reason for its inability to accommodate the employee cannot merely be that it is more expensive or less convenient to add pregnant women to the categories of individuals the employer accommodates.

Ultimately, the Court remanded the case to the Fourth Circuit, holding that Ms. Young established a *prima facie* case of discrimination because UPS had accommodation policies for other employees that ultimately provided them more favorable treatment than pregnant employees under similar circumstances.

B. What else does the Pregnancy Discrimination Act cover?

The Act covers discrimination based upon reproductive risk, intention to become pregnant, infertility treatment, and discrimination based on the use of contraception.

The EEOC provides the following example of discrimination based on intention to become pregnant:

> Anne, a high-level executive who has a two-year-old son, told her manager she was trying to get pregnant. The manager reacted with displeasure, stating that the pregnancy might interfere with her job responsibilities. Two weeks later, Anne was demoted to a lower paid position with no supervisory responsibilities. In response to Anne's

EEOC charge, the employer asserts it demoted Anne because of her inability to delegate tasks effectively. Anne's performance evaluations were consistently outstanding, with no mention of such a concern. The timing of the demotion, the manager's reaction to Anne's disclosure, and the documentary evidence refuting the employer's explanation make clear that the employer has engaged in unlawful discrimination.[9]

C. What can employers do to protect themselves?

Employers need to update their existing accommodation policies to ensure that non-pregnant workers are not receiving more favorable treatment than pregnant workers. Training on the new/updated policies is critical to ensure that supervisors and management are well-versed in the law and the company's procedures.

Types of accommodations to consider for pregnant employees are:

- Changing the employee's job duties;
- Changing the employee's work hours;
- Relocating the employee's work area if necessary;
- Providing aids to the employee;
- Transferring the employee to a less-strenuous position temporarily;
- Providing leave.

In essence, treat pregnant employees like other ADA-qualified employees. Notably, in 2015 Illinois, Nebraska and Rhode Island joined California,

[9] Enforcement Guidance: Pregnancy Discrimination and Related Issues, June 25, 2015, http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

Connecticut, Delaware, Louisiana, Maryland, West Virginia, and other states to pass *state* laws treating pregnancy and conditions related thereto as disabilities requiring accommodation by private employers. Accordingly, be mindful of both state and federal laws governing these issues.