Employment Practices Newsletter - June 2016

June 2, 2016

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EEOC Issues Final Regulations on Wellness Programs

by: Anthony E. Antognoli and Aimee E. Delaney

It seems to be a win-win when employers who provide employees with incentives to encourage healthy behavior. But employers that do so must contend with an alphabet soup of federal law — ERISA, GINA, HIPAA, the ACA, the ADA, just to name a few. In May, the EEOC weighed in and finalized its latest guidance on how employer wellness programs should be structured. These final regulations largely adopt the proposed regulations issued in 2015.

To meet the newly finalized EEOC requirements, the program must be reasonably designed to promote health or prevent disease. Accordingly, it cannot require an overly burdensome amount of time for participation, involve unreasonably intrusive procedures, be a subterfuge for violating federal laws prohibiting employment discrimination, or require employees to incur significant costs for medical examinations. For example, a program that tests employee health factors but does not follow-up with employees or provide test results generally would not meet the new requirements. A wellness program also is prohibited from having as its primary purpose the shifting of costs from the employer to targeted employees based on their health.

A main focus of the EEOC guidance is to ensure that employer wellness programs remain "voluntary" so employees do not feel compelled to participate. A program will be considered voluntary if it: (i) does not require employees to participate; (ii) does not deny coverage under any group health plan or particular benefit package offered under such group health plan for employees who do not participate in the wellness program, or limit the benefits available to them under such group health plans; (iii) does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees; and (iv) provides a detailed notice describing the wellness program.

Further, for a wellness program to be considered "voluntary," the incentives must be limited. The maximum permitted incentive is generally 30 percent of the total cost of self-only coverage under the employer's group health plan. The incentive may be in the form of an award (e.g., a cash payment or a reduction in group health plan premium costs) or a penalty (e.g., a surcharge on the premium costs for the health plan).

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The final rule applies both to wellness programs offered as part of a group health plan and to those that are stand-alone programs. Importantly, the rule applies only to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty. Programs that provide an incentive to employees who engage in certain activities, such as attending a health-related information session sponsored by the employer and then receiving a $10 gift card, are not subject to the rule.

The EEOC regulations make clear that employers who collect information from wellness programs remain subject to strict privacy and confidentiality rules. The EEOC also notes that complying with these regulations does not automatically relieve an employer from its obligation to comply with still other federal anti-discrimination laws.

Within 30 days of the rules publication, the EEOC will provide an example of a notice that complies with the rule on its website, www.eeoc.gov. To the extent that employers already use forms that provide the requisite information in an applicable document that complies with disclosures under ERISA and HIPAA, the rules state that employers do not have to create a new notice to satisfy the requirements of these provisions.

The final rule goes into effect January 1, 2017. To ensure that your company's wellness program is not DOA upon an EEOC investigation, review your program to ensure it fits within the EEOC's guidance and make sure that all notices and disclosures related to the wellness program are consistent with the requirements of the new rule.

Working 9 to 5: Overtime Exemptions Shrink

by: Evan J. Bonnett

The hour has arrived. Last summer, the Wage and Hour Division of the Department of Labor announced substantial revisions to federal regulations delineating who is exempt from overtime pay. After almost a year of waiting (and over 290,000 comments to the draft rule), the DOL published the final form of its revised overtime regulations under the Fair Labor Standards Act (FLSA).

Bottom Line Up Front: More Employees Will Be Eligible for Overtime

Beginning on December 1, 2016, employees making less than $913 a week ($47,476 annually) must be paid one and one-half times their regular rate of pay for all hours they work over forty (40) hours in a workweek, regardless of the employees' duties. This includes salaried employees making less than $913 a week!

A Sampling of the Rule's Practical Effects

A commonly used exemption is the "white collar exemption" for executive, administrative, professional, outside sales, and computer employees. An employee is exempt from overtime pay if an employee is paid at least a certain amount on a salary basis (the "threshold") and meets standards used to determine whether the employee's tasks really mean he or she is a "white collar" employee (the "duties" test). If the employee does not earn enough money to meet the threshold, his or her duties are irrelevant and the employee must be paid overtime. Although the proposed rules considered it, the final rules do not modify the "duties" tests in place since 2004.

By nearly doubling the salary threshold for exemption from $455 to $913 a week, these revised rules mean that many formerly-exempt "white collar" workers will suddenly be eligible for overtime pay when they work over 40 hours a week.

Under both the outgoing and revised rules, the salary threshold test does not apply to employees who are teachers, doctors, lawyers, or outside sales employees--these "white collar" employees are exempt because of their primary duties regardless of pay.

The rules also increase the "total annual compensation" threshold for "highly-compensated employees" from $100,000 to $134,004. This rule applies to those employees whose duties do not qualify for an exemption under the "duties" test, but who both pass a "minimal duties" test and earn total compensation above the threshold.

Finally, for the first time ever, the DOL is also indexing the salary and compensation thresholds in order to keep up with inflation.

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In the end, the DOL estimates this expansion will cover 4.6 million workers. Meanwhile, others estimate this expansion will cost employers $1.2 billion.

Anchors Aweigh

The released final rule is a brute, coming in at over a full ream of paper. Although the only readily-apparent change from the draft rules to the final rules is a reduction of the threshold from a proposed $970 per week to $913, we are thoroughly reviewing the 508-page long publication to ensure that there are no surprises lurking within (such as slight changes to the duties tests). A more thorough review and discussion is likely to be forthcoming once we are able to fully digest the final version of the rule to be formally published in the Federal Register.

What Employers Need to Do

Between now and December 1, 2016, it is imperative for your company to evaluate whether their currently-exempt employees be paid overtime under the new rule. This evaluation may require evaluating a combination of employee pay, hours, position descriptions, and the actual duties performed. Your company should also begin considering the ramifications this change has to their operations and finances by considering issues as diverse as employee reclassification, assignments, staffing levels, full or part-time status for employees, and strict monitoring and/or restriction of employee overtime, among many other issues.

Finally, be cognizant of the potential for an uptick in wage and hour claims while they are in the midst of the shifting sands of regulatory change. The FLSA provides for automatic “reasonable attorney’s fees” for prevailing plaintiffs’ attorneys, which makes contingency fee arrangements all the more attractive. The FLSA also prohibits retaliating against employees who file or participate in complaints. Therefore, ensure you are prepared to professionally handle these situations.

Where Do I Pee? “The Bathroom Corresponding to Your Gender Identity," Says the EEOC

by: Elizabeth A. Odian

Bathroom use by transgender individuals is today’s hot-button civil rights issue. The often strong and disparate opinions about the subject creates a conundrum for employers: How do we make everyone comfortable while ensuring a safe and inclusive environment? And how do we do that without violating the law?

In early May, the EEOC issued a fact sheet titled “Bathroom Access Rights for Transgender Employees Under Title VII.” Although the fact sheet addresses bathroom use specifically, it also sheds light on the EEOC’s broader position that transgender is a protected class, and any adverse employment action or harassment based on gender identity violates Title VII. Here are the important takeaways for employers:

- The EEOC takes the position that discrimination based on transgender status violates Title VII.
- You cannot condition your employee’s right to use the bathroom of his or her choice on undergoing sex reassignment surgery or providing medical documentation confirming that he or she has undergone such procedures.
- State laws requiring transgender individuals to use the bathroom corresponding to the sex assigned at birth, such as North Carolina’s hotly-debated bathroom law, is not a defense.
- Restricting transgender employees to use of single occupancy bathrooms is discriminatory (although you can make a single occupancy bathroom available to all employees who choose to use it).
- The opinions of or discomfort expressed by coworkers does not justify discrimination.

The bottom line: treat transgender employees as you would your other employees. Employers should not rely on outdated law holding “transgender” is not a protected status under Title VII. These laws are subject to reversal, and the EEOC has stated in no uncertain terms it will enforce Title VII as though transgender is a protected class. It remains unclear how courts will handle state laws conflicting with the EEOC's position. If your company is in a state with conflicting laws, consult your Hinshaw attorney.

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SCOTUS Aligns Application of Statute of Limitations in Constructive Discharge and Actual Discharge Cases

by: Elizabeth A. Odian

The U.S. Supreme Court held in *Green v. Brennan* that the statute of limitations for a constructive discharge begins to run on the date of resignation, not the date of the employer's last discriminatory act. As a result, in determining the deadline for filing a charge of discrimination with the EEOC, constructive discharge cases will be treated the same way as actual discharge cases.

What this ruling means to you:

Employers can no longer assert a statute of limitations defense based on the last date of discriminatory conduct, which is typically earlier than an employee's resignation. Although the filing period is now longer, employees will still need to prove a constructive discharge. The longer an employee waits to resign following a discriminatory act, the weaker the inference of a constructive discharge. If there is an upside, because employees will no longer need to file a pre-resignation charge of discrimination to avoid being time-barred, the number of multiple or amended charges should decrease, eliminating the costs associated with responding to and litigating multiple claims.

Knock-Knock, Who's There? The EEOC: When the EEOC Can Investigate an Employer's Premises Without Prior Consent

by: Elizabeth A. Odian

When the EEOC investigates a charge of discrimination, it may employ one of several investigatory methods, including site inspections. In *EEOC v. Nucor Steel Gallatin, Inc.*, a case of national first impression, a Kentucky district court considered whether to enforce a subpoena requiring the employer to provide on-site access to conduct witness interviews, examine the facility, and obtain additional information relating to the position the complainant applied for, or alternatively, to require the EEOC to obtain an administrative warrant.

The court held the EEOC need not obtain an administrative warrant. However, it must obtain pre-compliance judicial review providing substantive and procedural safeguards roughly equivalent to those afforded by administrative warrant procedures. The court then laid out the procedure for seeking and objecting to an inspection:

1. The EEOC notifies the employer of its intent to perform an inspection
2. If the employer objects to the inspection, the employer must state its refusal to permit it.
3. Upon notice of the employer's refusal, the EEOC must issue a subpoena detailing the nature of its request.
4. If the employer has objections to the subpoena, it must petition the EEOC's Director or General Counsel to modify or revoke the subpoena.
5. If the EEOC denies the appeal and the company still refuses to comply, then the EEOC's General Counsel or designee may institute proceedings in federal court to enforce the subpoena.
6. When the EEOC seeks enforcement, the district court must review the subpoena to determine the following: whether (a) the subpoena is within the EEOC's authority, (b) the EEOC has satisfied its own due process requirements, (c) compliance would be unduly burdensome, and (d) the information sought is relevant to the charges filed.
7. In considering the subpoena at issue, the court determined a full investigation required an access to the workplace itself; the EEOC need not take the employer's word that it provided the EEOC with everything it needed to make a determination on probable cause. An inspection would aid in determining the essential functions of the position in question. The court did limit the scope of the subpoena to the areas of the facility relevant to the filed charge.

The upshot is employers who receive inspection requests from the EEOC must carefully review such requests and be vigilant in contesting the scope of the notice or subsequent subpoena. Otherwise, an EEOC investigator might obtain unfettered access to the employer's facility, giving him or her access to parts of the facility irrelevant to the complainant's charges.

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