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HR Solutions Come Full Circle

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• FLSA exemption changes
  – Increase in threshold amounts
    • Now: $455/week ($23,660/year)
    • Proposed: $970/week ($50,440/year)

• Primary duty tests
  – Adopt the California rule?
  – 50+% of time must be spent on exempt duties
• Return to long and short tests?
  – More difficult duties test with lower salaries

• Threshold change for highly compensated employee exemption
  – Current: $100,000/year minimum salary
  – Proposed: $122,140
• Misclassification of workers as independent contractors
  – Six factor test for independent contractor vs. employee (Administrator’s Interpretation 2015-1)
    • Is the work integral to the entity’s business?
    • Opportunity for profit or loss
• Six factor test
  – Extent of relative investments of the worker and the entity
  – Whether special skills and initiative are required
  – Permanency of the arrangement
  – Degree of control over the worker exercised by the entity
• Pay data collection proposed by EEOC
  – Would apply to employers with 100+ employees
  – These employers would have to report the pay of employees in 12 pay bands by race, gender and ethnicity on revised EEO-1 forms
  – Would be effective 9/30/2017
For federal contractors & subcontractors
  – Pay Transparency rules (EO 13665)
    • Applies to federal contracts of $10,000+ entered into on and after 1/11/2016
    • Bars employers from having rules or taking action against employees who ask about, discuss or disclose pay amounts
  • Specific non-discrimination clause required
• Pay Transparency rules
  – Policy must be given to employees and applicants
  – New EEO poster is in the works
  – Effective for contracts entered into on and after 1/11/2016
• Federal contractors & Subcontractors
  – Paid sick leave
  – Must provide up to 7 days/year of paid sick leave under contracts executed in 2017 and later, at the accrual rate of 1 hour of leave for each 30 hours worked
Legislative/Regulatory - NLRA

• New election rules
  – In effect now
  – Shortened election periods
    • Before: 38 days from petition to election (median)
    • Now: 27 days (median)
  – New Statement of Position requirement
Legislative/Regulatory - NLRA

• Increased information in Voter Lists
  – Available personal phone numbers and email addresses
  – Job title, shift and department
  – Significant penalty for violations

• Unions won 67% of 2014 elections
• NLRB General Counsel Summary of Employee Handbook Cases
  – Regarding confidentiality, employee conduct, interactions with third parties, tape recording, photos at work, conflicts of interest, etc.
• Restroom access for transgender workers
Cases of Interest

• Supreme Court’s Gay Marriage Decision
  – Obergfell v Hodges
    • State laws barring or restricting same-sex marriage are unconstitutional and void
    • Same-sex spouses eligible for benefits
    • Negates need in handbooks for extension of benefits to same-sex couples
Cases of Interest

- Religious objections under the Religious Freedom Restoration Act available to closely held businesses with sincerely held religious beliefs against homosexuality
• Pregnancy Discrimination Act
  – Supreme Court in Young v UPS
  – Light duty work assignments to pregnant workers must be offered if a large percentage of non-pregnant disabled employees are offered light duty
  – Same concept applies to other forms of accommodation
Telecommuting not always a reasonable accommodation (EEOC v Ford Motor Co. (6th Circuit))

- Employee’s job required regular interactions with co-workers – her absences resulted in many mistakes
- Regular attendance at the workplace is normally an essential job function
• EEOC: Employers may have wellness programs that are “voluntary” and may conduct medical exams and require medical histories
  – Programs not “voluntary” – per the EEOC – if they require participation or penalizes employees who don’t participate
  – Incentives may be disguised penalties
• Resistance to sexual harassment and telling supervisor-harasser to stop are protected activities (EEOC v New Breed Logistics (6th Circuit))
  – Their discharges, with supervisor’s recommendation, were unlawful retaliation for engaging in protected activities
• White patient and family demanded African-American RN not care for patient
• Hospital agreed
• RN maintained all other duties and compensation and was not transferred
• Race discrimination case dismissed because RN suffered no adverse employment action (Foster v Mary Free Bed Hospital (WD Mich))
$938,000 award against EEOC for frivolous lawsuit (EEOC v Freeman (D Md))
Claim: Employer failed to hire racial minorities and men because of criminal record checks
Expert report “inexplicably shoddy”
• Discharges for performance issues or misconduct not discovered until employee was on FMLA leave
• Most recent case – Gabriel v Colorado Mountain Medical (10th Circuit)
• OK to discharge for legitimate reasons during FMLA leave
Cases of Interest - FMLA

- Employee fired for taking FMLA leave
- DOL informed employer this was illegal
- Employer reinstated employee immediately, 5 days after discharge
- Lawsuit dismissed because employee wasn’t harmed due to immediate remediation (Wilson v Gaston County (D NC))
• Under new election rules, election win for employer reversed for failure to provide all personal email addresses and phone numbers on Voter List (Danbury Hospital (NLRB))
Cases of Interest - NLRA

• Employee handbook conduct rules frequently invalidated by the NLRB for violating section 7 of the NLRA

• Old joint employer test revived (Browning-Ferris of California). Client of staffing firm a joint employer if it has authority to affect terms & conditions of employment, even if it never exercises them
• Joint employment
  – Decision in Miller & Associates will decide joint employer rule in union elections
  – Likely result: joint unit of shared employees and client company’s regular employees will be permitted
• Social media cases
  – Section 7 rights of employees are being broadly protected
  – Three D, LLC (2nd Circuit)
  – Pier Sixty (NLRB)
• HR Director 27 times tried to change OT policies to comply with FLSA
  – Discharged on 27th try and claimed retaliation
  – Issue: Did she complain, or was she just doing her job of proposing policy changes?
  – Court: This was protected activity (Rosenfield v GlobalTranz Enterprises (9th Circuit))
• Employer claimed its FLSA violations were in good faith because it relied on free “e-law website” to conclude its actions were legal
• Defense rejected (Miles v HSC-Hopson Services Company (5th Circuit))
GINA Discrimination

• 2 employees ordered to undergo DNA testing (saliva) to determine if they had been defecating in the plant
  – This violates GINA, as employers can’t require employees to produce genetic material (Lowe v Atlas Logistics Group retail Services (ND GA))
Questions

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