Lancaster Society for Human Resources Management
Labor and Employment Law Update

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PA Wage & Hour Update: Heimbach Decision

Heimbach v. Amazon: July 2021 PA Supreme Court decision on requirements of PA Minimum Wage Act

- **Issue: Is time spent by warehouse workers at end of shift waiting to undergo and undergoing security check compensable time worked?**
  - **PA regulatory definition of "hours worked": "….time during which an employee is required by the employer to be on the premises of the employer…"**
  - **Waiting for and undergoing post-shift security screens is "required" and therefore paid time.**
  - **Unlike federal law – the PA Supreme Court holds there is no "de minimis" exception**
  - **Compliance with the FLSA does not mean compliance with PA Minimum Wage Act ("MWA")**

PA Wage & Hour Update: Heimbach Decision

- **Tidal wave of class action suits challenging:**
  - **Time spent for COVID screening/questionnaires**
  - **Walking between entrance to/from work station**
  - **Donning/doffing uniforms and PPE on-site**
  - **Swiping in to building or parking lot**
  - **Logging on/off computer at beginning and end of shift**

PA Wage & Hour Update: Heimbach Decision

- **Industries/Employers most at risk:**
  - **Large warehouses (security / walking time)**
  - **Construction (travel time)**
  - **High-security Facilities (time completing security protocol)**
  - **Heavy industry (donning/doffing PPE)**
  - **Food service (preliminary/postliminary activities)**
  - **Any employer that required on-site COVID screening (all industries?)**

PA Wage & Hour Update: Heimbach Decision

- **<u>Best Practices in the Wake of the Heimbach decision</u>**
  - Establish timekeeping policy/protocol that captures all compensable time.
  - Self-audit for practices that may present a risk (priority for practices affecting large groups of employees).
  - Focus on beginning/end of day and meal periods.

Wage & Hour Update

- **Employees vs. Independent Contractors**
  - On January 9, 2024, DOL issued a Final Rule addressing when a worker is properly classified as an independent contractor under the FLSA
    - Economic Realities test – contractors are characterized as those who are not economically dependent on an employer for work; rather, they are in business for themselves
    - "Economic Independence" analysis looks to the totality of the circumstances with six key factors to consider

Wage & Hour Update

- **Employees vs. Independent Contractors – relevant factors**
  - Opportunity for **profit or loss** based on managerial skill
  - **Investments** by the worker and possible employer
  - **Permanence** of the relationship
  - Nature and **degree of control over performance** and **economic aspects** of the relationship
  - Is the work performed an **integral part** of the possible employer's business?
  - Use of a worker's **skill and initiative**

Do's and Don'ts of Utilizing ICs

Best Practices:	Risky Practices:
ICs paid a negotiated project fixed fee	ICs paid by the hour, day, week or piece rate
ICs invest in tools, equipment, insurance	ICs provide only their labor
ICs are engaged for duration of project	ICs retained indefinitely/open-ended term
ICs are engaged to produce a result	ICs are subject to ongoing supervision
ICs work is outside scope of business	ICs perform the same work as employees
IC skill/initiative results in greater profit	IC is paid the same regardless of skill/initiative
IC has multiple clients (and employees)	IC relies exclusively on single employer
IC may be required to comply with law (e.g. DOT drug testing, OSHA)	IC subject to same work rules as employees (e.g. uniforms, call off rules, etc.)

Independent Contractor Self-Audit

- **Review existing IC relationships**
- **Update written agreements to highlight independence**
- **Establish minimum standards to assure independence per factors above**
- **Red flag long-term exclusive relationships**
- **Periodically review whether IC function should be brought in-house**

Wage & Hour Update

- **Here We Go Again! Proposed Increase to Salary Basis Threshold**
  - August 30, 2023, the DOL issues proposed regulations to increase salary basis for white collar exemptions (executive, administrative, professional)
    - Current salary basis: $684 per week/$35,308 annually
    - Proposed rule increases salary basis using formula of 35th percentile of weekly earnings of full-time salaried workers in lowest U.S. census region
      - Currently = $1,059 per week/$55,058 annually
    - Includes automatic updates every three years

- **Takeaway: No time like the present. A final regulation is expected in 2024. Be proactive (and prepared) and review your current exempt positions under the proposed salary basis**

NLRB and Joint Employment

- **Final rule released October 26, 2023, with effective date of February 26, 2024 (revised effective date due to legal challenges)**
- **Why does this matter?**
  - Applies to union and non-union employees
  - Separate entities can be jointly responsible for employment practices of each other
  - Proposed rule broadens responsibility for unfair labor practices, collective bargaining, and other employment practices covered by NLRA
  - **Example**: Host employer may be liable for a temp agency's ULP
  - **Example**: Parent employer may be responsible for negotiating and abiding by affiliated employer's collective bargaining agreement

NLRB and Joint Employment

- **Prior rule required proof of actual direct and immediate control to establish joint employer status**
- **New rule only requires authority to control (not actual control) of essential terms and conditions of employment**
- **"Term and conditions" include wages, benefits, hours, assignment, supervision, work rules, safety/health, etc.**
- **Takeaways:**
  - The rule applies to matters within the jurisdiction of the NLRB. Other agencies (e.g., DOL) can have their own rule
  - Review policies and contracts with related or subsidiary entities

Wage & Hour Update

- **Joint Employment Audit**
  - Risk: Extensive use of temp firms
  - Risk: Longstanding use of same independent contractors
  - Risk: Inter-related operations with related company
  - Best Practice: Be sure agreements clearly delegate authority to establish "essential terms" to outside entity
  - Best Practice: Consider third party supervision of temps/ICs

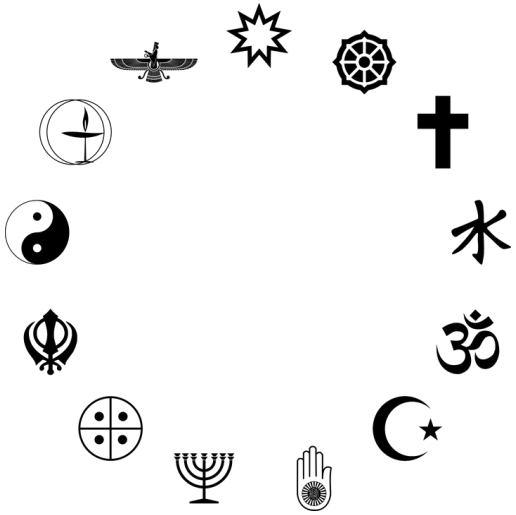
NLRB and Work Rules That May Violate Section 7 Rights

- **Stericycle, Inc. (NLRB August 2, 2023)**
  - **Changes the standard for evaluating lawfulness of work rules in the context of infringing on Section 7 rights under NLRA**
  - **Now a more onerous standard for employers**
    - **Overly broad work rules may chill exercise of Section 7 rights**
    - **Employer now ultimately bears the burden to prove:**
      - **Rule advances legitimate and substantial business interest, and**
      - **Employer is unable to advance that interest with a more narrowly tailored rule**
  - **Nearly any rule dealing with personal conduct could be determined unlawful if it is overly broad.**

NLRB and Work Rules That May Violate Section 7 Rights

- **Consider potential implications for policies/work rules involving:**
  - **Confidentiality/ Non-disparagement**
  - **Use of social media**
  - **Use of smart phones in the workplace**
  - **Rules promoting civility, respect, etc. in the workplace**
- **Takeaways:**
  - **Review your policies and consider whether they have an objective business purpose**
  - **If so, can you achieve the purpose with a narrower policy?**

Religious Accommodations



- **Groff v. DeJoy, U.S. Supreme Court (June 29, 2023)**
  - Title VII makes it unlawful for a covered employer to discriminate based on religion. A religious accommodation must be provided unless it poses an undue hardship. Under established case law, undue hardship was established for religious accommodations if more than de minimis cost is incurred.
  - In Groff:
    - Employee was a Sunday Sabbath observer and informed Employer (USPS) that he could not work on Sundays.
    - Employer offered to find employees to swap shifts with him.
    - Several Sundays, no co-workers could swap, and Employee refused to work.
    - Employee was terminated for attendance violations.

Religious Accommodations

- **The Groff decision has changed nearly 50 years of established precedent on the religious accommodation standard and undue hardship.**
  - Now, undue hardship assessed on a case-by-case basis:
    - Must show significant impact on conduct of the business
    - Factor in the size, operating costs, and nature of business
    - Even if an undue hardship, employers must consider whether other accommodations would work
- **Takeaways:**
  - Review accommodation policies and training related to religious accommodation.

Pennsylvania Human Relations Act Amendments

- **Amendments to the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act provide new definitions of race, gender and religious creed**
- **Expanded definition of "sex" includes sexual orientation**
  - This was not previously covered under express provisions of Pennsylvania law
  - Under the PHRA, the protected trait of sex now includes pregnancy, childbirth and related medical conditions; breast feeding; sex assigned at birth; gender identity or gender expression; affectional or sexual orientation; and "differences of sex development, variations of sex characteristics or other intersex characteristics"

Pennsylvania Human Relations Act Amendments

- **Expanded definition of "race" includes hairstyles associated with race**
  - The term race includes ancestry, national origin or ethnic characteristics; interracial marriage or association; Hispanic national origin or ancestry; "traits historically associated with race", including, but not limited to:
    - Hair texture
    - Protective hair styles, such as braids, locks and twists
    - Any other national origin or ancestry "as specified by a complainant in a complaint"

Pennsylvania Human Relations Act Amendments

- **Religious creed includes all aspects of religious observance and practice as well as belief**
- **PHRA applies to counties and local government**
- **Consider reviewing and revising discriminatory harassment policies and updating training in light of the expanded definitions**
- **Amended regulations effective August 17, 2023**

EEOC Updates

- **Guidance on use of AI in employment (5/23)/Executive Order (10/23)**
  - Includes use of AI in screening, evaluations, recruitment
  - Goal is to prevent discriminatory outcomes from use of AI
    - Employers should be able to explain how AI algorithms are being used
    - Employers should monitor outcomes to prevent adverse impact based on protected traits from use of AI tools
- **Takeaways:**
  - Don’t use AI unless you are willing to take responsibility for it and monitor outcomes.
  - Consider a policy to define if, how, and when AI will be used in your organization.

EEOC Updates

- **Enforcement Guidance on Harassment in the Workplace**
  - Currently proposed guidance, although it will likely become official after public review and comment.
  - The first guidance from the EEOC on this issue in 25 years.
  - Includes updated guidance on issues such as sexual orientation and gender identity as protected traits.
  - Focuses on covered traits, discrimination with terms and conditions of employment (hostile work environment), and liability.
- **Takeaway: Worth reading and using for training of managers.**

End of Non-Competes as We Know Them?

- **The FTC proposed a new rule that would ban employers from imposing noncompete agreements on their workers.**
- **FTC expected to vote on rule this year. If implemented, it would be illegal for an employer to:**
  - Enter into or attempt to enter into a noncompete agreement with a worker (could include overly broad confidentiality and non-solicitation provisions)
  - Maintain a noncompete agreement with a worker
- **Takeaway: Stay tuned…**

End of Non-Competes as We Know Them?

What's happening at the State level?

Over 30 states have statutes regulating non-competes

Employee non-competes generally not allowed in CA, CO, MN, ND, OK + DC (with narrow exceptions)

Pennsylvania legislation unlikely to pass in near term (but watch for "small bites" from Governor's Office)

2021: Washington, D.C., enacted ban on non-competes (effective date delayed until October 1, 2022)

2021: Illinois, Nevada, and Oregon laws amended

Unemployment Compensation Decision

- **Philadelphia Parking Auth v. UCBR 2024**
  - Employee terminated for arguing with customer
  - Employer's only witness was a manager who investigated the incident
  - Hearsay objection sustained

- **Takeaway: Remember that unemployment referees can issue subpoenas!**

Workers' Compensation Decision

- **Schmidt v. Schmidt Kirifides and Rassias, PC 2024**
  - Injured worker sustained a compensable work injury to his low back
  - Post-injury treatment included medication and over-the-counter CBD oil
  - Employer refused to pay for workers' out of pocket expenses for CBD oil

- **Takeaway: CBD oil might be a "medicine" or "supply" under the WC Act.**

QUESTIONS?

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