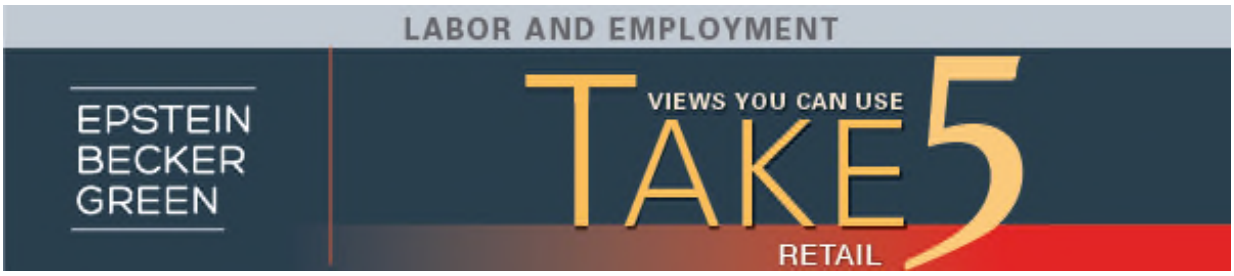

May 29, 2015

Five Employment, Labor, and Workforce Management Concerns Impacting Retailers

For the latest employment, labor, and workforce management news and insights concerning the retail industry, please visit and subscribe to *Epstein Becker Green's Retail Labor and Employment Law blog*.

Retailers will be busy this summer attempting to conform their policies and procedures to various local, state, and federal laws, such as the spate of state and city sick leave laws, and analyzing proposed amendments by the Equal Employment Opportunity Commission ("EEOC") that would significantly affect Affordable Care Act ("ACA")-compliant wellness programs. On the union organizing side, the "ambush election rules" issued by the National Labor Relations Board ("NLRB" or "Board") will, among other things, stimulate retailers to become more proactive in their labor relations and create an environment in which an organizing campaign cannot take root. And while reviewing their policies and procedures, retailers will likely wish to revise many of their standard handbook policies, since the NLRB recently called such policies into question because they may chill employees' rights to collectively discuss the terms and conditions of their employment. Finally, if complying with these changes is not challenging enough, the threat of a data breach, including cyber-attacks and accompanying lawsuits, feels almost inevitable. This edition of *Take 5* will help retailers navigate these issues and become informed about the recommended changes to their policies, procedures, and practices:

1. **Sick Leaves Laws Are Sweeping the Nation**
2. **The NLRB's New "Expedited" Election Rules Became Effective April 14, 2015—Expect a Major Uptick in Union Activity in Retail**
3. **EEOC Proposes Wellness Program Amendments to ADA Regulations: The Impact on Retail Employers**
4. **Security Considerations for the Retail Employer**
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1. **Sick Leaves Laws Are Sweeping the Nation**
   By Nancy L. Gunzenhauser

The paid sick leave trend is gaining traction. In his 2015 State of the Union address, President Obama called for national legislation guaranteeing paid sick leave for workers. While Congress has not yet taken any action, three local jurisdictions enacted paid sick leave laws affecting private employers in 2015 so far.

Three states, California, Connecticut, and Massachusetts, and nearly 20 cities have passed paid sick day legislation. These cities include Oakland and San Francisco, California; Bloomfield, East Orange, Irvington, Jersey City, Montclair, Newark, Passaic, Paterson, and Trenton, New Jersey; New York City; Eugene and Portland, Oregon; Philadelphia; Seattle and Tacoma, Washington; and Washington, D.C. Some of these laws, such as those in California and Massachusetts, will become effective in 2015, while others are already in effect. Understanding what is required by these laws has never been more important.

Generally, paid sick leave laws allow employees to take paid time off to diagnose, care for, or treat their own, or a family member's, illness, injury, or health condition, or to obtain preventative medical care. Some states and cities—such as California, Connecticut, Eugene, Portland, Seattle, and Washington D.C.—allow employees who are victims of domestic violence, sexual assault, or stalking to take paid time off as well. In addition, New York City, Portland, Seattle, Tacoma, and certain cities in New Jersey allow paid leave in connection with the closure of an employee's place of business due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed due to a public health emergency.

While some of the laws cover all employers, regardless of the number of employees, paid sick leave laws in Connecticut, Jersey City, New York City, Philadelphia, and Seattle do not apply to employers that employ less than a specified number of employees. Similarly, the laws in Jersey City, Massachusetts, New York City, and Portland provide that, even when a smaller employer is not required to provide *paid* sick days, those employers must still allow employees to take unpaid time off.

The threshold for employees' eligibility to accrue sick time differs by location, but most laws require that employees (including part-time and temporary employees) work a certain number of hours in a year in order to be eligible. For example, the ordinances enacted in New Jersey require that employees work more than 80 hours in a year in order to qualify for paid sick leave, while Philadelphia requires an employee to work at least 40 hours in a year.

While the accrual of sick time generally begins immediately upon hire, most sick leave laws provide that employees become eligible to actually *use* sick time after their 90th or 120th day of employment. Many of these laws dictate that employees accrue one hour of sick leave for every 30 hours worked (or 40 hours worked in Connecticut and Philadelphia). However, in places such as Seattle and Washington, D.C., accrual is based on the number of employees the business employs, so that employers with fewer employees accrue hours at a slower rate than those employers that employ greater numbers of employees.

Another major difference among various sick leave laws is the incremental use of sick time. In Washington, D.C., for example, employers must allow employees to use sick time in one-hour increments. In California, employees can use sick time in two-hour increments, while in New York City, employers can require that employees use a minimum of four hours of sick time at a time.

Essentially all the paid sick time laws require employers to either provide notice to employees of their rights under the law upon hire or display a poster containing the requisite information in their business establishment. Most of the laws require employers to maintain and retain adequate records of their compliance with the laws as well. Some of the laws even go so far as to require employers to track remaining sick time on employees' pay stubs.

The concern with the hodgepodge of sick leave laws popping up across the country is, of course, remaining in compliance, particularly for companies that operate in multiple locations. Many employers are opting to create a single sick leave policy that complies with all of the laws applicable to their various locations, while others have created separate policies for each location.

In any event, employers should keep an eye out for new sick leave laws in every jurisdiction in which they do business.

2. The NLRB's New "Expedited" Election Rules Became Effective April 14, 2015—Expect a Major Uptick in Union Activity in Retail
By Steven M. Swirsky

The NLRB issued a 733-page final rule ("Final Rules") this past December, which became effective on April 14, 2015, that amended the Board's rules and procedures for union representation elections and are commonly referred to by employers and others as "the ambush election rules." The Final Rules involve the most significant changes to the Board's procedures in representation cases in more than 50 years and, together with the Board's 2013 *Specialty Healthcare* decision, allow unions to petition for elections in so-called micro-units, consisting of small groups, sometimes smaller than a single department in a retail operation, and is expected to bring a major increase in union organizing in retail workplaces.

Because the Final Rules are designed to cut the period between the filing of a representation petition and the vote down to 21 days from the typical 40-45 days under the procedures that they replaced, retail and other employers will need to adjust their labor relations and human resources practices and strategies if they are to successfully maintain non-union status.

The Final Rules significantly change the Board's long-standing union election procedures and eliminates many of the steps that employers have relied on to protect their rights and the rights of employees who may not want a union. Cumulatively, the Final Rules tilt the scales in labor's favor by expediting the election process and cutting employer rights. Among the most important changes contained in the Final Rules are the following:

- Representation hearings will generally take place within eight days of the filing of the petition.

- Employers will have to provide the NLRB and any union that files a petition with a list of their employees' names, job classifications, shifts, and work locations before the hearing. Under the old rules, employers did not have to provide employees' names and addresses until after an election was agreed to by the parties or directed by the NLRB Regional Director after a hearing.

- If an employer does not agree that the proposed bargaining unit named by the union in its petition is an appropriate one, the employer must also provide the petitioning union and the NLRB with the names, job titles, work locations, and shift information for all other

employees whom it believes should be included in the unit. This information will allow the union to contact and begin its campaign among all of those employees as well.

- One of the most significant requirements of the Final Rules is that an employer must submit a detailed Statement of Position ("SOP") by noon the day before the before the hearing identifying any and all issues that it believes exist with respect to the petition—this will include issues concerning eligibility, inclusion or exclusion from the unit, supervisory and managerial status, and whether the unit that the union seeks is appropriate. If an issue is not raised in the SOP, the employer will be deemed to have waived all of its legal arguments that it did not raise. This means that it is critical that an employer carefully assess all of the facts and issues without delay.

- Under the Final Rules, employers no longer have the legal right to a hearing and to present evidence on issues such as supervisory status, unit composition, and other issues. The Board's Regional Office will generally deny employers the right to have important questions concerning eligibility and supervisory status resolved before an election.

- Instead, an employer will need to be prepared to make an "offer of proof" at the hearing, describing in detail who its witnesses and what its documentary evidence would have been had it been allowed to call witnesses.

- Employers no longer have the right to file post-hearing briefs on issues that are litigated at a representation hearing; instead, parties will be limited to arguing their positions in closing statements unless the Regional Director decides that briefs are necessary.

- Under the old rules, parties generally had not less than eight days from the close of the hearing to submit a written brief applying the facts and the law and presenting their arguments verbally. Generally, when an employer ordered the transcript of the hearing and requested an extension, its time to submit a post-hearing brief would be extended by an additional two weeks.

- Employers will no longer have the right to appeal a Regional Director's decision to the Board in Washington before an election is conducted. Under the old rules, this appeal period typically meant that the election could not take place until at least 25 days after the Regional Director issued a Decision and Direction of Election.

- The Final Rules expand the information that employers must provide about their employees to the union and the NLRB before the election. While the old rule required employers to supply employees' names and home addresses, the Final Rules dictate that employers also provide unions with employees' home telephone numbers and their personal email addresses. The list will now be due in two days rather than seven days and must be in a Word document.

- The Board's review of a Regional Director's legal findings and conclusions is severely curtailed.

- Perhaps most important, there will no longer be a minimum time period for the pre-election campaign because the Final Rules eliminate the minimum 25-day waiting period between a Direction of Election and the election. Rather, the Regional Director "shall

schedule the election for the earliest date practicable"—which could be as early as 14 days after the petition is filed.

By and large, the Final Rules run roughshod over an employer's right to dispute the propriety of the proposed bargaining unit before the election occurs and saddle the employer with new pre-election obligations. In effect, the NLRB has endeavored to speed up the election process so that an employer is unable to investigate and present a campaign against the union or fully consider the applicable legal questions. While the NLRB argues that the amendments "remove unnecessary barriers" to a union election, in reality, what was removed were those checks and balances preventing a union ambush and ensuring that an employer's right under the National Labor Relations Act ('NLRA" or "Act") to express and communicate its position under Section 9(c), the "employer free speech" provision, has meaning. To put it bluntly, organized labor and the Board hope for, and the rest of us should expect, more union elections, in a shorter period of time, and more victories by unions trying to organize.

While the NLRB characterizes the amendments as necessary to "modernize the representation case process," there is little in the Final Rules that merits such a claim. The amendments seem little more than window dressing to obscure the Board's intended goal of helping unions win elections.

Expect Additional and Faster Elections and More Union Organizing

Until now, the NLRB's goal has been to ensure that elections take place within 45 days of the filing of a representation petition. The Board's goal in amending its rules is to shorten that period as much as possible without amendments to the Act, which would require Congressional action.

When measuring their likely impact, the changes in the election rules should not be viewed in isolation. Rather, they need to be looked at in light of the Board's ruling in *Specialty Healthcare* and subsequent cases. In that line of cases, the Board made clear that it will find smaller, easier-to-organize units sought by unions to be appropriate and will direct elections accordingly, even though, under prior Board decisions, many such units would have been found to be inappropriate under the rule that units are not to be based on the extent of organizing.

The Final Rules should also be viewed in the context of the Board's recent *Purple Communications* decision, which held that, if employees are allowed to use their employer's email system for any non-work-related purpose, they will be presumptively allowed to use their employer's email system for union organizing and other matters relating to terms and conditions of employment.

3. EEOC Proposes Wellness Program Amendments to ADA Regulations: The Impact on Retail Employers
By August Emil Huelle

When the ACA increased wellness program incentives to encourage a healthier workforce, many employers in the retail industry embraced the potential long-term cost savings by amending their wellness programs to implement the maximum incentives allowed. A newly proposed wellness program rule issued by the EEOC may force employers to reduce their ACA-compliant wellness incentives and, at the very least, to update their existing wellness program designs to comply with the EEOC's proposed rule.

On April 20, 2015, the EEOC issued proposed amendments to regulations under the Americans with Disabilities Act ("ADA"), which attempt to clarify when wellness program incentives render a health plan involuntary and, therefore, discriminatory under the ADA. Title I of the ADA explicitly restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations. The statute, however, provides an exception to this rule for employers that "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." Employee health programs include workplace wellness programs.

Previous EEOC guidance explained that a "wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate," but until the recently released proposed rule, the EEOC was silent on whether and to what extent, if any, wellness program incentives sanctioned by the ACA violate the ADA.

The Proposed Rule

The proposed rule states that an employer may offer limited incentives up to a maximum of 30 percent of the total cost of employee-only coverage, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations as long as participation is voluntary. Under the proposed rule, "voluntary" means that an ADA covered entity does not: (1) require employees to participate, (2) deny coverage under any of its group health plans or limit the extent of such coverage to an employee who refuses to participate in a wellness program, and (3) take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.

Further, to ensure that participation in a group-health-plan wellness program that includes disability-related inquiries or medical examinations is truly voluntary, an employer must provide an employee with a notice indicating: (1) what medical information will be obtained, (2) who will receive the medical information, (3) how the medical information will be used, (4) the restrictions on such information's disclosure, and (5) the methods that the covered entity will employ to prevent improper disclosure.

Confidentiality of medical information also is addressed in the proposed rule. The EEOC made no changes to the current ADA confidentiality rules, but it did propose to add a new subsection that generally requires that the medical information collected though a wellness program be provided to the ADA covered entity only in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals, except as needed to administer the plan. The proposed rule confirms that a wellness program associated with a covered entity under the Health Insurance Portability and Accountability Act ("HIPAA") likely should comply with the new ADA confidentiality obligation by complying with the HIPAA Privacy Rule.

The proposed rule does not address whether the EEOC's interpretation of the term "voluntary" and its interplay with wellness program incentives under the ADA cross over to similar provisions under the Genetic Information Nondiscrimination Act ("GINA"). Rather, the proposed rule states that further rulemaking on GINA and wellness programs will be forthcoming.

The Big Departure from ACA Guidance

The proposed rule's biggest departure from current ACA wellness program guidance arguably is the 30 percent incentive limit placed on all participatory *and* health-contingent wellness programs that include disability-related inquiries or medical examinations, including those designed to reduce or eliminate tobacco use. The ACA does not impose limits on rewards for participatory wellness programs. Unlike health-contingent wellness programs, participatory wellness programs do not include any condition for obtaining a reward-based incentive that turns on an individual satisfying a standard related to health.

By excluding participatory incentives over 30 percent and the additional 20 percent health-contingent incentive allowed for tobacco cessation, employees lose the opportunity to lower their premiums by these additional amounts. Even more troubling is that, depending on the employee, a refusal to permit the full tobacco cessation incentive might tip an employee over the ACA's 9.5 percent threshold for "affordability," possibly resulting in assessable payments under the shared employer responsibility provisions.

Potentially compounding this problem is that the proposed rule requests comments on whether the EEOC should deem a wellness program with disability-related inquiries or medical exams coercive and involuntary if the incentives exceed the ACA's 9.5 percent affordability rate. Significantly, the EEOC takes the position in the proposed rule that the measure of affordability and the impact of a 30-percent reward or penalty are based on self-only coverage.

4. Security Considerations for the Retail Employer
By Adam C. Solander and Brandon C. Ge

In today's connected data-centric world, the reality is that, at some point, a retailer will likely experience a data breach. Despite this inevitability, consumers, employees, and business partners view such incidents with a critical eye and will want to understand what steps the business took to prevent the breach and mitigate the incident.

In the past year, there has been an explosion in the number of cyber-attacks targeting retail employee and consumer data. There has also been a corresponding increase in the number of lawsuits and government investigations challenging a retailer's practices that led to the data disclosure. Unfortunately, these challenges have the benefit of hindsight and, thus, retailers must take reasonable steps to protect their data and be ready to effectively respond when an incident happens.

While not all breaches are preventable, there are several critical steps that retailers can take to manage risk with regard to security incidents and protect against a foreseeable incident.

a. Risk Assessment

Conducting a risk assessment is perhaps the most important step in managing data breach risk. While there are a number of different frameworks for conducting a risk assessment, the assessment should at a minimum:

- identify all systems and processes that contain sensitive information,
- document potential threats and vulnerabilities to those systems and processes,

- identify additional security measures to mitigate risks to an acceptable level, and
- monitor the progress of mitigation.

If an organization has conducted a risk assessment and put in place measures to mitigate risk, it is in a good position to refute arguments that the organization did not take reasonable steps to protect its data.

b. Training

Nearly all of the major breaches reported this year have had some element of social engineering associated with them. In general, social engineering involves an outsider manipulating employees into performing actions or divulging confidential information. The most common forms involve phishing emails and phone calls designed to trick employees into divulging their credentials to access company systems. While it is important for employers to have systems in place to filter emails from likely sources of social engineering attacks, no system is perfect and these messages will get through. Thus, employers cannot rely on technical safeguards and should develop training programs to educate employees on social engineering attacks and cyber security more generally. This training should be an ongoing process designed to keep employees up to date on the types of attacks happening and things to be on the lookout for.

c. Information Security Frameworks

In a data breach dispute, the argument usually boils down to whether the controls that the business had in place to protect information were reasonable. The reality for employers is that there are an incalculable number of ways in which data can be lost or their systems can be compromised. Consequently, it is impossible for businesses to prepare for every contingency. It is therefore recommended that businesses adopt an industry accepted framework for information security management. There are a number of frameworks available (e.g., HITRUST, ISO, and NIST) and, if such a framework is adopted and followed, it becomes difficult for plaintiffs to argue that the controls put in place were not reasonable to protect information.

d. Vendor Management

Retailers rely on a host of vendors that may have access to their sensitive data or systems. Many of the largest and most damaging data breaches have occurred not because of an organization's actions but rather because of its business partners. As a result of this threat, retailers should be cognizant of whom they do business with and put in place a process to thoroughly examine the IT security practices of their business partners before giving them access to information systems or data. At a minimum, retailers should request and review all compliance documentation such as risk assessments, evidence of training, and policies and procedures. In addition, retailers should push out questionnaires to test the IT practices of potential business partners as part of the request-for-proposal process.

e. Encryption

Sophisticated system intrusions from skilled hackers are difficult for most businesses to prevent. The majority of data breaches are caused by employees losing company-owned assets containing sensitive information. To prevent these types of breaches, retailers should ensure that all company-owned laptops, desktops, and storage devices are encrypted. Under both state

and federal law, if information is encrypted using a certified methodology, it is considered unreadable and not subject to breach notification laws.

f. Data Destruction

Retailers can minimize the impact of a breach by instituting data destruction policies to purge data from company systems when no longer needed for a business purpose. Limiting the amount of data in a business environment reduces the risk profile of the organization. Additionally, because sensitive data is often stored in unintended locations, the business should routinely scan its environment to determine whether data is being stored inappropriately. If hidden repositories are found, the data should be moved to the appropriate location and business processes should be updated to ensure that data remains secure.

g. Patching and Penetration Testing

Given the litigious environment around data breaches, organizations can no longer take a passive approach to information security. Software and systems become outdated quickly and organizations must take active steps to identify vulnerabilities and update systems as soon as possible. Organizations should run regular vulnerability scans to determine whether their systems require patching to bring them up to date. Additionally, at least on an annual basis, organizations should invest in a comprehensive penetration test to determine if their systems are vulnerable to outside attack. Engaging in such practices allows the employers to show that they took steps to actively manage their environment if their practices become challenged following a security incident.

h. Incident Response Plan

When a breach occurs, employers should be prepared to address the breach quickly and effectively. In order to effectively respond to a breach, an employer should have an incident response plan in place that is fully documented, regularly tested for operational effectiveness, and regularly updated. This plan should identify any reporting obligations and those who need to be involved as soon as a breach is identified. This team should include the internal breach response team as well as any vendors that the employer would use to mitigate the incident. Because contracts take time to negotiate, it is a best practice to identify breach vendors and enter into contracts before a breach occurs. The breach response team should have a defined hierarchy of who makes decisions on behalf of the organization and who is authorized to speak for the organization.

5. NLRB Issues Critical Guidance on Employee Handbooks, Rules, and Policies, Including "Approved" Language

By Steven M. Swirsky

As the NLRB continues to assert itself in the realm of non-union workplaces, one critical aspect of the Board's initiatives, and those of the NLRB's General Counsel, has been in the area of employer policies and workplace rules, including, but not limited to, those maintained in employee handbooks. The Board and the General Counsel have emphasized the fact that the NLRA does not only protect employees' rights with respect to union membership and representation, but the fact that the Act ensures the right of employees to engage in "concerted activity" with respect to a broad array of terms and conditions of employment.

On March 18, 2015, NLRB General Counsel Richard F. Griffin, Jr., issued General Counsel Memorandum GC 15-04 ("Memorandum") containing extensive guidance as to the General Counsel's views on what types of employer polices and rules, in handbooks and otherwise, will be considered by the NLRB's investigators and regional offices to be lawful and which are likely to be found to unlawfully interfere with employees' rights under the Act. The Memorandum is highly relevant to employers throughout retail, regardless of whether they have union-represented employees.

As explained in the Memorandum, the Board's legal standard for deciding whether an employer policy unlawfully interferes with employees' rights under the Act is generally whether "employees would reasonably construe the rules to prohibit Section 7 activity"—that is an action of a concerted nature intended to address issues with respect to employees' terms and conditions of employment. As we have noted previously, this General Counsel and Board have consistently given these terms broad interpretations and have found that many employer policies and procedures, in handbooks and elsewhere, that appear neutral and appropriate on their face, violate the Act and interfere with employee rights. Many of these cases have involved non-union workplaces where there is not a union present and there is no union activity in progress.

The Memorandum offers a recap of NLRB decisions concerning the following eight broad categories of policies, with summaries of the Board's holdings and examples of policy language that the NLRB found to unlawfully interfere with employees' Section 7 rights and policy language that the Board found did not unlawfully interfere with employees' rights:

- **Employer Handbooks Rules Regarding Confidentiality** – The Memorandum reviews the Board's precedents holding that "[e]mployees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees such as union representatives." Interestingly, the Memorandum also states that "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." The Memorandum further "clarifies" by advising that "an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity."

- **Employer Handbooks Rules Regarding Employee Conduct Toward the Company and Supervisors** – As explained in the Memorandum, "Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." The Memorandum offers an overview of decisional law, with particular attention to cases involving rules that prohibit "employees from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context . . . ." As further noted, employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory."

- **Employer Handbooks Rules Regulating Conduct Towards Fellow Employees** – This section of the Memorandum focuses on language and policies that, according to the Board, interfere with the Section 7 right that employees have "to argue and debate with each other about unions, management, and their terms and conditions of employment," which as the General Counsel explains, the Board has held that protected concerted speech will not lose its protection under the Act, "even if it includes 'intemperate, abusive and inaccurate statements." Of particular interest in this portion of the Memorandum is the examination of

policies concerning harassment. The Memorandum notes that "although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects."

- **Employer Handbooks Rules Regarding Employee Interaction with Third Parties** – This section of the Memorandum focuses on employer policies and provisions that seek to regulate and restrict employees' contact with, and communications to, the media relating to their employment. The General Counsel notes that "[a]nother right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment," and that rules "that reasonably would be read to restrict such communications are unlawful." The General Counsel acknowledges, however, that "employers may lawfully control who makes official statements for the company," but any such rules must be drafted so as "to ensure that their rules would not reasonably be read to ban employees from speaking to the media or third parties on their own (or other employees') behalf."

- **Employer Handbooks Rules Restricting Use of Company Logos, Copyrights, and Trademarks** – The Board has found many employer policies, whether contained in employee handbooks or elsewhere, that broadly prohibit employees from using logos, copyrights, and trademarks to unlawfully interfere with employees' Section 7 rights. While the General Counsel acknowledges that "copyright holders have a clear interest in protecting their intellectual property," the Board has found, with the approval of such courts as the U.S. Court of Appeals for the Fourth Circuit, that "handbook rules cannot prohibit employees' fair protected use of that property." In this regard, the General Counsel states in the Memorandum that it is his office's position that "employees have a right to use the name and logo on picket signs' leaflets, and other protected materials," and that "[e]mployers' proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity."

- **Employer Handbooks Rules Restricting Photography and Recording** – While many handbooks and policies prohibit or seek to restrict employees from taking photographs or making recordings in the workplace and on employer policy, the Memorandum states, "Employees have Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures make recordings." The Memorandum further notes that such policies will be found to be overbroad "where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."

- **Employer Handbooks Rules Restricting Employees from Leaving Work** – With respect to handbook or other policies that restrict employees from leaving the workplace or from failing to report when scheduled, the Memorandum notes that "one of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike," and therefore "rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts." Not all rules concerning absences and leaving the workstations are unlawful. A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity."

- **Employer Conflict-of-Interest Rules** – The Memorandum states that, under Section 7 of the Act, employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. The Memorandum cites as examples of such activities that could arguably be in violation of broad conflict of interest policies as protests outside the employer's business, organizing a boycott of the employer's products and services, and solicitation of support for a union while on non-work time. Also, the Memorandum notes that when a conflict-of-interest policy "includes examples of otherwise clarifies that it limited to legitimate business interests [as such term is defined by the General Counsel and the Board] employees will reasonably understand the rule to prohibit only unprotected activity."

While the Memorandum arguably does not contain "new" information or changes in policy or case law, it should be useful for employers and practitioners (and employees) in that it provides a concise summary of the General Counsel's views on this wide range of matters and examples of language that is likely to be found lawful in future proceedings. Of course, it is important to note that each charge is decided on its own facts, and the actions and statements of employers and their supervisors in connection with the application and enforcement of the particular provision will almost always be relevant to the determination of whether the Board will issue a complaint on a particular unfair labor practice charge.

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NLRB Signals It Is About to Make It Much Easier For Unions to Organize Temps and Contingent Workers – Temps and Regular Employees To Be Included in Same Bargaining Unit

Posted on July 9th, 2015 by Steven M. Swirsky

The National Labor Relations Board (NLRB or Board) invited interested parties to submit amicus briefs in *Miller & Anderson, Inc.* in connection with the Board's reexamination of critical issues affecting the ability of unions to organize employees employed by temporary and staffing agencies ("temporary employees") in the same bargaining units as employees of an employer that supplements its direct workforce with temporary employees.

Elections Involving Joint-Employers

Under the existing law, the Board will only conduct an election and certify a unit that includes employees of joint employers if both of the joint employers agree to such an arrangement. The Board's grant of the petitioning union's request for review of a regional director's dismissal of petition for an election because one of the joint employers did not agree, appears to telegraph the Board's intention to abandon that requirement.

Easing the Test for Finding a Joint-Employer Relationship

The NLRB has previously suggested when it invited amicus briefs in imminently in *Browning-Ferris* that it is about to adopt a new test, based on what it calls "economic realities," for deciding whether a business is a joint employer with another entity such as a temporary agency or employee leasing service, of the personnel that the agency supplies to work for its client.

More Elections and Unions Representing Temps

If it does so, and then decides in *Miller & Associates* to create an easier pathway for temporary employees, part-time employees and other contingent workers" to obtain union representation, and be included in bargaining units alongside "regular employees" employed by the principal employer, could radically change the landscape and lead to organizing and bargaining over terms and conditions for temporaries and other contingent workers. The bargaining obligation

would apply not only to the staffing agency that writes a temporary worker's paycheck, but also to the temporary agency's client for whom the temporary worker does work.

Under the Board's 2014 decision in *Oakwood Care Center* a bargaining unit composed of both "solely employed employees" and jointly-employed employees would only be found to be an appropriate unit for bargaining and the Board would only direct an election in a unit of jointly and solely employed employees if both of the employers (i.e. the principal employer and the temporary or staffing agency supplying personnel to work with the principal employer's employees) consented to such an arrangement. Not surprisingly, few, if any, employers agreed to this.

Why Is the Board Doing This Now?

What the Board has indicated in its July 6, 2015 Notice and Invitation to File Briefs is that it is, at a minimum, looking at abandoning the requirement of consent of both employers and returning to the legal standards that preceded Oakwood, which standard was adopted by the Board in 2000, during the Clinton Administration in *M.B. Sturgis* which had permitted the Board to direct an election in a unit included both solely employed *and* jointly employed employees without the need for the consent of the two employers.

The fact that the Board has now, after three years, granted the union's 2012 request for review of a Regional Director's decision in Miller & Anderson stating that the union's appeal of the dismissal of its election petition "raises substantial issues warranting review with respect to the applicability of *Oakwood Care Center*," strongly suggests that the Board intends to eliminate the requirement that when a union seeks an election in a unit including employees the Board finds to be employed by joint-employers, that both employers must consent for an election to take place.

What To Expect

Given the expectation that the Board will shortly announce a much relaxed standard for finding employers to be joint-employers, this is not surprising. However, what it also likely presages is a continuation of the union campaigns, such as those in the realm of franchisor-franchisee relationships in fast food and elsewhere and the Board's movement towards more findings of joint employer status.

First Challenge to NLRB's New Election Rules Dismissed – Rules Held Constitutional

Posted on June 2nd, 2015 by Steven M. Swirsky

One of two lawsuits challenging the National Labor Relations Board's authority to issue the expedited election rules that took effect on April 14, 2015, has now been dismissed by Judge Robert L. Pitman of the United States District Court for the Western District of Texas in Austin. In his 27 page decision, Judge Pitman that the plaintiffs, including Associated Builders and Contractors of Texas and the National Federation of Independent Businessmen, could not establish that the NLRB's December 14, 2014 rule "Representation – Case Procedures; Final Rule," (the "New Rule") should be declared by the Court to be invalid under the Administrative Procedures Act, that the New Rule violated employers' rights under the National Labor Relations Act (the "Act") by compelling them to provide unions with employees' names and information before an election is directed or agreed to, by denying employers of their rights to a hearing prior to an election and by interfering with employers' rights to free speech as provided for in Section 8(c) of the Act.

Rather than attacking the application of the New Rule in any particular case or circumstances, the plaintiffs argued that the changes cumulatively were such that the New Rule violated the Act and the rights of employers and employees under the Act and thus the New Rule should be found to be invalid in its entirety and in all circumstances. The decision methodically addressed and rejected each of these claims and granted the Board's Motion to Dismiss and for Summary Judgment. While the Court rejected the Board's argument that the claims asserted in the challenge should be dismissed because they were not ripe, noting that the filing and processing of more than 141 Representation Petitions (as noted yesterday that number was up to 280 within 30 days) under the New Rule, the Court explained that because the lawsuit challenged the very existence and adoption of the New Rule and not the way that it had been applied by the NLRB in any particular circumstances, the challenge was one that needed to be analyzed as a "facial challenge," not an "as-applied challenge." This meant that the plaintiffs has the burden, in their purely legal attack, of establishing that the New Rule "could never be applied in a constitutional manner."

With respect to the plaintiffs' claim that in almost every case an employer would be denied a hearing in circumstances in which they would have been afforded the right to one, the Court

explained, to succeed the plaintiffs were obligated “to establish there is ‘no set of circumstances exists’ (sic) under which the New Rule would be valid,” and that “even if the New Rule ordinarily limits the scope and timing of the pre-election process, the deference granted a Regional Director to extend and expand” on the limits concerning the content and scheduling of representation hearings “renders Plaintiffs’ challenge unavailing.”

While the District Court’s decision is disheartening for employers hoping for a quick end to the Ambush Election rules, as we have reported another challenge to the New Rule remains pending before the District Court for the District of Columbia. Moreover, an appeal from the Associated Builders and Contractors of Texas decision to the 5th Circuit is all but inevitable. Meanwhile, the New Rule continues in effect with a steady flow of new petitions. As these cases proceed, we can expect that in addition to the early cases challenging the New Rule on its face, cases will emerge challenging the actual application in the real world presenting examples of the actual impact on the rights of employers and employees that the plaintiffs in the facial challenges anticipated.

NLRB Issues Critical Guidance On Employer Handbooks, Rules and Policies, Including "Approved" Language

Posted on March 19th, 2015 by Steven M. Swirsky and Adam C. Abrahms

On March 18, 2015, NLRB General Counsel Richard F. Griffin, Jr. issued General Counsel Memorandum GC 15-04 containing extensive guidance as to the General Counsel's views as to what types employer polices and rules, in handbooks and otherwise, will be considered by the NLRB investigators and regional offices to be lawful and which are likely to be found to unlawfully interfere with employees' rights under the National Labor Relations Act ("NLRA" or the Act").

This GC Memo is highly relevant to all employers in all industries that are under the jurisdiction of the National Labor Relations Board, regardless of whether they have union represented employees.

Because the Office of the General Counsel investigates unfair labor practice charges and the NLRB's Regional Directors act on behalf of the General Counsel when they determine whether a charge has legal merit, the memo is meaningful to all employers and offers important guidance as to what language and policies are likely to be found to interfere with employees' rights under the Act, and what type of language the NLRB will find does not interfere and may be lawfully maintained, so long as it is consistently and non-discriminatorily applied and enforced.

As explained in the Memorandum, the Board's legal standard for deciding whether an employer policy unlawfully interferes with employees' rights under the Act is generally whether "employees would reasonably construe the rules to prohibit Section 7 activity" – that is action of a concerted nature intended to address issues with respect to employees' terms and conditions of employment. As we have noted previously, this General Counsel and Board have consistently given these terms broad interpretations and have found many employer policies and procedures, in handbooks and elsewhere, that appear neutral and appropriate on their face, to violate the Act and interfere with employee rights. Many of these cases have involved non-union workplaces where there is not a union present and there is no union activity in progress.

There are two sections to the Memo. Part 1 of the Memorandum, which begins at page 2 and runs to page 20, offers a recap of NLRB decisions concerning 8 broad categories of policies, with summaries of the Board's holdings and examples of policy language that the NLRB has found to unlawfully interfere with employees' Section 7 rights and policy language that the Board has found did not unlawfully interfere with employees' rights. Section 2 reports on the General Counsel's settlement with Wendy's International LLC following an investigation of charges in which the General Counsel found portions of Wendy's employee handbook unlawfully overbroad, with an explanation as to why the General Counsel found the policies in question to interfere with employees' rights under the Act and a description of the language Wendy's adopted to replace the problematic policies as part of its settlement of the charges. Both parts of the Memorandum will be of interest to employers and attorneys who draft, apply and enforce handbooks and other workplace policy documents.

Part 1: Examples of Handbook Rules found by the Board to be Lawful and Unlawful in recent decisions

- **Employer Handbooks Rules Regarding Confidentiality** – The Memorandum reviews the Board's precedents holding that "Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as nonemployees such as union representatives." Interestingly, the Memorandum also states that "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." The Memorandum further "clarifies" by advising that "an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity."
- **Employer Handbooks Rules Regarding Employee Conduct toward the Company and Supervisors** – As explained in the Memorandum, "Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." The Memorandum offers an overview of decisional law, with particular attention to cases involving rules that "prohibit employees "from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context." As further noted, employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory."
- **Employer Handbooks Rules Regulating Conduct Towards Fellow Employees** – This section of the Memorandum focusses on language and policies that the Board has found to interfere with the Section 7 right employees have 'to argue and debate with each other about unions, management, and their terms and conditions of employment," which the General Counsel explains the Board has held will not lose their protection under the Act, "even if it includes 'intemperate, abusive and inaccurate statements." Of particular interest in this portion of the Memorandum is the examination of policies concerning harassment. The Memorandum notes that "although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects."
- **Employer Handbooks Rules Regarding Employee Interaction With Third Parties** – This section of the Memorandum focuses on employer policies and provisions that seek to regulate and restrict employee contact with and communications to the media relating

to their employment. The General Counsel notes that "(A)nother right employees have under Section 7 is the right to communicate with the new media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment," and that rules "that reasonably would be read to restrict such communications are unlawful." The General Counsel acknowledges however that "employers may lawfully control who makes official statements for the company," any such rules must be drafted so as "to ensure that their rules would not reasonably be read to ban employees from speaking to the media or third parties on their own (or other employees") behalf.

- **Employer Handbooks Rules Restricting Use of Company Logos, Copyrights and Trademarks** – The Board has found many employer policies, whether contained in employee handbooks or elsewhere, that broadly prohibit employees from using logos, copyrights and trademarks to unlawfully interfere with employees' Section 7 rights. While the General Counsel acknowledges that "copyright holders have a clear interest in protecting their intellectual property," the Board has found, with the approval of such courts as the Fourth Circuit Court of Appeals, that "handbook rules cannot prohibit employees' fair protected use of that property." In this regard the General Counsel states in the Memorandum that it is his office's position that "employees have a right to use the name and logo on picket signs' leaflets, and other protected materials," and that "Employers' proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity."
- **Employer Handbooks Rules Restricting Photography and Recording** – While many handbooks and policies prohibit or seek to restrict employees from taking photographs or making recordings in the workplace and on employer policy, the Memorandum states that "Employees have Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures make recordings." The Memorandum further notes that such policies will be found to be overbroad "where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."
- **Employer Handbooks Rules Restricting Employees from Leaving Work** – With respect to handbook or other policies that restrict employees from leaving the workplace or from failing to report when scheduled, the Memorandum notes that "one of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike," and therefore "rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts." Not all rules concerning absences and leaving the workstations are unlawful. A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity."
- **Employer Conflict of Interest Rules** – The Memorandum states that under Section 7 of the Act, employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. It cites as examples of such activities that could arguably be in violation of broad conflict of interest policies as protests outside the employer's business, organizing a boycott of the employer's products and services and solicitation of support for a union while on non-work time. The Memorandum notes that when a conflict of interest policy "includes examples of otherwise clarifies that it limited to legitimate business interests (note: as that term is defined by the General Counsel and the Board) employees will reasonably understand the rule to prohibit only unprotected activity."

Part 2: The Wendy's International LLC Handbook Cases

The second part of the Memorandum relates to the Board's settlement of a series of unfair labor practice charges against Wendy's International LLC (Wendy's) alleging that various provisions of the handbook were overbroad and unlawfully interfered with employees' rights under the NLRA. The company entered into an "informal, bilateral Board settlement agreement. In this section, the GC explains why various provisions were found unlawful and then sets forth negotiated replacement policies that the GC found did not violate the Act. While not a formal "safe harbor" since this is the position of the General Counsel and not the Board, it offers very good advice for employers and attorneys in this area. The Wendy's policies that the General Counsel argued violated employees' Section 7 rights and the replacements that the General Counsel found acceptable concerned the following areas:

- **Handbook Disclosure Provision** – The handbook in issue contained a broad prohibition against disclosure of the handbook and the information it contained without the company's express prior written permission. The General Counsel found this to be unlawful because it prohibited disclosure of employment practices to third parties such as a union or the NLRB.
- **Social Media Policy** – While the General Counsel acknowledged that employers have "a legitimate interest in ensuring that employee communications are not construed as representing the employer's official position," the General Counsel found the company's rule to be overbroad since it prohibited a much broader range of communications that would be protected by Section 7. This included photography and recording and no retaliation provisions.
- **Conflict of Interest Policy**
- **Company Confidential Information Provision**
- **Employee Conduct**
- **Walking Off the Job Without Authorization**
- **No Distribution/No Solicitation Provision**
- **Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision**

While Memorandum GC 15-04 arguably does not contain "new" information or changes in policy or case law, it should be useful for employers and practitioners (and employees) in that it provides a concise summary of the General Counsel's views on this wide range of matters and examples of language that is likely to be found lawful in future proceedings. Of course it is important to note that each charge is decided on its own facts and the actions and statements of employers and their supervisors in connection with the application and enforcement of the particular provision will almost always be relevant to the determination of whether the Board will issue a complaint on a particular ULP Charge.

Unions Can Now Use Electronic Signatures for Showing of Interest for NLRB Elections

Posted on September 3rd, 2015 by Steven M. Swirsky

Unions no longer will need to gather employees' signatures on authorization cards before they can file a petition with the National Labor Relations Board ("NLRB" or "Board") for a representation election. General Counsel Richard F. Griffin, Jr. has issued Memorandum 15-08 (pdf) announcing that effective immediately unions filing petitions will be allowed to submit and the Board will "accept electronic signatures in support of a showing of interest if the Board's traditional evidentiary standards are satisfied."

Acceptance of Electronic Signatures Flows from the Amended Election Rules

As the General Counsel points out, when the Board voted to adopt its Amended Election Rules in December 2014, it made clear that additional changes to the election procedures and rules were likely. The Board held at that time that its regulations, as they then existed, were "sufficient to permit the use of electronic signatures" to form the basis for the 30% showing of interest required when a petition for an election is filed. At that time the Board assigned to the General Counsel the responsibility "to determine whether, when and how electronic signatures can be practically accepted" and to "issue guidance on the matter."

The Minimum Requirements for Electronic Signatures

For an electronic signature to be acceptable and considered authentic and reliable by the Board's Regional Offices, the General Counsel has ruled that it must include the following information

1. the signer's name;
2. the signer's email address or other known contact information (e.g., social media account);
3. the signer's telephone number;

4. the language to which the signer has agreed (e.g., that the signer wishes to be represented by ABC Union for purposes of collective bargaining or no longer wishes to be represented by ABC Union for purposes of collective bargaining);
5. the date the electronic signature was submitted; and,
6. the name of the employer of the employee

The Memorandum also explains the procedures for submission of a showing of interest based on electronic signatures as follows:

A party submitting electronic digital signatures must submit a declaration (1) identifying what electronic signature technology was used and explaining how its controls ensure: (i) that the electronic signature is that of the signatory employee, and (ii) that the employee herself signed the document; and (2) that the electronically transmitted information regarding what and when the employees signed is the same information seen and signed by the employees.[3]

When the electronic signature technology being used does not support digital signatures that lend itself to verification as described in paragraph 2, above, the submitting party must submit evidence that, after the electronic signature was obtained, the submitting party promptly transmitted a communication stating and confirming all the information listed in Ia through If above (the "Confirmation Transmission").

1. The Confirmation Transmission must be sent to an individual account (i.e., email address, text message via mobile phone, social media account, etc.) provided by the signer.
2. If any responses to the Confirmation Transmission are received by the time of submission to the NLRB of the showing of interest to support a petition, those responses must also be provided to the NLRB.
3. Submissions supported by electronic signature may include other information such as work location, classification, home address, and additional telephone numbers, but may **not** contain dates of birth, social security numbers, or other sensitive personal identifiers. Submissions with sensitive personal identifiers will not be accepted and will be returned to the petitioner. They will not be accepted until personal identifiers are redacted

Questions Remain About Authentication

GC Memorandum 15-08 lays out the General Counsel's instructions to the Board's Regional Offices and to unions seeking to file elections under the new rules as to the nuts and bolts of collecting and verifying electronic signatures in place of actual signatures on cards that have been the norm since the NLRB began conducting elections 80 years ago and appears on its face to establish procedures for the agency's employees to follow to verify the authenticity of electronic signatures submitted in support of a petition for an election, as anyone who has had even cursory experience with the Board's handling of a union's showing of interest knows, employers have little if any opportunity to meaningfully challenge a showing of interest even where it has substantial doubts as to its authenticity. While the processes described in the Memorandum appear robust on their face, the fact remains that an employer or other interested party will never really know whether and to what degree the processes are being followed.

What Allowing Electronic Signatures Means

Although the General Counsel and the Board suggest that the decision to allow use of electronic signatures for a showing of interest is not significant and is consistent with the Board's opinion that it is Congress's intent that "that Federal agencies, including the Board, accept and use electronic forms and signatures, when practicable—i.e., when there is a cost-effective way of ensuring the authenticity of the electronic form and electronic signature given the sensitivity of the activity at issue, here the showing of interest," it would be a mistake to view this development in isolation.

Rather, it should be seen as yet another demonstration of the fact that the Board and the General Counsel share the view that the purpose of the Act and the agency is to encourage and promote collective bargaining and make it easier for employees to unionize. The decision to allow electronic signatures should be viewed alongside the Board's decision last week in *Browning Ferris Industries* jettisoning its long standing test for determining joint employer status for a that looked to whether the entity claimed to be a joint employer had *exercised* direct and immediate control over the terms and conditions of employment of the workers in question, for a new far looser test that simply asks whether the purported joint-employer *possesses* the authority to control the terms and conditions of employment, either directly or indirectly.". As the Board puts it, "*reserved authority* to control terms and conditions of employment, *even if not exercised*, is clearly relevant to the joint-employment inquiry."

Given the lowering of the bar for a union to obtain an election that is augured by the move to accept electronic signatures, effective immediately, we can certainly expect a continued increase in organizing and the filing of petitions, followed by ever faster elections.

Proposed DOL Rule To Make More White Collar Employees Eligible For Overtime Pay

Posted on July 1st, 2015 by Michael Kun and Jeffrey H. Ruzal

More than a year after its efforts were first announced, the U.S. Department of Labor ("DOL") has finally announced its proposed new rule pertaining to overtime. And that rule, if implemented, will result in a great many "white collar" employees previously treated as exempt becoming eligible for overtime pay for work performed beyond 40 hours in a workweek – or receiving salary increases in order that their exempt status will continue.

In 2014, President Obama directed the DOL to enhance the "white collar" exemptions to the Fair Labor Standards Act ("FLSA"), which currently exempt from overtime some employees who earn $455 per week, or $23,660 per year. The DOL's proposed rule would more than double the salary threshold for an executive, administrative or professional exemption to apply, increasing it to $970 per week, or $50,440 per year. In addition, the highly compensated employee exemption would increase from $100,000 to $122,148. Not unimportantly, pursuant to the proposed rule, These salary figures would automatically adjust for annual inflation.

Somewhat surprisingly, the proposed rule does not propose any enhancements to the duties requirements for an employee to qualify for any of the "white collar" exemptions. The proposed rule does, however, invite comments regarding the amount of time employees should be engaged in executive, administrative, or professional work to qualify for the exemption. Under the current federal regulations, exempt work must constitute the employee's "primary duty." That is a qualitative analysis, not a quantitative one. By inviting comments on consideration of California's requirement that exempt duties be performed more than 50 percent of the time – a quantitative analysis – the DOL has suggested the possibility of another significant change to "white collar" exemptions. As California employers know all too well, employees frequently file suit alleging they spend less than 50 percent of their time in exempt activities, challenging their employers to prove otherwise.

The proposed rule likely will be published shortly in the Federal Register. Upon publication, the proposed rule will be open to a 60-day comment period. The DOL will review the comments, respond where appropriate and issue its final regulations. The regulations will not be subject to Congressional approval. It is important to note that when the "white collar" exemptions were

last revised in 2004, the DOL received over 100,000 comments and spent nearly a full year responding to those comments before finalizing the regulations.

The Department Of Labor Addresses Independent Contractor Misclassification And Concludes That "Most Workers Are Employees"

Posted on July 16th, 2015 by Michael D. Thompson

The Administrator of the Wage Hour Division of U.S. Department of Labor has issued an Administrator's Interpretation of the FLSA's definition of "employ." And the conclusion is one that not only could have a significant impact on the way companies do business, but lead to numerous class and collective actions alleging that workers have been misclassified as independent contractors.

Addressing the misclassification of employees as independent contractors, the Administrator's Interpretation notes that the FLSA's defines the term "employ" as "to suffer or permit to work." Based on that definition, the DOL concludes that "most workers are employees."

The Interpretation cites to the six-factor "economic realities" test the DOL applies as indicia of employment, but emphasizes certain aspects of that test. Notably, the Administrator states that the goal of the "economic realities" test is to determine whether a worker is "economically dependent" on the alleged employer, or is really in business for himself or herself.

1. Is the Work an Integral Part of the Employer's Business?

The Administrator's Interpretation emphasizes that a workers' duties are likely to be an "integral part" of an employer's business if they relate to the employer's core products or services.

For example, the Interpretation cited to the Seventh Circuit's decision in *Secretary of Labor v. Lauritzen*, a self-described "federal pickle case" in which the issue was "whether the migrant workers who harvest the pickle crop of defendant … are employees … or are instead independent contractors…."

Summarizing the point, the Administrator's Interpretation quoted the Seventh Circuit's statement in that case stating that it "does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business. . . ."

2. Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?

The Administrator's Interpretation emphasizes that the opportunity for profit or loss reflects independent contractor status only when it is dependent on managerial skill.

By contrast, the Administrator opines that the fact that a worker that can increase his or her earnings by working longer hours is not evidence that the worker is an independent contractor

3. How Does the Worker's Relative Investment Compare to the Employer's Investment?

Previously, the DOL had stated that the relative investment of a worker "compared favorably" if the investment was substantial and could be used for the purpose of sustaining a business beyond the particular job or project the worker was performing.

While these factors are mentioned in the new guidance, the Administrator's Interpretation appears to place greater emphasis on a comparison of the investments of the worker and the potential employer. The Administrator opines that even if a worker has made an investment, that investment has to be significant when compared to the investment of the purported employer.

4. Does the Work Performed Require Special Skill and Initiative?

The Administrator's Interpretation asserts that it is a worker's business skills as an independent business person, not his or her technical skills, that support independent contractor status.

The Administrator states that only skilled workers who operate as independent businesses, as opposed to being economically dependent on a potential employer, are independent contractors.

5. Is the Relationship between the Worker and the Employer Permanent or Indefinite?

The DOL's prior Fact Sheet on independent contractor status stated that the absence of a permanent relationship may not suggest independent contractor status when arising from "industry-specific factors" or the fact that the potential employer "routinely uses staffing agencies."

The Administrator's Interpretation adds to this opinion by opining that the finite nature of an independent contractor relationship should be the result of the worker's "own business initiative."

Thus, an employer who imposes limits on the duration of its independent contractor relationships should consider whether that policy will continue to have the desired results.

6. What is the Nature and Degree of the Employer's Control?

The Administrator's interpretation emphasizes that an independent contractor must control "meaningful aspects" of the work demonstrating that the worker is conducting his or her own business. However, the Interpretation does not specifically explain what aspects of a job are "meaningful."

The Administrator does make clear that flexible work arrangements are common forms of employment. Therefore, the Interpretation concludes the fact that an individual works from home or controls the hours of work is not particularly indicative of independent contractor status.

While the Administrator's Interpretation does not have the force of law (or regulation), it will be applied by the DOL and may be given deference by courts. Accordingly, employers should evaluate the extent to which they are relying on criteria addressed by the Administrator (such as flexible work arrangements and relationships of finite duration) as justification for classifying workers as independent contractors.

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Joint-Employer Status: New NLRB Standards Reset the Stage and Redefine the Players

September 14, 2015

By Allen B. Roberts and Steven M. Swirsky

For those liberals and conservatives who do not think of themselves as "joint employers" of their doctors, lawyers, pet groomers, personal trainers, disc jockeys, and baristas, the National Labor Relations Board ("NLRB" or "Board") has set a new definition that would offer some surprises—were they not spared by the technicality that most individuals do not satisfy National Labor Relations Act ("NLRA" or "Act") jurisdictional standards of doing business in interstate commerce. However, unlike individuals, most business organizations today pass a very low bar for satisfying NLRB jurisdictional requirements.

In a time when U.S. private sector unionization has shriveled to 6.6 percent (down to approximately one-fifth of its high point in 1954), being drawn into joint-employer status and related obligations to bargain with a union may have seemed farfetched to businesses and other organizations. But under initiatives of a majority of Board members and a General Counsel appointed by President Obama, the NLRB has undertaken a stunning assertion of authority to impose joint-employer status, which is especially relevant in the current "gig" economy and millennial society. The NLRB's position portends that other agencies may emulate it and private practitioners may seize on a newfound opportunity to draw in a broad range of organizations that under long-standing precedents would not be found to be joint employers of their contractors, vendors, staffing and leasing agencies, or franchisees.

Why Joint Employment Matters

In ordinary circumstances, it would seem rational for an organization to set its own course and determine activities to which it will devote executive, management, and cash resources, contracting to others the responsibility for services or components that are not a business or strategic priority. By its recently issued three-to-two majority decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (August 27, 2015), the NLRB announced how differently it sees things, and it showed how deeply it is committed to disrupting established delineations of employer-employee relations.

Underlying the NLRB's decision is "the steady increase in procurement of employees through staffing and subcontracting arrangements, or contingent employment."

Depending upon the industry, businesses will be affected in such varied mainstream or support activities as temporary and contingent staffing, information technology, communications, help desk, mail room, facility and equipment maintenance, dining and catering services, security, janitorial, cleaning, and third-party administrators of benefit plans—in other words, virtually anything that conceivably could be done within the business, if it were not outsourced.

How the NLRB Describes Its New Joint-Employer Standard

The NLRB's starting point is a deceptively modest introduction of its objective:

> Our aim today is to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of "encouraging the practice and procedure of collective bargaining."

But the NLRB's standard accelerates with a set of basic inquiries that it will examine to determine joint-employment status:

- Do two or more statutory employers share or codetermine matters governing the essential terms and conditions of employment?

- Does the putative joint employer possess sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining?

- How is control manifested in a particular employment relationship?

- Is there direct, indirect, or potential control over working conditions?

- Is the authority to control terms and conditions of employment reserved?

The Board's inquiries are likely to result in a determination of joint-employer status so long as a party is found to possess at least an indirect ability to control employment terms and conditions, even if that authority has not been exercised.

Criteria the NLRB Will Not Consider

Possibly more revealing of what *Browning-Ferris* portends are criteria that the NLRB now explicitly rejects and will not consider relevant to a joint-employer inquiry.

The NLRB will no longer require that a party alleged to be a joint employer possessing the authority to control employees' terms and conditions of employment actually exercise that authority. Now, reserved authority to control terms and conditions of employment will be an essential consideration—even if the authority is not exercised.

Also, the NLRB has abandoned any requirement that an employer's control must be exercised "directly and immediately." Rather, now it will suffice that control is exercised through an "intermediary."

The NLRB also stated the following:

> [W]e reject any suggestion that such status should be found *only* where meaningful collective bargaining over employees' terms and conditions could not occur *without* the participation of the putative joint employer. Where two entities "share or codetermine those matters governing the essential terms and conditions of employment," they are *both* joint employers—regardless of whether collective bargaining with one entity alone might still be regarded as meaningful, notwithstanding that certain terms and conditions controlled only by the *other* entity would be excluded from bargaining.

Therefore, it does not matter to the NLRB whether the actual and direct employer could fulfill all responsibilities to bargaining unit employees and a union representing them without participation by a contracting employer, or another third party, drawn in as a joint employer.

No Immediate Administrative or Judicial Review of *Browning-Ferris*

Because *Browning-Ferris* was decided in the context of a representation case proceeding, where a union petitioned for an election in a unit of leased or temporary workers, there is no further administrative or judicial review immediately available to the company, the union, or the NLRB in the pending case. Challenges to the Board's new standards and opposition to findings of joint-employer status will have to be tested administratively in unfair labor practice cases alleging a putative joint employer's unlawful refusal to bargain or other alleged unfair labor practice activity (something underway for McDonald's and certain of its franchisees), prosecuted by the NLRB's General Counsel, litigated before an NLRB administrative law judge, and considered on review by the NLRB or its designated three-member panel.

But no NLRB decision is self-enforcing. As typical of matters in which the NLRB has taken bold steps to refashion established legal principles or expand its interpretive reach, review by a U.S. circuit court of appeals is predictable—if justified by the principle and value of the matter and within the resources of an organization subject to an adverse ruling.

Next Considerations for Business Decisions

Taking account of the mutually advantageous prevalence of business reliance on others to perform certain services, the *Browning-Ferris* majority purported to ground its holding in "the current economic landscape" of "contingent employment relationships." The holding seems to presume that the landscape is not a result of legitimate business decisions, consciously elected to define the activities that an organization will undertake to perform on its own, while identifying other activities for contracting or some other means of delegation or assignment to third parties. By way of example, a science,

technology, or media business may be formed for the purpose of creating content or ideas, but the enterprise may not want to be encumbered with details of either production or distribution of its "product," outsourcing those activities to others—and their workforces.

To be sure, the NLRB suggests a possible roadmap for avoiding joint-employer status, but the essential question for every organization potentially affected by *Browning-Ferris* and the NLRB decisions likely to follow in its wake is whether it is prudent and in the best interests of the business to relinquish the actual and potential control that could be determinative of joint-employer status. The answer for each organization and situation will vary, possibly with different results that depend on various factors, among them:

- criticality of activity,
- relation of activity to core business,
- comparative expertise,
- quality,
- efficiency,
- resources,
- manpower,
- confidentiality,
- time sensitivity,
- cost, and
- upside or downside risks.

Adding to the factors militating in favor of, or against, outsourcing, *Browning-Ferris* presents a new challenge to organizations that want to focus their business, executive, management, and economic resources on the aspects of the business that they know best and where they see the best opportunity. Now, some organizations may consider exposure of job classifications to unionization as a factor in determining which activities will be outsourced, as well as the manner in which outsourcing will occur.

Practical and Legal Consequences of *Browning-Ferris*

With respect to activities that may be performed remotely and offsite, *Browning-Ferris* may boomerang with a consequence neither intended nor foreseen by the NLRB majority: it could drive jobs offshore, where contractors and their employees are outside the jurisdiction of the NLRB—and its new joint-employer standards. In essence, the

NLRB implicitly may encourage outsourcing to countries outside the United States, where it has no jurisdiction over employers or employees.

Additionally, the NLRB may need to reconsider other precedents that do not fit neatly within the reach of *Browning-Ferris*. Already, the NLRB has indicated that it considers a pending case, *Miller & Anderson, Inc.*, 05-RC-079249, to be a vehicle for deciding whether to "disallow[] inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers."

A further complication inheres in the limitations that will exist by virtue of the NLRB's recognition that "a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful." Sorting out the particular areas of joint employer, as distinct from direct employer, responsibility in the potpourri of wages, hours, terms, and conditions of employment that are mandatory subjects of collective bargaining could be daunting in each unique relationship.

Potential Extensions of *Browning-Ferris* to Other Laws

Looking beyond the NLRA, organizations must anticipate a host of administrative and compliance actions, piggybacking *Browning-Ferris*, and other fallout from the NLRB's majority opinion. If a business is deemed a joint employer for NLRA purposes, other federal, state, and local administrative agencies, together with the plaintiffs' bar, may be at the ready to test whether other statutes have sufficient elasticity to mimic the NLRA and impose similar joint-employer exposure by means of administrative charges and complaints, judicial action, or arbitration proceedings. Topics of potential joint-employer reach could relate to direct or joint responsibility for wage and hour compliance, equal employment opportunity, occupational safety and health, immigration, medical and pension plan participation, payroll withholdings and deductions, workers' compensation, unemployment insurance, and the misclassification of independent contractors and others.

The Occupational Safety and Health Administration ("OSHA") presents one immediate area of applicability, and the NLRB's *Browning-Ferris* decision is likely to influence OSHA's approach to inspections and citations involving temporary or contract employees. When OSHA's temporary employee initiative was announced in 2013, the Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, declared that "[t]emporary staffing agencies and host employers share control over the employee, and are therefore jointly responsible for temp employee's safety and health. It is essential that both employers comply with all relevant OSHA requirements."

Although inspections under the temporary employee initiative sometimes result in citations being issued to both the host employer and the staffing agency, more often than not, only the host employer is cited because it is perceived as having a greater ability to control or prevent the temporary employee's exposure to a hazard. Should OSHA adopt the reasoning of *Browning-Ferris*, this trend will surely change, significantly

increasing staffing agencies' exposure to OSHA citations even when the staffing agency had no control over the workplace or awareness of the hazard. Additionally, under the agency's multi-employer worksite citation policy, OSHA may cite an employer for hazards that other employers' employees were exposed to when OSHA finds that the employer controlled the hazard, created the hazard, or was responsible for correcting the hazard. Applying the reasoning of *Browning-Ferris* to this policy could considerably expand the number of employers cited, treating multiple contractors as controlling employers, regardless of whether they had any real control over the hazards at the worksite.

What Employers Should Do Now

As learned from reception of the NLRB's zealous assault on mandatory arbitration and waivers of class and collective actions under a line of cases beginning with *D.R. Horton* in 2012, reviewing courts are not necessarily hospitable to the NLRB's novel extensions of coverage or intrusions into matters of settled legislation. Nevertheless, by its *Browning-Ferris* decision, the NLRB presents diverse and consequential issues for all businesses having existing relationships with contractors and other service providers or contemplating forming or expanding such relationships.

It is prudent to be mindful that existing facts, showing no actual exercise of control by one organization over employee relations of another, may not be sufficient to avoid a determination of joint-employer status. Instead, an NLRB determination may turn on control that *potentially* could be exercised in an arm's length business relationship that was understood to be quite ordinary—until *Browning-Ferris*.

Organizations should anticipate a role in newly filed proceedings alleging joint-employer status, even as they contemplate reforming or redefining terms by which they engage contractors and other providers of services supportive of their business. While many organizations will escape being targeted by the NLRB or a union seeking representation or pursuing an unfair labor practice charge—or other agency compliance or enforcement actions and private party litigations—it is clear that *Browning-Ferris* must become a factor in auditing existing relationships, contemplating new ones, and conducting due diligence for the acquisition or sale of a business.

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EEOC Updates Pregnancy Discrimination Guidance

Posted on July 6th, 2015 by Nathaniel M. Glasser and Kristie-Ann M. Yamane

In the wake of the U.S. Supreme Court's decision in *Young v. UPS*, [1] the EEOC has modified those aspects of its Enforcement Guidance on Pregnancy Discrimination and Related Issues ("Guidance") that deal with disparate treatment and light duty.

Under the prior guidance, issued in 2014, the EEOC asserted that a pregnant worker could prove a violation of the Pregnancy Discrimination Act ("PDA") simply by showing that she was "treated differently than a non-pregnant worker similar in his/her ability or inability to work." The 2014 guidance also took the position that an employer could not refuse to offer a pregnant worker an accommodation by relying on a policy that provides light duty only to workers injured on the job. The Supreme Court, however, was highly critical of and rejected this interpretation of the PDA, finding that it would require employers who provide a single worker with an accommodation to provide similar accommodations to all pregnant workers, irrespective of other criteria.

Thus, in the Guidance the EEOC deleted that language and an entire section that discussed its interpretation of "Persons Similar in Their Ability or Inability to Work." The EEOC has updated its discussions about disparate treatment and light duty work assignments for pregnant workers by adopting the Supreme Court's holding that a plaintiff may establish a *prima facie* case of pregnancy discrimination by following the *McDonnell Douglas* burden-shifting framework (*i.e.*, by showing that she is pregnant, that she sought accommodation which was not granted, and that the employer accommodated others similar in their ability or inability to work). Further, a plaintiff may show that the legitimate, non-discriminatory reasons for the employer's actions – even if supported by a facially neutral policy – were pretextual by showing the employer's policies caused a "significant burden" on pregnant workers without reasons that were "sufficiently strong to justify the burden."

To illustrate, the Guidance states that a practice of providing light duty to a large percentage of non-pregnant employees, while failing or refusing to provide light duty to a large percentage of pregnant workers, might demonstrate that the policy significantly burdens pregnant

employees. The Guidance, however, fails to specify what it considers a "large percentage," and provides no detail or examples as to what reasons might be sufficiently strong to justify such a burden.

This is the second time in two years that the EEOC has updated its enforcement guidance in this area. Last year, the EEOC revamped the Guidance to provide an overview of coverage under the PDA, to address the impact of the inclusion of pregnancy-related impairments under the Americans with Disabilities Amendments Act of 2008, and to address other benefits that must be provided to pregnant workers. These aspects of the Guidance remain unchanged.

Employers should take note of the EEOC's increased scrutiny of facially neutral policies that may impose significant burdens on pregnant workers. The EEOC's current Strategic Enforcement Plan identifies the accommodation of pregnancy-related limitations as an emerging issue that will be prioritized, and the updated Guidance on this subject is evidence of the agency's focus in this area.

[1] *Young v. UPS*, 135 S. Ct. 1338 (2015).

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NYC Commission on Human Rights Issues Enforcement Guidance for Newly Effective Credit Check Law

September 9, 2015

By William J. Milani, Dean L. Silverberg, Jeffrey M. Landes, Susan Gross Sholinsky, Kate B. Rhodes, and Nancy L. Gunzenhauser

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On September 3, 2015, the amendment to the New York City Human Rights Law ("NYCHRL") prohibiting the use of credit checks in employment ("Credit Check Law") became effective. On the same day, the New York City Commission on Human Rights ("NYCCHR"), the government agency responsible for enforcing the NYCHRL, issued enforcement guidance on the Credit Check Law ("Enforcement Guidance"), "Frequently Asked Questions," "Information for Employees and Job Seekers," and "Information for Employers."

These administrative materials from the NYCCHR expand upon and clarify certain provisions of the Credit Check Law and confirm that certain activities do not violate the Credit Check Law (e.g., performing Google and LinkedIn searches on applicants). Most significantly, the Enforcement Guidance addresses the Credit Check Law's exemptions for certain positions, including those where a credit check is required by law and high-level positions involving trade secrets, financial authority, and information technology.

The Enforcement Guidance also addresses recordkeeping practices, penalties, and the application of the Credit Check Law to workers in non-traditional roles (e.g., independent contractors).

Exemptions

As an initial matter, the Enforcement Guidance clarifies that the exemptions from the Credit Check Law apply to positions or roles, not individual applicants or employees. The Enforcement Guidance confirms that no exemption applies to an entire employer or industry.

With respect to specific exemptions, the Enforcement Guidance provides much-awaited guidance for the following:

- **Employers required by state or federal law or regulation or by the Financial Industry Regulatory Authority ("FINRA") to use an individual's consumer credit history for employment purposes.**

  The Enforcement Guidance explains that the exemption for FINRA members extends *only* to registered representatives. These FINRA members may not rely upon the exemption for other employees within the same company. In particular, the exemption does not apply to "individuals [who] perform functions that are supportive of, or ancillary to or advisory to, 'covered functions,' or engage solely in clerical or ministerial activities."

  In regard to the exemption for credit checks required by state law, the Enforcement Guidance notes that the only New York State law currently requiring an employer to consider an applicant or employee's consumer credit history applies to licensed mortgage loan originators pursuant to N.Y. Bank L. §559-d(9).

- **Positions involving responsibility for funds or assets worth $10,000 or more.**

  This exemption is limited to *only* executive-level positions with financial control over a company. The NYCCHR identifies such positions as Chief Financial Officer and Chief Operations Officer as representative examples. Importantly, the exemption does *not* include other staff members in a finance department, even if they would otherwise meet the exemption (i.e., by having responsibility for funds or assets worth $10,000 or more).

- **Non-clerical positions having regular access to trade secrets, intelligence information, or national security information.**

  The definition of "trade secrets" does *not* include the following: recipes, formulas, customer lists, processes, and other information regularly collected in the course of business or regularly used by entry-level and non-salaried employees and supervisors or managers of such employees.

- **Positions involving digital security systems.**

  Again, this exemption is limited to *only* positions at the executive level. The NYCCHR identifies such positions as a Chief Technology Officer or a senior information technology executive.

- **Positions requiring bonding under federal, state, or New York City law or regulation.**

  The following laws are examples of those that indicate positions that are required to be bonded by federal, state, or New York City law: Bonded Carriers for U.S. Customs, 19 C.F.R. § 112.23; Harbor Pilot, N.Y. Nav. L. § 93; Pawnbrokers, N.Y. Gen. Bus. L. § 41; Ticket Sellers & Resellers, N.Y. Arts & Cult. Aff. L. §§ 25.15, 25.07; Auctioneers, N.Y. City Admin. Code § 20-279; and Tow Truck Drivers, § 20-499.

- **Positions requiring security clearance under federal or state law.**

  "Security clearance" is defined as the ability to access classified information and does not include any other vetting process utilized by a government agency. The exemption applies only where the review is done by the federal or state government.

Recordkeeping

The "Information for Employers" document recommends that employers keep an "exemption log" to assist them in responding to information requests by the NYCCHR. The exemption log should include the following information:

- which exemption is claimed;
- how the applicant/employee fits into the exemption;
- the qualifications of the applicant/employee for the position/promotion;
- the name and contact information of the applicant/employee;
- the nature of the credit history information considered and a copy of such information;
- how the credit history information was obtained; and
- how the credit history impacted any employment action.

Penalties

The Enforcement Guidance clarifies that violations of the Credit Check Law may subject an employer to a penalty of up to $125,000 for violations, and up to $250,000 for violations that are the result of willful, wanton, or malicious conduct. These penalties are *in addition to* other remedies available in cases brought by individuals for violations of the NYCHRL, such as back pay and front pay and compensatory and punitive damages.

Scope of the Credit Check Law

The "Frequently Asked Questions" document provides that part-time workers, undocumented workers, interns, many independent contractors,[1] and probationary workers are all covered by the Credit Check Law.

What Employers Should Do Now

- Review job descriptions and organizational charts to determine whether any positions fit within one of the exemptions.
- Instruct recruiters and those who perform background checks to confer with legal counsel on whether consumer credit history may be used in connection with hiring or other employment-related decisions at all or for certain positions.
- Confirm that employment, placement, and temporary agencies, as well as background check providers, have revised their forms and procedures in compliance with the Credit Check Law for New York City applicants and employees.

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[1] The "Frequently Asked Questions" document does not define to which independent contractors this law would apply. The NYCHRL, however, covers "natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer."

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New York City Expected to Ban the Use of Credit Checks in Employment

April 23, 2015

By William J. Milani, Susan Gross Sholinsky, Jeffrey M. Landes, Dean L. Silverberg, Nancy L. Gunzenhauser, and Kate B. Rhodes

On April 16, 2015, the New York City Council passed an amendment ("Amendment") to the New York City Human Rights Law ("NYCHRL") that, if signed into law, would make it an unlawful discriminatory practice for employers to use "consumer credit history" for employment purposes. The Amendment contains several exceptions, discussed below, but would affect how employers conduct background checks. The Amendment has been delivered to Mayor Bill de Blasio's office. If he signs the bill, as is expected, the Amendment will become effective 120 days later.

Prohibited and Permissible Inquiries and Actions

The Amendment prohibits employers from requesting or using consumer credit history to (i) make an employment decision pertaining to an applicant or an employee, or (ii) discriminate against an applicant or employee. The term "consumer credit history" is defined as an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by:

- a consumer credit report;[1]
- credit score; or
- information that an employer obtains directly from the individual regarding:
    - details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries; or

[1] A "consumer credit report" is defined as "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history."

- bankruptcies,[2] judgments, or liens.

The Amendment includes a carve-out permitting employers to request or receive consumer credit history pursuant to a lawful subpoena, court order, or law enforcement investigation.

The Amendment falls in line with credit check laws passed in recent years in California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, North Carolina, Oregon, Vermont, and Washington.

Exemptions

Notably, the Amendment provides certain exemptions where requesting or using consumer credit history is, indeed, permissible.[3]

Employer Exemption. The Amendment does not apply to employers that are otherwise required to use an individual's consumer credit history for employment purposes by federal or state law or by a "self-regulatory organization," as defined by the Securities Exchange Act of 1934. Thus, the Amendment does not apply to employers subject to the rules of the Financial Industry Regulatory Authority ("FINRA").

Position Exemptions. The Amendment does not apply to persons applying for positions:

- as police officers or peace officers;
- subject to a background investigation by the New York City Department of Investigation;
- in which the employee is required to be bonded by federal, state, or city law;
- in which the employee is required to possess security clearance under federal or any state's law;
- as a non-clerical employee having regular access to trade secrets[4] (which excludes general proprietary company information, such as handbooks or policies), intelligence information,[5] or national security information;[6]

[2] Employers should note that federal bankruptcy laws may limit the use of an employee's bankruptcy in employment decisions as well.

[3] In cases where employers request consumer credit history in accordance with these exceptions, employers must continue to comply with the notice, authorization and disclosure requirements of the state and federal Fair Credit Reporting Acts.

[4] The Amendment defines "trade secrets" as

> information that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; (b) is the subject of

- (i) where the employee would have signatory authority over third-party funds or assets valued at $10,000 or more, or (ii) that involve a fiduciary responsibility to the employer with the authority to enter financial agreements valued at $10,000 or more on behalf of the employer; and

- where the employee has regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or clients' networks or databases.

Covered Employers

The NYCHRL applies to employers, including employment agencies, with four or more employees (including independent contractors who are "natural persons" and not themselves employers).

Enforcement

An employee alleging a violation of the Amendment may either bring a complaint with the New York City Commission on Human Rights or proceed directly to court.

What Employers Should Do Now

While awaiting the mayor's signature, New York City employers should:

- review the *employer* exemption to the Amendment to determine whether it will apply to them generally;

- review the *position* exemptions to determine if they may request or use consumer credit history in connection with one or more particular positions;

- review (and get ready to revise) background check procedures, as applied;

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efforts that are reasonable under the circumstances to maintain its secrecy; and (c) can reasonably be said to be the end product of significant innovation.

According to the City Council, having regular access to trade secrets *does not* include access to, or the use of, client, customer, or mailing lists.

[5] The Amendment defines "intelligence information" as "records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats."

[6] The Amendment defines "national security information" as "any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments."

- prepare to train recruiters and human resources professionals who perform background checks on whether consumer credit history may be used at all or for certain positions; and

- confirm that employment, placement, and temporary agencies, as well as background check providers, are aware of the Amendment and are poised to revise their forms and procedures in compliance with the Amendment for New York City applicants and employees in companies and positions covered (and not exempted) by the Amendment.

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New York City Is Expected to Become the Latest Jurisdiction to "Ban the Box"

June 18, 2015

By Susan Gross Sholinsky, Nancy L. Gunzenhauser, and Judah L. Rosenblatt*

On the heels of banning credit checks for most applicants for employment in New York City, on June 10, 2015, the New York City Council passed citywide ban-the-box legislation, formally titled the "Fair Chance Act" ("Act"). The Act joins legislation in six states and Washington, D.C., as well as laws in many other cities and counties that have "banned the box" for most private employers under their jurisdiction.

The Act, like other ban-the-box laws, restricts when employers may inquire about applicants' criminal histories during the application process and imposes significant obligations on employers that intend to take action based on such information. The Act will become effective 120 days after Mayor Bill de Blasio signs the bill, which is expected soon, as he has expressed support for the legislation.

The use of criminal records in the hiring process has received a great deal of attention in recent years. For example, in 2012, the Equal Employment Opportunity Commission issued guidance requiring employers to demonstrate that conviction records upon which they rely in making hiring decisions are directly job-related, and that applicants are individually assessed with respect to the position for which they are applying. The premise underlying the ban-the-box movement is that eliminating criminal history questions from the preliminary stage of the application process provides applicants with a fair chance at consideration based on their qualifications, rather than solely upon their criminal background.

The Act's Restrictions and Requirements

The Act prohibits New York City employers with four or more employees from inquiring about an applicant's pending arrest or criminal conviction record until *after* a conditional offer of employment has been extended. Thus, unless an exception applies, employers may not ask about criminal background history on an employment application or during the interview process. This restriction includes both (i) asking an applicant about his or her criminal history, and (ii) searching publicly available sources to obtain information about an applicant's criminal history.

After a conditional job offer has been extended, however, an employer may ask about an applicant's criminal record and conduct a criminal background check.

The Act also prohibits employers from advertising for jobs and indicating in such advertisements that an applicant's arrest or criminal conviction record will in any way limit the applicant's eligibility for the position.

Rescinding an Offer of Employment

If an employer decides to withdraw an offer of employment based on information obtained in connection with a criminal background check, additional requirements apply, similar to those under the federal Fair Credit Reporting Act ("FCRA"). Specifically, when the employer withdraws an offer based on criminal history information, it must provide the applicant with a written explanation of its decision and must hold the position open for three business days after providing such explanation.

Under existing New York State law, employers must analyze an applicant's criminal background record using the eight-factor balancing test set forth in New York Correction Law Article 23-A. The written explanation required by the Act must include an analysis under this balancing test. The Act provides that the New York City Commission on Human Rights will determine the manner in which the analysis must be presented to the applicant.

During the three-business-day period referenced above, the applicant is provided with a chance to respond to the employer or background screening company to explain any inconsistencies in the report or any evidence of rehabilitation that could affect the employer's decision.

Whether or not an applicant decides to provide information in response to the written explanation, the Act does not require an employer to hire someone with a criminal history. Finally, and as always, if an employer uses a third-party consumer reporting agency to obtain criminal background history, the employer must comply with the requirements of the FCRA, including providing both a "Notice of Intent to Take Adverse Action"[1] and a "Notice of Adverse Action."

Exceptions

Limited exceptions to the Act apply to particular jobs in which criminal background checks would bar employment, such as police officers, law enforcement agencies (e.g., the Division of Youth and Family Services), and certain positions susceptible to bribery

[1] The FCRA requires employers to provide a Notice of Intent to Take Adverse Action to the affected applicant and then hold the position for a "reasonable time" prior to actually taking the adverse action. In a Federal Trade Commission ("FTC") opinion letter, the FTC found that five business days was a reasonable period of time.

or other corruption.[2] Additionally, the Act does not apply to actions taken by an employer pursuant to any state, federal, or local law (including rules or regulations promulgated by a "self-regulatory organization," as defined in the Securities Exchange Act of 1934) that requires criminal background checks for employment purposes or bars employment based on criminal history.[3]

What Employers Should Do Now

Ban-the-box laws are quickly growing in popularity. Employers should review their hiring practices to ensure compliance in states, municipalities, and cities with ban-the-box laws.

In New York City, although the precise date on which the Act will be signed into law and take effect is uncertain, once the Act becomes law, employers should:

- revise job applications used in New York City to remove questions seeking criminal background information for all positions that are covered by the Act and, if a multistate application is used, either:
    - clarify that applicants for a position in New York City should not respond to questions seeking criminal background information (unless an applicable exception applies), or
    - remove the criminal conviction question altogether, in light of the growing success of the ban-the-box movement (and the number of exceptions that may be necessary to maintain an up-to-date multistate application);
- revise job postings used in New York City to remove information that limits or specifies that employment will be based on a person's arrest or criminal conviction history;
- review the individual positions for which they hire to determine whether any of those jobs would fall within an exemption to the applicability of the Act;
- train recruiters, hiring managers, human resources personnel, and others who conduct interviews not to ask about criminal history or conduct criminal background checks until after a conditional offer is extended;
- revise offer letters, if necessary, to confirm that the offer is contingent upon the successful completion of a criminal background check;

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[2] The NYC Council Committee on Civil Rights identified additional positions, such as those that "entail the provision of services to or safeguarding of people who, because of age, disability, infirmity or other conditions, are vulnerable to abuse." Committee Report from June 9, 2015.

[3] For example, the Act would not apply to actions taken by employers that are required to perform criminal background checks or ask about arrest history based on the rules of the Financial Industry Regulatory Authority ("FINRA").

- train recruiters, hiring managers, human resources personnel, and others who may be involved in deciding whether a criminal record should result in withdrawing a conditional offer of employment (or other adverse action) that their decision must be based on an evaluation of specific statutorily defined factors for legitimate business reasons; and

- confirm that employment agencies and background check providers are aware of the Act and have revised their forms and procedures accordingly.

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U.S. Department of Labor Offers New Insight on the Misclassification of Independent Contractors

July 17, 2015

By Michael S. Kun, Dean L. Silverberg, Jeffrey M. Landes, Susan Gross Sholinsky, Michael D. Thompson, Jeffrey H. Ruzal, and Judah L. Rosenblatt*

As federal, state, and local governments have focused in recent years on what they have termed "wage theft," the classification of workers as independent contractors has been the subject of agency audits and litigation (including class actions and collective actions) across the country. On July 15, 2015, the Administrator of the Wage Hour Division of the U.S. Department of Labor ("DOL") issued Administrator's Interpretation No. 2015-1 ("Interpretation") addressing how businesses should distinguish between employees and independent contractors to avoid misclassification of workers under the Fair Labor Standards Act ("FLSA").

The Interpretation may have a significant impact upon many businesses as it confirms not only that the DOL will continue to focus on the status of workers who are classified as independent contractors, but that it will do so with something approaching a presumption that "most workers are employees." And the Interpretation is likely to be used in litigation challenging the classification of workers as independent contractors.

The Interpretation refers to the FLSA's broad definition of the term "employ" and its intended expansive coverage for workers. In so doing, the Interpretation cites the DOL's "economic realities" test for indicia of employment, emphasizing certain aspects of that test.

The DOL's economic realities test typically includes six factors: (1) the extent to which the work performed is an integral part of the employer's business, (2) the worker's opportunity for profit or loss depending on his or her managerial skill, (3) the extent of the relative investments of the employer and the worker, (4) whether the work performed requires special skills and initiative, (5) the permanency of the relationship, and (6) the degree of control exercised or retained by the employer.

Notably, the Administrator states that the goal of the "economic realities" test is to determine whether a worker is "economically dependent" on the putative employer, or is really in business for himself or herself.

In the Interpretation, the DOL analyzes the "economic realities" factors as follows:

1. **Is the Work an Integral Part of the Employer's Business?**

To the extent that a worker's job responsibilities are consistent with the putative employer's business, the worker is more likely to be an employee than an independent contractor. The Interpretation emphasizes that a worker's duties are likely to be deemed an "integral part" of an employer's business if they relate to the employer's core products or services.

For example, the Interpretation cites the U.S. Court of Appeals for the Seventh Circuit's decision in *Secretary of Labor v. Lauritzen*, a self-described "federal pickle case" in which the issue was "whether the migrant workers who harvest the pickle crop of defendant … are employees … or are instead independent contractors." Summarizing the point, the Interpretation quoted the Seventh Circuit's statement in *Lauritzen* that it "does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business."

2. **Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?**

The Interpretation emphasizes that the opportunity for profit or loss by a worker reflects independent contractor status only when it is dependent on managerial skill. By contrast, the Administrator opines that the fact that a worker can increase his or her earnings by working longer hours for the putative employer is not evidence that the worker is an independent contractor.

3. **How Does the Worker's Relative Investment Compare to the Employer's Investment?**

In previous statements, including a May 2014 Fact Sheet and a presentation on employment relationships under the FLSA on its website, the DOL indicated that the relative investment of a worker compared "favorably" if the investment was *substantial* and could be used for the purpose of sustaining a business beyond the particular job or project that the worker was performing. In the Interpretation, however, the Administrator appears to place a greater emphasis on a *comparison* of the investments made by the worker and those made by the potential employer. The Administrator opines that even if a worker has made an investment (in tools or equipment, for example), his or her investment needs to be significant when compared to the investment of the putative employer.

4. **Does the Work Performed Require Special Skills and Initiative?**

The Interpretation asserts that it is a worker's *business* skills as an independent business person, not his or her *technical* skills, that support independent contractor status. In other words, according to the Administrator, even the most skilled worker is still an employee if he or she does not know how to run a business.

5. **Is the Relationship Between the Worker and the Employer Permanent or Indefinite?**

The Interpretation states that a relationship of an indefinite (or permanent) period is evidence of an employment relationship and notes that independent contractors are typically retained on a project-by-project basis. The DOL further notes that working for other employers does not indicate a lack of "permanence."

The DOL's May 2014 Fact Sheet on independent contractor status stated that having a relationship of a defined duration does not suggest independent contractor status when arising from "industry-specific factors" or the fact that the potential employer "routinely uses staffing agencies." The Interpretation supplements this criteria by stating that the finite nature of any independent contractor relationship should be the result of the worker's "own business initiative," and not simply the fact that in the particular industry in question, engagements are usually of a short-term nature. Thus, an employer that seeks to avoid unintended employment relationships through policies that limit the duration of its independent contractor relationships should consider whether such policies will continue to achieve the desired results.

6. **What Is the Nature and Degree of the Employer's Control?**

Although control has traditionally been one of the most significant aspects of the economic realities test, the Interpretation devalues this factor. The Interpretation emphasizes that an independent contractor must control "meaningful aspects" of the work in order to demonstrate that the worker is conducting (and controlling) his or her own business. The Interpretation does not specifically explain, however, what aspects of a job are "meaningful." The Administrator makes clear that, in today's economy, flexible work arrangements are common forms of employment, and a worker is not necessarily an independent contractor simply because he or she may work outside of the putative employer's office, and set his or her own hours.

What Employers Should Do Now

Given the new guidance, employers should:

- audit their independent contractor workforce, considering the six-factor "economic realities" test and whether the contractor in question is truly in business for himself or herself;

- in connection with such an audit, consider redefining relationships with current independent contractors in a manner consistent with the Interpretation to the extent that the economic realities of the relationship more closely reflect employment status; and

- as always, consider the operational feasibility and financial implications of employing workers instead of contracting with a contingent workforce.

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About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

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OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OSHA)
INJURY & ILLNESS RECORDKEEPING CHECKLIST

LABOR AND EMPLOYMENT PRACTICE

Occupational Safety & Health Administration (OSHA) regulations at 29 CFR § § 1904 and 1952 set forth a maze of injury and illness recordkeeping and reporting requirements applicable to approximately 1.5 million U.S. workplaces.

OSHA places significant emphasis on injury and illness recordkeeping because the data culled from employers' injury and illness logs is used by OSHA to identify workplace safety and health problems and to track progress in solving those problems. OSHA also uses recordkeeping data to improve standards, tailor enforcement programs, and focus individual inspections.

The current leadership team at OSHA believes that industry grossly under-records injury and illness data, and because of this concern, OSHA has cracked down on recordkeeping enforcement. Specifically, since the end of 2009, OSHA has been actively seeking out employers that it believes under-record or improperly record injury and illness data through recordkeeping inspections.

A senior OSHA official described this recordkeeping enforcement focus as follows: "There are several different goals here. One is just to find out what's going on. Another is to send a message to companies – via penalties – that injury and illness book-cooking won't go unpunished." OSHA has been finding the serious violations that it expected, including one remarkable set of recordkeeping citations with a penalty exceeding $1.2 million. Accordingly, accurate OSHA recordkeeping is more important now than ever before.

This checklist is intended to help employers decode OSHA's complex recordkeeping regulations and simplify the process. It highlights key issues for employers, such as exemptions from recordkeeping, required OSHA forms for recording certain work-related injuries and illnesses, recordkeeping protocols, updating/verifying records, and creation of recordkeeping policies and practices.

The checklist reflects the collective experience of the OSHA Practice Group at Epstein Becker & Green, P.C., which manages and counsels employers through hundreds of OSHA inspections of all types across the nation.

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SECTION I: SCOPE OF RECORDKEEPING RULE

Determine Whether a Partial Exemption Applies

- Employers are required to record certain work-related injuries and illnesses unless the employer:
  - has 10 or fewer employees (company-wide) at all times during the previous calendar year; or
  - operates in one of the specific low-hazard industries identified by OSHA (e.g., retail, service, finance, insurance
  - or real estate). For a complete list, see the table below from *Appendix A to Subpart B of OSHA's Recordkeeping Rule*:
- These are considered "partial" exemptions because
  - regardless of size or industry, all employers must report any workplace incident that results in a fatality or the hospitalization of three or more employees
  - an otherwise exempted employer may nevertheless be required to keep injury & illness records upon written notice from OSHA or the Bureau of Labor Statistics

Determine Whether Injured Employees Are Covered

- Recordkeeping requirements apply to an injury or illness to:
  - all employees on the payroll (whether labor, executive, hourly,

SIC Code	Industry Description	SIC Code	Industry Description	SIC Code	Industry Description	SIC Code	Industry Description
525	Hardware Stores	592	Liquor Stores	726	Funeral Service and Crematories	803	Offices of Osteopathic
542	Meat and Fish Markets	594	Miscellaneous Shopping Goods Stores	729	Miscellaneous Personal Services	804	Offices of Other Health Practitioners
544	Candy, Nut, and Confectionery Stores	599	Retail Stores, Not Elsewhere Classified	731	Advertising Services	897	Medical and Dental Laboratories
545	Dairy Products Stores	60	Depository Institutions (banks & savings institutions)	732	Credit Reporting and Collection Services	809	Health and Allied Services, Not Elsewhere Classified
546	Retail Bakeries	61	Non-depository	733	Mailing, Reproduction & Stenographic Services	81	Legal Services
549	Miscellaneous Food Stores	62	Security and Commodity Brokers	737	Computer and Data Processing	82	Educational Services (schools, colleges, universities, and libraries)
551 552	New and Used Car Dealers	63 64	Insurance Carriers, Agents & Brokers	738	Miscellaneous Business Services	832	Individual and Family Services
554	Gasoline Service Stations	653	Real Estate Agents	764	Reupholstery and Furniture Repair	835	Child Day Care Services
557	Motorcycle Dealers	654	Title Abstract Offices	78	Motion Picture	839	Other Social Services
56	Apparel and Accessory Stores	67	Holding and Other Investment Offices	791	Dance Studios, Schools, and Halls	841	Museums and Art Galleries
573	Radio, Television & Computer Stores	722	Photographic Studios, Portrait	792	Producers, Orchestras, Entertainers	86	Membership Organizations
58	Eating and Drinking Places	723 724	Beauty and Barber Shops	793	Bowling Centers	87	Engineering, Accounting, Research, Management, and Related Services
591	Drug Stores and Proprietary Stores	725	Shoe Repair and Shoeshine Parlors	801 802	Offices & Clinics of Medical Doctors and Dentists	899	Services, Not Elsewhere Classified

salary, part-time, seasonal, or migrant)
  - employees not on the payroll but who are supervised on a day-to-day basis (e.g., temporary employees, subcontractors, borrowed employees, etc.)
  - all contract employees who work in process areas covered by OSHA's Process Safety Management standard, even if the employer does not supervise the contract employees on a day-to-day basis
- The OSH Act does not treat any of the following as employees for recordkeeping purposes:
  - contractors not supervised by the employer
  - unpaid volunteers
  - sole proprietors
  - family members working on family farms
  - domestic workers in residences

SECTION II: OSHA RECORDKEEPING FORMS

OSHA 300 - Log of Work-Related Injuries and Illnesses

- An annual, cumulative chart of work-related injuries and illnesses
- Used to document and classify injuries and illnesses, and note the severity of each case
- Within seven calendar days of receiving notice that a covered employee has sustained a recordable injury or illness, record the injury or illness on the 300 Log
- Employers must record all of the required information on the 300 Log for each recordable case, including:
  - case number
  - employee's name (unless it is a privacy case)
  - employee's job title
  - date of the injury or illness
  - where in the workplace the injury occurred (e.g., warehouse)
  - brief description of the injury or illness
  - classification of the injury or illness (e.g., death, days away from work, etc.)
  - number of calendar days away from work or on restricted duty (including weekends and holidays)

OSHA 301 - Injury and Illness Incident Report

- For each injury or illness recorded on the OSHA 300 Log, the employer must complete an incident report within seven calendar days of receipt of information that a recordable injury or illness has occurred
- The 301 Report supplements the 300 Log by providing more detailed information about a particular case
- The 301 Report must include information about the:
  - employee's identity
  - nature and cause of the injury (e.g., what the employee was doing at the time of the accident, and what happened)
  - identity of the treating medical professional
  - treatment provided to the employee

OSHA 300A - Annual Summary of Work-Related Injuries and Illnesses

- At the end of each calendar year, employers must create an annual summary of injuries and illnesses recorded on the OSHA 300 Log
- The 300-A Summary Form must be

completed even if there are no recordable injuries during the calendar year

- ❏ The 300-A Summary Form must summarize the following data from the 300 Log:
  - ❍ total number of workplace fatalities
  - ❍ total number of cases with days away from work (and the number of days)
  - ❍ total number of cases with job transfer or restriction (and the number of days)

Private Concern List

- ❏ Enter "Privacy Case" on the 300 Log in lieu of the injured employee's name, if the injury relates to:
  - ❍ intimate body part or reproductive system
  - ❍ sexual assault
  - ❍ mental illness
  - ❍ HIV, hepatitis, or tuberculosis infection
  - ❍ needlestick or cut by a sharp object contaminated with another person's blood or potentially infectious material
  - ❍ another illness (not injury) for which the employee independently and voluntarily requests that he not be named on the 300 Log
- ❏ Maintain a separate confidential list of the case numbers and employee names of the privacy concern cases
- ❏ If the employee's job title or description of the nature of the injury or illness may enable others to identify the employee, employers should leave the job title blank or limit the description on the log

Alternate Forms May Be Permissible

- ❏ Employers may use alternate forms or electronic records for recording injuries and illnesses, incident reports, and annual summaries, so long as the forms:
  - ❍ are "equivalent" (i.e., include the same information as the OSHA form they substitute)
  - ❍ are readable and understandable
  - ❍ can be updated with new recordable data within seven days of an occurrence
  - ❍ can be accessed and produced within required time periods
  - ❍ are completed using the same instructions as the OSHA form they substitute

SECTION III: RECORDING INJURIES AND ILLNESSES

Five Basic Steps for Recording Injuries and Illnesses

- ❏ Obtain a report of every workplace injury
- ❏ Record injuries and illnesses (300 Log)
- ❏ Complete the First Report of Injury (Form 301)
- ❏ Prepare and certify the Annual Summary (Form 300A)
- ❏ Retain and maintain records for five years

Basic Recordkeeping Requirements

- ❏ Within seven calendar days, employers must record every injury, illness, or fatality that:
  - ❍ is *work-related*; and
  - ❍ is a *new case*; and
  - ❍ meets one or more of the general recording criteria in 29 CFR § 1904; or
  - ❍ meets one or more of the special recording criteria in 29 CFR §§ 1904.8-1904.12

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What Is an Injury or Illness?

- ❏ An abnormal condition or disorder
- ❏ Injuries include cases such as "a cut, fracture, sprain, or amputation"
- ❏ Illnesses "include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disease, or poisoning"
- ❏ Exposure is not an injury or illness unless the exposure results in signs or symptoms

What Is "Work-Related"?

- ❏ An injury or illness is work-related if the injury or illness is:
  - ❍ caused by events or exposures in the work environment
  - ❍ contributed to by events or exposures in the work environment
  - ❍ significantly aggravated by events or exposures in the work environment
- ❏ There is no eggshell or reasonable employee exception to work-relatedness (i.e., an injury is recordable if it meets the criteria for the specific injured employee, even if the occurrence would not have impacted other employees at all or as severely)
- ❏ An injury or illness is not work-related if the injury or illness occurs:
  - ❍ solely as a result of a personal task; and
  - ❍ outside assigned work hours (i.e., time employee is expected to work plus overtime)

Geographic Presumption

- ❏ Injuries and illnesses are *presumed* to be work-related if they result from an event occurring, where employees:
  - ❍ work; or
  - ❍ are present as a condition of employment
- ❏ Exceptions to the Geographic Presumption (employers are not required to record illnesses or injuries resulting from):
  - ❍ an auto accident in the company parking lot or access road during a commute
  - ❍ symptoms that surface at work but result solely from a non- work event
  - ❍ voluntary participation in a wellness program or in a medical, fitness, or recreational activity (e.g., as a blood donation, physical exams, flu shots, or exercise classes)
  - ❍ eating or preparing food for personal consumption (unless the employee contracted food poisoning from employer- provided food, or the food was tainted by workplace contaminants such as lead)
  - ❍ personal grooming, self-medication for non-work-related conditions, or intentionally self-inflicted harm
  - ❍ the common cold or flu
  - ❍ the employee's presence at the workplace as a member of the public rather than as an employee
  - ❍ mental illness (unless the employee voluntarily provides an opinion from a medical professional that the mental illness is work-related)
  - ❍ personal tasks unrelated to employment at the workplace outside assigned working hours

Work Relatedness: "Significant Aggravation"

- ❏ "Significant aggravation" of a pre-existing condition makes the injury or illness work-related if:
  - ❍ a workplace event aggravates the pre-existing injury enough that it yields greater consequences than would have occurred but for the aggravating event

- a workplace event or exposure results in:
  - » death
  - » loss of consciousness
  - » one or more days away from work, restricted work, or job transfer
  - » medical treatment
- In sum, if on-the-job "aggravation" independently meets recordability criteria, it is a work-related recordable injury/ illness (e.g., an employee is able to work on Monday after injuring his back playing football at home on the weekend, but at work on Monday, wrenches his back lifting a box, which causes him to miss three days of work) (29 CFR 1904.5(b)(4))

What Is a "New Case"?

- ❏ A workplace injury or illness is a new case, when an employee:
  - has *never before reported* similar symptoms
  - has *completely recovered* (i.e., all signs and symptoms disappeared) from a previous injury or illness of the same type that affected the same part of the body, and *workplace event or exposure causes the signs or symptoms to reappear*

SECTION IV: RECORDING WORKPLACE INJURIES AND ILLNESSES

Categories of General Recording Criteria - 29 CFR § 1904.7

- ❏ An injury or illness in the following categories must be recorded on the 300 Log:
  - death
  - days away from work
  - restricted work or transfer to another job
  - loss of consciousness
  - significant injury or illness diagnosed by a physician or other licensed medical professional
  - medical treatment beyond first aid

Death

- ❏ Report all work-related fatalities to OSHA within eight hours
  - *Note*: All employers must "report" work-related fatalities, even if excluded from the duty to "record" injuries
  - Report fatalities by telephone to OSHA's Emergency Notice Line: 800.321.6742
  - Do *not* send an email
- ❏ Record work-related injuries and illnesses resulting in death by entering a ✓ in the 300 Log's column for "Death" cases
- ❏ Employers are required to record the following work-related fatalities but are not required to report them:
  - non-construction related automobile fatalities; and
  - work-related incidents resulting in an employee's death 31 or more days after the incident

Days Away from Work Injuries

- ❏ Record injuries or illnesses resulting in Days Away From Work (DAFW) by:
  - entering a ✓ in the 300 Log's column for "Days Away from Work" cases
  - entering total *calendar* days of missed work (including weekends, holidays, and other days the employee is not otherwise expected to work) in the 300 Log's column for "Number of Days"
  - for lengthy absences, entering estimated DAFW within seven calendar days of injury, and then updating if the estimate is not accurate
  - *not* counting the day on which the injury occurred

- ❍ if a medical professional recommends days away, entering the number of days recommended even if the actual DAFW turns out to be fewer
- ❍ capping DAFW at 180 days even if the actual DAFW turns out to be greater

Restricted Work/Job Transfer

- ❏ An injury or illness is a "Restricted Work" or "Job Transfer" case if:
  - ❍ the employee is limited in performing one or more "routine functions" (i.e., a work activity "the employee regularly performs at least once per week")
  - ❍ the employee is restricted from working one or more full days (not counting the day of the injury); or
  - ❍ a medical professional recommends restricting one or more routine functions for one or more full days of work (even if the employee does not follow the recommendation)
- ❏ *Exception*: Employers are not required to record "minor musculoskeletal discomfort" as Restricted Work if a medical professional determines that employee is able to perform all routine functions, but recommends a work restriction just to prevent a more serious condition
- ❏ Record injuries or illnesses resulting in Restricted Work or Job Transfer by:
  - ❍ entering a ✓ in the 300 Log's column for "Job Transfer or Restriction"
  - ❍ entering total *calendar* days of work missed (including weekends, holidays, and other days the employee is not otherwise expected to work) in the 300 Log's column "on job transfer or restriction days"
  - ❍ for lengthy restrictions/transfers, entering estimated time in the 300 Log's column "on job transfer or restriction days" within seven calendar days of the injury, and then updating if the estimate is not accurate
  - ❍ *not* counting the day on which the injury occurred
  - ❍ recording partial days (except the day of the injury) as a full day
  - ❍ if a medical professional recommends restriction or transfer, entering the recommended number of days (even if actual time turns out to be less)
  - ❍ clarifying vague medical recommendations (e.g., "light duty")
  - ❍ choosing the most authoritative of competing medical opinions
  - ❍ capping Restricted/Transferred days at 180 days (even if actual time is greater)

Loss of Consciousness

- ❏ Record every work-related injury or illness resulting in unconsciousness:
  - ❍ it does not matter for how long the worker was unconscious
  - ❍ feeling "woozy" is not recordable as loss of consciousness
  - ❍ by entering a ✓ in the 300 Log's column for "Loss of Consciousness"

SECTION V: SPECIAL RECORDING CRITERIA

Categories of Special Recording Criteria - 29 CFR §§ 1904.8 - 1904.12

- ❏ Certain other injuries and illnesses not otherwise covered by the five categories of General Recording Criteria must also be recorded, including:
  - ❍ significant injury or illness diagnosed by a licensed health care professional
  - ❍ medical treatment beyond first aid
  - ❍ needlestick or cut from a contaminated sharp object

- ❍ medical removal (i.e., requiring days away from work or job transfer) pursuant to special standards (e.g., lead, cadmium, benzene)
- ❍ occupational hearing loss cases
- ❍ tuberculosis infection or exposure

Significant Injury or Illness Diagnosed by a Physician

- ❑ Record significant work-related injuries and illnesses diagnosed by licensed medical professionals for which neither medical treatment nor work restrictions are recommended at the time of diagnosis
- ❑ The same is true if medical treatment or work restrictions are deferred. Examples of such injury or illness include:
  - ❍ cracked bones;
  - ❍ punctured ear drums;
  - ❍ cancer; or
  - ❍ chronic irreversible disease
- ❑ Record these injuries and illnesses at the initial diagnosis even if medical treatment or work restrictions are not recommended (or are deferred)
- ❑ Record these injuries and illnesses by entering a ✓ in the 300 Log's column for "Other recordable cases"

Medical Treatment Beyond First Aid

- ❑ Injuries or illnesses requiring medical treatment beyond first aid must be recorded on the OSHA 300 Log
- ❑ "Medical treatment" is the management and care of a patient to combat disease or disorder
- ❑ Medical treatment does not include:
  - ❍ first aid;
  - ❍ visits to medical provider exclusively for observation or counseling; or
  - ❍ diagnostic procedures, such as x-rays, blood tests, and administering prescription medication for diagnosis
- ❑ Treatment is first aid *only if* the treatment appears on this list:
  - ❍ non-prescription medication at non-prescription strength
  - ❍ cleaning, flushing, soaking surface wounds
  - ❍ wound coverings (bandaging or putting on a band-aid)
  - ❍ removing splinters or foreign materials by irrigation, tweezers, swabs
  - ❍ removing foreign bodies from eyes with swabs, irrigation
  - ❍ tetanus shots
  - ❍ non-rigid supports (e.g., elastic bandages or wraps)
  - ❍ temporary immobilization (e.g., a splint or sling)
  - ❍ drilling finger/toe nails to relieve pressure or drain blisters
  - ❍ eye patches
  - ❍ finger guards
  - ❍ massages (not including physical therapy or chiropractic treatment)
  - ❍ fluids for heat stress relief
  - ❍ hot or cold therapy
- ❑ Record any injury or illness requiring any form of medical treatment not on that list by entering a ✓ in the 300 Log's columns "remained at work" and "other recordable cases"

SECTION VI: MISCELLANEOUS RECORDING PROCEDURES

Recording Procedures

- ❑ Record each work-related injury or illness in only one *outcome* column of the 300 Log
- ❑ Select the outcome column reflecting the most serious outcome (columns on the 300 Log descend in order of seriousness from left to right)

- ❏ Corrections to errors or updates due to an outcome increasing in severity must be made by lining out (not erasing) the previous entry

Multiple Establishments

- ❏ Maintain a separate 300 Log for each separate establishment expected to operate for one year or longer
- ❏ Establishments include:
  - ❍ single physical locations where business is conducted; or
  - ❍ for industries with employees working at multiple locations (e.g., construction, utility, transportation, etc.), the main/ branch office and the terminal or station from where activities are supervised or based
- ❏ Maintain a separate 300 Log for individual divisions or geographical regions
- ❏ If an employee is injured at an establishment of the employer where he or she does not normally work, record the case on the 300 Log for the establishment where the injury occurred, not where the employee normally works
- ❏ For employees injured at a location other than one of the employer's establishments, record the case on the 300 Log where the employee normally works
- ❏ Link employees who telecommute to one of the employer's establishments

Competing Medical Opinions

- ❏ When contemporaneous and conflicting recommendations by two or more health care professionals are obtained (by the employee, the employer, or both), the employer:
  - ❍ may determine which recommendation is the most authoritative
  - ❍ records (or does not record) based on the best documented, best reasoned, and most persuasive recommendation
- ❏ Once medical treatment beyond first aid is provided for an injury or illnesses (even if a subsequent medical professional concludes it was unnecessary), the case is recordable

SECTION VII: UPDATING AND VERIFYING RECORDS

Verify, Summarize, Certify, Post, and Maintain

- ❏ By February 1st of each calendar year, employers must:
  - ❍ review the 300 Log from the previous calendar year for accuracy (and update or correct, if necessary)
  - ❍ summarize the data from the 300 Log on the 300-A Summary Form
  - ❍ certify the 300-A Summary Form.
  - ❍ have the certification done only by a "Company Executive," who can be any of the following:
    - » owner of sole proprietorship
    - » partner of partnership
    - » officer of corporation
    - » highest-ranking official at jobsite
    - » supervisor of highest-ranking official
  - ❍ post the 300-A Summary Form for three months (from February 1 to April 30)

Updating and Maintaining OSHA Forms

- ❏ Keep all injury and illness recordkeeping forms for five years
- ❏ Employers are permitted to maintain past years' records at a central location, rather than at each establishment, provided that:
  - ❍ information regarding a recordable injury can be transmitted from the establishment to the central location

within seven calendar days; and

- ❍ records can be produced to government representatives, employees, former employees, and employee representatives within required timeframes (see below)

- ❏ Employers must continue to update 300 Logs for five years if new information becomes available (e.g., outcomes change or new facts are learned, which lead to different recording conclusions)
- ❏ Employers need not update 300-A Form or 301 Reports
- ❏ Do *not* submit recordkeeping forms to OSHA or the Bureau of Labor Statistics unless specifically requested
- ❏ Upon request by OSHA during a workplace inspection, recordkeeping forms must be produced within four business hours of receipt of the request

Employee Participation and Access to Records

- ❏ Establish a procedure for employees to report injuries
- ❏ Inform employees how and to whom to report injuries
- ❏ Provide access to 300 Logs and 301 Reports:
  - ❍ to employees, former employees, and employee representatives (e.g., union representatives)
  - ❍ by the end of the next business day
  - ❍ at no charge for first-time copies

SECTION VIII: PENALTIES

- ❏ OSHA citations can be classified in one of five ways: Other- than-Serious, Serious, Repeat, Willful, or Failure to Abate
- ❏ In general, recordkeeping violations are not classified as Serious citations, because they do not create a substantial probability of death or serious physical harm
- ❏ They are, however, often classified as Repeat or Willful, which carry maximum penalties of $70,000 per violation

SECTION IX: RECORDING ACTION PLAN

Implement Comprehensive Recorkeeping Plan

- ❏ Ensure recordkeeping policies are current, accurate, compliant, and implemented
- ❏ Train recordkeeping staff on OSHA requirements and internal policies
- ❏ Develop a policy requiring employees to report to management all workplace injuries and illnesses, and train all employees about the policy
- ❏ Avoid policies that discourage reporting/recording of injuries (e.g., tying bonus payments to recordable rates)
- ❏ Train your recordkeeping staff on all relevant OSHA requirements and internal recordkeeping procedures. They should be familiar with the following:
  - ❍ recordkeeping regulations: www.osha.gov/pls/oshaweb/owastand.display_standard_group?p_toc_level=1&p_part_number=1904
  - ❍ handbook on recordkeeping: www.osha.gov/recordkeeping/handbook/index.html
  - ❍ recordkeeping forms: www.osha.gov/recordkeeping/handbook/index.html
  - ❍ interpretation letters: www.osha.gov/recordkeeping/RKinterpretations.html

Conduct Periodic Recordkeeping Audits

- ❏ Conduct periodic internal or third-party

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recordkeeping audits that include cross-checking medical records (e.g., first-aid logs, workers' compensation reports, sick-leave requests, accident reports, medical records, etc.) against OSHA injury and illness recordkeeping forms

- ❏ When possible, audits should be conducted at the direction of in-house or outside legal counsel to protect findings under the attorney-client privilege
- ❏ Review prior safety and health audits and recommendations, and ensure that all recommendations regarding recordkeeping are addressed

Prepared May 2012

Updated 50-State Wage and Hour App for Employers

Epstein Becker Green's updated version of its free, first-of-its-kind app, Wage & Hour Guide for Employers, now includes all 50 states – and more! The app puts federal and state wage and hour laws at the fingertips of employers. Plus, the updated app supports iPhone, iPad, Android, and Blackberry devices and has new capabilities.

Key features of the update include:

- New summaries of wage and hour laws and regulations covering all 50 states – plus federal law, the District of Columbia, and Puerto Rico)
- Available without charge for **iPhone**, **iPad**, **Android**, and **BlackBerry** devices
- Direct feeds of EBG's **Wage & Hour Defense Blog** and **@ebglaw on Twitter**
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With wage and hour litigation and agency investigations at an all-time high, EBG's app offers an invaluable resource for employers, in-house counsel, and human resources personnel.

The multitude of wage and hour claims that employees have filed under the Fair Labor Standards Act and its state law counterparts has made compliance with the intricate wage and hour laws more important than ever. Employers in all industries—including financial services, health care, hospitality, retail, and technology, media, and telecommunications—are susceptible to claims under these statutes.

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Rather than search through a variety of resources to locate applicable wage and hour laws, users can follow this easy-to-navigate app to find the answers to many of their questions, including citations to statutes, regulations, and guidelines. To provide the best experience possible, the app enables users to download the guide at any time, with or without a connection.

Epstein Becker Green's **Wage & Hour Guide for Employers** has been prepared by some of the most respected counselors, litigators, and authors in the field to help employers achieve their business objectives, comply with federal and state wage and hour laws, and avoid govern¬ment investigations and class action litigation.

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