Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

March 2019

Department of Labor Update

On March 14, 2019, the U.S. Department of Labor released new opinion letters that addressed compliance issues related to the Family and Medical Leave Act (FMLA). An opinion letter is an official, written opinion by the Department of Labor's Wage and Hour Division on how a particular law applies to a specific circumstance.

The newest FMLA opinion letter clarifies whether employers can let workers take paid leave in lieu of FMLA Leave. The letter states, "an employer may not delay the designation of FMLA- qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave." This means once an employer learns an absence qualifies for FMLA leave, it must begin calculating that leave towards the employee's FMLA entitlement. However, the opinion letter is quick to note the federal regulation does not prevent the employer from providing additional leave, past the 12 weeks required by the FMLA.

Sexual Orientation and Gender Identity Update

Last week, members of the U.S. House of Representatives reintroduced a bill that would amend the Civil Rights Act of 1964 to include sexual orientation, and gender identity among the prohibited categories of discrimination or segregation. Title VII prohibits discrimination based on "sex." The bill defines "sex" to include sex stereotypes, sexual orientation or gender identity, and pregnancy, childbirth or a related medical condition. The Equality Act also clarifies that the Religious Freedom Restoration Act (RFRA) cannot be used in a civil context to provide a claim, defense, or basis for discrimination.

The bill, if signed into law, would be the first national nondiscrimination law for LGBTQ Americans. It is noteworthy that three significant sex discrimination cases, *Altitude Express v. Zarda*, *Bostock v. Clayton Cty,* and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, petitioned to be heard by the U.S. Supreme Court regarding Title VII's coverage of sexual orientation and transgender discrimination. The Supreme Court Justices listed the three cases for consideration during the Court's March 15, 2019 conference, but the Court did not provide any indication whether it will hear the trio of cases.

FAIR ACT

On February 28, 2019, U.S. Rep. Hank Johnson (D-GA) and U.S. Sen. Richard Blumenthal (D-Ct) introduced the Forced Arbitration Injustice Repeal Act (the "FAIR act). The goal of this bill is to increase Americans' rights to seek justice and accountability through the court system.

If passed, the bill would amend the Federal Arbitration Act to prohibit mandatory pre-dispute arbitration agreements which force arbitration of future employment, consumer, antitrust, or civil rights disputes. The bill would also prohibit agreements which interfere with the rights of individuals, workers, and small businesses to participate in joint, class or collective action related to an employment, consumer, antitrust, or civil right dispute. Rep. Johnson stated, "[f]orced arbitration agreements undermine our indelible Constitutional right to trial by jury, benefiting powerful businesses at the expense of American consumers and workers." Forced arbitration requires employees or consumers to resolve disputes behind closed doors with binding arbitration. In arbitration, an arbitrator decides the dispute between the parties, which is binding and usually confidential. Arbitration awards tend to be lower than those reached in Court.

DOL Sets New Overtime Rule Exemption Threshold

The U.S. Department of Labor (DOL) issued its highly anticipated overtime rule, raising the minimum salary threshold required for workers to qualify for the Fair Labor Standard Act's (FLSA) white-collar exemptions to $35,308 per year. The rule will boost the standard salary level from $455 to $679 per week.

The FLSA requires employers to pay employees overtime wages for hours worked over 40 in a workweek. The rule exempts employees who work in white collar jobs which are executive, administrative, or professional in nature.

The salary threshold was last increased in 2004, during the George W. Bush administration. In 2016, under Barack Obama the DOL nearly doubled the salary threshold to just over $47,000, but a Federal Texas Judge blocked the rule just days before the it was set to take effect.

Supreme Court Remands Equal Pay Act Case

On February 25, 2019, the United States Supreme Court remanded a case captioned *Yovino v. Rizo* to the Ninth Circuit Court of Appeals. In *Yovino*, the Ninth Circuit held that a company's utilization of a female employee's prior salary as a factor in paying her less than a male counterpart violated the Equal Pay Act. Under the Equal Pay Act, an employer has a defense to a gender-based pay disparity if the disparity is based on i) a seniority system, ii) a merit system, iii) a system which measures earnings by quantity or quality of production, or iv) any other factor other than sex. The employer in *Yovino* argued the utilization of prior salary constituted a factor "other than sex." The Ninth Circuit rejected this argument, finding prior salary is not a permissible "factor other than sex" because prior salary is not a job-related factor and perpetuates wage disparities based on gender. The Ninth Circuit rendered its decision en banc, meaning the entire court (11 judges) heard the case; the decision was split 6-5. However, prior to the issuance of the decision, the judge who authored the court's opinion died.

The employer filed a petition for writ of certiorari in the Supreme Court, challenging the decision on the ground that the court could not count the vote of the deceased judge. The Supreme Court agreed, granting the petition, vacating the judgment of the Ninth Circuit, and remanding the case for further proceedings. The significance of the Court' decision is it did not reach the salient question, which is whether prior salary may be used to justify pay disparity. Moreover, it is unclear where the Ninth Circuit will land on this question considering how closely divided its decision was. Employers will have to wait for guidance on the important issue raised by the *Yovino* case.

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