

Federal & State Updates

November 1 – 15, 2011

FEDERAL ISSUES

\$115,000 Paid in Disability Discrimination Settlement

Maverik Country Stores will pay \$115,000 and provide other relief to settle a lawsuit filed by the EEOC on behalf of an employee who was fired after disclosing that they had HIV. According to the lawsuit, Maverik learned of the employee's HIV status when it was disclosed during a workers' compensation hearing. The employee had worked for the company for over 3 years, and was fired 2 weeks after the disclosure due to an alleged fear that he should not be working with food. HIV is a disability under the ADA, and employers are required to provide reasonable accommodations. Further, there is nothing about having HIV which would preclude an individual from working with food. Employers cannot ignore the interactive process to determine if there is an accommodation for an employee with a disability, and should consult with an HR professional or employment law attorney before terminating someone with a disability.

\$132,500 Paid to Clerk with Autism

In another disability discrimination case, Tarsadia Hotels was found to have: (1) unlawfully denied a reasonable accommodation, (2) disciplined, and (3) terminated an employee with autism due to his disability. The clerk had prior experience in a similar position, and had good recommendations. Shortly after beginning work, he sought free job coaching services from the state which would have helped him learn to master the job by using autism-specific training techniques. However, the company refused to allow him the job coach and fired him. The EEOC pursued the claim, and after a court battle, the company will pay \$132,500 and overhaul their policies and procedures with respect to ADA compliance, including extensive training, and will be required to submit annual reports to the EEOC.

FMLA Not Subject to Blackout Periods

A federal district court in New Mexico held that FMLA is not subject to "blackout periods" declared by the employer when leave will be denied or judged by stricter standards. Further, employers may not harass employees who exercise their rights to take FMLA leaves. In the case against the state of New Mexico, an employee was denied FMLA to care for her own, as well as a disabled child's, health condition. The state denied her leave purportedly on the basis of insufficient medical records. When the employee finally took leave, she was ridiculed and encouraged to resign by management. The court held that management's alleged conduct raised concern that the employee was subjected to interference and retaliation for taking FMLA. The court also ruled that the FMLA is not subject to blackout periods, nor may employers harass employees who exercise their rights to take FMLA leaves.

H-1B Employees More Expensive

A recent DOL investigation into a Florida-based health care staffing agency's use of H-1B workers found that they were not paid the required wage rate for nonproductive time. H-1B workers are required to be paid for all nonproductive time caused by their employers, including time leading up to or in between staffing assignments. The finding resulted in the agency paying \$134,073 to 40 nonimmigrant workers. If your company uses foreign workers, it's imperative that you understand the requirements under their work authorization visa. As you can see, failing to do so can be expensive.

Selectively Applying Policy Lands Employer in Court

The Fourth Circuit Court of Appeals upheld a decision by the NLRB finding that an employer violated the NLRA when it terminated an employee allegedly for photographing other employees at work without permission, which was a policy violation. The employee had been embarrassed about a bad haircut, and began to wear a hat to work without comment from her supervisor. A week later, she was told to remove the hat, which violated company policy, she refused, and was sent home. She wore a hat the next day, which was a day that employees were permitted to dress in costume, claiming her hat was part of the costume. This time, when she was told to take it off, the employee said that the policy was being enforced unequally, and she was written up for insubordination for refusing to remove her hat the prior day. She proceeded to photograph employees over the next few weeks who were wearing hats. She discussed with employees the unequal treatment she felt she was subjected to, trying to rally support. She was eventually terminated for violating the photography policy. She filed a complaint with the NLRB alleging that the company interfered with her right to engage in protected concerted activity. The Court agreed with the NLRB that the employee was actually discharged because she engaged in protected concerted activity (by trying to gain support for her position), and that the employer had inconsistently applied its photography and dress code policies. Beyond violating an employee's right to engage in protected concerted activity, employers who inconsistently apply policies can also face allegations of discrimination, making it crucial to be consistent!

Violations Lead to Jail Time for Company President

The president of Franklin Drywall in Minnesota was sentenced to 2 years in federal prison for submitting false statements to his employees' Union regarding their pension fund. Franklin was requiring his employees to falsify their time sheets and reports to the two benefits and pension funds by underreporting their hours worked. The employees were all paid at straight time regardless of the number of hours they worked resulting in underpayment to the pension and benefit funds. Franklin will serve jail time, and was also ordered to pay \$3.3 million in restitution. As you'll see in other cases reported below, employers must follow wage and hour laws and record time accurately, and failure to do so is increasingly resulting in penalties.

STATE ISSUES

California

2012 Minimum Wage Rates for Exemptions Announced

The state has released the minimum hourly, monthly, and yearly rates for exempt computer software, physician, and surgeon employees. Each year, the rate is determined based on changes to the California Consumer Price Index. The index has increased 2.5% over the past year, and the Division of Labor Standards Enforcement (DLSE) has adjusted the rates required in

order for these positions to be considered exempt. As of January 1, 2012, Computer professionals must be paid at least \$38.89 per hour or \$81,026.25 per year. Licensed physicians or surgeons must be paid at least \$70.86 per hour. Employers should adjust the rates of affected employees accordingly.

No Meal Period Requirement in the Trucking Industry?

A federal judge in the Southern District of California has given the trucking industry a significant legal victory. The judge ruled that California's rest and meal period laws are preempted by federal law. In the case, the truck drivers were permitted to take breaks as their schedule allowed, but 30 minutes was automatically deducted from their time each day. The court found that California's meal and rest period standards interfere with the price, route, or service of a motor carrier, which impacts competitive market forces. The court found that one of the purposes of the Federal Aviation Authorization Act – which regulates transportation, including trucking – provides for the preemption of state law. Therefore, the court found that the California law did not apply. While this is a victory for trucking industry employers, it will most likely be appealed. We recommend employers strive to provide meal periods, and will keep you updated on any developments in this area.

Illinois

Wage and Hour Case Costs Employers \$1.5 Million – Personally!

A recent case in Illinois reminds employers of the importance of paying employees accurately. In the case, a brother and sister managed three restaurants. A Department of Labor investigation found that the servers were required to sign over their paychecks as soon as they were received, and the only payment they received was tips from customers. No offset payment was made to employees to ensure they were paid at least minimum wage for all hours worked. There were also numerous recordkeeping violations. The DOL sued the restaurants, the owner, and the manager individually. The court found in favor of the DOL, and required the defendants pay nearly \$600,000 to 64 workers for minimum wage and overtime compensation. The judge also ordered the defendants to pay an equal amount in liquidated damages. The final blow was that the judge held that the owner and managers were employers under the FLSA, and were therefore individually liable for the nearly \$1.5 million. This case is a strong reminder to employers that paying people improperly can cost you!

New Jersey

New Employee Notice and Posting Requirement

The Department of Labor and Workforce Development (DLWD) has issued regulations requiring employers to post a notification regarding their requirement to maintain and report records regarding wages, benefits, and taxes under state law. The regulations require the employer to post a notice, as well as provide a copy to all employees by December 7, 2011 and any employee hired after November 7, 2011. If the company has a website or an intranet site for exclusive use by employees, posting notice on the site will satisfy the requirement to display the notice. The employer may also email the notice to employees to satisfy the requirement to provide a written notice. A sample notice is available on our website or from the DLWD.

New York

\$5.1 Million Settlement with Lenny's

The state Department of Labor has settled a case with the restaurant chain Lenny's: The Ultimate Sandwich for a record \$5.1 Million for minimum wage and overtime violations. The DOL found that the employees worked in excess of 8 hours a day without being compensated for overtime and being paid far less than minimum wage. The company also failed to keep accurate time records. Employers who fail to pay correctly and maintain required time records are asking for trouble. Federal and state departments of labor are pursuing wage and hour cases vigorously as this case and the case in Illinois demonstrates.

Vermont

State Minimum Wage to Increase

Vermont has announced that the state's minimum wage for 2012 will increase \$.31 per hour effective January 1, 2012. The new rate is \$8.46 per hour. Tipped employees must be paid at least \$4.10 per hour, and the maximum tip credit an employer may take is \$4.36 per hour.