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Supreme Court Reaffirms Home-Healthcare Overtime Exemption

Federal Minimum Wage Increases

EEOC Issues Guidance on "Family Responsibility Discrimination"

MO S. Ct. Changes Duties of Public Employers and Employees in Collective Bargaining

EEOC Cracks Down on Discriminatory Hiring Practices

U. S. Supreme Court Limits Timeframe for Filing EEOC Claims of Discriminatory Wages

Selection of Most Qualified Applicant Does Not Violate ADA

Shift Rotation Is an Essential Job Function

Recent Successes

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Supreme Court Reaffirms Home-Healthcare Overtime Exemption

In Long Island Care at Home v. Coke, the Supreme Court unanimously rejected the claim that employees who provide in-home health care services are entitled to overtime pursuant to the Fair Labor Standards Act. While the FLSA exempts individuals who provide "domestic service employment" and/or "companionship services" from overtime, an employee challenged the legality of the DOL specific interpretative regulation that attempted to fill in the gaps and clarified the scope of this exemption, specifically 29 CFR § 552.109.

The Second Circuit declined to defer to the DOL regulation and concluded that the FLSA exemption should not apply to third-party employees that provide such services. In rejecting this restrictive interpretation, the Supreme Court recognized that Courts should defer to the DOL because Congress had intended and authorized it to administer and apply the FLSA. Stated otherwise, Congress authorized and expected the DOL to work out the details of the broad FLSA exemptions and its decision to include third-party employees was an appropriate exercise of regulatory authority.

What now? First, nothing in the Long Island Care opinion would preclude the DOL from issuing a new regulation in the future. Certainly a democratic administration would be inclined to issue a more restrictive interpretation. Second, Congress can always amend the FLSA definition of "domestic service employment" and/or "companionship services" to exclude employees of third-party employees. Only time will tell on this front.

Finally, the Long Island Care decision may fuel efforts by labor unions to organize home healthcare employees. In fact, the Service Employees International Union undertook representation of Ms. Cook in order to bring her claim as a "test" case to strike down the longstanding DOL regulation. In light of this increased emphasis by SEIU to organize employees in the health care industry, they will likely attempt to convince employees to join the union so that they can receive overtime compensation through collective bargaining. As such, employers should be vigilant to any organizing efforts.

Federal Minimum Wage Increases

For the first time in 10 years the federal minimum wage will increase from \$5.15/hour to \$7.25/hour. The increase was included as part of the supplemental Iraq War funding bill that was recently signed into law by President Bush. The increase to the federal minimum wage rate will be phased in over the next 2 years, beginning with the first increase on July 24, 2007, to \$5.85/hour. Further increases will occur on July 24, 2008 (\$6.55/hour) and July 24, 2009 (\$7.25/hour).

Obviously the minimum wage increase will not currently affect employers in either Illinois or Missouri because each State has previously raised the minimum wage on its own. Generally, employers in Illinois must pay \$6.50/hour, which will increase to \$7.50/hour effective July 1, 2007. In Missouri, the minimum wage was increased by the voters last year to \$6.50/hour. Any further increases for Missouri employers will be dictated by the 2008 and 2009 federal minimum wage increase.

EEOC Issues Guidance On “Family Responsibility Discrimination”

Although federal and state laws in Missouri and Illinois do not explicitly prohibit discrimination against caregivers or those with “family responsibilities” directly, the EEOC has recently announced its intention to focus on protecting caregivers against indirect discrimination in the form of gender or disability discrimination. This promise is clear from the EEOC’s recent publication of guidelines on caregiver discrimination awareness and prevention.

In its recently published guidelines, the EEOC stated that women who continue to work frequently outside the home but maintain primary care giving responsibilities to their children or parents, may be discriminated against due to their gender because of the view that a woman should focus on being a good wife and mother rather than working. It is also concerned about protecting pregnant women in the workplace and making sure they continue to receive the same employment benefits and opportunities after they inform their employers of their pregnancies.

The new guidance manual is lengthy and provides many helpful examples. For instance, the EEOC guidance gives several vignettes, including one in which a young woman who had recently graduated business school is asked questions about her plans to have children and how she will split child care responsibilities with her husband. The interviewer remarked that men are unreliable caregivers and told someone after the interview he was concerned about hiring a young married woman because being a mother was incompatible with a fast-paced business environment. Under the circumstances, if the applicant met the requirements for the position and had as much experience as other applicants who received interviews, there was probably some illegal gender discrimination based on sex-based stereotypes. The guidelines also address awareness and prevention of harassment of an employee based on his or her responsibilities to care for a disabled family member.

The full text of the guidance is available at: www.eeoc.gov/policy/docs/caregiving.html, and a question and answer facts sheet is available at: www.eeoc.gov/policy/docs/qanda_caregiving.html.

The EEOC emphasizes that the guidance does not create a new protected category of employees with family responsibilities. Rather, it makes clear that certain treatment of employees who need to care for children, parents, or disabled family members can constitute unlawful discrimination under the Americans With Disabilities Act, Title VII, or the

FMLA. The EEOC said low-wage workers and women of color are at particular risk for discrimination based on their care giving responsibilities. In light of this stated intention, EEOC will likely scrutinize future charges that implicate such issues more closely.

Missouri Supreme Court Changes Duties of Public Employers and Employees in Collective Bargaining

Last month, the Missouri Supreme Court handed down a major decision regarding public sector employment: *Independence-National Education Association v. Independence School District*. This decision changes 60 years of precedent relating to public employment in Missouri and expressly overrules two earlier Missouri Supreme Court cases.

Previously, public employees in Missouri did not enjoy the right to collective bargaining. Rather, they only could “meet and confer,” and a public employer was free to unilaterally rescind any concession or agreement it had previously made with employee groups. In the first part of this opinion, the Court found that while public teachers are exempt from the Missouri public sector labor law, they still enjoy the right to collective bargaining under that Missouri Constitution. The second part of this important opinion held that a public employer may not unilaterally reject or terminate a memorandum of understanding or agreement once entered into.

The full effects of this case are not completely clear, and the Missouri Legislature may act quickly to alter the effects of this case. While this case dealt with the bargaining rights of teachers, the holding will likely result in police officers and firefighters asserting the right to bargain for the first time. According to the Supreme Court, public employers are now required to meet with representatives of all employees and need to be more cautious in entering any agreements concerning the terms and conditions of employment. The law remains unchanged, however, that a public employer need not ultimately enter into an agreement with employee groups. Rather, it is required only to meet and confer.

EEOC Cracks Down On Discriminatory Hiring Practices

The EEOC has launched an initiative aimed at cracking down on discriminatory hiring practices. This coincides with the EEOC’s well-publicized recent class action lawsuit (filed in federal court in East St. Louis, Illinois) alleging widespread racial bias by Walgreens against African-American workers. This initiative also coincides with the EEOC’s new “E-RACE” (eradicating racism and colorism from

employment) program, under which it will now pay closer attention to how minority applicants are hired and promoted.

In addition to focusing on what it believes is blatant and direct discrimination in hiring and promoting minority workers, the EEOC will carefully scrutinize hiring decisions based on ethnic names, arrest and conviction records, personality tests, and credit scores, all of which the EEOC believes may have an overall negative impact on minorities. To the extent employers utilize such practices in its hiring process, it should use the practices for all applicants and should track the actual results of applicants who are rejected so as to ensure that there is not a disparate impact on certain protected categories.

According to the EEOC, race discrimination complaints continue to be the most popular complaint made to the EEOC. In light of the EEOC's new initiatives, employers should re-examine their recruiting, hiring, and promotion policies and practices. Employers should be sure that they have a good business reason for the criteria they use to reject applications and to deny promotions.

U. S. Supreme Court Limits Timeframe For Filing Claims of Discriminatory Wages

The Supreme Court on May 30, 2007 made it easier for employers to defend discrimination claims based on long-ago decisions about salary and raises. By a 5-4 vote, the Court held an employee claiming he or she was discriminated against as it relates to their wages must file an EEOC charge within 300 days of the original decision—and not just within 300 days of his or her most recent paycheck.

The employee in *Ledbetter v. Goodyear Tire & Rubber Co.* sued in 1999 claiming she had been paid less than her male co-workers for the past 20 years. The employee argued her EEOC charge and lawsuit were timely because she had filed the charge within 300 days of her most recent paycheck (which she claimed was illegally low because of past discrimination). At trial, the jury awarded almost \$225,000 in back pay. However, the Supreme Court ruled that the EEOC charge had to be filed within 300 days of the alleged wrongfully discriminatory *decision*, not just within 300 days of a paycheck that was the result of that decision. Accordingly, the Supreme Court affirmed the reversal of the jury award.

This is certainly a pro-employer decision and will make it easier for an employer to defend such claims. The dissenting Supreme Court justices and pro-employee groups complained this recent decision

unfairly requires women to detect subtle discriminatory pay immediately. Moreover, several members of Congress have vowed to revise Title VII and expand the time frame for bringing wage claims. Furthermore, employees may still resort to the Equal Pay Act, which provides a two-year window to challenge gender-based wage disparities.

Selection of Most Qualified Applicant Does Not Violate ADA

In a case of first impression in the Eighth Circuit, the Court recently held that the Americans with Disability Act does not require an employer, with an established policy of filling vacant job positions with the most qualified candidate, to reassign a disabled employee to a vacant position when the disabled employee is not the most qualified applicant for that position. Huber v. Wal-Mart Stores, Inc.

Huber was employed by Wal-Mart as a dry grocery order filler. After sustaining a permanent injury to her right arm and hand, Huber could no longer perform the essential functions of her position. She was considered to be disabled under the ADA and sought, as a reasonable accommodation for her disability, reassignment to the vacant and equivalent position of router. Wal-Mart had a policy of hiring the most qualified candidate for a position. Pursuant to its policy, Wal-Mart did not automatically reassign Huber to the router position, instead requiring her to apply and compete for the job of router with other applicants. While Huber was qualified to perform the functions of the position of router, she was not the most qualified applicant for the position. Wal-Mart denied Huber the position of router, instead awarding it to the most qualified applicant for the position.

This issue has arisen in other circuits, with differing results. The Tenth Circuit has held that reassignment under the ADA means awarding a position to a qualified disabled employee, regardless of whether other better qualified applicants are available. The Seventh Circuit, on the other hand, has held that reassignment under the ADA does not require employers to reassign a qualified disabled employee to a job for which there is a more qualified applicant.

In adopting the Seventh Circuit approach, the Eighth Circuit concluded that “the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”

Shift Rotation Is an Essential Job Function

Recently, the Eighth Circuit Court of Appeals affirmed summary judgment in favor of Procter & Gamble (P & G) in an ADA disability discrimination lawsuit, holding that shift rotation was an essential function of the job of warehouse technician at a P & G 24-hour production facility.

P & G acquired the Iams production facility in Aurora, Nebraska in August of 1999. In January 2000, P & G instituted a rotating shift schedule for all warehouse technicians consisting of two twelve hour shifts: 6:00 a.m. to 6:00 p.m. and 6:00 p.m. to 6:00 a.m. Warehouse technicians worked two scheduled 12-hour shifts, followed by two days off. The employees also worked alternating weekends. Every two weeks employees would rotate between day and night shifts.

The Plaintiff suffered from Type I diabetes. He had been working as a warehouse technician at the plant in Aurora, Nebraska, prior to its acquisition by P & G. After P & G acquired the facility and implemented shift rotation, Rehrs continued to work as a warehouse technician until February 2002, when he suffered a heart attack. In August 2003, one month after returning from short-term disability leave, Rehrs' doctor submitted a letter to P & G asking that Rehrs, because of his diabetes, be placed on a fixed daytime schedule to more easily maintain his blood sugar level. P & G temporarily granted this accommodation.

Upon learning that the doctor planned that the accommodation be permanent, P & G denied Rehrs the accommodation, claiming that shift rotation was an essential part of the job. P & G encouraged Rehrs to apply for straight shift positions with the company. Rehrs refused to apply for one position, was turned down for another due to lack of experience and removed his application for a third straight shift position.

In support of its argument that shift rotation was an essential function of the job of warehouse technician, P & G claimed that all of its subsidiaries operated under the High Performance Work System, of which shift rotation was a component. Shift rotation, the Company argued, exposed its employees to management and other resources, including vendors and customers, that otherwise would only be accessible to those working on the day shift. As a result of shift rotation, employees' opportunities for training and development were enhanced, and in turn, plant productivity increased. If shift rotation were not required of all warehouse technicians, P & G argued, it would harm the company from a production standpoint, and, furthermore, it was unfair to other

technicians to allow Rehrs to work a straight shift, because the other technicians would then lose the benefit of shift rotation, and thereby decrease their opportunities for promotion and development.

The Court agreed with P & G, holding that an accommodation that would cause other employees to work harder, longer or be deprived of opportunities is not mandated by the accommodation provisions of the disability laws. The Court stated "the term essential function encompasses more than core job requirements; indeed, it also may include scheduling flexibility." The Court went on to say that P & G had not conceded that shift rotation was non-essential merely because it had voluntarily granted Rehrs a temporary accommodation, stating "To find otherwise would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers."

RECENT SUCCESSES

Thomas E. Berry, Jr. successfully obtained summary judgment on behalf of a client who terminated an employee who was unable to return to work after fully exhausting all leave of absence entitlements. The Plaintiff alleged her termination was unlawful either as disability discrimination or in retaliation for pursuing workers compensation. The Circuit Court for Caldwell County, Kentucky concluded that Plaintiff's inability to return to work and perform her essential functions precluded either claim.

Stacie A. Owens successfully sought and obtained a permanent injunction on behalf of two different clients against a former employee who had made threats against his former co-workers.

Thomas E. Berry, Jr. successfully obtained summary judgment on behalf SIUE. The Plaintiff sought to challenge her termination as being unlawful based on either race or gender discrimination. In addition to naming the University, the Plaintiff also named several University representatives in their individual capacity. The Federal Court in East St. Louis rejected Plaintiff's claims in its entirety.

The choice of a lawyer is an important decision and should not be based solely on advertisements.