Holland and Holland L.L.C.

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EMPLOYMENT LAW DIGEST

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DEPARTMENT OF LABOR TO TARGET CERTAIN EMPLOYERS

Currently, complaints from individuals about wage and hour issues make up the main area of enforcement for the U.S. Department of Labor (DOL). According to Laura Forman, the Principal Deputy Administrator for the wage and hour division, the DOL intends to shift its enforcement focus from individual complaints to targeted enforcement of areas involving low-wage and what it perceives as vulnerable workers. According to Ms. Forman, such workers may not complain about receiving less than minimum wage and no overtime, because they are afraid of losing their jobs. As a result, the DOL intends to target employers who employ this type of employee.

The Principal Deputy Administrator also indicated there would be an increased effort to identify employers that misclassify employees as independent contractors in order to avoid payroll taxes and other costs.

In addition to targeted areas of enforcement by the DOL, the Obama administration has proposed increasing the minimum wage from the current amount of $7.25 to $9.00 an hour by 2015 and then indexing the minimum wage to inflation. At the same time, the DOL is considering a proposal to raise the minimum wage for tipped employees, which is currently $2.13 per hour.****

What's Inside?

The Lighter Side of Law

DESPITE DELAY IN IMPLEMENTATION, AFFORDABLE CARE ACT TO REQUIRE EMPLOYERS TO GIVE NOTICE OF EXCHANGE

Under the Affordable Care Act (ACA) individuals and employees of small businesses were to have access to insurance coverage by January 1, 2014 through ACA health insurance exchanges (Exchange). Open enrollment under the Exchanges was to begin on October 1, 2013.

The Treasury Department, with issuance of Notice 2013-45, announced on July 2, 2013 that implementation of certain components of the ACA with regard to employers would be delayed. Despite the delay it appears employers will still be required to provide employees with notice of insurance exchanges.

The ACA, through amendments to the Fair Labor Standards Act (FLSA), requires employers to provide all new hires and current employees with a written notice about ACA's Exchanges. On May 8, 2013, the Department of Labor (DOL) released temporary guidance on the Exchange notice requirement. The temporary guidance will remain in effect until the DOL issues regulations or other guidance.

Included with the temporary guidance is model Exchange notices that can be used by employers to satisfy the Exchange notice requirement. The DOL also set a compliance deadline for the Exchange notices. Employers are required to provide all employees with a notice by October 1, 2013. The DOL's temporary guidance also includes a new COBRA model election notice. The new COBRA notice has been updated to include information regarding health coverage alternatives offered through an Exchange.

The requirements will apply to employers that are subject to the FLSA. Generally, the FLSA's minimum wage and maximum hour provisions are limited to entities that are engaged in, or produce goods for, interstate commerce. Usually, a business must have at least $500,000 in annual dollar volume of sales or receipts to be covered by the FLSA. (The FLSA also specifically covers hospitals; institutions primarily engaged in the care of the sick, the aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state and local government agencies). However, the Notice of Exchange requirement does not appear to have the same FLSA limitations. As a result, it appears to apply to all "employers" as that term is broadly defined by the FLSA. This would include, with very few exceptions, all employers.

In general, the Exchange notice must:

Inform employees about the existence of the Exchange and describe the services provided by the Exchange and the manner in which the employee may contact the Marketplace to request assistance;

Explain how employees may be eligible for a premium tax credit or a cost-sharing reduction if the employer's plan does not meet certain requirements;

Inform employees that if they purchase coverage through the Exchange, they may lose any employer contribution toward the cost of employer-provided coverage, and that all or a portion of this employer

contribution may be excludable for federal income tax purposes; and

Include contact information for the Exchange and an explanation of appeal rights.

The DOL has provided model Exchange notices for employers who do not offer a health plan and a model notice for employers who do offer a health plan to some or all employees.

Employers must provide the notice to all employees, full and part time. The notice is required to be provided in writing, free of charge. The notice must be given in a manner calculated to be understood by the average employee. The notice can be sent by mail or electronically if the employee consent or has work related computer access.

DEFINITION OF "SUPERVISOR" NARROWED BY SUPREME COURT

On June 24, 2013, the United States Supreme Court made a decision that should benefit employers. The US Supreme Court in the case of Vance v. Ball State decided the question of who qualifies as a "supervisor" in a Title VII claim of harassment based on race.

Under Title VII, a company is liable for the actions of a supervisor which result in a "tangible employment action." A "tangible employment action" includes hiring, firing, failing to promote, discipline, demotion or effecting significant changes in working conditions or benefits. A company can also be liable, even if there is no resulting tangible employment action, if a supervisor creates a hostile work environment. However, if the alleged harasser is only a co-worker, the employer is liable only if it was negligent in controlling the employee's working conditions. This could happen in a situation where an employer fails to respond appropriately to a complaint of harassment by a co-worker.

Ms. Vance argued that a supervisor is someone who is authorized to control someone else's daily work activities and evaluate performance, a definition that is consistent with one used by several courts and the Equal Employment Opportunity Commission (EEOC).

But the Supreme Court ruled that a supervisor must have greater powers, including formal authority to hire, fire, promote, transfer or discipline another worker. The Court held that an employer is liable for an employee's harassment "only when the employer has empowered that employee to take tangible employment actions against the victim." Justice Alito said that today's non-hierarchical management structures required a narrow definition of supervisor, implying that everyone could otherwise sue everyone else for every imagined slight. In its decision, the Court rejected the broader EEOC definition as unclear and too complex because it relied on the balancing of a number of factors.

The original case was filed by Maetta Vance, an African-American employee of Ball State University. Ms. Vance alleged she was the victim of discrimination by a fellow food service worker. Although the parties agreed the alleged harasser did not have the power to hire, fire, demote, promote, transfer or discipline Vance, they disagreed about the extent of power the employee had over Vance. The Court determined that the alleged harasser was not a supervisor because she lacked the ability to take tangible employment actions against Ms. Vance and therefore, was not a supervisor.

This decision should have a favorable impact on employers. The United State Supreme Court adopted a definition of supervisor that narrows the scope of employees for whose conduct a company might be liable even if it is unaware of their specific actions. The Supreme Court's decision should also increase the opportunity for lawsuits to be decided early on by summary judgment. The definition of employer is now less subjective. However, it may only be a matter of time before Congress decides to pass legislation adopting the broader definition of "supervisor" promoted by the EEOC.****

RETALIATION MUST BE THE CAUSE OF EMPLOYMENT DECISION

In 2006, Dr. Nassar, who is of Middle Eastern descent, resigned from the University of Texas Southwestern Medical Center over derogatory comments his supervisor had made about his race and religion. He later sued alleging that he was denied a job at the medical center's sister hospital in retaliation for his previous complaints about discrimination. The jury found in favor of Dr. Nassar and awarded him $3 million in damages. The University appealed, arguing that for Dr. Nassar to prevail, he had to show that retaliation was the sole factor leading to the job denial – not just a factor.

On June 24, 2013, the United States Supreme Court decided University of Texas Southwestern Medical Center v. Nail Nassar. The Court held that the retaliation provision of Title VII requires the plaintiff to prove that an employer would not have taken an action *but for* the existence of improper motives. There must be a demonstrable causal link between the injury sustained and the wrong alleged. In other words, a plaintiff claiming retaliation must prove the adverse employment action would not have occurred but for the improper motives.

The stronger causation standard should help to decrease the number of frivolous claims and increase the ability of employers and the courts to deal with the pressing issues of real workplace harassment.****

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E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.