

HRAGC LEGAL UPDATE

APRIL 19, 2018

FEDERAL

United States Supreme Court

On April 2, 2018 the U.S. Supreme Court rejected the standard that had been used for construing FLSA exemptions. The case was *Encino Motorcars, LLC v. Navarro*. For fifty years the Court has adhered to the principal that FLSA exemptions must be narrowly construed against employers. The Court created a new standard instructing lower courts to give the exemptions “a fair reading.” As a result of the change, it may be easier for employers to prevail when asserting an employee falls within an exemption to prevail in any legal challenge.

On the same day the U.S. Supreme Court declined to review a decision of the Seventh Circuit Court of Appeals permitting an employer to terminate the employment of a worker who made a leave request for several months under the ADA after exhausting his FMLA leave. The case was *Severson v. Heartland Woodcraft, Inc.* A word of caution: the Seventh Circuit is not in line with the majority of Circuits who have addressed this issue, and this should not be read as approval for declining to accommodate employees who request multi-month long leaves. The employee had exhausted his FMLA leave, requested the ADA leave before he needed it, and it was likely he could return to work when the leave expired. The Court held the employee was not a “qualified individual” because he was unable to work during the long-term medical leave. This opinion is in conflict with EEOC views, although the question whether the ADA is intended to be a “leave law” is generating some debate.

Second Circuit Court of Appeals

On February 22, 2018 the Second Circuit held Title VII bans discrimination based on sexual orientation, in the case of *Zarda v. Altitude Express*. The EEOC determined several years ago sexual orientation was encompassed by Title VII, but not all courts agree. Even within the government there is disagreement as the U.S. Department of Justice argued against the EEOC position in this case, and there were three dissents in the Second Circuit case.

NEW HAMPSHIRE

Human Rights Commission Update

There have been significant changes at the New Hampshire Human Rights Commission. A new Executive Director, Ahni Malachi, began last week. Roxanne Juliano is retiring after 30 years and Sarah Burke-Cohen will take over as Deputy Executive Director. Several new Commissioners have been appointed. At a recent seminar, a Commission investigator indicated the top claim is for disability discrimination.

Employment Security Update

The Department of Employment Security is altering how it handles collection of overpayment of benefits in situations when an employer makes a back-wage payment. Typically, this arises when an employee is terminated, receives unemployment benefits and then settles a claim with the former employer. RSA 282-A:14, III(b) makes it the responsibility of the employer to reimburse the DES for the overpayment. In the past, DES has also looked to the employee, but it has stopped that practice and now looks solely to the employer. Thus, the employer must address the overpayment before paying the employee or it is exposed to paying an additional amount to DES.

Legislative Update

SB 428 – Payment of Wages

This bill passed the Senate and is now to be taken up by the House of Representatives. If passed, this Bill would require employers to pay all wages due to employee “within 8 days after the expiration of the work week if the employee is paid on a weekly basis, or within 15 days after the expiration of the work week if the employee is paid on a bi-weekly basis.”

HB 1319 – Prohibiting Discrimination Based on Gender Identity

This bill would prohibit discrimination in housing and employment based on gender identity. The House passed the bill in March. The Senate Judiciary Committee now has the bill under consideration.

The Human Rights Commission already recognizes gender identity as a protected class and accepts discrimination claims based on gender identity, so passage of this law may not materially change how the Commission operates.

HB 628 – Family and Medical Leave Insurance

This bill provides for family and medical leave insurance. It passed in the House in March and was referred to the Senate Finance Committee. It appears a further vote is scheduled for April 26.

HB 1201 – Earned but Unused Vacation

This bill would require employers who offer paid vacation to (1) inform employees of any policy regarding accrual or use of vacation time and any limits on accrual or use, (2) provide a means through which vacation time requests and approval are processed, and (3) provide an accounting on the employee’s pay statement of vacation hours used and remaining. It would also require employers to allow an extra 90 days for an employee to use excess vacation time once reaching the date of hire anniversary or end of the annual vacation time accrual period. Finally the bill would require payment of unused vacation time if the employee was unable to schedule the time due to the needs of the business. This bill passed the House in March and was referred to the Senate Commerce Committee.

PRACTICE POINTER

Avoid Potential Traps When Handling and Settling Discrimination Claims

- Be mindful of the impact of the new tax law on settlement of sexual harassment claims. If there is a non-disclosure provision in the settlement, the employer is now prohibited from deducting the payment and its attorney’s fees.
- Consider whether a standard severance agreement, where there is no sexual harassment claim, should omit any reference to sexual harassment, in order to avoid this prohibition.
- Address any overpayment with DES before finalizing a settlement agreement and making the payment.
- Consider what instructions are given during internal investigations. Requiring confidentiality and prohibiting employees from discussing what is happening at work may run afoul of the NLRA’s protection of concerted activity.

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