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Compliance Connection

July 2020

Federal Compliance Update

NLRB Decision Modifies Standard for Addressing Offensive Outbursts During Protective Activity

On July 21, 2020, the National Labor Relations Board (NLRB) released its decision in *General Motors LLC* (14-CA-197985) changing the legal standard it will use to determine whether employees were lawfully discharged or disciplined when they engage in abusive conduct in connection with National Labor Relations Act (NLRA) § 7 protected activity. § 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

In *General Motors*, the NLRB reviewed the following scenarios where an employer discharged an employee who:

- Used profanity against, and falsely attacked the character of, their employer's owner during a meeting where the employee also raised concerted pay complaints;
- Posted on social media a profane, false character attack against a manager and the posting also promoted union representation voting; and
- Shouted racial slurs while picketing.

Previously, the NLRB would apply the following setting-specific standards to determine an NLRA violation:

- The four-factor *Atlantic Steel* test for workplace outbursts to management that considers:
  1. The place of the discussion;
  2. The subject matter of the discussion;
  3. The nature of the employee's outburst; and
  4. Whether the outburst was, in any way, provoked by an employer's unfair labor practice.
- The totality of the circumstances for social-media posts and most cases involving workplace conversations among employees.
- The *Clear Pine Mouldings Standard* for picket-line conduct which asks whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the abusive conduct.

However, in *General Motors*, rather than using a setting-specific standard, the NLRB is applying the *Wright Line Standard* that presumes that employee discipline based on their abusive conduct in the course of § 7 activity violates the following NLRA protections:

- Employees may not be discriminated against employees because of their union activities or sympathies under §§ 8(a)(3) and (1)); or
- Employers may not interfere with employee rights, even when no union activity is involved, under § 8(a)(1).

However, under the *Wright Line Standard*, these NLRA protections do not apply if the employee's abusive conduct essentially disqualifies them – in other words, they lose the act's protections. Subsequently, the NLRB decided that abusive conduct and § 7 activity are not "analytically inseparable" under the *Wright Line Standard* and instead, the General Counsel (who is a president-appointed individual, independent from the NLRB, who investigates and prosecutes unfair labor practices) must show that:

- The employee engaged in § 7 activity;
- The employer knew of that activity; and
- The employer had hostility against the § 7 activity, which must be proven with evidence sufficient to establish a foundational relationship between the discipline and the § 7 activity.

If the General Counsel proves these elements, then the employer must prove it would have taken the same action against the employee even in the absence of their § 7 activity, for example, by showing consistent discipline of other employees who engaged in similar abusive or offensive conduct. The importance of this decision is the NLRB's shift from using setting-specific standards, when employees are discharged or disciplined by their employer for abusive conduct during § 7 protected activity, to the *Wright Line Standard*. According to the NLRB, "while these [setting-specific] tests were based on the view that employees should be permitted some leeway for impulsive behavior when engaging in activities protected under the Act, they often resulted in reinstatement of employees discharged for deeply offensive conduct. These decisions were out of step with most workplace norms and were difficult to reconcile with antidiscrimination law."

CDC Guidance for COVID-19, Tests, and Discontinuing Home Isolation

On July 20, 2020 the U.S. Center for Disease Control (CDC) announced:

- A test-based strategy is no longer recommended to determine when to discontinue home isolation, except in certain circumstances.
- Symptom-based criteria were modified as follows:
    - Changed from "at least 72 hours" to "at least 24 hours" have passed since last fever without the use of fever-reducing medications.
    - Changed from "improvement in respiratory symptoms" to "improvement in symptoms" to address expanding list of symptoms associated with COVID-19.
- For patients with severe illness, duration of isolation for up to 20 days after symptom onset may be warranted.
- For persons who never develop symptoms, isolation and other precautions can be discontinued 10 days after the date of their first positive (RT-PCR) test for COVID-19 (SARS-CoV-2 RNA).

The CDC also provides, and regularly updates, the following resources:

- A summary of current evidence and rationale for ending isolation and precautions for persons with COVID-19 using a symptom-based strategy; and
- A website for businesses and workplaces to plan, prepare, and respond to COVID-19.

DOL Guidance as Workplaces Reopen During COVID-19

On July 20, 2020, the U.S. Department of Labor released additional guidance on how the protections of the following laws impact workplaces reopening during COVID-19:

- Fair Labor Standards Act (FLSA);
- Family and Medical Leave Act (FMLA); and
- Families First Coronavirus Response Act (FFCRA).

These materials include the following:

- Fact Sheet for Employees;
- Fact Sheet for Employers;
- Questions and Answers about paid sick and expanded family and medical leave under the FFCRA;
- Guidance posters for federal workers and all other employees, which fulfill notice requirements for employers that need to inform employees of their FFCRA rights;
- Questions and Answers about posting requirements; and
- Quick Benefits Tips to determine how much paid leave the FFCRA allows workers to take.

The Wage and Hour Division also provides additional information on issues employers and employees face when responding to the coronavirus and its effects on wages and hours worked under the FLSA and job-protected leave under the FMLA.

Form I-9 Flexibility Extended Due to COVID-19

On July 18, 2020, the U.S. Immigration and Customs Enforcement (ICE) announced:

- After July 19, 2020 no additional extensions will be granted to employers who were served notices of inspection by ICE during the month of March 2020; and
- An extension to the flexibility rules for Form I-9 compliance to August 19, 2020.

In an announcement on March 19, the physical presence requirements associated with Form I-9 were deferred and set to expire on May 19. Then on May 19, and again on June 19, the deferral was extended for an additional 30 days respectively.

FMLA Forms Updated

On July 16, 2020, the U.S. Department of Labor (DOL) released new optional-use Family and Medical Leave Act (FMLA) forms that employers can use to provide required notices to employees; and employees can use to provide certification of their need for leave for an FMLA qualifying reason. These forms are electronically fillable PDFs and can be electronically saved. Employers may also use their own forms if they provide the same basic notice information and only require the same basic certification information.

The forms that were updated, in June 2020 and expire June 30, 2023, have more questions with check-box responses and include electronic signature features:

- **Notice Forms** – Employers covered by the FMLA are obligated to provide their employees with certain critical notices about the FMLA so that both the employees and the employer have a shared understanding of the terms of the FMLA leave. Employers can use the following forms to provide the notices required under the FMLA:
    - Eligibility Notice (Form WH-381) – informs the employee of their eligibility for FMLA leave or at least one reason why the employee is not eligible.
    - Rights and Responsibilities Notice (Form WH-381) (combined with the Eligibility Notice) – informs the employee of the specific expectations and obligations associated with the FMLA leave request and the consequences of failure to meet those obligations.
    - Designation Notice (Form WH-382) – informs the employee whether the FMLA leave request is approved; also informs the employee of the amount of leave that is designated and counted against the employee's FMLA entitlement. An employer may also use this form to inform the employee that the certification is incomplete or insufficient and additional information is needed.
- **Certification Forms** – Certification is an optional tool provided by the FMLA for employers to use to request information to support certain FMLA-qualifying reasons for leave. An employee can provide the required information contained on a certification form in any format, such as on the letterhead of the healthcare provider, or official documentation issued by the military. There are five DOL optional-use FMLA certification forms:
    - Certification of Healthcare Provider for a Serious Health Condition:
        - Employee's serious health condition (Form WH-380-E) – use when a leave request is due to the medical condition of the employee.
        - Family member's serious health condition (Form WH-380-F) – use when a leave request is due to the medical condition of the employee's family member.
    - Certification of Military Family Leave:
        - Qualifying Exigency (Form WH-384) – use when the leave request arises out of the foreign deployment of the employee's spouse, son, daughter, or parent.
        - Military Caregiver Leave of a Current Servicemember (Form WH-385) – use when requesting leave to care for a family member who is a current service member with a serious injury or illness.
        - Military Caregiver Leave of a Veteran (Form WH-385-V) – use when requesting leave to care for a family member is who a covered veteran with a serious injury or illness.

The FMLA does not require the use of any specific form or format. Although the DOL revised the FMLA forms in June 2020 to make them easier to understand for employers, leave administrators, healthcare providers, and employees seeking leave, the revised forms convey and collect the same information, which can be provided in any format, as the old DOL forms.

Employers cannot require employees to provide new certification, using the updated form, when the employee already provided the required FMLA information using the old certification form. Additionally, the content of the information contained within an expired optional-use DOL form is still applicable, regardless of the expiration date. The expiration date on the DOL forms is related to the collection of information as required by the Office of Management and Budget (OMB), and not relevant to the content of the required information.

Lastly, these forms do not have any applicability to the Families First Coronavirus Response Act (FFCRA). The FFCRA has different documentation requirements located here (see #15 and #16).

SCOTUS Opinions, Religion, and the Workplace

On July 8, 2020, the Supreme Court of the United States (SCOTUS) decided the following cases addressing religion and employment:

- In *Our Lady of Guadalupe School vs. Morrissey-Berru*, the court held that the ministerial exception under the religion clauses of the First Amendment forecloses the adjudication of employment-discrimination claims of Catholic school teachers in these cases. In its opinion, the court applied a modified ministerial exception where two teachers at Catholic elementary schools sued for workplace discrimination under the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). Based on the First Amendment, clergy members cannot bring claims under the federal employment discrimination laws, including the ADA, the ADEA, the Equal Pay Act, and Title VII. The ministerial exception applies only to those employees who perform essentially religious functions. In the opinion, the court shifted from the *Hosanna-Tabor* four-factor analysis because "it was a rigid formula," to "whether each particular position implicated the fundamental purpose of the [ministerial] exception." The opinion concluded with, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." Thus, the Catholic elementary school teachers are "ministers, the exception applies, they cannot sue for employment discrimination.
- In *Little Sisters of the Poor Saints Peter and Paul Home vs. Pennsylvania et. al.*, SCOTUS held that the U.S. Departments of Health and Human Services, Labor, and the Treasury had authority under to create lawful exemptions under the Affordable Care Act (ACA) for employers with religious or moral objections from providing contraceptive coverage to their employees under their group health plans.

FFCRA and Reporting Qualified Sick Leave Wages and Qualified Family Leave Wages Paid

On July 8, 2020, the Treasury Department and the Internal Revenue Service released Notice 2020-54 guiding employers in their required reporting of the amount of qualified sick leave wages and qualified family leave wages they paid to their employees under the Families First Coronavirus Response Act (FFCRA). Employers will be required to report these amounts either on Form W-2, Box 14, or on a separate statement. This required reporting provides employees who are also self-employed with information necessary for properly claiming qualified sick leave equivalent or qualified family leave equivalent credits under the FFCRA.

Read more about the Credit for Sick and Family Leave and the Employee Retention Credit, which are two new employer tax credits for businesses severely impacted by COVID-19.

State Compliance Update

Healthy Families and Workplaces Act

On July 14, 2020, Colorado Governor Jared Polis signed legislation (SB 205) enacting the Colorado Healthy Families and Workplaces Act. Although the law took effect July 14, 2020, it does not apply until 2021 and 2022. This is because the state needs time to create the rules that implement the act and employers need time to comply. Subsequently, the act applies to employers with 16 or more employees as of January 1, 2021, and applies to all employers as of January 1, 2022.

Paid Sick Leave

Under the act, employees earn one hour of paid sick leave (at their regular rate of pay) for every 30 hours worked, capped at 48 hours per year (in both accrual and usage). Accrual begins upon hire, and employers may loan or frontload paid sick leave in advance of accrual. Employees may use paid sick leave for themselves or a family member to:

- Treat an injury or health condition that prevents them from working.
- Receive diagnosis or treatment of an illness or injury.
- Obtain medical care.
- Abuse victim care or related legal services.
- Accommodate for a workplace (or school or place-of-care) closure due to a public emergency.

Employers are not required to reimburse employees for their paid sick leave who are separated from employment. If an employer rehires an employee within six months of separation, then their accrued, unused paid sick leave must be reinstated (unless the employee received a payout at separation). Employees who are denied paid sick leave because of a retaliatory personnel action are entitled to recover it from their employer.

The act also provides additional use and payment terms, notice and documentation requirements, and protections for confidentiality, posting, recordkeeping, and retaliation. Employers can continue to use their pre-existing paid sick leave policies if they meet the act's requirements.

Additional Leave During Public Health Emergency and COVID-19 Related Leave

The act also requires all employers in Colorado, upon declaration of a public health emergency, to supplement each employee's accrued paid sick leave as follows:

- Employees who normally work 40 or more hours per week receive 80 hours of additional paid sick leave.
- Employees who normally work fewer than 40 hours per week receive as additional leave the number of hours they are scheduled to work in a 14-day period, or the average time they work in a 14-day period — whichever is greater.

Employers may count an employee's unused accrued paid sick leave toward the required supplemental paid sick leave and an employee may use paid sick leave until four weeks after the public health emergency officially ends. However, documentation is not required to take this additional leave.

Employers in Colorado must also comply with the federal Emergency Paid Sick Leave Act (EPSLA) under the Families First Coronavirus Response Act (FFCRA) when employees take COVID-19 paid sick leave. Specifically, through December 31, 2020, each employer in Colorado (regardless of size) must provide paid sick leave (as described above and for EPSLA purposes) to each employee who is not covered under the EPSLA.

Whistleblowers and Public Health Emergencies

On July 11, 2020, Colorado Governor Jared Polis signed legislation (HB 1415) prohibiting employers, and entities that annually contract with five or more independent contractors in the state, from discriminating, retaliating, or taking adverse action against any worker who:

- Raises any concern about workplace violations of government health or safety rules (or an otherwise significant workplace threat to health or safety that is related to a public health emergency) to their employer, workers, or the public, if the employer controls the workplace where the threat or violation occurred; or
- Voluntarily wears their own personal protective equipment (PPE), such as a mask, faceguard, or gloves, at their workplace if it provides more protection than the employer-provided PPE or is recommended by a public health agency.

Employers may not require that workers sign an agreement limiting or preventing them from disclosing information about workplace health and safety practices, public health emergency hazards, or to otherwise abide by a workplace policy that would limit or prevent this disclosure. Workers are not protected for disclosures they know are false or made with reckless disregard about their accuracy. The law also requires that employers conspicuously post a notice of these worker rights in their workplace.

The law took effect July 11, 2020.

Compliance Calendar

July
7/31 – Summary of Material Modification (SMM) Deadline for changes to 2019 calendar year plans
7/31 – Form 941 Filing Deadline (second quarter)
7/31 – Form 5500 Filing Deadline (calendar year plans)
7/31 – PCORI Fee Deadline

Aug
8/1 – VETS-4212 filing period opens.

Sep
Nothing to report