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Semi-Monthly

General Counsel Report

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July 17, 2018

SOUTHCOAST
Human Resources Council

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Equal Pay & Independence Day

What's that title all about, you ask? First, it's a snappy rhyme. Second, July is a perfect time to remind *all* employers, not just Massachusetts employers, about some of the lesser-discussed aspects of equal pay.

There has been a lot of talk about Massachusetts' Equal Pay Act ("MEPA"), and for good reason. The July 1st law imposes multiple compliance obligations on employers and allows employers to create an affirmative defense against equal pay complaints by conducting an audit (note: we highly recommend that MA employers conduct an audit – do not allow the passing of the effective date to deter you!). One aspect of MEPA we haven't talked much about is pay secrecy.

The NLRA states that employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Concerted activities under section 7 includes discussion of wages and conditions of employment. And, employers may not enact policies or procedures that prohibit employee's discussions of wages or (even if they do not outright prohibit) serve to chill such discussions. Further, an executive order issued under President Obama prohibits federal contractors and subcontractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co–workers.

There are, however, exceptions to the NLRA's rule:

- Section 7 does not apply to supervisors. The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
- Confidential employees are also excluded from protection. A confidential employee is defined as someone who assists and acts in a confidential capacity to the management personnel who make and implement labor relations policies, or as someone who has regular access to confidential information about future bargaining strategy or changes that the employer anticipates may result from collective bargaining. The definition is not so broad as to include all employees with access to confidential information.
- Unauthorized/wrongfully obtained information – Wrongfully obtaining information from a company's private files is not a protected activity. While section 7 guarantees an employee the right to use information available in the normal course of work activity and association, it does not extend to the unauthorized dissemination of information obtained from an employer's confidential files or records. Cases here involve employees accessing files or offices they do not have a right to or listening in or private management conversations.
- Confidential information/breach of trust – Certain types of information may involve such disloyalty to an employer that the disclosure falls outside the protection of Section 7. One area considered is whether the information that was disclosed was of a type which the employer had a right to expect would be treated as confidential, such that the disclosure was fundamentally a breach of trust. Cases here involve employees properly obtaining information through their roles. However, because the employees knew that the information was confidential, and were aware that the employer prohibited dissemination of the information, the disclosure fell outside of section 7 protection.

What practical steps can you take to ensure compliance with state and federal laws?

1. Review your policies/handbook: Make sure policies don't explicitly or implicitly prohibit employee behavior protected by state or federal law.
2. Consider your compensation practices: Many employers bristle at the idea of making compensation practices public. And, the law doesn't require that an employer make public its pay bands, steps, or compensation strategy. But, transparency can cut down on gossip and misinformation.
3. Consider your culture: The company's culture, and the words and actions of the company's leaders, influence an employee's decision about who to approach with questions or concerns about working conditions, including pay. Consider whether your employees are likely to feel welcomed and empowered to approach leadership.
4. Train front-line supervisors and managers: These managers are the most likely to overhear conversations about pay and to innocently and unknowingly violate the law by discouraging, or even disciplining, employees from engaging in such discussions. Ensure your supervisors and managers are aware of the federal and state laws that protect the employee's right to talk about pay.

I hope you and your families enjoyed your Independence Day celebrations!

Did You Electronically Submit Your OSHA Forms?

Under the current recordkeeping rule, the deadline for electronic submission of information from OSHA Forms 300 and 301 by covered establishments was July 1, 2018.

However, OSHA has announced its intent to issue a proposal to amend its recordkeeping regulation to remove the requirement to electronically submit to OSHA information from the OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) for establishments with 250 or more employees which are required to routinely keep injury and illness records.

OSHA will not enforce this deadline for these two forms without further notice while this rulemaking is underway.

All covered employers can continue to electronically report their Calendar Year (CY) 2017 Form 300A data to OSHA, submissions after July 1, 2018 will be flagged as "Late".

Not sure whether you are a covered establishment? You aren't alone.

There are two groups of "covered establishments" required to submit accident and injury reports to OSHA. Companies that have 250 or more employees that are currently required to keep OSHA injury and illness records, and companies with 20-249 employees that are classified in certain high risk industries. A list of high risk industries is located here: https://www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.html.

However, not all employers are required to keep OSHA injury and illness logs. Certain partially exempt industries are not required to keep OSHA injury and illness records regardless of their size. A list of partially exempt industries is located here: https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html. These establishments are not required to keep OSHA accident and injury logs, and are not subject to OSHA's electronic record keeping rules.

OSHA refers to these industries as "partially exempt" because these establishments must still report to OSHA any workplace incident that results in a fatality, in-patient hospitalization, amputation, or loss of an eye.

Reducing the Threat of Workplace Violence

Unfortunately, this topic was prompted by yet another workplace shooting. On June 28, 2018, a man armed with a shotgun and smoke grenades stormed into the newsroom of the Capital Gazette in Maryland, killing five newspaper employees. This time, the suspected shooter was not a current or former employee, but an outside individual with, according the New York Times, "a long history of conflict with the [newspaper]…suing journalists there for defamation and waging a social media campaign against them."

There is no simple solution for preventing workplace violence. In fact, the terrible truth is that there is no combination of solutions that will prevent all tragedies from occurring. Even a company that has taken careful and thoughtful steps to prevent violence may still fall victim to a violent crime. But, there are steps an employer can take to reduce the risk of violence occurring in the workplace.

- Establish an open-door policy that encourages employees to voice concerns to their manager, human resources, or any manager they are comfortable speaking to.
- Establish a zero-tolerance policy toward workplace violence against or by employees. Train your employees on the policy. Ensure all employees are aware of the policy and understand that all claims of violence will be investigated and remedied promptly. Periodically retrain employees on the policy.
- Establish and maintain a workplace violence prevention program.
- As is permitted by federal, state, and local laws, perform background and drug screenings on applicants and employees.
- Consider partnering with an Employee Assistance Program ("EAP") provider.
- Train employees and managers to recognize some of the warning signs of possible violent behavior. The Department of Labor includes the following on **its list of warning signs**:
    - Attendance problems – excessive sick leave, excessive tardiness, leaving work early, improbable excuses for absences;
    - Supervisor's time – supervisor spends an inordinate amount of time coaching and/or counseling employee about personal problems, re-doing the employee's work, dealing with co-worker concerns, etc.;
    - Inconsistent work patterns – alternating periods of high and low productivity and quality of work, inappropriate reactions, overreaction to criticism, and mood swings;
    - Poor health and hygiene – marked changes in personal grooming habits;
    - Evidence of possible drug or alcohol use/abuse;
    - Evidence of serious stress in the employee's personal life – crying, excessive phone calls, recent separation;
    - Unshakable depression – low energy, little enthusiasm, despair.

Additional resources for employers:

- The CDC has **published a report** on workplace violence prevention strategies.
- OSHA has dedicated **a portion of its website** to workplace violence prevention.
- The Department of Homeland Security offers **guidance for responding to an active shooter situation**. Employers may wish to consider circulating this guidance to employees.

Please reach out if we can assist in creating a workplace violence prevention policy or program for your organization.

Can an employee really take FMLA in 15 minute increments?!

In many cases, well yes, they can. As we've discussed **before** the FMLA is good like that.

Under the FMLA regulations, employees must be allowed to use FMLA in the smallest increment of time the employer allows for the use of other forms of leave, as long as it is no more than one hour. If you are in a state that mandates sick leave, this likely means you will be required to allow your employees to track FMLA in the same interval you allow employees to track sick leave.

That said, the FMLA does provide employers with some important and often overlooked tools for managing employee abuse of intermittent FMLA. In a case where an employee's use of intermittent FMLA is problematic, take a look back at the Certification of Healthcare Provider. What does the Certification say about the duration and frequency of leave? If the employee's use of intermittent leave is not in line with the certification, the FMLA actually provides employers with some options for bringing employees in line. Check out our previous blog post on the subject for **tips** on managing intermittent leave.

General Counsel Office Hours

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Attorney Michael E. Foley's bio.

As General Counsel, Mike will be available within his virtual and gratis office hours for all SCHRC members in good standing from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help SCHRC members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his SCHRC General Counsel Office Hours at 508-548-4888.