2019 EMPLOYMENT LAW UPDATE

Rochester Human Resources Association

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More Employer-Friendly U.S. Department of Labor

The DOL is likely to shift how it approaches enforcement. It is expected that the DOL will return to the more traditional, pre-Obama administration practices. For example, many expect the DOL to:

Stop seeking liquidated damages unless a case actually goes to court.

Stop attempting to develop novel theories of the employment relationship and joint employment, such as arguing franchisees and subcontractors are joint employers.

Stop seeking a third year of back pay for willful violations unless an employer clearly has acted with bad intent even where the violation was based on willful conduct.

Work with employers willing to confess a violation as part of a supervised back-pay settlement agreement.

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Unpaid Internships

The DOL decided to adopt the “primary beneficiary” test set forth by the courts. *See* Factsheet #71: Internship Programs Under the Fair Labor Standards Act.

The prior test contains six elements.

- The work is similar to training that would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern isn’t displacing regular employees and is closely supervised by the company.
- The employer doesn’t gain any immediate benefit from the intern’s work.
- The intern is not necessarily promised a job at the end of the internship.
- The employer and the intern understand that the internship is unpaid.

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Unpaid Internships, cont.

Under the new factsheet, the DOL identifies the following seven factors that should be considered and weighed:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

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Unpaid Internships, cont.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Unlike with the previous internship test, no one factor is determinative or will render an unpaid internship illegal. Instead, whether an unpaid internship is legal will depend on the individual circumstances of each case.

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Protected, Concerted Activity

The National Labor Relations Board's ("NLRB's") enforcement will likely also evolve.

The Obama NLRB struck down multiple handbook policies using *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran*, the board set out a test for when the rule of any employer—unionized or not—violates the National Labor Relations Act ("NLRA").

Under this decision, the NLRB considers whether employees could construe a policy to prohibit protected, concerted activity, which is protected for employees of union and non-union employers. The *Lutheran* decision and this application had been applied to strike down social media and confidentiality handbook policies.

Lutheran was overturned in December after Republicans assumed control of the board.

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NLRB Moves Forward on Joint Employment Change

The NLRB moved forward with its new rule to redefine "joint employer" status. The extended comment period for the rule ended in January.

The rulemaking is intended to re-establish the decades-old joint employer standard in place prior to the Board's 2015 decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).

Under the proposed rule, "[a]n employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction."

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NLRB Moves Forward on Joint Employment, cont.

A potential joint employer "must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine."

The rulemaking is in response to the overturning of the NLRB's December 2017 decision in *Hy-Brand Industrial Contractors, Ltd*, 365 NLRB No. 156 (December 14, 2017) which overruled the controversial joint employer standard that was announced in BFI. However, the *Hy-Brand* case was vacated by the NLRB on February 26, 2018, for an alleged conflict of interest due to Board Member Emanuel's participation in the case, leaving the *Browning-Ferris* standard intact.

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Moral and/or Religious Objection Rules to Contraceptive Coverage

The final rule that allows for certain employers to decline to provide insurance coverage for contraceptives subject to the mandates of the Patient Protection and Affordable Care Act (PPACA) became effective on January 14, 2019.

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Retaliation Is Still Hot

Retaliation claims are not going anywhere.

The number of retaliation claims has nearly tripled since 1997.

Retaliation is now the most frequently filed charge with the Equal Employment Opportunity Commission (EEOC).

An employee can prevail on a retaliation claim even where there was no underlying discrimination.

Easier to win.

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Elements of a Retaliation Claim

The employee only needs to do the following:

- All that is needed to win such a claim is to show
  1. Protected activity;
     - Includes making a complaint, filing a charge of discrimination, etc.
  2. An adverse employment action; and
     - Termination, pay decrease, writeup, reassignment, etc.
  3. A causal connection between the two.
     - Can be shown by direct evidence or indirect evidence such as the timing of the adverse action relative to the protected activity.

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Individualized Arbitration of Employment Disputes

The decision means employers can stop employees from combining cases in situations like wage disputes.

The U.S. Supreme Court has established that employers may, by agreement, require employees to arbitrate employment disputes individually rather than collectively. (*Epic Systems Corp. v. Lewis*, 584 U. S. ____ (2018).)

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Individualized Arbitration of Employment Disputes, cont.

Basic scenario:

- An employee enters into an employment agreement saying that the employee will resolve any employment disputes through arbitration.

- The agreement says that any such arbitration will be individualized—that the employee cannot combine his or her claims with the claims of other employees (as with a class action) to effectively team up against the employer.

- The employee, joining with other employees with similar claims, sues the employer in federal court for alleged violation of the Fair Labor Standards Act (FLSA) and state law.

The Supreme Court determined that this kind of case does indeed have to be resolved through individualized arbitration.

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Individualized Arbitration of Employment Disputes, cont.

Upshot.

It is worth considering whether to include a requirement for individualized arbitration.

Pros:
- Discourages claims.
- Decrease total claim value.
- Inconsistent results could blunt effects of losing some claims.
- Greater privacy of claims.

Cons:
- Will be more expensive if multiple employees go through with it.
- Greater likelihood of losing some claims.

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Tip Pooling

In March of 2018, President Trump signed a spending bill that includes an amendment to the federal Fair Labor Standards Act (FLSA).

The amendment allows employers to pool tips and redistribute them among employees—including employees who do not customarily receive tips—as long as they pay employees at least the full minimum wage.

However, employers will not be able to keep any portion of the tips or allow managers or supervisors to participate in the tip pool.

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Does Federal Law Prohibit Discrimination on the Basis of Sexual Orientation/Gender ID?

- For many years, Title VII was not understood to provide any protection to LGBT people in the workplace.
- Recently, some federal appeals have ruled otherwise.
- Supreme Court review is pending.
- In Minnesota and the rest of the federal Eighth Circuit, the law for now is that Title VII does not prohibit such discrimination.
- Remember, of course, that Minnesota state law very much does prohibit discrimination on the basis of sexual identity.

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Transgender Rights in the Workplace

The US Supreme Court will soon decide whether to resolve a circuit split over whether Title VII of the Civil Rights Act of 1964 protects gay and transgender employees from discrimination.

There were reports that the Trump administration is considering establishing a legal definition of "sex" that could have the effect of rolling back all federal protection for gay and transgender individuals and avoid recognition of transgender status.

In response to those reports, nearly 180 companies signed on to a statement opposing "any administrative and legislative efforts to erase transgender protections through reinterpretation of existing laws and regulations."

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St. Paul: Final Ordinance/Rule on Sick and Safe Time

Protected Time Off: Earned Sick & Safe Time

Adopts final rules implementing and enforcing the Earned Sick and Safe Time Ordinance (No. 233).

"ESST" means earned sick and safe time.

Employees accrue one hour of ESST for every 30 hours worked. For example, if Nancy works 120 hours, she accrues 4 hours of ESST. (120 hours worked / 30 = 4 hours of ESST.)

Much more, but this is the key.

Available at https://www.stpaul.gov

The possibility of a statewide law looms.

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Coming to Rochester?

Paid Sick Leave

Minimum Wage

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#METOO

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Hostile Work Environment

General Rule:

To prevail on a hostile work environment claim, a plaintiff must establish that
(1) she is a member of a protected group;
(2) she was subject to unwelcome harassment;
(3) the harassment was based on membership in a protected group;
(4) the harassment affected a term, condition or privilege of her employment; and
(5) the employer knew of or should have known of the harassment and failed to take appropriate remedial action.

Goins v. W. Group, 635 N.W.2d 717, 725 (Minn. 2001).

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But…

Even if a plaintiff demonstrates discriminatory harassment, such conduct is not actionable unless it is “so severe or pervasive” as to “alter the conditions of the [plaintiff's] employment and create an abusive working environment.” *Goins v. W. Group*, 635 N.W.2d 717, 725 (Minn. 2001)

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HF 10 – "Severe or Pervasive" Sexual Harassment Standard

The Minnesota House has passed a bill removing the severe or pervasive requirement from the Minnesota Human Rights Act (MHRA).

The Senate Judiciary and Public Safety Finance and Policy Committee will have to approve the measure (SF 1307). Ultimately, it may be reviewed by multiple committees.

The full Senate will have to approve the bill.

If the bills are not identical, they will go to conference committee to align them, and, if finally approved, the bill will go to Governor Walz, who is expected to sign it.

Reasonable likelihood that this will become law this session.

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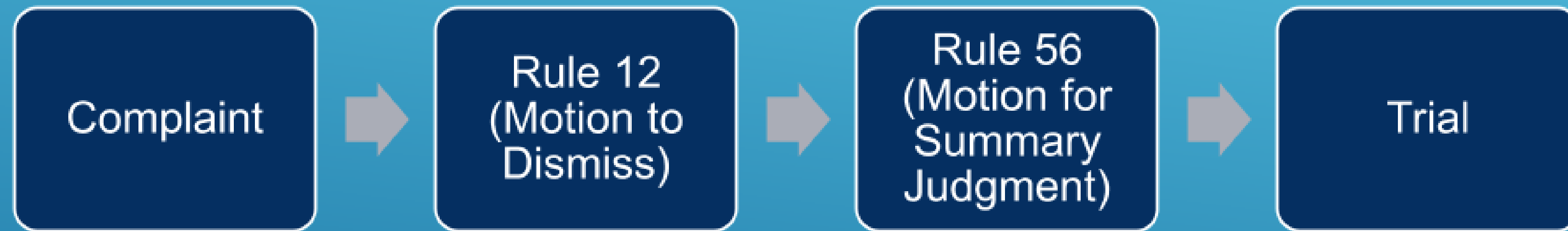
What's the Upshot?

Plaintiffs have a greater chance at surviving summary judgment.



That will likely lead to more risk and larger settlements.

But will it really be that big of a deal?

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HF 11 – Sick and Safe Time

The Minnesota House is pushing forward on a "sick and safe time" law.

The bill would provide for one hour of earned sick and safe time per 30 hours worked.

Accrue up to a maximum of 48 hours in a year, roll over annually up to a maximum of 80 hours.

This bill is very unlikely to pass without unified DFL government (before 2021).

This is what the future looks like. We can safely expect that this will continue to be a DFL priority until it becomes law.

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HF 6 – Wage Theft

The Minnesota House is also moving forward on a wage theft bill.

No new private rights of action.

More enforcement mechanisms for the Department of Labor and Industry and the Minnesota Attorney General's Office.

Also more enforcement funding.

Criminal penalties as well.

Again, unlikely to become law . But look for more aggressive enforcement from the Walz administration using the tools already in place.

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Questions?

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