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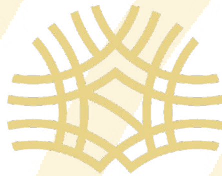

STOKES WAGNER

ATTORNEYS AT LAW

QUARTERLY LEGAL UPDATE

April 2018

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Trump DOL Seeks to Rescind Obama-Era Tip Pool Regulation

In 2011, the U.S. Department of Labor ("DOL") introduced regulations affirming that tips are the property of the employee regardless if the employer uses a tip credit under the FLSA. Under this framework, only "customarily tipped employees" can receive distributions from a company tip pool. Tip pools set up by employers to include employees who are not regularly tipped employees are invalid. This limitation applies even where the employees contributing to a tip pool are paid the applicable minimum wage. Moreover, employers and management staff are precluded from receiving any portion of tip pools under the current regulation. The 2011 regulation has led to voluminous litigation over what constitutes a "customarily tipped employee" and has resulted in inconsistent rulings from various courts.

The DOL under the Trump administration has proposed a change to the 2011 regulation that would eliminate many of the restrictions on an employer's use of tip pools. The proposed change would allow employers to include non-tipped employees in tip pools, including back-of-house employees who have little to no interaction with customers and even management staff or business owners.

What does this mean for you?

The proposed regulation would apply only to employers who pay its tipped employees at least the federal minimum wage. Employers who continue to take advantage of the tip credit and pay tipped employees lower than the minimum wage would still be subject to the 2011 regulation's restrictions on sharing of tips.

The DOL's public comment on the proposed changes to the 2011 regulation closed in February 2018, and the DOL is expected to present a proposed regulation in the coming months. Stokes Wagner will keep you updated. Stay tuned!

Have You Checked Your Website's Accessibility?

The newest trend in Americans with Disabilities Act ("ADA") lawsuits target businesses' websites. Litigants have increasingly sued or threatened to sue under Title III, alleging that the website is not sufficiently accessible to the disabled (i.e., the website lacks assistive technology for individuals who are blind or hearing-impaired).

Litigants commonly point to the international "Web Content Accessibility Guidelines (WCAG) 2.0 AA" as the standards that a website must meet to ensure that the website's content and features are sufficiently accessible to all individuals. These guidelines have not yet been adopted by the Department of Justice ("DOJ"), which issues ADA's formal regulations. Moreover, the Trump Administration recently moved the ADA website regulations onto the "inactive" list and it is unlikely that the DOJ will address these regulations in the near future. This means that WCAG are simply guidelines and not yet law.

The uncertainty and lack of regulations will not stop or discourage a plaintiff from sending your business a demand letter or even filing a lawsuit. It is also unclear how a court will rule. In 2017, a Florida District Court ruled against Winn Dixie, finding that their website violated Title III of the ADA by having an inaccessible website. The Court further held that the $250,000 cost to remediate Winn Dixie's website was not an undue burden and ordered Winn Dixie to make its website conform with WCAG Guidelines 2.0 AA. That same year, a California federal court went in another direction and dismissed a lawsuit against Domino's Pizza finding the failure of the DOJ to issue clear guidelines for website compliance violated defendant's due process rights.

What does this mean for you?

Businesses should reach out to their web designers to ensure that their website design ensures conformity with WCAG 2.0 AA criteria, even if such guidelines are not yet law. Businesses should also consider reviewing their agreements with web designers/developers and decide whether compliance with WCAG 2.0 AA criteria should be included in those agreements.

NLRB Relaxes Enforcement of Workplace Rules Aimed To Restrict Employee Discussion over Grievances and Unionization.

The National Labor Relations Act (NLRA) protects the employee right to engage in "concerted activities for the purpose of . . . mutual aid or protection." This includes not only the right to support a union, but also simply the right of employees to converse among themselves on issues affecting their employment. Consequently, any workplace rule explicitly infringing on this right, as well as any rule applied so as to cause such infringement, can be held unlawful. For example, if employees regularly get together before or after work, during which gripes and grievances (or unions) can be discussed, a workplace rule restricting these gatherings will generally be held unlawful.

Facially neutral rules which do not explicitly prohibit concerted activities, pose a special problem. Under previous administrations, the National Labor Relations Board struck down a wide range of such rules, if the rule in question could be "reasonably construed" by employees to discourage them from concerted activities. In a 2016 case *Beaumont Hospital*, the Board struck down a rule calling for "harmonious interactions and relationships," while also prohibiting "negative or disparaging comments" aimed at other employees. Philip Miscimarra issued a dissent, stating there was no evidence "that the requirement of 'harmonious' relationships actually discouraged or interfered with NLRA-protected activity." Moreover, "All employees in every workplace aspire to have 'harmonious' dealings."

Under the current administration, the Board reversed *Beaumont Hospital* this past December. Following Miscimarra's *Boeing Company* opinion, the Board will now give significantly more weight to the "business justifications" asserted for facially neutral rules.

What does this mean for you?

While this will continue to be balanced against "invasions of employee rights," and will involve fact-intensive, case-by-case decisions, employers can now look forward to more favorable rulings from the Board in this area of concern. Employers should keep their ears open for changes and new decisions, and consult Stokes Wagner with any concerns regarding infringement on the NLRA.

Preventing Sexual Harassment in a #METOO World

#METOO took social media by storm in October 2017 as a means of illustrating the prevalence of sexual assault, harassment, and misconduct, particularly in the workplace. As the conversation around the #METOO movement swirls, employers have begun to assess how the movement affects their policies. Employers should stick to a simple three-part strategy: (1) promulgate a clear policy; (2) thoroughly investigate complaints; and (3) always respond accordingly and swiftly.

(1) Promulgate a Clear Policy. Courts generally find that employers may be found liable for the sexual misconduct of their employees, and the jury awards are staggering. Employers must have a zero tolerance policy which is distributed to the employees in a clear manner through employee handbooks or other similar materials.

(2) Thoroughly Investigate Claims. Employees, regardless of gender or gender-identity, should feel that they have a safe venue for reporting concerns without retaliation. All complaints and allegations must result in a fair and thorough investigation. If an employee brings an allegation of sexual harassment, the allegation should be kept as confidential as possible. A thorough investigation includes retrieving statements, preferably in the person's own handwriting, from the complainant, alleged perpetrator, and any witnesses or other employees who may have knowledge surrounding the circumstances.

(3) Always Respond Accordingly and Swiftly. Employers who gather the facts and act reasonably are generally favored by juries. For example, a company recently terminated a long-term employee following several allegations of sexual misconduct. After the termination, all of the accusers recanted their stories, and the former employee sued the company for wrongful termination. Despite this, the court ruled in the employer's favor, finding that it had acted reasonably given the circumstances. Employers should use the results of the thorough investigation to take action that is reasonable and responsive to the results of the investigation. Employers should rely on their own progressive discipline policies to either discipline or terminate the employee.

Back-of-House Staff Employed in States Without Tip Credits May Now Participate in Tip Pools

On Aril 6, 2018, the U.S. Department of Labor announced amendments to the Fair Labor Standards Act ("FLSA") § 3(m).

One amendment rescinds portions of regulations regarding tip pooling when tipped employees earn at least the full FLSA minimum wage and do not claim a tip credit. In light of this amendment, the Department of Labor provided guidance and announced that employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools.

Another amendment prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit. This means that managers and supervisors are still prohibited from participating in tip pools as their participation would deemed as though the employer is unlawfully keeping the tips, which is still prohibited under the FLSA.

What does this mean for you?

The FLSA effectively allows back-of-house staff who earn at least minimum wage and are employed in states without mandated tip credits (California, Nevada, Washington, Alaska, Minnesota, Montana) to participate in tip pools. The Dept. of Labor's Wage & Hour Division expects to proceed with finalized rulemaking in the near future to fully address the impact of these 2018 amendments.

Ninth Circuit Approves Calculation of Minimum Wage by Weekly Average

In November 2017, the Ninth Circuit (covering California, Washington, Oregon, Nevada, Hawaii, Alaska, Idaho, Arizona, Montana) decided that the Fair Labor Standard Act's ("FLSA") hourly minimum wage requirement applies to weekly per-hour averages rather than actual per-hour pay. This means that the appropriate way to determine minimum wage compliance under the FLSA during any workweek is by calculating the pay earned during the entire workweek, rather than the pay earned in each individual hour of the workweek.

In *Douglas, et al. v. Xerox Business Services, LLC*, plaintiffs were customer service representatives whose primary duties were to answer incoming calls, attend meetings, attend trainings, and monitor emails. Each plaintiff earned a different rate of pay depending on the task performed and the time spent on each task. The Xerox pay system averages pay for all hours worked in a week and increases it to minimum wage in any weeks where the average variable compensation fails to meet this level. Under this practice, no employee's average weekly pay ever fell below the minimum wage.

The plaintiffs sued, arguing that they were entitled to back pay for every hour worked at a rate lower than the minimum wage. Specifically, the plaintiffs argued that the FLSA did not allow averaging over a longer period of time, but rather measures compliance on an hourly basis.

Ultimately, the Ninth Circuit rejected plaintiffs' claims and concluded that Xerox had not violated the FLSA. The court accepted Xerox's position that compliance with the FLSA's minimum wage provisions is determined on a weekly rather than an hourly basis.

What Does This Mean For You?

As a result of the Ninth Circuit's holding, the hourly minimum wage requirement now applies to weekly per-hour averages rather than actual per-hour pay. And, although the FLSA may be read to require either hourly or weekly compensation, the Ninth Circuit highlighted the fact that the Department of Labor has interpreted and enforced the minimum wage provisions of FLSA on a workweek basis since 1938. In short, this decision avoids a split among the circuits and further reinforces the ability of employers to assure compliance with minimum wage requirements by averaging total pay divided by the number of hours worked in a given workweek.

Second Circuit Holds that Anti-Gay Discrimination Falls Within the Purview of Title VII

The 2nd Circuit, covering Connecticut, New York, and Vermont, has revived a sex bias claim brought on behalf of Donald Zarda, a deceased skydiving instructor who was allegedly fired for telling a client he was gay. As an instructor at Altitude Express, Zarda sometimes mentioned his orientation in order to help female clients feel more comfortable when jumping, as they would be tied physically close to him during jumps. Zarda was fired after a boyfriend of one female client complained to Zarda's boss that Zarda had inappropriately touched his girlfriend and mentioned he was gay. Zarda denied anything inappropriate and alleged that his dismissal was entirely because he said he was gay.

Zarda's estate tried to get a trial court to reinstate the sex bias claim after the EEOC held that the prohibition against gender discrimination in Title VII of the Civil Rights Act of 1964 extended to sexual orientation. The question of whether Title VII encompasses sexual orientation discrimination has led to inconsistent results, with the 7th Circuit ruling that the statute does in fact prohibit orientation bias and an 11th Circuit panel deciding that it does not. Now the 2nd Circuit has aligned itself with the 7th Circuit and the EEOC.

The 7th Circuit held that "Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor," and that "[s]exual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account."

The court explained that the reach of law has expanded, and this ruling reflects that evolution. The court concluded that stereotypes around sex are the foundation of discrimination on the basis of sexual orientation, and their shared roots mean they warrant shared Title VII protection. The court viewed sexual orientation as being protected through "the lens of associational discrimination," the same principle that protects an employee who marries someone of a different race.

On-Call Workers May Pursue Reporting Time Pay When They "Report" to Work via Phone.

On-call employees of fast food chain Yoshinoya claim they are owed reporting time pay when they call in for a shift but are not put to work. A L.A. Superior Court judge recently ruled that the plaintiffs may pursue their claims. This putative class of kitchen and cashier "on-call" employees call two hours before their scheduled shift to find out whether they are needed to work. If they fail to call in or do not show up for work when needed, they may face discipline. Plaintiffs claim that they are entitled to reporting time pay when they call in but are not put to work, even though they are not required to physically report to work.

In California, if an employee reports to work but is not put to work, the employer must pay the employee half their usual or scheduled day's work, with a minimum of two hours. This case questions whether "report to work" means the employee must be physically present at the worksite. The employer sought to dismiss the case before trial, on the ground that the plain language of the reporting pay requirement defeats the plaintiffs' case as a matter of law. Interpreting the reporting pay requirement in the context of "the modern era, where many workers remotely [use] telephones to clock in and out for time keeping purposes," the Court reasoned that common sense and the "ordinary reading" of the law would include remotely reporting via telephone under the reporting pay requirement.

This issue has been addressed in Ward v. Tilly's, L.A. Superior Court Case No. BC595405, which is currently pending appeal and may result in a controlling decision.

What does this mean for you?

While the L.A. Superior Court's decision here is not law, this case may signal a new avenue of wage and hour liability and focus for employees and plaintiff's counsel. As the Court notes, the issue is on appeal, and may result in controlling law in the near future. In the meantime, employers who use on-call shifts should review their policies to ensure they are implementing best practices.

Baby Bonding Leave in California

California's New Parent Leave Act (S.B. 63), which requires small business employers (20-49 employees) to provide employees with 12 weeks of unpaid, job-protected parental bonding leave went into effect on January 1, 2018.

Covered employers must now provide 12 weeks of unpaid, job-protected parental leave upon the request of eligible employees to bond with a new child within one year of the child's birth, adoption or foster care placement. Employees may choose to use any type of accrued paid time off, such as paid vacation and sick leave, during the parental leave. As with other "leave laws," employers may not retaliate and/or discriminate against an individual for taking parental leave and may not interfere with, restrain or deny an employee his or her right to leave under the act, and must provide a guarantee of employment in the same or a comparable position upon return to work.

What does this mean for you?

This new law only applies to employers with 20-49 employees. If an employee is subject to both the California Family Rights Act ("CFRA") and the Family Medical Leave Act ("FMLA"), the employee is not eligible for the New Parent Leave Act. CFRA and FMLA have the same eligibility requirements (hours worked and months of service) as the New Parent Leave Act, but require that the employee work at a worksite with 50 or more employees within 75 miles.

AB 450 – ICE Raids/Audits

California's "Immigrant Worker Protection Act" ("AB 450") went into effect on January 1, 2018. This Act prohibits California employers from allowing an ICE agent to search a worksite by an ICE agent without proper, legal documentation. Employers may not provide ICE agents access to employee records without a subpoena or warrant, with the exception of Form I-9's and other documents for which the employer receives a Notice of Inspection.

Within 72 hours of receiving Notice of the Inspection, employers must notify each current employee – and any applicable union representative – that ICE will be inspecting of I-9s or other employment records. The notice must be delivered in the language the employer normally uses to communicate employment-related information to the employee; include the name of the immigration agency conducting the inspection; state the date the employer received the notice of the inspection; and state the nature of the inspection. The Labor Commissioner will publish a template for employers to use by July 1, 2018.

Lastly, if the results of a Notice of Inspection identify an employee who may lack work authorization, an employer must provide the "affected employee" (and any applicable union representative) within 72 hours of receipt: (1) a copy of ICE's notice of the inspection results; and (2) written notice of the obligations of the employer and the affected employee arising from the results of the records investigation.

Violations of this law carry civil penalties range from $2,000 to $5,000 for the first violation, and up to $10,000 for subsequent violations.

What Does This Mean For You?

Until the Labor Commissioner releases a template for employers, employers who receive a Notice of Inspection from ICE should create a template that meets the notice requirements of AB 450 for employees to fill out in the case of an inspection. Employers should also train employees who are in charge of the workplace facility access to demand a warrant before allowing ICE agents to enter the non-public areas of the worksite, and to only provide employee records to an agent if presented with a subpoena or judicial warrant for such records.

Criminal Conviction for Violation of Santa Monica Minimum Wage Ordinances

In July 2016, Santa Monica enacted two minimum wage ordinances, one specific to hotel workers (the "Hotel Workers Living Wage Ordinance"), and the other to any employees of an employer in Santa Monica ("Minimum Wage Ordinance"). The hotel worker minimum wage is currently $15.66 per hour; the minimum wage for employees covered by the other ordinance is currently $12 per hour for employers with 26 or more employees and $10 per hour for employers with 25 or fewer employees. Both are scheduled to rise in July 2018 (for hotel workers indexed to inflation, for other employees to $13.25 and $12.00, respectively).

Late last year, the City of Santa Monica announced its first conviction for a violation of the minimum wage ordinances, a hotel-based retail that entered "no contest" pleas to three misdemeanor counts of failing to pay the required minimum wage and one count of unlawful retaliation. The plea agreement calls for 36 months of probation, the payment of $11,000 in back wages plus $3,000 to compensate the City for its investigation costs, and 150 hours of community service.

What does this mean for you?

It is imperative that all employers, especially those in the hospitality industry, stay up to date with everchanging local minimum wage requirements.

California/OSHA Approves New Hotel Housekeeping Injury Standard

On January 18, 2018, California's Department of Industrial Relations Occupational Safety & Health Standards Board, approved a proposed regulation requiring hotel employers to maintain "an effective, written, musculoskeletal injury prevention program (MIPP) that addresses hazards specific to housekeeping." The regulation requires the employer to assess the risks, implement a program to address them in cooperation with any housekeepers' union representative (the regulation was based in large part on a proposal set forth by UNITE HERE Local 11), train the housekeepers with respect to the MIPP, and ensure the housekeepers' implementation of the MIPP. Employers are also required to keep records of the evaluation giving rise to the employer's program, and the steps taken to implement it.

The approved standard has been filed with California's Office of Administrative Law to ensure compliance with the Administrative Procedures Act. **The standard goes into effect on July 1, 2018.**

What does this mean for you?
Stokes Wagner recently prepared a memorandum outlining the approved requirements. Please contact us with any further questions.