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UPDATES FROM THE DOL AND
THE EEOC -
STRATEGIC DECISION MAKING
UT-Battelle Labor & Employment
August 24, 2023

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DOL BUDGET DISCRETIONARY FUNDS

2017 \$12,072,941,000

2019 \$12,131,501,000

2021 \$12,536,098,000

2023 \$13,841,339,000



DOL FULL TIME EQUIVALENT EMPLOYEES

FY 2016 16,472

FY 2018 15,280

FY 2020 14,538

FY 2022 14,443

FY 2024, Proposed 17,778



WAGE AND HOUR DIVISION

The Wage and Hour Division (WHD) of the Department of Labor enforces the Fair Labor Standards Act (FLSA) as well as the Family and Medical Leave Act, certain employment standards and worker protections under the Immigration and Nationality Act, government contracts prevailing wage statutes, and garnishment provisions of the Consumer Credit Protection Act.



WHD ENFORCEMENT

In FY 2022, the WHD had 1,364 full time employees. The proposed number for FY 2024 is 1,863. The WHD is currently operating with one of the lowest investigator levels in the last 50 years resulting in decreased number of on-site investigations.

Majority of WHD enforcement is with regard to the FLSA which regulates minimum wage, overtime, recordkeeping and child labor.



WHD ENFORCEMENT

National Initiatives

- Child Labor
- Health care workers
- Warehouse and logistics workers
- Farm laborers
- Restaurant workers
- Residential construction workers



RETALIATION

Retaliation against employees for filing complaints and/or cooperating with the DOL is a new focus of the WHD.

Since January 2021, WHD has concluded more than 500 cases that involved retaliation, recovering more than \$2.1 million in back wages for approximately 700 workers.



RETALIATION

In one case, an employer terminated a worker for asking to be paid in compliance with the FLSA. An investigation resulted in the employer paying the former employee \$25,000 in punitive damages and \$3,310 in back pay and liquidated damages. Seventeen (17) other employees were also found to be owed an additional \$14,006 in unpaid overtime and liquidated damages.



RETALIATION

In another case, an employer paid a former employee his final wages of \$915 in about 91,500 oil-covered pennies dumped in the employee's driveway after the employee contacted the WHD about getting his final paycheck. WHD investigated and found 9 workers due \$39,934 in back wages and liquidated damages.



LITIGATION

DOL AND PRIVATE

The WHD's strategic plan calls for litigation on high impact cases in order to send a strong signal to employers and industries.

Collective action cases under the FLSA by private attorneys also continue to be a major concern. There are more private action lawsuits filed under the FLSA than any other labor laws. The 6th Circuit, along with the 2nd and the 9th, have the most FLSA cases filed.



ATTRACTIVENESS OF PRIVATE LITIGATION

- FLSA has a built in class action vehicle requiring employees to make only minimal showing that claim shares facts common to other employees
- 2 year or 3 year statute of limitations based on determination of willfulness
- Potential liquidated (or double) damages
- Prevailing plaintiffs entitled to automatic attorney's fees



INDEPENDENT CONTRACTORS

Another focus of the WHD is the issue of workers being incorrectly classified as independent contractors versus employees. In what may be the largest misclassification case in its history, the USDOL filed suit against a Florida-based customer service provider for major national brands, including Barnes & Noble, Comcast, Disney and Walgreens to pay back wages and liquidated damages to more than 22,000 workers.



INDEPENDENT CONTRACTORS

- A federal court in Nashville just ordered a security and traffic control company to pay \$116,272 to 105 workers incorrectly classified as independent contractors.
- A federal court in Durham, NC, ordered a construction maintenance company to pay \$1.6 million in back wages and liquidated damages for 188 workers misclassified as independent contractors.



TIPPED EMPLOYEES

Employers of tipped employees face severe restrictions of when they can pay a tipped employee \$2.13 per hour. Regulations that came into effect in 2022 made significant changes and limitations to the \$2.13 per hour payment.



PUMP FOR NURSING MOTHERS ACT

The PUMP for Nursing Mothers Act, passed in December 2022, was made part of the FLSA and is enforced by the WHD.

Under the PUMP Act, most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view and free from intrusion to express breast milk while at work. This right is available for up to one year after the child's birth.



PUMP FOR NURSING MOTHERS ACT

The WHD has already started actions against employers for compliance. For instance, in Lubbock, TX, the WHD found a corporate-owned location of Whataburger Restaurant failed to provide reasonable break time for an employee to express breast milk, and that when the employee left the premises to express milk, she was terminated. \$1,800 in back wages and liquidated damages were found due to the employee.



COMMON ERRORS RESULTING IN FLSA VIOLATIONS

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record
- Failure to record all hours worked
- Treating an employee as an independent contractor



COMMON ERRORS

- Failing to include all pay required to be included in calculating the regular rate for overtime such as performance bonuses, incentive pay, shift differential, commissions or on-call pay.
- Improper classifications of salaried employees as exempt executive, administrative or professional employees
- Failure to record all hours worked



EEOC UPDATE



EEOC

- Strategic Enforcement Plan for 2023-2027
- January 10, 2023



EEOC SEP

- (1) Eliminating Barriers in Recruitment and Hiring
 - Focus on policies/practices that discriminate against racial, ethnic and religious groups, older workers, women, pregnant workers, pg-related medical conditions, LGBTQI+ individuals and people with disabilities



EEOC SEP

- USE OF AI - more on that ...
- JOB ADS THAT EXCLUDE GROUPS
- LIMITING ACCESS TO TRAINING/PROGRAMS
- SCREENING THAT IMPACTS PROTECTED STATUS EMPLOYEES BY AI, PRE-EMPLOYMENT TESTS AND BACKGROUND CHECKS



EEOC - SEP

- 2 - Protecting vulnerable workers & persons from underserved communities
 - Immigrant/migrant workers
 - Disabled
 - Arrest/conviction histories
 - LGBTQI+
 - Temp employees
 - Older workers
 - Native Americans
 - Limited English



EEOC - SEP

- (3) Advancing Pay Equity
 - Pay secrecy policies or practices
 - Retaliation against employees raising questions or revealing salary/pay
 - Reliance on pay history in setting pay
 - Requiring applicants to specify desired pay



EEOC - SEP

- (4) ACCESS TO THE LEGAL SYSTEM
 - Overly broad waivers, releases, NDAs, Non-disparagement Agmts.
 - Mandatory arbitration provisions
 - Retaliation practices that dissuade reporting



EEOC - SEP

- (5) Preventing Systemic Harassment
 - Combat widespread pattern or practices of harassment
 - Target to prevent future occurrences
 - Focus on training tailored to the employer's workplace and workforce



EEOC TARGETS AI

- “As employers increasingly turn to AI and other automated systems, they must ensure that the use of these technologies aligns with the civil rights laws and our national values of fairness, justice and equality.”
 - EEOC CHAIR, CHARLOTTE BURROWS
- May 2022 – Guidance on ADA and Use of AI





- October 2022
- “Blueprint for an AI Bill of Rights”
- Through the WH Office of Science and Technology Policy
- Technical Companion Issued



5 Pillars

- 1. Validation by AI Team
- 2. Proactive with internal measures
- 3. Plain language consent from user in advance
- 4. Advance notice to user – what information is gathered, and what is done with it?
- 5. Users given ability to opt out for a “Human Alternative”



DOJ, FTC, CFPB & EEOC

- April 25, 2023: Joint Statement of DOJ, EEOC, CFPB, FTC - *“Pledge to Confront Bias/Discrimination in AI”*
- “We already see how *AI* tools can turbocharge fraud and automate discrimination, and we won’t hesitate to use the full scope of our legal authorities to protect Americans from these threats” –
- “There is no *AI* exemption to the laws on the books, and the FTC will vigorously enforce the law to combat unfair or deceptive practices or unfair methods of competition.”



RECENT ACTIVITY

- May 18, 2023 -
- EEOC - Tech Asst. *“Assessing Adverse Impact in...AI Used in Employment under Title VII”*
- ***EEOC v. ITutorGroup, et al., USDC, E.D.NY, 2022--(EEOC sued alleging software auto-rejected females > 55 and males > 60 in violation of the ADEA; Consent Decree waiting for Court approval).***



LEGISLATION

- Illinois - Employers using AI analysis in video interviewing must give **advance notice to applicants** of how AI tool works and what characteristics will be used to evaluate them.
- NYC –Employer may not use an AEDT to screen candidates and employees unless (1) the tool has undergone a **bias audit** no more than one year prior to its use, (2) a **summary** of the most recent bias audit is made publicly available, and (3) **notice** of the AEDT use and an opportunity to request an alternative selection process is provided to each candidate and employee who resides in New York City.



AI RISKS

- **AI** can conduct job interviews, with chatbots detecting favorable or unfavorable characteristics for a “job fit,” performing résumé scans, prioritizing applications based on keywords; can also apply discretion concerning promotions, RIFs, monitor employees, assess performance criteria, evaluate accommodation requests, or determine compensable time....
- What can possibly go wrong?



WHEN WE THINK OF AI RISKS...



**Just what do
you think you're
doing, Dave?**



REMEMBER WHEN...

Katrina wants to fire Brian...?



ACTION STEPS TO CONSIDER

- Develop TEAM to assess where *AI* is being used
- Realize Employer may be liable for *AI* decision-making even if designed and administered by 3rd party – assess ways to minimize risk
 - Confirm program does not violate applicable laws: ADA, Title VII, ADEA, etc.
- Ensure that those using *AI* are trained on the risks and the fact that “*AI did it*” is not a defense to those risks.



ACTION STEPS TO CONSIDER

- Consider on-going assessments/3rd party audits of programs/employee and contractor policies
- Consider engaging counsel for attorney-client privilege, development/guidance purposes
- Review AI vendor contracts for protective provisions – validation audits, indemnity, etc.
- TRAIN, TRAIN, TRAIN & DOCUMENT IT!





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UPDATES - STRATEGIC DECISION MAKING 865-546-1000

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