Employer Express March 2014 Newsletter

Barbara E. Hoey, Mark A. Konkel

March 14, 2014

Key developments in the Employer Express March 2014 newsletter include:

New EEOC Guidelines on Religious Accommodation

On March 6, 2014 the Equal Employment Opportunity Commission issued new question-and-answer guidelines on employer accommodation of religious attire in the workplace under Title VII of the Civil Rights Act of 1964. The guidelines apply across the board to employers in the private sector, state, and local government, as well as employment agencies, unions, and federal government agencies. Employers are well-advised to take heed of the EEOC's increased focus on religious accommodations for religious attire in the workplace and take steps to ensure compliance.

The guidelines, while not imposing new obligations, offer additional insight and clarify existing obligations of employers with at least 15 employees, who in most instances are required by federal law to make exceptions to their usual rules or preferences to allow applicants and employees to observe religiously-mandated dress and grooming practices. The guidelines pose several sample questions and illustrative examples addressing the basic application of Title VII to religious dress and grooming in the workplace and “sincerely held” practices and beliefs, the steps to address and appropriately accommodate an employee’s religious garb in violation of an employer policy, as well as retaliation and religious harassment in the workplace and an employer’s obligations to stop it.

Title VII generally protects all aspects of religious observance, practice and belief, prohibiting disparate treatment based on religion in any aspect of employment as well as denial, retaliation, or harassment for requesting an accommodation. To the extent an employer questions whether an employee has a sincerely held belief, employers may ask for additional information reasonably necessary to evaluate a request for religious accommodation. That said, the sincerity of an employee’s stated belief is generally not litigated in religious discrimination cases.

Under the guidelines, employers must make an exception to allow an employee’s religious garb, even if it violates the employer’s appearance or dress policy, so long as doing so would not be an undue hardship of the employer’s business operations. While company image or marketing strategy are likely not sufficient to rise to the level of undue hardship, employers are permitted to deny accommodations for religious garb where such attire raises concerns of workplace safety, security, or health. Additionally, employers may not take action against an employee based on the discriminatory religious practices of others, whether those of other co-workers, clients, or even customers. Employers in customer service industries should be particular conscious, as they are not permitted to assign employees to non-customer contact positions based on customer preference.

DOL’s Wage & Hour Division “Beefs Up” Enforcement Activity

The Obama administration has sent yet another clear message to employers: enforcement of workplace pay issues by the Wage & Hour Division will only increase, as the President’s most recent proposed budget for the 2015 fiscal year reveals a hefty boost to the Division’s enforcement resources.

The proposed Federal budget provides for an 18% increase of more than $41 million to the WHD budget – out of a whopping $11.8 billion in discretionary funding to the DOL overall - allowing the Division to hire 300 new investigators and implement risk-based strategies targeting industries and employers most inclined to commit violations. The sum is predominantly intended to help the WHD ensure employers pay employees appropriate wages and overtime and offer employees job-protected family and medical leave. Additionally, the budget also allocates $10 million in state grant funding and another $4 million to the WHD for investigations into employee misclassification.

We will continue to monitor the proposal’s, arguably unlikely, approval through the congressional appropriations progress, and will update you on any developments. In the meantime, employers are well-advised to review and identify any vulnerabilities and gaps in compliance in payroll and recordkeeping practices to avoid being subject to the increase of investigations by the Division. Employers in “fissured industries,” such as hotels, restaurants, construction and janitorial services, are particularly susceptible to WHD investigations and should contact counsel to take the necessary pro-active steps to protect themselves.

Finally, a Federal Court Holds Attendance May Be an Essential Function under ADA

Many employers are shocked to learn that actually showing up for work may not be an “essential function” of a job. Providing welcome news for employers, a Florida district court recently held that regular attendance is an essential function under the ADA for a specialized nurse and that his employer had no obligation to grant a request “to arrive at work at any time, without reprimand.”

Readers who attended our seminar last fall on “Disability Discrimination: Best Practices & Legal Developments” will remember an extensive discussion of whether regular attendance is an essential function under the with Disabilities Act. While it might seem like common sense that an employer can Americans demand punctual attendance of its employees, guidance from the EEOC and several courts have demonstrated that it is no longer safe for an employer to assume attendance is an essential function of *all* positions. A recent line of federal cases, however, demonstrates that employers do not have to assume that attendance *never* is an essential function.

In *Mecca v. Florida Health Services Center, Inc.*(M.D.FL. Feb. 3, 2014), a federal judge held that regular attendance is an essential function of an acute-care nurse, a specialized nursing position primarily responsible for inserting IV catheters through a patient’s vein until it rested next to the plaintiff’s heart. The plaintiff in *Mecca* suffered from depression, panic attacks, and anxiety, which interfered with his ability to perform his job. His employer granted him numerous leaves of absence under the FMLA, modified his working schedule, and reduced his hours. Despite these accommodations, the plaintiff’s symptoms did not improve. After returning from one such leave, the plaintiff sought what the court deemed a request “to go home or be absent from work if he was experiencing episodic flare-ups of depression and anxiety/panic making it difficult to function.” When the request was denied, the plaintiff quit and sued under the ADA.

Granting the employer’s motion for summary judgment, the court held in Mecca that regular and reliable on-site attendance was an essential function of the PICC position. In so holding, the court highlighted that the position required on-site presence and specialized skills, thereby making it difficult to find on short notice a suitable replacement who could perform potentially fatal procedures. The court also noted the lengths at which the employer went to attempt to accommodate the plaintiff and the fact that the plaintiff was unable to provide “any estimate as to when or if his condition would improve.”

When managing employee leave demands, employers must recognize that regular attendance is not an essential function of many jobs, but may be for those requiring specialized and highly technical skills in a regimented work environment. Employers who believe attendance is an essential function of a position would be wise to list “attendance” and “punctuality” as essential functions on their job descriptions and communicate the reason for such requirements. Employers also should be aware that allowing employees to work from home, work flexible schedules, and telecommute may make it more difficult to argue that regular on-site attendance truly is essential.

Legislative and Judicial Recognition of LGBT Rights in the Workplace Increases

In an interview with The New York Times published last month, U.S. Attorney General Eric H. Holder Jr. said that state attorneys general are not obligated to defend state legislation they consider discriminatory or violative of constitutional protections. Attorney General Holder’s comments come in the face of six state attorneys general who refused to defend their states’ same-sex marriage bans from challenge. Attorney General Holder himself previously refused to defend the constitutionality of the provisions of the federal Defense of Marriage Act (“DOMA”) that barred the federal government from recognizing same-sex marriages performed in states where such marriages are lawfully recognized. That portion of DOMA was struck down by the Supreme Court in United States v. Windsor in June 2013.

Lower courts similarly have expanded the reach of established federal law to recognize rights and protections for LGBT individuals. While federal anti-discrimination law does not extend protection to individuals discriminated against because of their sexual orientation or gender identity, the EEOC and the majority of federal circuits have recognized Title VII claims based on a theory of gender stereotyping. Under this theory, the courts recognize a claim where an employee is subject to discrimination or harassment for failing to conform to traditional gender norms and stereotypes.

Notably, last year in *EEOC v. Boh Brothers Construction*, an *en banc* panel in the fairly conservative Fifth Circuit reinstated a jury verdict finding that an ironworker was subject to same-sex harassment based on gender stereotypes when his supervisor subjected him to verbal abuse, sexual gestures, and exposing himself. The EEOC presented evidence at trial that the ironworker's supervisor harassed him because he thought he was feminine, "less than manly," and did not conform to the gender stereotypes of a typical "rough ironworker." On February 27, 2014, the EEOC issued a press release stating that the employer agreed to a consent judgment requiring it to pay $125,000 in damages. The *Boh Brothers* decision opens employers up to more same-sex harassment litigation and underscores the importance of having defined harassment policies and conducting sensitivity training in the workplace.

LGBT rights in the workplace have also been greatly expanded through legislative efforts at the state and local levels. Presently, 21 states and the District of Columbia extend non-discrimination protection to employees and applicants based on sexual orientation and/or gender identity. (Although a proposal to amend federal anti-discrimination law to protect LGBT individuals has been introduced in every Congress since 1994, it has never been able to make it through both houses.)

The momentum in favor of LGBT rights in the workplace is on the rise as state and local governments are extending protections to same-sex spouses and couples under laws sick leave and child leave laws. We will continue to update you as there are developments in this area.

Whole Foods Faces Class Action Suit Over Employee Background Check

We have previously reported on how employers' use of background checks is under vigorous attack by the EEOC and state legislation. On top of these non-discrimination initiatives, nationwide class action suits targeting background checks under the federal Fair Credit Reporting Act are on the rise.

Last month, Whole Foods became the newest target of a putative nationwide class action alleging that the background check consent form used by the food retailer as part of its online application process violated the FCRA.

The FCRA imposes nuanced notice and authorization requirements on employers who obtain consumer reports—including criminal background checks, credit histories, and driving records—in the hiring process. Notably, the FCRA requires that, *prior to* obtaining a consumer report for employment purposes, an employer must disclose to the applicant that a report may be obtained and obtain written authorization from the application to do so. To comply with the FCRA, the disclosure must be "a clear and conspicuous disclosure in writing…in a document that *consists solely of the disclosure.*" While the government agency tasked with enforcing the FCRA has clarified that the disclosure document and authorization may be combined into a single document, the notice cannot include extraneous information, such as a request for a consumer's waiver of his or her rights under the FCRA.

The complaint in *Gezahegne v. Whole Foods Market California, Inc.* alleges that the online form Whole Foods uses to obtain an applicant's authorization for a consumer report also contains language releasing those who obtain the consumer report from all liability. According to the complaint, this violates the FCRA's requirement that the disclosure and authorization be in a standalone document, free from extraneous information. The complaint seeks damages of up to $1,000 for each applicant since February 2009 for whom Whole Foods obtained a consumer report, as well as punitive damages and costs.

The Whole Foods class action is just one in a line of a class actions against national retailers in the past year alleging FCRA violations. Last year, Domino's Pizza and K-Mart settled FCRA class actions for $2.5 and $3 million respectively. In light of this rising trend and the significant liability at stake, employers would be wise to review their background check processes and consult with legal counsel to ensure compliance with the many requirements of the FCRA.

Criminal History: San Francisco Enacts "Ban-the-Box" Legislation

On February 14, 2014, the City of San Francisco joined the wave of jurisdictions with "ban-the-box" legislation and passed sweeping amendments to local ordinances designed to significantly restrict the ability of covered employers to inquire into, and use, criminal records in their hiring practices.

The new local ordinances impact employers with more than 20 employees that are located or do business in the City of San Francisco. In addition to "banning-the-box," the new San Francisco legislation also imposes a host of additional new restrictions on the use of criminal history for employment purposes, including prohibiting employers from inquiring into an applicant's criminal history on the employment application or during the first live interview.

Thereafter, employers are only permitted to inquire about misdemeanors and felony convictions that occurred within seven years of the inquiry and can only make the inquire about providing the applicant with notice of (a) the criminal history employers are prohibited from considering, (b) the restrictions on employer's inquiry into criminal history, (c) the individual's right to submit information about rehabilitation and mitigating factors, and (d) contact information for the Office of Labor Standards Enforcement to report suspected violations. Employers are prohibited from asking about arrests for which there are no pending charges, completion of any diversion programs, sealed and juvenile offenses, and any other infractions that are not misdemeanors or felonies. Consideration of an applicant's criminal history is only permitted to the extent it has a "direct and specific negative bearing on [the applicant's] ability to perform the duties or responsibilities necessarily related to the employment position." Further still, any employer rejecting an applicant based on their criminal history, must provide a pre-adverse action and a final adverse action notice.

As reported in our January newsletter, similar legislation has already been enacted in Buffalo, Hawaii, Massachusetts, Newark, Philadelphia, and Seattle, with Rhode Island and Minnesota slated to enact similar statutes later in 2014; currently similar legislation is pending in 26 other states. In light of this growing legislative trend and aggressive enforcement by EEOC, employers should continue to be vigilant of use of background checks in hiring practices. We will continue to monitor and update you on the rapidly evolving climate.

In the interim, be sure to reach out to Kelley Drye for advise on navigating the matrix of timing restrictions on the criminal history question to make sure you do not make an inquiry before your jurisdiction allows. We can help you review your employment application, revise hiring procedures and conduct a risk assessment to strengthen compliance with federal, state, and local laws.

Delayed, but Still Kicking: DOL Again Delays Implementation of Controversial New "Persuader Rule"

As the *Employer Express* previously reported, the U.S. Department of Labor's proposed changes to so-called "persuader rules" – which require employers to identify labor consultants with whom they consult about influencing employee opinion in union elections, among other things – have been indefinitely delayed for unspecified reasons. The proposed rule changes very much remain on the

DOL's radar, however, and employers should keep a watchful eye on developments.

In 2001, the DOL proposed rules to vastly narrow provisions of the Labor-Management Reporting and Disclosure Act in force since 1962 that protect communications labor attorneys might have with employers during union organizing and election campaigns from public disclosure. Among other things, the LMRDA requires employers to file reports with the DOL when they hire consultants or contractors to persuade employees on the issue of unions. The proposed narrowing of these rules would extend the reporting requirements to communications with labor counsel.

The proposed change garnered an exceptional level of public criticism, including from the American Bar Association, which argued that the rule would effectively (and without basis) gut an important part of the attorney-client privilege, which is one of the oldest privileges known to the law. About three weeks ago, an affiliation of 50 business groups asked the DOL to delay finalizing the regulations. This past Friday, a DOL spokesperson confirmed that rule will be delayed until a later date. The DOL has not commented on the reasons for the delayed implementation. We will keep you posted of any developments.

EEOC Lawsuit Challenges Standard Severance Agreement

The boilerplate severance agreements used by many employers may now be subject to challenges by the U.S. Equal Employment Opportunity Commission. On February 7, the EEOC filed a "pattern or practice" lawsuit in Illinois federal court against CVS Pharmacy Inc., attacking language commonly used in separation and release agreements by employers across the country and seeking to invalidate the company's standard severance agreement.

The EEOC alleges that CVS' separation agreement violates Title VII of the Civil Rights Act of 1964 by unlawfully interfering with employees' right to file discrimination charges or even communicate with the EEOC and could thus be interpreted as deterring an employee from filing a charge or participating in an EEOC investigation. Specifically, the EEOC has taken issue with the language (1) provisions requiring employees to inform the company if they are contacted in relation to a legal matter or administrative investigation, (2) a non-disparagement clause, (3) a clause barring the disclosure of confidential company information, (4) a general release of claims stating the employee gives up "any claims of unlawful discrimination of any kind," and (4) a covenant not to sue stating the employee represents that they have not filed "any complaint" with "any…agency" and will not file such complaint. Particularly worrisome is the fact that the challenged clauses appear to be fairly standard and likely to be found in separation and release agreements of employers across the county.

Even more alarming to employers is the EEOC's apparent indifference towards the agreement's express language that it is not "intended to or shall [not] interfere with Employee's right to participate in a proceeding with" any agency, nor to "prohibit Employee from cooperating with any such agency in its investigation." The EEOC contends the "qualifying sentence" is insufficient, as it is only provided in one paragraph of the agreement.

The EEOC is seeking a permanent injunction preventing CVS from using the current version of the separation agreement and discontinue any practices impeding an employee's right to file a charge. The agency also wants the court to provide all former employees who were subject to the separation agreement 300 days to file a discrimination charge.

While we await its final outcome, this suit should serve as a warning to employers of increased EEOC scrutiny over commonly used terms in severance agreements that could *remotely* be interpreted as limiting employees' ability to interact with the EEOC. Employers should take this opportunity to review their standard separation and release agreements. We can help you evaluate your standard agreements and ensure terms are not so overly broad so as to attract the attention of the EEOC.

Minimum Wage Hike for Federal Contractors

As we mentioned in our January issue, the issue of minimum wage is on the forefront of a number of local legislation and regulatory initiatives across the country, and President Obama's recent Executive Order raising minimum wage for workers of federal contractors now extends those efforts to the federal context.

An Executive Order signed by President Obama on February 12, 2014, increased the minimum wage for non-tip earning workers of federal contractors and subcontractors to $10.10 per hour as of January 1, 2015 – an increase of 39 percent from the current minimum wage of $7.25 per hour. In successive years, the minimum wage will increase in accordance with the Consumer Price Index. The hourly cash wage earned by tip-earning workers will also increase to $4.90 per hour by January 1, 2015, from the current $2.13, with a similar yearly increase of the lesser of $0.95 cents or the amount necessary for the cash wage to equal 70% of the minimum wage of non-tip earning workers.

Only federal contractors soliciting or receiving new contracts on or after January 1, 2015, for procurement of services or construction, services covered by the Service Contract Act, concessions, and services in connection with federal property or lands, will be subject to the new minimum wage. The new minimum wage will not apply to all employees, but rather only to employees "in performance of the contract." Regulations implementing the detailed requirements of the new minimum wage are expected to be issued by the U.S. Secretary of Labor by October 2014. New solicitation provisions and contract clauses reflecting the increase will be published within 60 days thereafter - that is, by December 1, 2014.

The announcement follows that of 13 other states and 4 cities raising state and local minimum wages in 2014. Employers who are parties to federal contracts or subcontracts should factor the new minimum wage requirement into future contract bids and begin brace themselves for increased minimum wage costs as of January 2015. It is essential that employers immediately assess their wage and payroll practices to ensure compliance with the new minimum wage rates. Federal contractors in particular should analyze and prepare budgets, payroll, benefits, and for some, collective bargaining obligations to ensure compliance with the Executive Order by its January 2015 effective date.

NLRB Allows Anti-Union Workers to Defend Vote Declining Unionization at Volkswagen

Effort by unions to organize non-union employees across a variety of industries has redoubled as the overall percentage of the unionized American workforce has fallen. These efforts, as we previously reported, are supported by aggressive new rulemaking by the National Labor Relations Board that, many critics believe, is intended to smooth the path for unions.

Against this background, the United Auto Workers (UAW)'s recent failed bid to represent workers at Volkswagen AG's plant in Chattanooga, Tennessee was closely watched as an indicator of unions' viability in the South. What made the loss particularly noteworthy was that Volkswagen's management actually supported unionization. The UAW appealed its loss on February 14, 2014, primarily on the basis of widely disseminated threats by elected officials that state-financed incentives would be withheld if workers voted to unionize.

Last week, the National Labor Relations Board permitted five Chattanooga workers who were opposed to unionization and Southern Momentum, an anti-union group, to intervene in the post-election dispute to defend the outcome of the vote and counter UAW's request for a new election. Despite the lack of precedent for such intervenor-status of a non-party, the NLRB based its decision on UAW's allegations of third-party misconduct involving widely disseminated statements made by at least one of the five intervening employees opposing the union representation and Southern Momentum, centering on a threat to loose state financial incentives for VW expansion in Chattanooga if the workers opted to unionize.

DC's Earned Sick & Safe Leave Amendment Act in Effect

As we previously reported in last month's newsletter, New York, New Jersey and several other jurisdictions are enacting legislation requiring employers to offer sick leave to employees. Now our nation's capital joins the trend by bolstering its existing legislation.

The District of Colombia has signed into law the Earned Sick & Leave Amendment Act expanding several aspects of DC's existing Accrued Sick and Safe Leave Act of 2008, which already provided certain DC employees with the right to earn paid leave for physical or mental illness, preventative care, family care, parental leave and absences connected to a domestic or sexual violence or stalking incident.

Under the Act, which took effect at the end of February 2014, employees will begin to accrue leave from the first day of employment and will be permitted to use accrued leave after working 90 days, instead of the previously required one year of service. Once excluded under the 2008 statute, tipped restaurant and bar employees will now also receive an hour of paid leave for every 43 hours worked, up to a total limit of five days per year. In addition, employers must now specify whether accrued paid leave can be carried over to the next year and whether it will be paid out upon termination.

The Act goes further by expanding the definition of "employer" to include any entity that directly or indirectly employs or exercises control over the wages, hours, or working conditions of employment, including through use of temporary workers or a staffing agency. The Act also contains expansive anti-retaliation protections and private right of action for employees, and dramatically increases the penalties imposed on employers for noncompliance.

It remains to be seen how existing regulations implementing the 2008 legislation will be affected. At a minimum, employers should review existing policies and procedures, as well as leave tracking and recordkeeping procedures so as to implement the necessary changes as soon as possible and ensure timely compliance. We are happy to assist you in the interim as to what steps should be taken in preparation for such implementation.

Employers' Health Care Obligations: "Shared Responsibility" Mandates Delayed; Long-Awaited Guidance At Last

Employers can breathe a sigh of relief as key provisions of the employer shared responsibility under the Patient Protection and Affordable Care Act (PPACA) are delayed to January 2015, with added transitional relief extending to 2016 for some employers.

Marking the second delay of the effective date of the key provisions of the PPACA, the Obama administration recently announced a partial delay of the Act's employer shared responsibility mandate, pushing the effective date of the "play or pay" provision to January 2015. The shared responsibility requirements apply to "large employers" with 50 or more "full-time equivalent employees" working an average of 30 hours per week. As of January 2015, employers that fail to provide employees with qualifying healthcare coverage will face significant penalties.

Additionally, final regulations for the implementation of the employer shared responsibility provisions were issued by the Internal Revenue Service on February 9, 2014. These provide some additional transition relief, delaying the application of the employer shared responsibility mandate to January 2016 for employers with an existing workforce of 50 to 99 full-time equivalent employees that do not eliminate or materially reduce the health coverage offered as of the February 9, 2014. The final regulations contain additional clarifications on the implementation of the shared responsibility rules intended to facilitate phase-in and assist employers with compliance. Further still, the final regulations include definitions of full-time employees and hour of service, imposing detailed rules for measuring hours of service as well as the application of the rules to various employee categories, such as volunteers, educational employees, adjunct faculty and seasonal employees.

In addition, the final regulations reduce the percentage, from 95 to 70, of full-time employees that must be offered qualifying coverage by the first payroll period of 2015 to avoid penalties of $2,000 per year per full-time employee if at least one full-time employee purchases subsidized coverage through the exchange. While under the statute and proposed regulations the first 30 employees were disregarded for purposes of calculating this penalty, the first 80 employees will be disregarded for 2015 as part of the transitional relief provided under the final regulations. The final regulations also clarify that coverage offered by employee staffing firms to an individual performing services for a client-employer deemed to be the individual's common law employer will be treated as being provided by the client-employer, so long as the fee paid by client-employer to the staffing firm is higher than if the employee had not enrolled in such coverage.

It is essential that employers familiarize themselves and comply with the PPACA's detailed requirements so as to minimize liability for penalties which the IRS will begin assessing in 2015. Employers using staffing agencies, in particular, should ensure their contracting agreements require the agency to offer qualifying coverage to agency employees who work full time on behalf of the client and that fee arrangements for such employees reflects as much. We can help you navigate these complex requirements, implement the necessary strategies to identify the gaps and ensure timely compliance with the employer mandate.

New Limitations on Whistleblower Protections

The expansive reach of laws protecting whistleblowers keeps many employers guessing as to the line between protected whistleblowing and unprotected employee misconduct. In Villanueva v. U.S. Department of Labor*, the Fifth Circuit narrowed the scope of whistleblower protections under the Sarbanes-Oxley Act ("SOX"), holding SOX only protects whistleblowers reporting violations of U.S. federal law. The Fifth Circuit has avoided the question of whether the Sarbanes-Oxley Act protects whistleblowers outside the United States or can apply to overseas conduct.*

The case is centered around a Colombian national employed by a Colombian subsidiary of Core Laboratories, a publicly-traded company - that is, until he was passed over for a pay raise and ultimately terminated for refusing to certify the company's tax receipts, claiming the company's transactions violated Colombian tax law. After three unsuccessful administrative reviews, Villanueva finally filed suit in federal court.

The Fifth Circuit Court of Appeals found that Villanueva had not engaged in SOX protected activity. Specifically, the Court emphasized that Section 808 of SOX only prohibits retaliation when the employee reports conduct that they reasonably belief violated one of six enumerated categories of U.S. law, including U.S. federal statutes governing mail, wire, bank and securities fraud, fraud against shareholders, and Securities Exchange Commission rules and regulations. However, because Villanueva failed to demonstrate that he engaged in protected activity, having only pleaded his reasonable belief Colombian tax law violations, the court found it “unnecessary” to address whether SOX could be applied extraterritorially.

While the Court’s decision here is a welcome development for employers, you should remain vigilant in investigating and documenting all internal whistleblower complaints – even those involving foreign subsidiaries or alleged violations of foreign law.

Wage & Hour Division Proposes to Revise FMLA Definition of “Spouse”

The Labor Department’s fall regulatory agenda, issued November 26, 2013, promised the Wage and Hour Division would be slated to issue a proposal to revise the definition of “spouse” under the Family and Medical Leave Act (FMLA) in March 2014, in light of the Supreme Court striking down Section 3 of the Defense of Marriage Act (DOMA) in United States v. Windsor*.*

Under the FMLA, eligible employees may take leave to care for a spouse who has a serious health condition, among other reasons. According to a DOL FMLA Fact Sheet issued by the DOL in August of 2013, “spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where employee resides, including ‘common law’ marriage and same-sex marriage.” While *Windsor* does not require states to recognize same-sex marriage in other states, the IRS and DOL have already adopted a “state of celebration” rule, meaning that same-sex marriages that were validly entered into in a jurisdiction whose laws authorize the marriage of two individuals of the same sex will be recognized, even if the couple resides in a jurisdiction that does not recognize the validity of same-sex marriages. Currently, 14 states and the District of Columbia recognize same-sex marriage.

While we continue to await the issuance of these revisions, employers should be on the look-out for and review their leave policies and forms to ensure compliance with the new definition.

Time Not Worked: Supreme Court to Hear Amazon.com FLSA Case Concerning Time Spent in Security Screenings

The Supreme Court is set to hear arguments in Staffing Solutions Inc. v. Jesse Busk et al., on whether the time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act of 1947, which will resolve a circuit split created by the Ninth Circuit’s decision involving Amazon.com warehouse workers.

On March 3, 2014, the Supreme Court granted certiorari to Integrity Staffing Solution’s appeal of the Ninth Circuit’s April 12, 2013 opinion in a purported class action lawsuit brought against Integrity, who provides staffing for warehouses owned by Amazon.com.

The Plaintiffs in the suit primarily perform the job duties of retrieving items from inventory to fill orders placed by Amazon.com customers. After punching out at the end of their shifts, the workers were required to go through a brief security screening in which they removed their personal belongings from their pockets and went through a metal detector.

The District of Nevada granted Integrity’s motion to dismiss, finding that the time spent walking through the screening was not “integral or indispensable” to the workers’ principal activities of “fulfilling online purchase orders.” However, the Ninth Circuit reversed, holding in a sharp departure from what had been considered a settled area of the law, that the security screenings were compensable under the FLSA because they were “required” by Integrity and were done “for Integrity’s benefit.”

The Ninth Circuit’s decision conflicts with decisions from the Second and Eleventh Circuits holding that employees were not entitled to compensation for time spent in security screenings. Integrity argued that it was “critically important” that the Supreme Court resolve the Circuit split, because “[i]f allowed to stand, the Ninth Circuit’s decision threatens to impose massive retroactive liability on employers, and to render the Portal-to-Portal Act… largely toothless.” Integrity argues that the Portal-to-Portal Act’s plain language establishes that a worker’s “preliminary” and “postliminary” activities are not covered by the FLSA.

According to Integrity’s petition, “in the last six months since the [Ninth Circuit’s decision], plaintiff’s lawyers have brought nationwide class actions against a number of employers – including Apple, Amazon.com and CVS – seeking back pay (plus overtime and penalties) for time spent in security screenings.”