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Employment Law Update

MHRA 2024 Spring Meeting
Chris Johnson



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Agenda

- Internships, Apprenticeships, and Untapped Labor Pools
- New (Proposed) Salary Threshold for Exempt Workers
- New FLSA Independent Contractor Regulations
- Pregnant Workers Fairness Act Regulations
- Questions



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Internships

- Paid = Employee
 - Minimum wage
 - Overtime
 - EEO rights
 - ACA – 30 hours/week?
- Unpaid
 - For “civic, charitable, or humanitarian reasons”
 - “Without promise, expectation, or receipt of compensation”
 - Service must be “offered freely and without pressure or coercion, direct or implied”
 - Cannot volunteer to do same or similar job they do as an employee



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Apprenticeships

- Apprenticeship = Employee
 - Minimum wage
 - Overtime
 - EEO rights
 - ACA – 30 hours/week?



Apprenticeships

- Registered Apprenticeship
 - Can pay subminimum wages
 - Develop program
 - Apprentice must be learning while doing
 - Partner with educational institution
 - Register program with/get approval from DOL Office of Apprenticeship
 - Register apprentices before they start work
 - Washouts
 - Probation period – must get apprentice certified; won't count against washout
 - Tightly regulated
 - General expectation that completion leads to regular employment
 - Apprentices are still employees for other purposes



Disabled Workers

- Typically involves structuring job functions to individuals' strengths and abilities
- State programs
 - SC Vocational Rehabilitation Department
 - Job training services for individuals
 - Partners with employers to assess needs and place individuals
 - SC Commission for the Blind
 - Provides VR services for blind and low vision individuals
 - Partners with employers
 - SC Dept. of Disabilities and Special Needs
 - Training for individuals with intellectual and spinal cord disabilities



Disabled Workers

- Federal law – employers of disabled workers may obtain certificates to pay subminimum wages
- SC law prohibits subminimum wages to disabled workers since 2022
- ADA
 - Employees who can perform essential functions of job with or without accommodations
 - Requires reasonable accommodations (incl. job modifications) to allow employee to perform essential function
 - Most disabled worker programs involve modifying essential functions



FLSA Salary Threshold Changes

- Two tests for salaried, exempt workers
 - Salary test
 - Duties test
- Current salary test
 - Guaranteed salary
 - \$684/week (\$35,568/year)
- Proposed
 - Guaranteed salary
 - \$1059/week (\$55,068/year)
 - Adjusted for inflation every 3 years



FLSA Salary Threshold Changes

- Rule cleared White House Review on April 10, 2024
- Likely to be made public with an effective date in the near future
- Plan now
 - Increase pay to keep exempt?
 - Convert to hourly
 - How will you determine regular rate?
 - Budget for overtime
 - How will you track time?
 - Workplace morale ("I don't want to punch a clock.")



FLSA Independent Contractor Rules

- Focuses on “economic dependence” of worker on employer
- Factors (not exclusive and none more important than another)
 - Opportunity for profit/loss depends on managerial skill
 - Investments by worker vs. by employer (capital/entrepreneurial investment in business vs. cost of tools and supplies)
 - Degree of permanence of the relationship (indefinite, continuous, exclusive vs. project based, time-limited, sporadic)
 - Nature and degree of control (setting work hours, directly supervising work performance vs. retaining control over finished product/project)
 - Work integral to employer’s business (making the product/providing the service vs. tangential work)
 - Skill and initiative (brings particular skill to the job vs. dependence on training by employer)



Pregnant Workers Fairness Act

- Pregnant Workers Fairness Act – EEOC just issued regulations
- Expands on ADA accommodations
 - ADA: employee is qualified if can do essential functions of the job with or without reasonable accommodations
 - PWFA: same plus if employee will be able to do the essential functions in the near future (i.e., after the pregnancy)
- Can’t require any accommodation not arrived at through interactive process
- Can’t require leave if a less drastic accommodation is available



Pregnant Workers Fairness Act

- Reasonable Accommodations include:
 - Frequent breaks
 - Sitting/standing
 - Schedule changes, part-time work, and paid and unpaid leave
 - Telework
 - Parking
 - Light duty
 - Making existing facilities accessible or modifying the work environment
 - Job restructuring
 - Temporarily suspending one or more essential functions
 - Acquiring or modifying equipment, uniforms, or devices
 - Adjusting or modifying examinations or policies



Pregnant Workers Fairness Act

- Almost always reasonable accommodations:
 - allowing an employee to carry or keep water near and drink as needed
 - allowing an employee to take additional restroom breaks as needed
 - allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed
 - allowing an employee to take breaks to eat and drink as needed
- May require medical documentation only if it is reasonable to do so
- Treats abortion as a condition related to pregnancy that must be accommodated (usually only with time off)
- Requires employers to consider whether employee can nurse during working hours based on proximity of child to the workplace



Questions?

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