Employment Law Update

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Agenda

- COVID-19 Employment Legislation
- Going Forward – Workplaces *After* COVID-19
- Caselaw and legislative Update

COVID-19 Employment Legislation

- Families First Coronavirus Response Act
  - *Proposed* HEROS Act
- Minnesota Emergency Executive Orders
- City Ordinances
- Health Screening
- Positive Test

Families First Coronavirus Response Act

- Emergency Sick Pay Leave Act (80 hours/FT) – First Day
  1. Quarantine / Isolation order related to COVID-19
  2. Advised to self-quarantine related to COVID-19 by health care provider
  3. Experiencing COVID-19 symptoms and seeking diagnosis
  4. Caring for an *individual* subject to #1 or #2
  5. Caring for child whose school/provider close or unavailable because of COVID-19 (“Child Care”)
  6. Experiencing any substantially-similar condition specified by US Dep’t of Health & Human Services

Emergency Sick Pay Leave Act - Applicability

- Eligible on Day 1
- Less than 500 employees
  - Count on day of request
  - All employees – regular, temporary, absent
- Emergency responders
- Health care providers
  - Retirement facilities, nursing home, pharmacy, in-home health care provider, laboratory, individuals employed by an entity that contracts with a health care provider to provide services or maintain the operation of the facility
- Small business exemption (school / child provider leave)

Families First Coronavirus Response Act

- Emergency Family and Medical Leave Expansion Act (12 weeks)
  - Caring for child whose school/provider closed/unavailable because of COVID-19 (“Child Care”)
  - First 2 weeks not paid
- Applicability
  - After 30 days
  - Less than 500 employees
  - Emergency responders / health care providers
  - Small business exemption

Families First Coronavirus Response Act
Small Business Exemption – School/Child Care Only!

- Jeopardize the viability of the Small Business
  - Expenses and financial obligations > Available revenue, causing business to cease operating at minimal capacity
  - Employee(s) departure for leave = Substantial risk to business's finances / operations because of the employee's skills, knowledge, or responsibilities
  - Insufficient workforce – able, willing, qualified, and available to perform departed employee's work and allow business to operate at minimal capacity

No application / submission required

Families First Coronavirus Response Act
Calculating Pay – Daily and Total Maximums Apply*

- Full rate for Hours Normally Worked – 3 reasons; Greater of rates
  1. Quarantine / Isolation order related to COVID-19
  2. Advised to self-quarantine related to COVID-19 by health care provider
  3. Experiencing COVID-19 symptoms and seeking diagnosis
- 2/3 rate for Hours Normally Worked – All Other Reasons; Regular rate
  1. Caring for an *individual* subject to #1 or #2
  2. Caring for child whose school/provider close or unavailable because of COVID-19 (“Child Care”)
  3. Experiencing any substantially-similar condition specified by US Dep’t of Health & Human Services

Families First Coronavirus Response Act Documentation

- IRS documentation for reimbursements and credits
- Establish separate form from FMLA documentation
  - Employee statement of qualifying reason for FFCRA leave
  - Documentation evidencing qualifying reason
  - Statement of inability to work or telework
  - Child Care leave – Certification of no other individual caring for child
    - **If** only child is 14 or older, identification of special circumstances
    - Names, ages, school/provider name
  - Election of other paid leave
- FMLA forms
- Location

Families First Coronavirus Response Act
Questions

- What happens to health insurance during EFMLA leave?
- Can employers require PTO to run concurrently with FFCRA leave?
  - Emergency Paid Sick Leave – No
  - EFMLA Leave – After the first 2 weeks
- What if the employee exhausted traditional FMLA leave?
  - EFMLA – Not eligible; review rolling period
  - Emergency Paid Sick Leave – Available
  - Minnesota Isolation Legislation – Minn. Stat. 144.4196

Families First Coronavirus Response Act
Questions

- How much EPSLA and EFMLA leave can a FT employee (48 hours) take for school closure / daycare leave?
  - Consider prior use of leave (FMLA, EPSLA, EFMLA)
  - EPSLA – 80 hours; not 2 weeks
  - EFMLA – 12 weeks (48 hours each); first 2 weeks unpaid
- If employee elects to use PTO concurrently with EFMLA, what is their daily rate?
  - Full rate without daily max
  - PTO exhausted – 2/3 for remaining weeks
- Can FFCRA leave be used intermittently?
  - Employer's choice; Workplace performance – School/Child Care leave only

DOL Field Assistance Bulletin No. 2020-4

- Issue:
  - The Family First Coronavirus Response Act (FFCRA) requires covered employers to provide eligible employees with up to 2 weeks of paid sick leave and up to 12 weeks of family and medical leave if (among other reasons) EE is unable to work due to a need to care for EE's child whose place of care is closed because of COVID-19.
  - EE must name the place of care and show that the place of care is closed and that no other suitable person is available.
    - This is easy to show where a child was enrolled at the time of closure.
      - How does an EE satisfy this for a summer program that never opened?

Guidance:

- Requirement is satisfied if:
  - Child did enroll
  - Child attended in prior years and is eligible this year.
  - "There may be other circumstances that show an employee's child's enrollment or planned enrollment."
- But "An EE generally could not take FFCRA leave . . . based on the closing of a [program] that the child has never attended, unless there were some indication that the child would have . . . ."
  - Mere interest in a camp or program is generally not enough.
- But affirmative steps short of enrollment may be sufficient—application, deposit, waitlist.
- Example not given (my own thought): Prearranging with daily sitter for week off?
- No one-size-fits all rule.

Proposed
HEROS ACT – Workplace Leave Relief

- *High Likelihood* – Stopped at Senate
- Traditional FMLA – Eligibility will be 90 days; no min. hours
- EFMLA
  - 1 or more employees
  - Adds other EPSLA qualifying reasons
  - Self-isolating based on recommendation / order of *public official* or health care provider
    - Need not be specific to employee
    - Presence @work = jeopardize employee's health, others, or member(s) of household because of (1) possible exposure of COVID-19 to employee; or (2) exhibition of symptoms by employee
  - Care for family member self-isolating because of diagnosis or seeking medical attention *regardless* of availability of others to care for individual
    - Domestic partners (committed relationship),
    - All those related by blood or affinity
  - Traditional FMLA does not count

Minnesota Emergency Executive Orders

- Emergency peacetime extended through August 12, 2020
- COVID-19 Preparedness Plan – Executive Order 20-74
  - Isolating sick employees
  - Handwashing and cleaning
  - Encourage working from home
  - Social distancing
  - *Templates and Industry-Based Guidance*
- **All workers who can work from home must do so.**
  - Evaluate productivity
  - Completion & balance of required job duties

Isolating Sick Employees

- Health screening
  - Verbal inquiry – temperature, exposure to COVID-19, positive test or any symptoms of COVID-19
  - What can you do if employee refuses to participate?
  - What if an employee doesn't "pass" the screening?
  - What if employee has a *positive* COVID-19 test? (CDC; Minnesota)
    - Isolate positive employee and workers potentially exposed
    - Remain home and self-monitor
    - Determine proper cleaning and disinfectant protocol
- Confidential results

City Ordinances

- Face Coverings
  - Minneapolis, Rochester, Edina, Winona, St. Paul, Duluth, etc.
  - Mankato – Age 13, medically tolerate, indoor spaces of public accommodation
    - Appt. only business (w/o public accommodation space); business w/ employee only access spaces
    - Medically intolerant - ADA disability, difficulty breathing, mental health condition, or development disability
    - Employees required to wear face coverings for face-to-face contact with public
- Sick and Safe Time
  - Minneapolis – testing, quarantine (symptoms or exposure), workplace closure by government order, school/child care closure
  - Duluth and St. Paul

US DOL Field Assistance Bulletin 2020-3

- Issue:
  - FLSA and DOL Regulations limit child employment based on whether or not school is "in session."
    - How does "in session" apply during a typical school year if schools are closed or doing distance learning?
  - In agriculture, children 14 and up may work "outside of school hours" even when school is in session.
    - What are "school hours" for a school doing distance learning?

Guidance:

- If school district where child resides (not where ER is) requires any participation (live or DL) then school is "in session."
- If summer school is offered but not mandatory, then school is not "in session."
- If the district implements mandatory summer school, the school is "in session."
- School districts may issue new school hours if conducting distance learning, but if they do not, then "school hours" means those in effect before the DL, regardless of when DL is actually occurring.
  - Even if children are actually goofing off most of the day

Going Forward

- ~~After COVID~~
- ~~After the EEOs~~
- ~~When things go back to normal~~
- Dealing with the next wave of insanity

Going Forward

- Layoffs
- Changing Job Duties
- ADA Accommodation
- ADA Association Claims
- FLSA/PTP Considerations

Layoffs.

- Scenario: Employer's business is lagging and there is no longer enough work to employ previous workforce. Employer decides to terminate workers.

Layoff Dangers:

- Discrimination claims
  - Old problems: Race, gender, ethnicity, Work Comp, FMLA, etc.
  - New problems: Requests to work from home, protected COVID leave, complaints about workplace safety

Layoff Solutions:

- Build a plan to conduct layoffs only on legally permissible bases.
  - Document the need for the reduction: Decide what positions are needed first, without regard to who will fill them. So you are not deciding who to fire, you are deciding what to keep.
  - Factors for retention:
    - Skills
    - Productivity
    - Discipline—scrub carefully for borderline issues
  - Personnel:
    - Ensure that the decision makers are high enough up the chain to have an equal view of all employees. Realize that most managers will bat for their staff and their (legitimate and illegitimate) favorites.
    - Have enough decision makers that one person's illegal bias—(e.g. the subject of a complaint of harassment) doesn't control.
  - Consider paid releases:
    - You're already bleeding

Layoff Dangers:

- WARN Act
- Applies to ERs with 100 EEs laying off 50 EEs
  - 60 Day notice requirement
  - Exception for unforeseen circumstances
    - Still need to provide reasonable notice
- Initial COVID/EEO layoffs easily qualified for UC
- Don’t assume that future layoffs will
- If indefinite layoffs become permanent, notice required

Changing job duties

- Scenario:
  - Employees return to work with new duties.
  - Shrinking workforce pushes typical non-exempt duties on to previously exempt employees.

Changing Duties Dangers:

- Mismatch between old job description and actual duties performed:
  - undercuts terminations for poor performance of undocumented duties;
  - supports wrongful termination claims;
  - makes it difficult to evaluate accommodation requests;
  - supports employee claims that duties were not core functions and that accommodation was reasonable;
- Border line exempt employees no longer exempt.

Changing Duties Solutions:

- Modify job descriptions to account for changing duties.
  - At the very least, do a temporary additional duties memorandum;
  - Make some recordable evidence of service on employees; signature is best, stored email is acceptable;
  - If only doing a temporary memo, document the importance of the additional duties; (e.g. cite COVID Preparedness Plan.)
- Conduct review of overtime exempt employees.

ADA Accommodation

- Scenario:
  - Under EEOs ER sent employees to work from home for months. No front end cost analysis was done because this was mandated. ER did the best it could with what it was required to do.
  - Post EEOs, EE requests to work from home due to disability (limited mobility, allergy, immune problems.)
  - ER does not want to accommodate this request on the basis that EE is less productive from home.

ADA Accommodation Dangers:

- Established history of EEs working from home
- "Of course you can accommodate this, I worked from home for three months."

ADA Accommodation Solutions:

- Lay the foundation for a not reasonable/undue burden defense
- NOW, document tangible and intangible costs of working from home.
  - Lost productivity
  - Increased burden on other staff
  - Client privacy, trade secrets
  - Employee morale, including EEs not working from home
- For EEs still working from home, hold them to standards.

ADA association claims

- Scenario:
  - EE is a hospice volunteer outside of work. Her volunteer network issues a rule that no one may continue to volunteer if they work at a job where co workers or members of the public frequently go without masks.
  - ER is not subject to any law or ordinance requiring masks and does not require masks.
  - EE repeatedly asks that ER issue a 100% mask policy. Her requests are initially are polite but she keep ratcheting it up. She berates other employees and demands that they wear masks. She just won't stop.
  - ER tells EE to stop harassing other employees and "you just need to decide what is more important—this job or your volunteer work—because apparently you can't do both."
  - EE quits claiming constructive discharge and sues under the ADA.

ADA Association Dangers:

- The ADA prohibits ERs from discriminating against applicants and employees based on their relationship or association with and individual with a disability.
- The nature of the relationship is not defined for purposes of the ADA. The EEOC guidance has stressed that the relationship can be quite remote. Their examples include and employee who volunteers at a homeless shelter also provides services to clients with HIV/AIDS—in other words, no direct relationship at all.
- I've never seen a stand-alone claim of discrimination based on association under the ADA. Typically, they are tacked on the FMLA claims or some other ADA claim.
- The chances of such a claim succeeding are remote . . . but so are the chances of everything else that happened this year.

ADA Association Solutions:

- In this scenario, there is not much the ER could have done differently. Try to avoid addressing the volunteer work: "We understand your personal preferences but other employees have personal preferences as well. We will not be changing our policy."
- Just keep in mind that these claims exist when dealing with employee requests.

Another Association Scenario:

- All State and Federal COVID requirements have expired. EE works a second job as an EMT. The local community is experiencing a new surge in COVID cases and EE tells coworkers she's been responding to a lot of calls for people with extreme COVID symptoms. ER does not require masks generally, but decides to tell EE to stay in her cubicle or wear a mask whenever she leaves it.
- Threshold question as to whether this would be adverse employment action.
- Nonetheless, don't take action based on association or on ER's guess as to EE's medical situation.

FLSA/PTPA “Donning and doffing”

- Scenario: ER re opens with COVID Preparedness Plan that includes daily temperature checks, daily certification of no symptoms, and wearing face shields. ER is a large manufacturing facility. ER trains only 5 employees to conduct temperature checks and facilitate daily certifications. 200 employees come and go at shift change; this results in employees waiting up to 5 minutes in line for this procedure. The time clock is located inside the facility so EEs cannot punch in until they go through the procedure.

FLSA/PTPA Dangers:

- FLSA and the Portal-to-Portal Act require that employees be paid for "principle activity."
- Early case law focused on preparatory activities such as EEs greasing machinery or sharpening knives.
- Later case law extended this to putting on and taking off clothing specific to the work environment. Cases turned on whether the change of clothing was required by the nature of the job or done for EE's personal convenience.
- "Customary" tasks common to many employment situations are generally not "principle activity" and are not compensable. (e.g. putting lunches, purses, coats, etc. in a locker.)
- No court has yet ruled on the compensability of COVID related processes. Getting a temperature check is not a "principle activity" of any job. However, legal compliance and work place sanitation is in the interests of most employers. However, however, maybe temperature checks will be "the new normal" and thus "customary" for any workplace.

FLSA/PTPA Solutions:

- Pay for this time.
- In the scenario, the ER would be best served by moving the timeclock to the outside of the line. If that is impossible, the ER could provide a flat rate, good faith correction to the time clock by adding 5 minutes of time to each day.
- Continue to monitor the time actually spent in the line and that EEs are moving expeditiously (i.e. that this is not turning into morning chat time).

CASELAW AND LEGISLATIVE UPDATE

Minnesota Chamber of Commerce v. City of Minneapolis, A18-0771, 2020 WL 3067712 (Minn. June 10, 2020)

- Issue - Whether the Ordinance is enforceable against employers with principal places of business outside Minneapolis.
- Ordinance
  - Employees working at least 80 hours per year in MSP
  - Earn 1 hour SST for every 30 hours worked in MSP – 48 hours max
  - Use SST hours only in MSP, when required to work
  - Carry over hours to max of 80 hours
  - Paid - 6/+ employees; Unpaid - <5 employees
  - Recordkeeping requirements – 3years

Minnesota Chamber of Commerce v. City of Minneapolis, A18-0771, 2020 WL 3067712 (Minn. June 10, 2020)

- Extraterritoriality Doctrine
  - Majority: No violation, enforceable against non-MSP principal place employers
    - City's power and jurisdiction = its geographical boundaries
    - Identify purpose and effect of ordinance
    - Permissible – primary purpose and effect of the ordinance is to regulate activity within its geographical limits (well being of workers in MSP)
  - Dissent: Violation, expands *beyond* MSP (records, notice, etc.)
    - General policing power = city regulation limited to geographical boundaries
    - Express grant of authority from Legislature – Does a statute imply the power to regulate beyond the city to achieve the Legislature's purpose in granting the power?
      - Ex. *State v. Nelson* – Statute authorized cities to regulate sale of milk and dairy herds; MSP adopted ordinance requiring inspection of herds to obtain license to sell in MSP

Minnesota Chamber of Commerce v. City of Minneapolis, A18-0771, 2020 WL 3067712 (Minn. June 10, 2020)

- Application to Your Business
  - Do employees work in a city with an earned sick and safe time ordinance?
  - Minnesota Wage Theft law – requires disclosure of the benefit at initial notice
  - Do you have leave policies providing at least the required hours, max allowance, accrual rate, and eligibility for leave?
  - Maintain accurate records of leave earned and used
  - Limit use to within the city of the ordinance

NLRB Decision: *Graphic and Bemis*. 04-CB-215127, June 5, 2020

- Issue:
  - Can a Union unlawfully retaliate or discourage engagement in a grievance process when no grievance is filed?
  - How specific must a threat of reprisal be?
  - How specific must a request to terminate be?

Graphic Facts:

- December 14, 2017 an EE (name unknown) reported to ER that Union President (an EE) had been harassing EE Stasko.
- ER suspended UP and investigated. Stasko and Samsel gave statements to HR.
- December 18, 2017 Union Secretary (EE) approached Stasko, got in his face and yelled that she was going to get to the bottom of this and asked “How could you do this to UP!?”
- January 18 2018 ER fired UP.

Graphic Facts (Continued):

- January 22, 2018 UP posted on bulleting board:
  - "Turning in fellow Union members is a violation of the Union by laws and could result in fines and black listed from all union jobs."
- January 25, 2018 US saw Stasko without required earmuffs. US reported to supervisor. This was US's first ever report of an EE for workplace safety violation.
- January 25, 2018 safety meeting with pizza. Stasko cut his pizza with a work razor blade and without a protective glove. EE reported him to safety supervisor and to US.
- January 26, 2018 US called HR and demanded an investigation into the pizza cutting incident. She did not directly demand adverse employment action, only an investigation.

Graphic Facts (Continued):

- Late January 2018 UVP asked Samsel if HR had been "on the floor shaking hands and congratulating people that UP got fired." Samsel said no but reported to UVP that notes and fake rats had been left in his work area.
- UVP says he replied: "thankfully, it's not like in years past where people's toolboxes were getting vandalized, lockers were being caved in, or cars were being keyed."
- Samsel says UVP replied: "it could get much worse . . . they can settle like the old days, caving in skulls, smashing lockers, people's personal properties and cars."
- ALJ and NLRB believed UVP.

Graphic Decision:

- Stasko's participation in the HR investigation was a Protected Activity, because it was part of a union grievance, even though no grievance was filed—because it was likely that UP would file a grievance for his own eventual termination.
- Union violated NLRA by posting a memo on the union bulletin board threatening to blacklist members from employment opportunities if the reported union members' misconduct to ER.
- Union violated NLRA when its VP threatened an employee with reprisal in response to Samsel's complaints about notes left at his workplace.
- Union violated NLRA when it threatened Stasko with reprisal for reporting Union President's misconduct and by trying to get ER to discipline Stasko.
  - Even though US only said she was going to investigate, test for reprisal is "whether the remark can reasonably be interpreted by the EE as a threat."
- NLRA makes it unlawful for a union to attempt to cause an ER to discriminate against an EE for engaging in the grievance process. Direct evidence is not necessary, an implied request is sufficient.

Graphic Takeaway

- Remember that NLRA non reprisal provisions apply to Unions too.
- This might be an extreme decision based on extreme facts and Trump NLRB.

Kenneh v. Homeward Bound, Inc., A18-0174, 2020 WL 2893352 (Minn. June 3, 2020)

- Issue: Whether conduct alleged sufficiently severe and pervasive for a reasonable person to find the work environment hostile / abusive?
  - Sexual harassment requires "unwelcome sexual advances . . . or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment." Minn. Stat. 363A.03, subd. 43(3).
  - Conduct must be "so severe or pervasive as to alter the conditions of the plaintiff's employment and create an abusive working environment" to constitute an actionable claim

Kenneh v. Homeward Bound, Inc., A18-0174, 2020 WL 2893352 (Minn. June 3, 2020)

- K alleged sexual harassment, reported multiple incidents involving J
- J's comments to K – seductively
  - I'll cut your hair at my house; "I like it pretty all day and night"
  - I like "Beautiful women and beautiful legs;" "I will eat you—I eat women"
  - K pumping gas; J stops, talks, and leaves right after her
- April 11 – Investigation determined inconclusion + 2 additional reports
  - J returns to blocking K's door with his body
  - Oral sex gestures, sexy, pretty, and beautiful
- June 1 – K late and unprepared; K didn't want to work because of J
- June 29 – Requested schedule change to avoid J
- June 29 – Request denied & Terminated

Kenneh v. Homeward Bound, Inc., A18-0174, 2020 WL 2893352 (Minn. June 3, 2020)

- Employer granted summary judgment – Not severe or pervasive to create hostile work environment
- Reversed – "If a **reasonable person** could find the alleged behavior objectively abusive or offensive, a claim is sufficiently severe or pervasive to survive summary judgment." A18-0174, 2020 WL 2893352 at 6.
  - Evaluate totality of the circumstances
  - Frequency, severity
  - Physical, threating, humiliating
  - Merely offensive
  - Reasonably interferes with work performance

Kenneh v. Homeward Bound, Inc., A18-0174, 2020 WL 2893352 (Minn. June 3, 2020)

- Application to Your Business
  - Investigation – prompt and complete
  - All witnesses, supervisors, and colleagues
  - Document findings and misbehavior

Anthony v. Trax, 955 F.3d 1123 (9th Circuit US App.) April 17, 2020

- Issue:
  - Given that after-acquired evidence can't justify a termination, can it show that an individual was not a "qualified individual"?

Anthony Facts:

- ER hired EE at a Technical Writer under a contract with the Army
- Contract required that EE have a BA. EE didn't have a BA but ER didn't know that.
- EE had PTSD; condition worsened resulting in FMLA.
- While on FMLA, EE requested to work from home. ER denied with very little interaction but did extend FMLA for another 30 days. Then insisted EE get a full release or be terminated. EE was not released so ER terminated.
- EE sued. During discovery, ER learned that EE didn't have a BA.

Anthony Decision:

- EE and the EEOC argued that EE is a QI in spite of lack of a BA because she performed the job and was not fired for lack of a BA.
- EE also tried to draw in cases establishing rule against after-acquired information as to terminations such as an age discrimination case where ER learned after termination that EE had stolen money.
- Court drew a sharp distinction between the basis for the termination and the QI question.
- An ADA claim requires the **EE** to prove that she is a "qualified individual" and this is the first question, so the reason for termination is irrelevant.

Anthony Takeaway:

- ER got lucky here, don't forget the ADA process even if FMLA is exhausted.
- In litigation, leave no stone unturned.

DOL Joint Employer Rule
Codified 29 CFR Part 791 – FLSA only!

- Scenario 1: ER suffers, permits, or otherwise employs EE to work, but P-ER simultaneously benefits from the work
  - P-ER is joint employer **only if he acts** directly or indirectly in the interest of ER in relation to employee
- Weigh 4 Factors – Does P-ER:
  - Hire or fire the employee;
  - Supervise and control the employees work schedule or conditions of employment to a substantial degree
  - Determine the employee's rate and method of payment;
  - Maintain the employee's employment records

DOL Joint Employer Rule
Codified 29 CFR Part 791 – FLSA only!

Office hires Cleaner to clean Office's building for a fee. Office reserves the right to supervise the Cleaner's employees while Office's building. However, Office does not set the Cleaner employees' wages or individual schedules and does not in fact supervise the Cleaner employees' performance of their work in any way. Is Office a joint employer of the Cleaners employees?

- No – Office is not a joint employer

Office does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. Office's reserved contractual right to control the employee's conditions of employment is not enough to establish that it is a joint employer.

29 C.F.R. § 791.2(g)(3)

DOL Joint Employer Rule
Codified 29 CFR Part 791 – FLSA only!

- Scenario 2: ER employs a worker for a set of hours in a workweek, and A-ER employs the same worker for a separate set of hours in the same workweek
  - Each employer must act independently
  - Employers must be disassociated with respect to employment of worker
- Sufficiently Associated for Joint Employer Status Shown by:
  - An arrangement between ERs to share worker's services;
  - 1 ER is acting directly or indirectly in the interest of the other ER in relation to the worker; or
  - ERs share control of the worker, directly or indirectly, by reason of the fact that one ER controls, is controlled by, or is under common control with the other ER (sharing vendors or franchisor along is insufficient).

DOL Joint Employer Rule
Codified 29 CFR Part 791 – FLSA only!

John works 30 hours/week as a cook at Diner A, and 15 hours/week as a cook at Diner B owned by the same person. The Diners coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both Diners. The Diners decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

- Yes – Sufficiently Associated, jointly and severally liable
  - Common ownership of Diners
  - Coordinate cook's schedule
  - Jointly determined cook's wages

Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

29 C.F.R. § 791.2(g)(2)

NLRB Joint Employer Rule
Final Rule Effective April 2020

- Determine liability under the NLRA
- **Exercise** Substantial Direct and Immediate Control of an essential term or condition of employment
  - Wages
  - Benefits
  - Hours of work
  - Hiring
  - Discipline
  - Supervision
  - Direction

NLRB Decision: *Caesar's and AFL-CIO*, Case 28-CA-060841, December 16, 2019

- Issue:
  - Whether the NLRA requires ERs to permit EEs to use email and other IT for protected activities.
  - Recall previous G&H guidance: "You don't have to let EEs use computers for personal use, but if you do, you can't limit what they use it for; beyond criminal, harassment, pornography, confidentiality, and identifying as ER."
  - We also recommended a savings clause for protected labor activity.

Caesar's Facts:

- Handbook prohibits many nonwork-related activities but allows limited use of email for personal purposes.
- ER maintains an EE breakroom where EEs are allowed to engage in nonwork-related solicitation and distribution, including protected activity.
- EEs work in a non-distributed, service environment, mostly out of the same location.

Caesar's Decision:

- ALJ's decision found Handbook unlawful based on the *Purple Communications* decision which held that broad prohibitions presumptively also covered protected activity and were therefore unlawful.
- NLRB disagreed.
- *Purple Communications* is overturned because it violated ERs' property rights.
- *Register Guard* case is reinstated: Facially neutral restrictions on the use of ER IT resources are generally lawful, provided they are applied non discriminatorily.
- NLRB did not directly address a "no union organizing on ER IT" rule, but its analysis suggests even this would be acceptable.
- The NLRB left open the possibility that for some ERs, company email might be the only reasonable way EEs can communicate and that in these cases, blanket prohibitions might be unlawful.
  - But c'mon—FB, Twitter, Gmail, etc.

Caesar's Takeaway:

- ERs have more leeway as to blanket prohibitions.
- But don't change your policies. If you allow personal use of ER IT, don't emplace any limitations beyond criminality, harassment, pornography, confidentiality, and identifying as ER.
- Savings clause for protected activity is not as important, but not harmful, so leave it in if you have it.
- NLRA is not the only law to consider—political activity, general discrimination.
- The NLRB composition changes every time the Presidency changes parties, so this will likely swing back.

LA Specialty Produce Company and Teamsters Local 70, Int'l Brotherhood of Teamsters, 368 NLRB 93 (Oct. 2019)

- Issue: Whether confidentiality, non-disclosure, and media contact rules infringe upon employees' Section 7 rights under the NLRA.

- Section 7 rights – ability to self-organize and engage in concerted activities for the purpose of collective bargaining or mutual aid or protection

LA Specialty Produce Company and Teamsters Local 70, Int'l Brotherhood of Teamsters, 368 NLRB 93 (Oct. 2019)

- Would the facially neutral rule, "reasonably interpreted" **potentially** interfere with the exercise of Section 7 rights?
  - Reasonable employee
  - Viewing rule for *everyday* application
- Yes – Weigh the following:
  - Nature and extent of potential impact on NLRA rights; and
  - Employer's legitimate justification for the rule

LA Specialty Produce Company and Teamsters Local 70, Int'l Brotherhood of Teamsters, 368 NLRB 93 (Oct. 2019)

- "Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [employer] including but not limited to client/vendor lists"
  - Facially neutral
  - No potential to infringe on rights (reasonable person)
    - Doesn't prohibit disclosure of client names
    - Limited to employer's nonpublic, proprietary records
- Confidentiality and Non-disclosure policies prohibiting disclosure of client and vendor lists = Category 1(a) rule, Lawful

LA Specialty Produce Company and Teamsters Local 70, Int'l Brotherhood of Teamsters, 368 NLRB 93 (Oct. 2019)

- "Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President [Name] is the only person authorized and designated to comment on Company policies or any event that may affect our organization."
  - Emphasized phrases should not be read in isolation
  - Prohibits – employees speaking on behalf of the company
  - Doesn't prohibit – employees' expressing their own opinions about conditions, wages, terms of employment, or labor disputes
- Policies prohibiting employees from speaking to media on behalf of employer = Category 1(a) rule, Lawful

LA Specialty Produce Company and Teamsters Local 70, Int'l Brotherhood of Teamsters, 368 NLRB 93 (Oct. 2019)

- Application to Your Business
  - Review employment policies
  - Revise policies in light of test

NLRB Decision, *MV and ATU*, case 28-CA-173726, September 10, 2019.

- Issue:
  - CBAs generally list many things that a Union and ER may or must do.
  - Most CBAs have a carve out section of rights retained by and ER. (e.g. maintain order, hire and fire subject to grievance policy, etc.)
  - What about when an ER action is neither prohibited nor expressly allowed?
  - Courts have interpreted CBAs like any other contract, using the canons of construction. Many factors but generally, if an action isn't prohibited, then it is allowed.
  - Past NLRB decision have applied a "clear and unmistakable waiver" standard: Unless the CBA "specifically refers to the type of ER decision" at issue "or mentions the kind of factual situation" then the ER may not make that decision.

MV Facts:

- Don't really matter. This was a purely legal decision.
- ER changed some policies, Union contended that it could not do that because there was no "clear and unmistakable waiver"

MV Decision:

- NLRB rejected the "clear and unmistakable waiver" standard and will interpret CBAs like any other contract.

MV Takeaway:

- ***THIS*** NLRB will interpret CBAs like any other contract.
- Just because an ER right is not specifically retained, that doesn't mean ER doesn't have it.
- As much as I like this ruling, *expression unions* is an issue
- Discussion of Hero Raise Case.

Fair Labor Standards Act (DOL Opinion Letters)
Regulations *Clarifying* Regular Rate of Pay issued Dec. 16, 2019

- FLSA2020-1: Lump Sum Nondiscretionary Bonus
  - **Question 1**: Is a lump sum bonus to an employee of $3,000 at completion of 10-week training included in regular rate of pay for overtime?
    - 29 CFR 778.208 Inclusion/Exclusion of Bonuses
  - **Answer 1**: Yes, bonuses promised to induce employee to stay must be included in regular rate of pay.
    - Bonuses contingent upon employee remaining until date of payment – included
  - **Question 2**: Employee worked 47 hours during week 8 and is eligible for overtime, what method do I use for calculating the regular rate of pay?

FLSA2020-1: Lump Sum Nondiscretionary Bonus Regular Rate of Pay, cont…

- Methods – 29 CFR 778.209
  - Bonus covers only 1 week – add the bonus to all other included earnings that week
  - Multi-week – Cannot allocate bonus earnings proportionately to workweek actually earned:
    - Assume equal bonus earnings per workweek; or
    - Assume equal bonus earnings per hour
- **Answer 2**: Equal bonus earnings per week because each of the10 weeks of training was necessary to earn the bonus.
  - $3,000(bonus) / 10 weeks
  - $300 of bonus must be added to ot

FLSA2020-6: Clarifying Outside Salespeople Overtime Exemption

- **Question:** Is the employee exempt from overtime pay?
  - 80% of time in the field selling, marketing, and demonstrating product
  - 20% sales event planning and inventory stock
  - Uses employer vehicle and electronics
  - Employer provides sales training
  - Paid on base salary + commission

FLSA2020-6: Clarifying Outside Salespeople Overtime Exemption

- **Answer:** Yes
  - No minimum salary requirement
  - Primary duty – make sales or get orders for services
    - Incidental to primary duty (e.g. conferences, planning itineraries, writing sales reports) 29 CFR 541.500(b)
    - Promotional work – incidental to and in conjunction with the employee's outside sales work. 29 CFR 541.03(a)
  - Customarily & regularly engaged in duties away from employers place of business
    - Fixed site used as employee's headquarters
    - Greater than occasional, but less than constant – 29 CFR 541.701
    - 1-2 hours/day, 1-2 times per week = sufficient
    - 60 times per year = sufficient