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Breathe Easy: With Vaccinations on the Rise, Ohio Rescinds COVID-19 Health Orders on June 2nd

By Scott H. Dehart*

On May 12th, Governor DeWine announced that, effective June 2nd, Ohio will rescind the majority of its COVID-19 health orders. Accordingly, with limited exceptions, Ohio will no longer mandate the use of masks and social distancing, nor impose COVID-related capacity restrictions. Despite the State lifting its orders, businesses still may voluntarily continue to require mitigation measures. As Governor DeWine explained, "[l]ifting these health orders will not prevent a business from imposing its own requirements. In fact, based upon the experiences of other states, we expect that many stores or businesses may require social distancing and masking."

Following Governor DeWine's announcement, the Centers for Disease Control and Prevention ("CDC") issued interim recommendations on May 13th (available here) stating that, in non-healthcare settings, fully vaccinated people can resume activities without wearing masks or social distancing. In response, Governor DeWine instructed the Director of Ohio's Department of Health to amend existing orders in accordance with the CDC's guidance. That amended order (available here) provides, among other things, that fully vaccinated people are no longer required to wear masks with limited exceptions, e.g. public transportation, and can resume activities without social distancing.

Ohio's lifting of its COVID-19 health orders is a promising sign that the worst of the pandemic is behind us. However, Ohio employers now must decide what mitigation measures, if any, they wish to maintain. This presents a challenging decision, and employers should consider consulting with counsel on effective approaches for revising and communicating changes to their COVID-19 policies and procedures.

EMPLOYERS SHOULD CONSIDER CONSULTING WITH COUNSEL ON EFFECTIVE APPROACHES FOR REVISING AND COMMUNICATING CHANGES TO THEIR COVID-19 POLICIES AND PROCEDURES.

*__Scott H. Dehart__, a member of the firm's Columbus office, practices in all areas of labor and employment law. If you have questions about Ohio's pandemic health orders or the impact of COVID-19 on your workplace, please contact Scott at shd@zrlaw.com or (614) 224-4411.

Coming Soon: Covered Employers Must File EEO-1 Component 1 Reports by July 19, 2021

By Tiffany S. Henderson*

The Equal Employment Opportunity Commission ("EEOC") collects annual workforce demographic information from covered employers. However, due to the pandemic, the EEOC did not collect data last year. On March 19, 2021, the EEOC announced it was accepting EEO-1 Component 1 Reports ("EEO-1") and that covered employers must file their 2019 and 2020 data by July 19, 2021.

What is an EEO-1?

The EEO-1 is an annual report the EEOC requires covered employers to file that includes demographic data for employees sorted by job category, ethnicity, race, and gender. Title VII of the Civil Rights Act of 1964 requires the filing. Last year was the first time the EEOC did not require covered employers to file a report.

Which Employers Are Covered?

The EEOC requires private employers with at least 100 employees to file an EEO-1. In addition, federal contractors with more than 50 employees that are not exempt under 41 CFR 60-1.5 must file an EEO-1.

How Long Will Employers Have to File an EEO-1?

The EEOC is accepting EEO-1s now, and employers must file their EEO-1s by July 19, 2021. This year's EEO-1 filing period differs from years past, as the EEOC usually only allows employers 10 weeks to file. However, the EEOC recognized the COVID-19 pandemic's impact on the workforce and extended the deadline by two weeks to ensure employers have time to provide accurate and reliable data.

How do Employers File?

Covered employers should visit the EEOC's EEO-1 website which can be accessed here. Prior to filing, employers should have received 2019 and 2020 EEO-1 notification letters via U.S. mail that should have contained the "Company ID" and "Passcode" employers need to create user accounts.

Employers can file an EEO-1 either: (1) by entering the data into a secure form available at https://eeocdata.org/eeo1/signin; or (2) by uploading a data file using an EEOC-approved format available at https://eeocdata.org/eeo1.

Employers should be aware that they must file an EEO-1 for each year they were in business and met the filing requirement. Due to the pandemic, this year's collection includes 2019 and 2020 data. Covered employers must file two EEO-1 reports beginning with 2019. The EEOC will certify the 2019 report and then employers can file their 2020 report.

Employers that have not received notification letters or that have questions about filing an EEO-1, including eligibility, should contact counsel or visit EEO-1 Help for more information.

***Tiffany S. Henderson** practices in all areas of labor and employment law. If you have questions about the EEO-1 or any employment law questions, please contact Tiffany at tsh@zrlaw.com or (216) 696-4441.

DUE TO THE PANDEMIC, THIS YEAR'S COLLECTION INCLUDES 2019 AND 2020 DATA. COVERED EMPLOYERS MUST FILE TWO EEO-1 REPORTS BEGINNING WITH 2019.

Zip It: NLRB Provides Guidance on Confidential Investigations

By Jantzen D. Mace*

Maintaining confidentiality during a workplace investigation may seem like a common-sense practice to help ensure the integrity of the investigation. Yet, directing employees to do so can give rise to allegations of interference with employee rights under the National Labor Relations Act ("NLRA"). Fortunately, in a recent decision, the National Labor Relations Board ("NLRB") reinforced employers' ability to issue reasonable directives to employees on maintaining confidentiality during workplace investigations.

In *Alcoa Corp.*, 370 NLRB No. 107 (2021), an employer received reports that one of its employees made racially offensive comments and engaged in other disrespectful behavior. The employer began an investigation which included interviewing employees. During those interviews, a representative for the employer told each employee "to keep in mind that their interview conversation was confidential, to keep the conversation confidential, including from supervisors and other employees, and to decline to answer if others asked about the conversation."

Based on the results of the investigation, the employer terminated the employee who made the offensive comments. The union representing the employee subsequently filed an unfair labor practice charge alleging, among other things, that the employer violated the NLRA by instructing employees to keep their interviews confidential.

Initially, an Administrative Law Judge ("ALJ") found in favor of the union. As to the confidentiality directives, the ALJ held the employer unlawfully interfered with employees' "right to discuss a workplace disciplinary matter." The ALJ emphasized that the employer did not expressly advise the employees that they could discuss the interviews once the investigation ended. The employer appealed the ALJ's decision to the NLRB.

In its decision, the NLRB reversed the ALJ and held the employer's confidentiality directives were lawful. The NLRB relied on its recent decision in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), which overruled prior holdings prohibiting employers from restricting discussion of ongoing investigations unless they could make "a particularized showing of a substantial and legitimate business justification." Instead, the NLRB held that investigative confidentiality rules, that by their terms apply only for the duration of any investigation, are *categorically* lawful.

In support of its finding, the NLRB noted that no evidence or allegation existed that: (1) the employer's directives were given pursuant to a general company policy or rule; (2) the directives applied to anyone other than the employees interviewed during the investigation; or (3) the directives prevented those employees, or any other employees, from discussing the events giving rise to the investigation. Notably, the NLRB disagreed with the ALJ's conclusion that the employer had to provide an express statement that employees could talk with others about the interviews once the investigation ended. Under the circumstances, the NLRB found that the employees would have reasonably understood that the confidentiality instruction lasted only through the duration of the investigation.

The NLRB's decision in *Alcoa Corp.* reinforces employers' ability to provide reasonable confidentiality directives to employees that interviewed as part of an internal investigation. In doing so, employers should not restrict employees' ability to discuss the events giving rise to the investigation, or their ability to discuss the interviews once the investigation has ended. When conducting workplace investigations, employers should consider consulting legal counsel for advice on conducting them effectively while avoiding potential claims by employees or their unions.

WHEN CONDUCTING WORKPLACE INVESTIGATIONS, EMPLOYERS SHOULD CONSIDER CONSULTING LEGAL COUNSEL FOR ADVICE ON CONDUCTING THEM EFFECTIVELY WHILE AVOIDING POTENTIAL CLAIMS BY EMPLOYEES OR THEIR UNIONS.

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To Pay or Not to Pay: DOL's Opinion On Employee Travel and Training Time

By Lauren M. Drabic*

The Department of Labor's Wage and Hour Division ("WHD"), recently issued two opinion letters interpreting the Fair Labor Standards Act's ("FLSA") compensation requirements for work-related travel and voluntary training hours. Specifically, the WHD examined three work-related travel scenarios for a construction company's non-exempt foremen and laborers, and six voluntary training or continuing education scenarios for a hospice care provider's non-exempt employee. This article summarizes the WHD's opinion letters to help employers gain a better understanding of their FLSA obligations in comparable scenarios.

Work-Related Travel

In its recent opinion letter, the WHD addressed the following scenarios:

1. **Local Job Site:** The foremen of a construction company must first retrieve a company truck from the employer's principal place of business, drive it to a local job site, and then return the truck at the end of the day.
2. **Remote Job Site (1.5 – 4 hours of travel time):** The employer pays for hotel accommodations and per-diem meal stipends for employees working at the job site. Each foreman retrieves a company truck from the employer's principal place of business at the beginning of the job, drives it to the job site, and returns it at the end of the job. Laborers can drive their personal vehicles to and from the job site at the beginning and end of the job; or they can drive their personal vehicles to the principal place of business and ride to and from the job site with the foremen.
3. **Remote Job Site (1.5 – 4 hours of travel time):** Same facts of the second scenario except the laborers choose to travel to and from the job site each day instead of staying at the hotel.

Generally, the FLSA requires employers to compensate employees for time suffered or permitted to work. Under the FLSA, travel time between home and work, typically, is not compensable. However, time spent traveling between an employer-designated reporting place to a separate work location could fall within the definition of compensable working hours. In *Integrity Staffing Solution, Inc. v. Busk*, the Supreme Court clarified employer FLSA obligations for preliminary and postliminary travel requirements. According to *Busk*, employees' preliminary or postliminary travel is *not* compensable simply because the employer requires it. The U.S. Supreme Court stated that travel time is compensable if the purpose of the travel is "integral and indispensable to the [employee's] principal activities," meaning the activity must be:

1) "an intrinsic element" of the employee's principal activities; and

2) one the employee "cannot dispense [with] if he is to perform his principal activities."

Integrity Staffing Solution, Inc. v. Busk, 135 S. Ct. 513, 518-19 (2014).

The WHD concluded that in eac h of the three scenarios, the foremen's travel time to and from the employer's principal place of business with the company truck is both integral and indispensable to their principal activities because (1) the employer mandates the pickup and return of the company truck as part of the foremen's job responsibilities; and (2) the principal activities at the construction site require the company truck. Accordingly, the foremen's travel time in the company truck to and from the employer's principal place of business is compensable travel time under the FLSA regardless of jobsite location.

Employer compensation requirements under the FLSA for employee travel time to remote job sites in another city depend on *when* and *how* employees travel. If an employee's travel time is for a special one-day assignment, then the travel *is* compensable worktime. In these situations, the FLSA permits employers to account for the actual travel time or the average commute time that the employee would have used to travel to their usual work site and deduct it from the compensable travel time. Similarly, if an employer offers transportation but the employee chooses to utilize their own transportation, the employer can calculate compensable travel time with either (1) the amount of time the employee spent traveling; or (2) the amount of time that would have accrued using the employer's offered transportation. If the travel keeps an employee away from home overnight, then travel that occurs during the employee's normal working hours, even during typical nonwork days, *is* compensable work time because the travel is in place of the

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employee's normal duties. On the other hand, travel that occurs after the employer relieves the employee for long enough "to use the time effectively for [the employee's] own purposes" is not compensable, even if the employee uses the time to travel to an employer-provided lodging accommodation or to the employee's home multiple hours away. 29 C.F.R. § 785.16(a).

Applying these principles to the second scenario, the WHD concluded that the laborer's travel time to a remote jobsite is not compensable under the FLSA, unless the travel occurs during the laborer's normal working hours. Further, the FLSA considers the travel time occurring between the jobsite and the hotel at the beginning or the end of the workday as part of the everyday commute, which is not compensable travel time. Additionally, since laborers have the option to travel to and from the job site with the foremen, the employer may choose to calculate the laborer's compensable travel time using either the time that would have accrued if the laborer rode with the foremen or the laborers actual compensable travel time.

The WHD reached the same conclusion for the laborer's travel time in the third scenario. When a laborer chooses to forego the hotel accommodation and drive between the remote job site and their home each day, the laborer is traveling during their personal time after the employer has relieved the laborer for the day. Therefore, the laborer's travel time is not compensable under the FLSA.

Voluntary Training Time

The WHD, in its recently issued opinion letter, states that according to the FLSA, employee "attendance at lectures, meetings, training programs and similar activities" is not compensable working time if it meets all four of the following criteria:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is voluntary;

(c) The course, lecture, or meeting does not directly relate to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

29 C.F.R. 987 § 785.27. Generally, training time that fails to meet any one of the above four criteria *is* compensable work time. However, the WHD recognizes two "special situation" exceptions to this general rule even when the training directly relates to the employee's job. If an employee attends (1) a course offered by an independent bona fide institution of learning related to the employee's job; or (2) an independent school, college or independent trade school to take courses related to the employee's job, that time *is not* compensable for FLSA purposes so long as the other three criteria apply. If an employer mandates training, if the training (voluntary or not) occurs during regular working hours, or the employee performs productive work for the employee's job duties during the training, then the training *is* compensable as work time. Employers may, however, establish policies prohibiting employees from participating in training courses during regular working hours.

In each of the following scenarios, the WHD assumed that employee attendance was voluntary, and that the employee did not perform any productive work.

Scenario 1: A nurse participates in an on-demand webinar *after* working hours that *directly* relates to the nurse's job and counts towards professional licensing requirements. The WHD concluded that this scenario is exempt as a special situation for a course offered by an independent bona fide institution of learning related to the employee's job. Thus, the voluntary training time *is not* compensable. The WHD also noted that the special exception applies regardless of whether the course is offered by the employer or by a third party.

Scenario 2: An accounting clerk participates in an on-demand webinar *after* working hours that *directly* relates to the clerk's job but has no continuing education component. The WHD stated that it did not have sufficient facts to issue an opinion because it could not determine whether an independent bona fide institution offered the training course. If an independent bona fide institution of learning offered the training course, the employee's time is exempt as a special situation. Otherwise, the training is compensable for FLSA purposes.

Scenario 3: An accounting clerk participates in an on-demand webinar *during* working hours that *directly* relates to the clerk's job but has no continuing education component. The WHD concluded this is compensable training time because the training takes place during working hours.

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Scenario 4: An accounting clerk participates in an on-demand webinar *during* working hours that *does not* directly relate to the clerk's job and has no continuing education component. The WHD concluded this is compensable training time because the training takes place during working hours.

Scenario 5: A nurse participates in an on-demand webinar *during* working hours that directly relates to the nurse's job and counts toward professional licensing requirements. The WHD concluded this is compensable training time because the training takes place during working hours.

Scenario 6: A nurse participates in an out-of-state weekend conference that has some topics relating directly to the nurse's job and professional licensing requirements and some topics that don't. Travel time to the conference occurs during some of the nurse's normal work hours, but the conference occurs outside of the nurse's normal work schedule. The WHD concluded that the training time is exempt as a special situation and not compensable time. Additionally, the WHD stated that since the conference is not compensable work hours, travel to and from the conference is personal non-compensable travel time.

While the above referenced opinion letters provide some helpful interpretation of employer requirements, they are not the law. If you have questions about your obligations, please contact counsel, as even small FLSA compliance errors can create significant liability.

***Lauren M. Drabic** regularly advises clients on labor and employment matters, including FLSA compliance. If you have questions about wage and hour issues, please contact Lauren at lmd@zrlaw.com or (216) 696-4441.

Z&R SHORTS

Please join Z&R in congratulating Jzinae N. Jackson

Z&R is proud to congratulate **Jzinae N. Jackson**, a Stokes Scholar Alumni, on joining the Cleveland Metropolitan Bar Association's Louis Stokes Scholars Advisory Committee, which is committed to expanding diversity in the legal profession. To learn more about the Stokes Scholars Program and to read a recent feature on Jzinae by Court News Ohio, please click here.

Upcoming Speaking Engagements

June 2, 2021

Ryan C. Spitzer presents "CBD Products, Hemp and Employee Positive Drug Tests" for the Ohio Municipal Attorneys Association.
Webinar Registration Information: https://www.anymeeting.com/AccountManager/RegEv.aspx?PIID=E053DC80824F3E

June 26, 2021

Jonathan J. Downes presents "Budgets, Revenues, Expenditures – Oh My!" at the 2021 Ohio Prosecuting Attorneys Association Summer Workshop.
OPAA Summer Workshop Information:
http://www.ohiopa.org/training/summer2021.html

September 14, 2021

Jonathan J. Downes presents "Bargaining for Results: Achieving Agreement while Maintaining Flexibility for Management" for the Ohio Association of Chiefs of Police in Hilliard, Ohio.
Full-Day Workshop Information:
https://oacp.org/bargaining-results2021/