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Employment Practices Newsletter - December 2015 Edition

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FLSA Exemption Amendments: Preparing for the Inevitable

by Linda K. Horras

On June 30, 2015, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking aimed at extending overtime compensation to a broader section of the American workforce. Rather than overhaul or even tweak the substantive elements of the white-collar exemptions, the DOL recommended a substantial increase to the salary basis on which all of these exemptions are based. We do not yet have an effective date for this change. Bureaucratic tarot cards suggest that this will become effective in late 2016, quite possibly before the presidential election.

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The EEOC's Battlecry: Cracking Down Hard on Religious Discrimination

by Nicole E. Jagielski

Last month, in line with the EEOC's "hottest litigation trend," a Northern District of Illinois jury awarded two Muslim truck drivers $240,000, finding Star Transport fired them for refusing to transport alcohol despite their religious beliefs. The case, *EEOC v. Star Transport Co*., is just one of a multitude of religious discrimination cases the EEOC brought this year. Others include the *National Tire and Battery* case (Arab and Muslim mechanics accused of making bombs), the *Consol Energy/Consolidation Coal* case (employee who saw "Mark of the Beast" in biometric scanner forced to retire), the *National Federation of the Blind* case (Hebrew Pentecostal employee refused to work on Saturdays), the *Dunkin' Donuts* case (employer revoked job offer because applicant couldn't work on Saturdays), the *UPS* case (employees who wore beards as part of their religious observance were not promoted until they shaved), and the *Rotten Ralph's Restaurant* case (Muslim employee refused to remove headscarf). And those are just the cases dating back to July.

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Amex Employment Arbitration Policy Held Unlawful by NLRB

by Mellissa A. Schafer

In *Amex Card Services Company*, three former American Express employees filed a charge with the NLRB alleging that the company's Arbitration Policy and corresponding acknowledgment form violated section 8(a)(1) of the National Labor Relations Act by requiring employees to submit to final and binding arbitration on all wage and hour claims on an individual basis. The NLRB panel agreed, finding that Amex engaged in unfair labor practices by maintaining and enforcing a policy that would lead employees to believe that they were barred or restricted from filing charges with the NLRB or otherwise accessing the NLRB's processes. Its analysis relied on a key distinction between the policy and acknowledgment form: while the policy clearly stated, "any claim under the National Labor Relations Act was not covered," the form did not. As a result, the NLRB deemed the policy and form ambiguous when read together. Construing the ambiguity against Amex, the panel found the policy unlawful.

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EEOC Issues Proposed Rule Clarifying When Employers May Offer Incentives to Employee's Spouses in Exchange for Genetic Information

by Evan J. Bonnett

The EEOC has issued proposed rules clarifying when employers may maintain incentivized wellness programs that include the collection of genetic information regarding employees' spouses. The law at issue is the Genetic Information Nondiscrimination Act of 2008 (GINA), which generally prohibits employers from requesting, requiring, or purchasing genetic information about an employee or his or her spouse, children, and family members. GINA maintains an exception, however, permitting employers to request genetic information as part of voluntary wellness programs, as long as certain requirements are met. Until the recent proposed rules, it was unclear how or whether the incentive rules applied to the spouses of employees.

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Federal Judge Finds That Employer May Have Used Experience Requirement to "Weed Out" Older Workers

by Nicole E. Jagielski

In *Kleber v. CareFusion Corp.*, the Northern District of Illinois rejected an employer's motion to dismiss an age discrimination complaint, finding that an employer's cap on the experience that it would accept for a position may have been a workaround to avoid older workers, and "could constitute age discrimination." Dale Kleber, a 59-year old attorney and former General Counsel of a Fortune 500 company applied for a position titled "Senior Counsel, Procedural Solutions." The job posting stated a preference that candidates should have "3 to 7 years (no more than 7 years) of relevant legal experience." Mr. Kleber was not invited to interview for the position. Those

who were interviewed had seven or fewer years of legal experience. Mr. Kleber filed suit, claiming that the requirement that applicants have seven years or less of legal experience was intended to "weed out older applicants such as himself." The employer filed a motion to dismiss, which the federal judge denied. Even while acknowledging that an employer "does not commit age discrimination when it declines to hire an overqualified applicant," the judge found it possible that something else was going on in this case: the employer may have unlawfully used experience as a proxy for age if it purportedly made its hiring decisions based on "experience" but in truth was trying to "weed out" older applicants.

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