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SuperVision™ TODAY

Labor & Employment News

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Federal Contractors Should be Planning Ahead for the New Section 503 and VEVRAA Rules

by Larissa C. Dean

On August 27, 2013, the Office of Federal Contract Compliance Programs ("OFCCP") issued two Final Rules, making significant changes to the regulations implementing affirmative action under Section 503 of the Rehabilitation Act ("Section 503") and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"). Federal contractors that meet the affirmative action coverage threshold for Section 503 and VEVRAA have until March 24, 2014 - merely four months away - to implement the numerous changes adopted in OFCCP's Final Rules.

Read the full article on our website.

Notes from the Chair & Executive Editor

It's difficult to believe the year 2013 is coming to an end, but it is. Plans are already afoot for our 2014 SuperVision symposium schedule, as well as for a few Affordable Care Act (ACA) seminars throughout the region; please watch for e-mail updates with the specifics, once dates and locations are confirmed. Along those lines, bear in mind that with the ACA pay-or-play mandate for employers (but not individuals) being postponed to 2015, this upcoming year is the critical one for measuring the hours of your workforce to determine whether you have an obligation to offer health insurance coverage.

We did want to pass along updated information regarding how the National Labor Relations Board is treating class action waivers. Last quarter Alyesha Dotson prepared an article looking at the recent Supreme Court case law on this issue.

Given the continued proliferation of class actions, we continue to urge employers to utilize the right legal guidance in considering such waivers. This area of the law is still developing and, not surprisingly, the Board has been conflicted in how to treat that precedent (as Alyesha updates us):

> NLRB Administrative Law Judge Bruce D. Rosenstein has ruled Chesapeake Energy Corp. may require its employees to waive their rights to bring class or collective actions in accordance with the Supreme Court's recent *American Express* decision. Judge Rosenstein reasoned that because the National Labor Relations Act does not mention class actions, and because it was enacted before the advent of Federal Rule of Civil Procedure 23, the principles expressed by the Supreme Court in its

American Express decision regarding anti-trust law equally apply to the Board. Nevertheless, Judge Rosenstein found that Chesapeake's arbitration policy violated the law because it included NLRA claims among those subject to binding arbitration, and thereby prohibited employees from exercising their right to file unfair labor practices with the Board. Interestingly, a decision by a different Administrative Law Judge, Gerald Wacknov, demonstrated the NLRB's internal discord as he held that *American Express* was not binding because *American Express* did not specifically pertain to the relationship between the NLRA and the Federal Arbitration Act. Stating that he was bound to follow Board precedent, Judge Wacknov decided that the arbitration policy at issue violated the NLRA. Judge Wacknov also reasoned that the agreement was unlawful because employees could read the policy as barring employees from bringing charges to the Board (echoing in this part Judge Rosenstein's opinion and demonstrating the hard review the Board will still give to all waivers).

In this edition of SuperVision Today, the last edition for 2013, we take a look at how health reimbursement arrangements (also known as HRAs) are governed under the ACA; Larissa Dean examines new requirements for federal contractors who must maintain affirmative action programs; Gordon Mowen explains an issue critical to the banking industry on how the Department of Labor is treating mortgage originators for purposes of being exempt from overtime; and Lindsay Griffin Smith discusses proposed legislation that has been getting a fair amount of publicity lately, the Federal Employment Non-Discrimination Act. We hope you enjoy it, and we wish everyone a wonderful holiday season.

Eric W. Iskra
Chair, Labor & Employment Group

Eric E. Kinder
Editor, SuperVision Today

Mortgage Loan Officers: Likely Exempt Under the Fair Labor Standards Act... For Now

by Gordon L. Mowen, II

This past July, the United States Court of Appeals for the District of Columbia ("D.C. Circuit") vacated a 2010 Department of Labor ("DOL") Interpretation Letter that concluded employees who perform the "typical" job duties of a mortgage loan officer do not qualify as administrative employees. This is important because "administrative employees," defined as employees who exercise discretion on "matters of significance," are exempt from the Fair Labor Standards Act's ("FLSA") overtime wage requirement.

What does this mean to mortgage-lending employers?

Read the full article on our website.

Putting the Pieces Together: How the ACA Impacts Health Reimbursement and Flexible Spending Arrangements

by Erin Jones Adams and Eric E. Kinder

Employers responding to the market reforms contained in the Affordable Care Act ("ACA," also referred to as ObamaCare) are trying to grasp how it treats some current arrangements, such as health reimbursement arrangements (HRAs) and flexible spending arrangements (Health FSAs). These features are popular in many employer-sponsored benefits plans. The Departments of the Treasury, Health and Human Services, and Labor are developing coordinated regulations on these issues and have recently adopted a notice to address many concerns.

Read the full article on our website.

8 Important Things You Should Know About the Employment Non-Discrimination Act

by Lindsay Griffin Smith

The Employment Non-Discrimination Act ("ENDA") is federal legislation that would prohibit employers from discriminating against potential or actual employees during hiring and employment based on their sexual orientation or gender identity. The Act defines sexual orientation as "homosexuality, heterosexuality, or bisexuality." Gender identity is defined as "gender-related identity, appearance, or mannerism or

other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

Read the full article on our website.

Alyesha Asghar Dotson

Ms. Dotson's primary areas of practice are labor and employment law and litigation. She is an ABA Labor and Employment Section Fellow, and a member of the ABA Young Lawyers Division Labor & Employment Law Committee. She is also an Associate Editor for *TYL*. Ms. Dotson is admitted to the West Virginia State Bar, the West Virginia Supreme Court of Appeals, the United States District Courts for the Northern and Southern Districts of West Virginia and the United States Court of Appeals for the Fourth Circuit. She received her B.A., *summa cum laude*, from Concord University in 2004 and her J.D. from West Virginia University in 2008.

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