Issue 1, 2019

The Editor's Note

Welcome to 2019's first edition of *SuperVision*, the e-newsletter from Spilman Thomas & Battle's Labor & Employment Law Group. We hope you received our e-blast with the news of the U.S. Department of Labor proposed rulemaking to increase the salary basis for certain exempt employees. The increase is in keeping with comments by Secretary of Labor Alexander Acosta, who endorsed raising the threshold to account for inflation since 2004. We've included a review of the proposed rule in this newsletter.

Meanwhile, we wanted to get the word out to you about our upcoming SuperVision symposia. This year we are slated for symposia in Pittsburgh, Pennsylvania on May 8; Charleston, West Virginia on June 28; and Greensboro, North Carolina on October 18. We are still working on finalizing the agenda, especially for the full-day sessions in Charleston and Greensboro, so please feel free to let us know your thoughts on subjects you would like us to cover. Nonetheless, we do anticipate addressing emergency preparedness, unseen disabilities, marijuana and the impact of technology on the reasonable accommodations process, workplace investigations after #MeToo backlash, and best practices in employee training.

In this edition of *SuperVision*, Carrie Grundmann explains a recent Fourth Circuit decision making clear that gossiping about a female employee "sleeping her way to the top" can constitute sexual harassment; Mitch Rhein examines the National Labor Relations Board's recent reversal regarding how it will define independent contractors versus employees subject to the National Labor Relations Act; and Chelsea Thompson takes a look at recent EEOC regulation changes regarding wellness program incentives.

As always, we welcome any suggestions and comments regarding the e-newsletter. Thank you so much for reading.

Eric W. Iskra, Chair, Labor & Employment Practice Group
Eric E. Kinder, Executive Editor, *SuperVision*

The Rumor Mill: A Case Study on Workplace Conduct - *How Perpetuating Workplace Rumors Can Create Employer Liability for Gender Discrimination*

By Carrie H. Grundmann

On February 8, 2019, the Fourth Circuit ruled an employer can be liable for gender discrimination for spreading false rumors that a female employee slept with her male boss to obtain a promotion. *Parker v. Reema Consulting Services, Inc.,* 915 F.3d 297 (4th Cir. 2019).

Before turning to the facts of this case, let me say this: *the ruling represents nothing new under the law.*

Click **here** to read the entire article.

New Test or Old Test?: The NLRB and Independent Contractors

By Mitchell J. Rhein

The National Labor Relations Board ("NLRB") began the year by again changing the test it uses to determine whether a worker is an independent contractor. The test is, however, not new. Instead, in *SuperShuttle DFW, Inc.* (367 NLRB No. 75), the NLRB returned to its long-standing test to determine whether a worker is an independent contractor, thereby rejecting the test it had adopted during the Obama administration. The NLRB's return to a traditional test, which is more consistent with other federal agencies and courts, means it is less likely a worker may be an "employee" for the purpose of the National Labor Relations Act ("NLRA") while simultaneously, on the same facts, an independent contractor for the purpose of a second statute. Also, because the NLRA generally protects employees and not independent contractors, the NLRB's decision impacts the scope of workers who a union may represent or workers who are protected when they engage in concerted activity. As a result, the test is important for employers that rely on contingent workforces or franchisees.

Click **here** to read the entire article.

Back at Square One: The Questionable Status of Employer Wellness Plans

By Chelsea E. Thompson

Sponsored wellness plans that include incentives to employees who voluntarily disclose personal health information as part of disability-related inquiries or medical examinations are in legal limbo after the EEOC removed the underlying rules from the Americans with Disabilities Act and Genetic Information Nondiscrimination Act.

Click **here** to read the entire article.

DOL Proposes Updates to the Overtime Rule to Account for Inflation Over the Past 15 Years

By Carrie H. Grundmann and Eric E. Kinder

Last week, the Department of Labor announced new proposed revisions to the Overtime Rule. This is not the first time in recent years that revisions have been proposed to the so-called "white collar exemptions" contained in the Fair Labor Standards Act. Because a 2016 proposal to nearly double the salary threshold for white collar exemptions was enjoined by a federal court and later shelved, this would be the first change to the salary threshold since 2004.

Click **here** to read the entire article.