Issue 2, 2019

The Editor's Note

Welcome to the second quarter edition of *SuperVision*, Spilman's labor and employment law e-newsletter. Within the past couple of weeks, the United States Office of Management and Budget announced the Department of Labor will be making a request for information to "solicit comments on ways to improve its regulations under the FMLA to: (a) better protect and suit the needs of workers; and (b) reduce administrative and compliance burdens on employers." This is particularly interesting because it has been slightly more than a decade since the Department of Labor last made significant changes to the regulations governing the FMLA. Particularly notable is that Helen Applewhaite, the DOL's Branch Chief for the FMLA, announced the DOL is currently reviewing its model certification form with a goal of making the forms easier to use. The labor and employment team here at Spilman will be keeping an eye on these developments and will share more information as it becomes available.

The second quarter of the year always brings the SuperVision symposium to Charleston, West Virginia. This year, we will be at the Embassy Suites in Charleston on Friday, June 28. The symposium will address a number of evolving topics that will impact workplace strategy, such as the possible backlash over #MeToo, accommodating mental health conditions, dealing with medical marijuana, and navigating the latest concerns with social media and wage and hour issues. We hope you can attend this free seminar. To register, please visit our website or contact April Bias at abias@spilmanlaw.com.

In this edition of *SuperVision*, Carrie Grundmann discusses EEO1 requirements, Mitch Rhein discusses the DOL's latest on the virtual marketplace, and Chelsea Thompson explains a recent United States Supreme Court case that may not mean quite as much as some headlines made it seem.

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

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

Pay Up! EEOC Confirms 2017 AND 2018 Pay Data Due September 30, 2019

By Carrie H. Grundmann

Each year, U.S. employers who have at least 100 employees or are a government contractor with 50+ employees and at least $50,000 in government contracts must file an EEO-1 form with the Equal Employment Opportunity Commission ("EEOC"). The EEO-1 traditionally included information about the race, ethnicity and gender of an employer's workforce within 10 specific federally defined job categories ("Component 1 Data").

In February 2016, the EEOC expanded the scope of the EEO-1 Reports that are submitted by employers to require information about employees' W-2 earnings and hours worked within 12 pay bands ("Component 2 Data"). The purpose of seeking this data was to allow the EEOC to run statistical tests on it to investigate allegations of discrimination. Not surprisingly, employers were opposed to and contested these expanded EEO-1 requirements. In August 2017, the newly elected Trump administration stayed implementation of Component 2 data, which left many to believe the issue was dead in the water.

However, that has proven not to be the case.

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

Virtually Independent Contractors or Employees - DOL Takes a Look

By Mitchell J. Rhein

In a recent opinion letter, the United States Department of Labor concluded that workers who use a "virtual marketplace" business--similar to Uber, DoorDash, Instacart, or Rover--are independent contractors and not employees of the business. The opinion provides helpful insight for how the DOL determines whether a virtual marketplace business's service providers are properly classified as independent contractors (at least during the Trump administration). For other employers, the opinion, which the DOL described as "inherently difficult to conceptualize," may provide helpful insight for how the DOL analyzes particularly difficult classification questions under the Fair Labor Standards Act ("FLSA").

Subject to certain exceptions, any person may ask the DOL for an official written explanation of what the FLSA requires in fact-specific situations. Why might a company want to do so?

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

Waiver Warning: SCOTUS Determines Title VII Failure to Exhaust Defense Can be Waived

By Chelsea E. Thompson

A recent decision from the Supreme Court of the United States--*Fort Bend County v. Davis*--has sparked conversations about whether a current or former employee must file a complaint with the EEOC before suing an employer for discrimination. Many of you may have heard about this case, and we wanted to set the record straight on what it says and--perhaps more importantly--what it does not say.

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