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PUBLIC ACCOMMODATION

New Florida statute seeks to prevent disability access lawsuits

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

Businesses of all sizes and types throughout Florida that are open to the public face the constant threat of disability access lawsuits brought under Title III of the Americans with Disabilities Act (ADA). We've highlighted the nature of public accommodation lawsuits in previous articles and warned you of the importance of ensuring compliance with the ADA's provisions requiring equal access to public facilities for all individuals, regardless of any disability. The Florida Civil Rights Act contains similar provisions.

Obviously, the aims of those laws are noble, but the outcome can be less than desirable. Courts have approved the use of "testers," who visit businesses open to the public to determine if there are accessibility issues that violate the ADA, but that has led to a flood of litigation, especially since prevailing parties are awarded attorneys' fees and costs. The Florida Legislature appears to be attempting to curb the problem. Lawmakers recently enacted § 553.5141 of the Florida Statutes to provide employers some ammunition in fending off accessibility claims.

State of ADA Title III litigation

Title III of the ADA makes it unlawful for a business to discriminate against individuals with disabilities in places of public accommodation. If you've ever seen a wheelchair lift at a hotel pool, you've witnessed evidence of the aim of the law's guarantee of accessibility to disabled individuals in places open to the public. Indeed, Title III requires things like wheelchair ramps, accessible bathrooms, and even thresholds between doors.

If a business runs afoul of the ADA's accessibility requirements, it can face a lawsuit and be ordered to correct the issue, among other remedies. Importantly, a party that prevails in such a lawsuit will be awarded attorneys' fees and costs. Of course, where there's money, there are lawyers.

'Cottage industry' of lawyers bringing Title III claims

One federal judge used the term "cottage industry" to describe the absolute flood of litigation in Florida under Title III. Way back in 2004, that judge noted in *Rodriguez v. Investco, L.L.C.*, "The current ADA lawsuit binge is . . . essentially driven by economics—that is, the economics of [attorneys'] fees."

Indeed, the nature of the law permits quick lawsuits against businesses for technical violations with the looming threat of an award of attorneys' fees. It isn't uncommon for testers or individuals named as plaintiffs in Title III actions to walk up and down A1A in South Florida or other major

AGENCY ACTION

DHS allowing additional visas for temporary workers. The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) announced in July 2017 that U.S. businesses in danger of suffering irreparable harm because of a lack of available temporary nonagricultural workers will be able to hire up to 15,000 additional temporary nonagricultural workers under the H-2B program. To qualify for the additional visas, petitioners must attest, under penalty of perjury, that their business is likely to suffer irreparable harm if it cannot employ H-2B nonimmigrant workers during fiscal year 2017. Labor Secretary Alexander Acosta and then-Secretary of Homeland Security John Kelly (who is now White House chief of staff) determined that there aren't enough qualified and willing U.S. workers available to perform temporary nonagricultural labor to satisfy the needs of some American businesses.

Premium processing for certain visa petitions resumes. U.S. Citizenship and Immigration Services (USCIS) announced in July that premium processing for certain cap-exempt H-1B petitions would resume. The H-1B visa has an annual cap of 65,000 visas each fiscal year. Additionally, there is an annual "master's cap" of 20,000 petitions filed for beneficiaries with a U.S. master's degree or higher. Premium processing will resume for petitions that may be exempt from the cap if the H-1B petitioner is an institution of higher education, a nonprofit related to or affiliated with an institution of higher education, or a nonprofit research or governmental research organization. Premium processing also is to resume for petitions that may also be exempt if the beneficiary will be employed at a qualifying cap-exempt institution, organization, or entity.

USCIS using revised Form I-9. USCIS has released a revised version of Form I-9, Employment Eligibility Verification. As of September 18, employers must use the revised form, which has a revision date of July 17, 2017. Among other things, the new form adds the Consular Report of Birth Abroad (Form FS-240) to List C. Employers completing Form I-9 on a computer will be able to select Form FS-240 from the drop-down menus available in List C of Sections 2 and 3. E-Verify users also will be able to select Form FS-240 when creating a case for an employee who has presented that document for Form I-9. Also, all the certifications of report of birth issued by the State Department have been combined into selection C #2 in List C. Another change is the renumbering of all List C documents except the Social Security card. For example, the employment authorization document issued by DHS on List C changed from List C #8 to List C #7. ✤

thoroughfares, checking for those wheelchair lifts in pools or grab rails in restaurant bathrooms. Individuals often bring suit against many businesses at the same time in cases prosecuted by the same lawyers. Florida lawmakers sought to curb these abuses during the last legislative session.

New law provides a shield

Florida Statutes § 553.5141 provides businesses exposed to potential liability under Title III a shield to defend themselves against public accommodation litigation. The statute provides that business owners can request that an expert (e.g., a contractor or an architect) examine their property to make sure it's in compliance with the requirements of the antidiscrimination laws. If it is, the business or property owner gets a certificate stating the property is in compliance with the law. The business can then file the certificate with the Florida Department of Business and Professional Regulation (DBPR) as a notice to others of its compliance.

If the expert determines that the property is not in compliance with the antidiscrimination laws, the property owner may then enter into a remediation plan approved by the expert that indicates it will update or modify the property to be in compliance with the ADA. The remediation plan may be filed with the DBPR and serve as a notice that the business is in compliance with the ADA and has entered into a plan to makes updates as appropriate.

That's important because the law provides that a court must consider the existence of a remediation plan when determining whether a public accommodation case was brought in good faith and whether the plaintiff should be awarded attorneys' fees. The fact that an attorney who filed a public accommodation case was on notice of the business's compliance efforts will undercut any claims of good faith and entitlement to attorneys' fees.

What does this mean for businesses?

It's important to note that the new law is a state law. While there is a provision prohibiting discrimination against individuals based on their disability in public accommodation in Florida's laws, and specifically the Florida Civil Rights Act, the new law doesn't prohibit an individual from filing suit under the ADA in federal court. Only time will tell how federal and state courts will view the filing of remediation plans and certificates of conformity, but the statute provides a good defense for businesses facing an unexpected disability discrimination lawsuit.

Property owners and businesses that are open to the public should consider consulting their attorneys, contractors, and other experts to determine whether filing a certificate of conformity or entering into a remediation plan is a wise course of action. Taking those steps may allow the business the breathing room to update its premises on its own timeline, not while it's staring down the barrel of a loaded public accommodation lawsuit aimed at it by a professional plaintiff and her lawyer.

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MANDATORY ARBITRATION

Did Florida appellate court just 'dis' an arbitration agreement?

by Andy Rodman
Stearns Weaver Miller Weissler
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Is it prudent for employers to require employees to sign mandatory arbitration agreements? There's no right or wrong answer in the continuing debate over such agreements, just a long list of pros and cons. Proponents of mandatory arbitration often cite factors like confidentiality, costs, and the desire to remove the risk of facing a "runaway jury." Conversely, opponents focus on factors like the potential for the arbitrator to "split the baby" in an effort to appease both sides, limited discovery (exchange of evidence), and the limited right to appeal an adverse decision.

Florida's 5th District Court of Appeal (DCA), which has jurisdiction over Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange, Osceola, Putnam, Seminole, St. Johns, Sumter, and Volusia counties, recently issued a decision that may make it more difficult for employers to enforce mandatory arbitration agreements, particularly if such agreements are contained in employment contracts. In light of the court's decision, one thing is clear—if you're going to adopt a mandatory arbitration policy, make sure it says exactly what you mean.

'I'll see you in court,' says disgruntled former employee

Amanda Saunders worked as a veterinarian for Pet Doc. Upon being hired, she signed an employment agreement that contained the following arbitration provision: "Any claim or controversy that arises out of or relates to this agreement, or the breach of it, shall be settled by arbitration in accordance with the rules of the American Arbitration Association [AAA]."

Things apparently didn't go very well for Saunders at Pet Doc. After various incidents of alleged sexual harassment by a coworker, she left Pet Doc because of what she considered to be a hostile work environment. Predictably, she then sued her former employer in circuit court for sex discrimination under an Osceola County ordinance and for negligent hiring, training, supervision, and retention. Notably, she did *not* sue for breach of the employment agreement that contained the arbitration provision.

'Uh-uh—we'll see you in arbitration,' replies former employer

Pet Doc attempted to compel arbitration of Saunders' claims pursuant to the arbitration provision in her employment agreement. The clinic argued that her claims "arose out of" the employment agreement because she wouldn't have been employed by Pet Doc (and therefore wouldn't have asserted claims against it) if she hadn't signed the employment agreement.

The circuit court agreed with Pet Doc and sent the case to arbitration. But, of course, that isn't the end of the story. In an effort to avoid arbitration, Saunders appealed.

Clarity is key

The 5th DCA reversed the circuit court's order, holding that the employment agreement didn't require arbitration of Saunders' claims. Specifically, the court of appeal held that the employment agreement did in fact create a legal relationship between the parties, but Saunders' claims "did not relate directly to the contract itself."

Saunders didn't sue Pet Doc for breach of the employment agreement, and the claims she asserted against her former employer didn't require interpretation of the employment agreement. Rather, she asserted a claim under a county ordinance as well as various common-law tort (personal injury) claims—none of which arose out of or was related to the employment agreement itself.

Saunders won, and avoided arbitration. Based on the language of the arbitration provision, the court of appeal sent the case back to the trial court. *Saunders v. St. Cloud 192 Pet Doc Hospital.*

Takeaway

While the impact of the 5th DCA's decision in *Saunders* remains unclear, it would be prudent for Florida employers that use mandatory arbitration agreements to ensure that the arbitration provision is sufficiently broad to cover any and all disputes related to or arising out of the employment relationship (and its termination), including claims for breach of contract, statutory claims, claims arising under local laws or ordinances, and common-law tort claims. That may give you a stronger argument that you and your employee expressly contemplated arbitration of all disputes, not merely disputes

that strictly arise out of the employment agreement containing the arbitration provision.

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WORKPLACE VIOLENCE

Pinning hopes for making workplaces less violent on better hiring

by Paula Santonocito

The recent incident in Orange County in which a former employee entered the workplace and fatally shot five people before turning the gun on himself has HR professionals again discussing how to prevent similar acts in their workplace. One issue that frequently comes up is the possible link between hiring and workplace violence. But does such a link exist?

Predicting violence

HR is well aware of the potential for violence in connection with employee terminations. Especially at large companies, procedures detailing how to sever an employment relationship with attention to workplace safety are generally in place.

Yet such procedures are typically focused on the termination and its immediate aftermath. The Orange County employee was terminated in April and returned to the workplace in June. Foreseeing future acts of violence may be next to impossible, even as HR and other management professionals sometimes think, in retrospect, there were signs.

What statistics show

Still, the number of workplace homicides makes HR and other management professionals search for a way to predict and prevent these acts. In 2015, the most recent year for which data are available, there were 417 workplace homicides, according to the U.S. Bureau of Labor Statistics (BLS). Of those, 354 were intentional shootings. Others involved stabbing, cutting, slashing, and piercing.

Were any of the deaths preventable? Maybe. But maybe not.

BLS data show assailants in workplace homicides differ greatly depending on the gender of the decedent. In 2015, approximately 43 percent of female decedents were fatally assaulted by a relative or domestic partner. The corresponding figure for male decedents was two percent. In other words, the conflict isn't always between an employer and an employee.

Looking for red flags

That makes things really complicated for employers looking for a link between hiring and workplace violence. Yes, you can and should conduct preemployment screening. Comprehensive background checks are a must. Similarly, pay attention to work history because past behavior is typically a predictor of future behavior.

You should also interview applicants with attention to their social skills. That includes being alert to body language, along with any negative vibe you may get from the job candidate. Answers to behavioral interview questions likewise provide insight into how the person reacts to criticism and how he manages his feelings. Needless to say, you're looking for red flags.

Following these guidelines will not prevent every violent workplace incident. But if they stop you from hiring one violent person, you may have saved a life.

Paula Santonocito, primary contributing editor for Recruiting Daily Advisor, is an experienced business journalist and author of more than 1,000 articles on a wide range of HR and career topics, with an emphasis on recruiting and hiring. Her articles have appeared in many publications and information outlets (including HR Dive, Human Resource Executive, The Wall Street Journal, The Florida Times-Union, and Monster.com). She is the former managing editor of Recruiting Trends and former U.S. features editor of Online Recruitment Magazine. Go to http://recruitingdailyadvisor.blr.com/ to access Recruiting Daily Advisor, where this guest column first appeared. ✤

EEOC ENFORCEMENT

Best practices for employers under EEOC's new SEP

The Equal Employment Opportunity Commission (EEOC) recently released its Strategic Enforcement Plan (SEP) for 2017 to 2021. The new plan replaces an earlier version issued in 2012, but it isn't a radical departure from the agency's previous agenda. Employers hoping for a more employer-friendly EEOC under the new administration may be disappointed by the 2017 SEP.

The plan makes clear that the agency will continue to aggressively investigate and litigate issues it sees as having the greatest impact on the development of the law or on promoting compliance across a large organization or industry. The EEOC expresses its intent to "focus on strategic impact" to be effective as a "national law enforcement agency," despite its increasingly limited funding and staffing.

The new plan focuses on developing substantive areas, including the "gig economy," "backlash" discrimination against Muslim and Middle Eastern employees, and discriminatory hiring and recruitment policies. It also makes clear that hot-button topics from recent years are likely here to stay. Employers

are strongly urged to develop practices now to help them avoid EEOC charges and withstand the agency's scrutiny.

EEOC takes on 'gig economy'

Today, employees are more likely than ever before to be temporary, part-time, leased, employed through a staffing agency, or employed by more than one employer. These days, more workers fall in that ill-defined gray zone between true independent contractors and employees. The "gig economy" is defined by the prevalence of short-term contracts and freelance work. In its SEP, the EEOC "adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on[-]demand economy."

Employers that use those types of employment arrangements must remember that "gig" workers can also allege discrimination or harassment. Don't cut corners on training on your antidiscrimination and antiharassment policies. Temporary employees may be viewed as easy targets for harassment, discriminatory treatment, or bullying. As the recent events at Uber have made clear, companies that grow quickly need to make sure they "grow up" by timely implementing clear and consistent policies and encouraging a culture of professionalism.

Discrimination against Muslim, Middle Eastern employees

Another focus area for the EEOC is "addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups." While it's somewhat unusual for the EEOC to announce that it will specifically focus on particular religious groups or nationalities, the plan explains that strategic protection is necessary because of "backlash against [those groups] from tragic events in the United States and abroad." It's unclear how enforcement of the issue will proceed under the new presidential administration.

Remember that you must provide employees reasonable accommodations for religious observances, including breaks for prayers. Appearance and dress code standards that arbitrarily ban or restrict beards, turbans, or head coverings likely will draw increased scrutiny from the EEOC. Backlash discrimination should be specifically covered in antidiscrimination training.

Barriers in recruitment and hiring

The EEOC restated its commitment to eliminating barriers in recruitment and hiring and added new details to its goal. Specifically, the EEOC will take aim at the lack of diversity in certain industries, including technology and police work, and the increasing use and impact of data-driven employment screening tools. Employers in targeted industries should continue to focus on recruiting a diverse workforce.

Employers that use online applications, algorithms, or similar data tools to screen applicants must be particularly careful. Those tools can provide a first look at applicants and assist hiring managers. However, you must know what parameters are used in the screenings and make sure you consider how the screenings could present barriers (even unintentionally) for groups such as older workers, minorities, women, and people with disabilities. For example, a screening tool that automatically eliminates applicants with a long gap in employment may unintentionally have a disparate impact on women who left the workforce to care for a young family. Date-of-birth inquiries could discriminate against older workers. Online application processes that aren't accessible to people with disabilities present an obvious problem.

The number of EEOC charges based on sexual orientation or gender identity increased by 34 percent in 2015.

Screening applicants by checking their social media profiles also can be risky. Social media profiles may reveal more than a potential employer should know about employees' religion or other protected characteristics.

Pregnancy discrimination, unequal pay, LGBT protections

The EEOC will continue to prioritize substantive issues such as rooting out pregnancy discrimination, preventing unequal pay, and protecting LGBT individuals from discrimination.

The EEOC has focused on accommodating employees' pregnancy-related limitations. Employers are reminded that pregnant employees should be treated the same as nonpregnant employees with a similar ability or inability to work. Remember, if a pregnant employee hasn't requested leave or a new role, you can't force her to take leave or change roles because you believe she shouldn't perform a certain job. At the same time, a pregnant employee who requests an accommodation should be treated the same as other employees who request accommodations.

The EEOC will continue to focus on equal pay. However, the SEP makes clear the agency won't focus on equal pay strictly as a gender issue: "The Commission will also focus on compensation systems and practices that discriminate based on any protected basis." The guidance reminds employers that pay differentials should be based on seniority, merit, or quantity or quality of production, not on protected characteristics.

Finally, as you likely know by now, the EEOC interprets the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 as forbidding employment discrimination based on gender identity and sexual orientation. The agency has enjoyed great success in enforcing its position. It has obtained more than $6 million in monetary relief for LGBT workers, required policy changes by employers, and convinced a growing number of courts to endorse its interpretation of Title VII.

The number of EEOC charges based on sexual orientation or gender identity increased by 34 percent in 2015. The agency is unlikely to slow down in its strategic enforcement in this area, and you would do well to include sexual orientation and gender identity as protected characteristics in your equal employment and antiharassment policies. The Human Rights Campaign has reported that the vast majority—89 percent—of Fortune 500 companies already prohibit discrimination based on sexual orientation, and two-thirds prohibit discrimination based on gender identity.

Bottom line

The EEOC expects employers to follow not only the laws it enforces but also its interpretations of those laws. Take the time to analyze your work environment regarding the issues in the agency's SEP. Consider revising your policies and practices to more closely align them with the EEOC's strategic positions. Your efforts will prove to be invaluable if your company faces an EEOC charge or investigation. ✤

EMPLOYEE BENEFITS

Sloppy benefits administration is a lawsuit waiting to happen

For many employers, benefits administration is something of a poor cousin to human resources. Often, the responsibility for managing benefits—especially health and welfare benefits—falls to a relatively inexperienced employee, frequently one in payroll who has no prior HR training or experience. And, very often, that person reports not to HR but to the CFO, COO, or a similar position.

Even if it's handled by a more experienced HR professional, benefits administration can get the short end of the stick. It gets far less attention in legal and HR circles than the "hotter" topics, such as harassment and discrimination, overtime requirements, or the Family and Medical Leave Act.

So with open enrollment approaching for employers with a calendar-year plan, we thought it might be a good time to look at some of the top mistakes we see in the arena of benefits administration.

Beware these pitfalls

Mistake #5: not having a plan document or summary plan description. Most employee benefits plans (other than government and church plans) are covered by the Employee Retirement Income Security Act (ERISA). Two of the key requirements for sponsors of ERISA plans are to (1) have a written plan document and (2) provide a summary plan description for employees explaining their benefits in simple terms. Many employers assume that insurance certificates provided by their carrier meet these requirements, but they don't.

Mistake #4: assuming you don't need to worry about the Health Insurance Portability and Accountability Act (HIPAA). If you sponsor a self-insured group health plan, then you are almost certainly subject to HIPAA, and you need to get HIPAA policies and procedures in place ASAP. But even fully insured employers have an obligation to safeguard employee health information they receive if it meets the definition of "protected health information" under HIPAA.

Mistake #3: not reading (or understanding) your contracts/administrative service agreements. For every employee benefit you offer, you need a clear understanding of what the carrier will do, what your broker will/can do, what you are required to do, and what you are farming out to a third-party administrator, such as a COBRA administrator. The contractual documents issued by various insurance companies can be called different things, but you need to look for whatever document lays out precisely which responsibilities are the carrier's and which ones are yours. Otherwise, there is a very good chance something will get missed, and that could harm not only your company but your employees as well.

Mistake #2: giving employees tax or legal advice. Of course you want to help your employees as much as possible, but there are some questions you just shouldn't answer. For example, whether an employee can (or should) continue contributing to a health savings account (HSA) after she turns 65 is an extremely complicated issue that the employee should discuss with a tax or legal adviser—NOT YOU! There are numerous other examples, such as the obligation to maintain health insurance when a married couple separates, whether a significant other qualifies for coverage as a common-law spouse, and so on. If you don't know the answer, ask yourself whom you would have to ask to find out. If it's an accountant or attorney, then that's who the employee should be talking to. Which leads us to . . .

Mistake #1: Pressuring your benefits broker for legal advice. While benefits brokers are very knowledgeable on a lot of aspects of insurance and related benefits, there are some questions you shouldn't expect them to answer. The main motivation we see for clients going to their brokers instead of a lawyer for advice is to

avoid legal fees. But that is shortsighted at best. Here are some of the risks:

- No matter how knowledgeable they are, brokers aren't attorneys and are unlikely to provide the depth of analysis you need on complex or nonstandard issues.
- Even if your broker has compliance attorneys on staff, they should be telling you up front that they aren't practicing law and can't provide you with legal advice.
- Communications with your broker aren't protected by the attorney-client privilege.
- Getting the right information and advice from an attorney can be quicker and cheaper in the long run than a lengthy and expensive lawsuit.

Reflection time

So, be honest. Do you see yourself committing any of the above mistakes? If so, congratulations! The hardest part is admitting you have a problem. ✤

REGULATIONS

WHD is pivoting on a dime on Obama-era regs

President Donald Trump's campaign was based in large part on the promise of reshaping government to be leaner, meaner, and more employer-friendly. One of his first actions was to sign an Executive Order instructing the various regulatory agencies to reduce regulatory burdens on businesses. While that directive is being met with varying degrees of speed and success by different federal agencies, one that seems to be going full speed ahead is the U.S. Department of Labor (DOL) and, more specifically, its Wage and Hour Division (WHD).

In the roughly three months since Secretary of Labor Alexander Acosta was confirmed by Congress, the WHD has placed a number of pending regulations on hold for further review and withdrawn or expressed the intent to withdraw regulations and guidance documents that were already in effect. Let's take a quick look at some of the more significant changes already made or being considered.

Minimum salary requirement

Perhaps the hottest HR topic of 2016 was the Obama administration's final regulation raising the minimum salary requirement for white-collar employees to be classified as exempt from $23,660 to $47,476 per year. The new requirement was originally scheduled to take effect on December 1, 2016, but was delayed by a court ruling at the last minute.

In late July 2017, the WHD announced that it would be seeking public comments about the minimum salary requirement, including the salary-level test, the exempt-duties test, the effect of bonuses and incentives on the salary test, and the salary test for highly compensated employees. One of the more interesting ideas apparently being considered is using a different minimum salary level for different types of white-collar exemptions.

The deadline to submit comments was September 25, 2017.

Tip-pool regulation

Under the Fair Labor Standards Act (FLSA), employers are allowed to count a portion of an employee's tips as wages in order to satisfy minimum wage requirements. In the past, different federal appeals courts have disagreed over the proper distribution of tips by an employer that pays its employees at least the full minimum wage and therefore doesn't need to use the tip credit to meet minimum wage requirements. These employers frequently establish a "tip pool," meaning they accumulate tips received by all tipped employees and distribute them evenly to some part of the employee population.

One question that many courts historically disagreed on was whether employers could distribute tip-pool proceeds among all employees, even those who don't customarily receive tips (such as kitchen and maintenance staff). In 2011, the WHD issued regulations that said no, they couldn't. Now, however, the WHD has begun the process of revoking the 2011 regulations and says it won't be enforcing them in the meantime.

Going forward, employers that use a tip pool will need to look to case law to determine their legal obligations, at least until the issue is resolved by the U.S. Supreme Court or a new regulation is issued.

Joint employment definition

During the Obama administration, the DOL issued an administrative interpretation (AI) that allowed two separate businesses to share legal responsibility for an employee if they both exercised at least "indirect

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control" over him. This was an expansion of the previous definition of joint employment, which required both companies to exercise direct control over the employee. This created problems for parent, subsidiary, and affiliated companies; employers that used staffing agencies or outsourced certain payroll or HR functions to a third party; and franchisers that relied on franchisees to set employees' work conditions.

The WHD has now withdrawn the AI, and it is no longer available on the DOL website. While the law hasn't technically changed, the existence of a joint-employment relationship will now be determined by using the previously applicable "direct control" standard rather than the Obama administration's broader "indirect control" test.

Independent contractor interpretation

Another Obama-era AI took the position that "most workers" are employees, not independent contractors, under the "economic realities" test used by courts. This was a part of the Obama DOL's enforcement initiative on misclassification of independent contractors. While it remains to be seen, withdrawal of the AI may be a sign that the DOL intends to back off of the intense focus it had been placing on independent contractor arrangements during the Obama administration.

Other DOL changes

The DOL has been busy outside the WHD as well, taking action on such items as fiduciary rules for Employee Retirement Income Security Act (ERISA) plans (delayed effective date), electronic reporting of injury and illness data to the Occupational Safety and Health Administration (OSHA) (delayed deadline), and disability claims procedures for ERISA plans (under review).

Bottom line

It looks like this is only the beginning when it comes to the regulatory environment for employers. It's hard to predict what will come next, but as always, we will be working to provide you with all the information you need to remain compliant in your workplace practices. ✤

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