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High Court Adopts Employee-Friendly Standard in Retaliation Lawsuits

Under federal law, an employer cannot retaliate against an employee who files a Title VII complaint of discrimination or participates in an investigation of a complaint. An employer violates the statute if it takes any "materially adverse" action against an employee who exercised his/her rights under the federal law, even if the employee's original complaint is found to have no merit. Now, in a victory for employees, the U.S. Supreme Court has broadened the definition of retaliation, creating additional exposure for business owners.

In *Burlington Northway & Sante Fe Railway v. White* (June 22, 2006), the Court held that an employer could be liable for retaliation under Title VII if it takes any action at all that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Previously, the lower courts had held that an employee must suffer some tangible job action – such as a demotion, loss in pay or a termination of employment. With this decision, business owners could face litigation over seemingly trivial things like moving an employee from a corner office to a cubicle, changing a work schedule, assigning an employee less "prestigious" duties, or a suspension without pay (even if the employer offers reinstatement with full back pay). As the Court noted, a schedule change might not matter to many employees, but "may matter enormously to a young mother with school age children."

Although an employee cannot sue based on "petty slights and minor annoyances," given the broad sweep of this new decision, many cases that would have been dismissed on summary judgment will now likely go before a jury. The Court's decision is a critical reminder that companies need to be extra vigilant in policing against retaliation and must think cautiously before making any workplace changes following a charge of discrimination.

New Restrictions On Using Employee Social Security Numbers

A new Maryland law, scheduled to go into effect on January 1, 2007, prohibits an employer from printing an employee's social security number on a paycheck, attachment to paycheck, direct deposit notice, or notice of credit to a debit card account. The law applies to all employers regardless of size.

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Can You Dock an Executive for Losing a Laptop?

Suppose one of your company's executives loses or damages his/her laptop or cell phone. Can you deduct the cost from the employee's wages, or require the employee to reimburse the business, without jeopardizing the employee's "exempt" status under the Fair Labor Standards Act ("FLSA")? According to a March 16, 2006 opinion letter of the Department of Labor ("DOL") (FLSA 2006-7), the answer is "no."

For an employee to be "exempt" under the FLSA, the employee must receive a salary, that is, a predetermined wage which is generally "not subject to reduction." The DOL takes the position that deductions from salary for the loss, damage or destruction of an employer's property due to an employee's neglect (even where the employee agrees to pay) would defeat the exemption because an employee has a right to a salary "free and clear" of deductions. Consequently, any deductions made to reimburse an employer for lost or damaged equipment would violate the salary basis rule and perhaps subject the company to liability for unpaid overtime.

With regard to nonexempt (e.g., rank-and-file) employees, an employer may require repayment through deductions from pay only if the employee has given express written authorization to the employer to make the deduction. The Maryland Wage Payment and Collection Act requires that such authorization take the form of a separate and distinct statement, signed by the employee, concerning only the deduction and nothing more. Even with a proper authorization, however, employers must still pay at least the federal minimum wage.

Timesheets for Executives?

A related FLSA question arises as to whether an employer can require executives or professionals to fill out daily or weekly time records without jeopardizing their exempt status. According to a DOL Opinion Letter (FLSA 2005-16), the FLSA does not limit an employer's ability to track an employee's working time through timesheets or computer logs. The employer raising the issue had a policy of requiring its salaried, exempt employees, such as in-house attorneys, to submit biweekly timesheets. The timesheets were used to track hours spent by employees working in various cost centers (which were used to prepare departmental budgets). In the Opinion Letter, the DOL reaffirmed its long-held policy that an employer does *not* endanger the exempt status of employees by requiring them to track their time on an hourly basis. Thus, employees who are exempt as bona fide executives, administrative or professional employees do not lose their exempt status when they are required by their employer to track their time on an hourly basis.

Workers' Compensation Law Applies to Undocumented Aliens

In a decision last year, Maryland's highest court held that the state's workers' compensation statute applies to undocumented aliens injured in the course of (illegal) employment. *See Design Kitchen and Baths v. Lagos*, 388 Md. 718 (2005). The court held that an undocumented alien who is injured in the course of employment is a "covered employee" under the Workers' Compensation Act and, thus, is entitled to receive workers' compensation benefits. Of course, under the federal Immigration Reform and Control Act, an employer may not knowingly hire or continue to hire a worker who is not authorized to work in the U.S. But, according to the Maryland court, a worker's undocumented status will not preclude him/her from an award of benefits.

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