

CUT AND PASTE POST APRIL, 2019

Like the FMLA Isn't Confusing Enough!

Scenario: An employee has accrued over 200 hours of sick leave and experiences an event that qualifies for unpaid leave under the Family Medical Leave Act (FMLA). In order to avoid employees exhausting their sick leave and then requesting 12 more weeks of FMLA leave, your company policy is to run paid leave concurrently with FMLA leave.

A recent [opinion letter](#) from the U.S. Department of Labor (DOL) took the position that, once an employer knows that a leave of absence qualifies under the Family and Medical Leave Act (FMLA), it must designate it as such, even if the employee wants to first exhaust paid-time-off benefits. So, your company policy is OK.

This letter conflicts with a 2014 decision by the 9th U.S. Circuit Court of Appeals, [Escriba v. Foster Poultry Farms Inc.](#), which held that an employee may decline to designate time off as FMLA leave, even if the reason for the leave qualifies for this time off. Montana is in the 9th Circuit, so your company policy would not be OK.

What does HR do given these conflicting directions? Melanie Pate, an attorney with Lewis Roca Rothgerber Christie in Phoenix, Arizona, addressed this question in an article on the SHRM website. In this article, Ms. Pate is quoted as saying "This is a somewhat open question, because DOL opinion letters do not carry the same authority as a law, DOL regulation or court ruling," However, Pate added that some employment lawyers consider the *Escriba* case to be an outlier, because it directly contradicts the FMLA regulations.

Click [here](#)
to read the
SHRM
article.

Professional Pointer: As an HR person in the 9th Circuit, you are bound by *Escriba*. The conflicting outcomes need resolved but, before that can happen, another Circuit Court has to issue a ruling that conflicts with the 9th Circuit, Congress has to pass a law that negates the 9th Circuit's ruling, or the DOL needs to address it in rules. Pending resolution, the safest bet is probably to follow the 9th Circuit decision, but this seems like an issue best discussed with a really good labor law attorney!

Montana Legislative Update

We're over $\frac{3}{4}$ of the way through the 2019 Legislative Session. See the last 2 pages of this *Cut N Paste* for a status check of HR bills of general interest. Stay tuned for a final wrap up in May's *Cut N Paste*.

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Comment Deadlines for U.S. Department of Labor Proposed Rulemaking

Proposed Rule	Comment Deadline	Links
White Collar Rule (See March, 2019 <i>Cut N Paste Post</i> News Flash)	May 21, 2019	https://www.dol.gov/whd/overtime2019/index.htm
Joint Employer Status	60 days to comment after the date of publication in the Federal Register.	https://www.dol.gov/whd/flsa/jointemployment2019/
Calculating Regular Rate of Pay	May 28, 2019	https://www.dol.gov/whd/overtime/regularrate2019.htm

EEO-1 Survey Update

According to the EEOC website, the following employers must file a Standard Form 100 (EEO-1):

- A. All private employers who are:
1. subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees EXCLUDING state and local governments, public primary and secondary school systems, institutions of higher education, American Indian or Alaska Native tribes and tax-exempt private membership clubs other than labor organizations;
 - OR
 2. subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.
- B. All federal contractors (private employers), who:
1. are not exempt as provided for by 41 CFR 60-1.5,
 2. have 50 or more employees, and
 - a. are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to \$50,000 or more; or
 - b. serve as a depository of Government funds in any amount, or
 - c. a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes.



No EEO-1 reports are filed from establishments in Puerto Rico, the Virgin Islands, or other American Protectorates.

Over the past few months, there has been a “Battle in the Beltway” regarding requiring employers to report pay data in addition to the usual EEO-1 statistics. (Governmental agencies have been reporting pay data for years on the EEO-4 form). This has delayed the timeline for filing the EEO-1 report beyond the usual March 30th deadline.

Where are we at?















- At least for now, employers filing an EEO-1 form will not be required to submit pay data (referred to as “Component B” data). It’s possible that EEO-1 employers will be required to report pay data by September 30, 2019, so it wouldn’t hurt to start collecting this data, just in case.
- The EEO-1 reporting website is open for business and **the EEO-1 report is due Friday, May 31, 2019.** EEO-1 Survey instructions may be found [here](#).

Montana Legislative Update

The following bills are still working their way through the process (the bills in **red** were not included in previous *Cut N Paste Posts*):

Bill Type – Number	Primary Sponsor	Status	Status Date	Short Title
HB 16	Dave Fern (D) HD 5	(S) Returned to House with Amendments	04/04/2019	Establish affordable housing loan program
HB 67	Thomas Winter (D) HD 96	Chapter Number Assigned	02/28/2019	Revise unemployment insurance benefits for members of the military
HB 295	Fred Anderson (R) HD 20	(S) Hearing -- (S) Finance and Claims	04/08/2019; 9:00 AM, Rm 317	Create grant program to encourage work-based learning
HB 323	Brad Tschida (R) HD 97	(H) Signed by Speaker	03/25/2019	Provide for free association for non-union public employees
HB 343	Bradley Hamlett (D) HD 23	(H) Signed by Speaker	04/01/2019	Extend retention of employee settlement documents (State employees only)
HB 543	Zach Brown (D) HD 63	(S) Scheduled for 3rd Reading	04/08/2019	Revise laws related to misdemeanor expungement
HB 631	Kimberly Dudik (D) HD 94	(S) Hearing -- (S) Business, Labor, and Economic Affairs	04/03/2019; 8:30 AM, Rm 422	Create public private partnership to help workers in targeted industries
HB 645	Katie Sullivan (D) HD 89	(S) Hearing -- (S) Judiciary	04/09/2019 9:00 AM, Rm 303	Establish the Montana Biometric Information Privacy Act.
HB 732	Derek J Harvey (D) HD 74	(S) Hearing -- (S) Business, Labor, and Economic Affairs	04/10/2019; 8:30 AM, Rm 422	Provide workers' compensation premium offset in certain learning programs
HB 751	Willis Curdy (D) HD 98	(S) Hearing -- (S) Business, Labor, and Economic Affairs	04/09/2019; 8:30 AM, Rm 422	Generally revise licensure of plumbers
HB 757	Derek J Harvey (D) HD 74	(S) Hearing -- (S) Business, Labor, and Economic Affairs	04/09/2019; 8:30 AM, Rm 422	Generally revise workers' compensation laws
SB 29	Fred Thomas (R) SD 44	(S) Transmitted to House	01/29/2019	Require workers' comp for all volunteer firefighters
SB 53	Jon C Sesso (D) SD 37	(H) Scheduled for 2nd Reading	04/08/2019	Revise meal reimbursement for public employees
SB 65	Keith Regier (R) SD 3	(S) Hearing -- (S) Judiciary	04/09/2019; 8:00 a.m. Rm 317	Generally revise drug and alcohol laws (raises question on interlocking devices for company vehicles)
SB 150	Bryce Bennett (D) SD 50	(S) Signed by President	04/05/2019	Revise ethics laws
SB 160	Nate McConnell (D) SD 48	(H) Scheduled for 3rd Reading	04/08/2019	Provide workers' compensation for presumptive diseases of firefighters
SB 218	Steve Fitzpatrick (R) SD 10	(H) Scheduled for 3rd Reading	04/08/2019	Exempt certain students from minimum wage and overtime compensation requirements
SB 266	Mark Blasdel (R) SD 4	(H) Hearing -- (H) Taxation	04/05/2019; 9:00 AM, Rm 152	Revise taxation to promote new business and economic activity
SB 295	Tom Richmond (R) SD 28	(S) Signed by President	04/03/2019	Generally revise public employee death benefits

Here are the bills of general HR interest that are probably dead (the bills in red were introduced and/or placed on the “Probably Dead” list after the March *Cut N Paste Post*):

HB 171  	David Bedey (R) HD 86	Create career and technical education and workforce development commission
HB 208  	Moffie Funk (D) HD 82	Establishing family medical leave insurance
HB 214  	Vince Ricci (R) HD 55	Revise laws relating to the State Fund
HB 216  	Kimberly Dudik (D) HD 94	Revise tax laws related to student loan reimbursements by employers
HB 313  	Andrea Olsen (D) HD 100	Allow worker to choose treating physician in workers' compensation cases
HB 345  	Mary Ann Dunwell (D) HD 84	Provide a stepped increase in minimum wage to a living wage
HB 465  	Kim Abbott (D) HD 83	Generally revise the Montana human rights act
HB 468  	Jade Bahr (D) HD 50	Involve certain state agencies in disability integrated employment programs
HB 547  	Laurie Bishop (D) HD 60	Revise laws related to employee disclosure of wage information
HB 565  	Casey Schreiner (D) HD 26	Create the Montana apprentice utilization and investment act
HB 588  	Mary Caferro (D) HD 81	Prohibit subminimum wages for workers with disabilities
HB 679  	Jessica Karjala (D) HD 48	Clarify workweek for overtime eligible employees
HB 772  	Thomas Winter (D) HD 96	Providing protections, clarifications regarding employment contracts
HJ 6  	Kimberly Dudik (D) HD 94	Study resolution on post incarceration employment opportunities
SB 15  	Charlie Boland (D) SD 12	Allow certain state funds to be used for affordable housing infrastructure
SB 18  	Margaret (Margie) MacDonald (D) SD 26	Establish workforce housing tax credits
SB 23  	Keith Regier (R) SD 3	Require accommodations to employer-mandated vaccinations to be uniformly offered
SB 78  	Mary McNally (D) SD 24	Require workers' comp insurers to provide notice to worker of claim closure
SB 54  	Fred Thomas (R) SD 44	Revise laws governing multiple employer welfare arrangements
SB 122  	Sue Malek (D) SD 46	Revise clean indoor air act to include vaping
SB 126  	Fred Thomas (R) SD 44	Revise workers' comp solvency guidelines for self-insured public entities
SB 168  	Brian Hoven (R) SD 13	Restrict certain initial employment applications regarding criminal history
SB 233  	Terry Gauthier (R) SD 40	Establish the small business retirement program
SB 272  	Steve Hinebauch (R) SD 18	Revise zone pay and dispatch cities for prevailing wages
SB 294  	Brian Hoven (R) SD 13	Revise laws related to employing individuals with criminal records
SB 303  	Margaret (Margie) MacDonald (D) SD 26	Revise laws related to national instant criminal background check system
SB 313  	Nate McConnell (D) SD 48	Generally revise enforcement of discrimination laws