CUT AND PASTE POST
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DOL Issues Guidance on PUMP Act for Nursing Workers

A little history…. On December 29, 2022, President Biden signed the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) into law.

- The PWFA applies to employers 15 or more employees and pregnant employees who can perform the necessary functions of their job, with or without accommodations.
- PUMP — PUMP applies to employers who are subject to the Fair Labor Standards Act, with no workforce limitation. However, employers with fewer than 50 employees are not subject to PUMP if compliance would impose an undue hardship on the business, based on that company's size, financial resources, and the nature and structure of the employer's business. Crewmembers of air carriers are also exempted.

On May 17, 2023, the United States Department of Labor (DOL) Wage & Hour Division issued a Field Assistance Bulletin providing guidance to its field staff regarding enforcement of the PUMP Act. The Bulletin:

- Defines "reasonable break time" under the PUMP Act;
- Clarifies the type of space an employer is required to provide for a nursing employee and notes that approaches may vary;
- Reminds employers of the act's posting requirements (this FLSA Poster that may be used to meet the FLSA's posting requirements); and
- Emphasizes the DOL's commitment to enforcing the PUMP Act.

Professional Pointer: Employers need to review their current policies for nursing employees to ensure they comply with the PUMP Act and related DOL guidance, as well as state and local laws.

DOT Publishes Final Rule for Oral Fluid Drug Testing

On May 2, 2023, the Federal Department of Transportation published its final rule on the use of oral fluid drug testing for covered transportation workers. The final rule amends 49 CFR Part 40, and is 58 pages long with about 40 pages of explanation. Among other things, the new rule:

- Gives employers the option to choose either a urine test or an oral fluid test for all DOT-regulated drug tests, including preemployment, random, reasonable suspicion, post-accident, follow-up, or return-to-duty tests.
- Prescribes the procedures for this new testing process, including who can collect the samples;
- Makes permanent the permissibility of remote substance abuse professional counseling; and

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- Prescribes the testing procedures for certain classes of employees.

The final rule was effective on June 1, 2023 and is a great tool for covered employers who are far from certified labs. However, this Rule is not without glitches: some of the major steps that need taken before an employer can offer DOT Oral Fluid testing include.

- A minimum of two laboratories need approved to process DOT Oral Fluid Samples (2 labs are necessary to allow for split sample testing.) As of July 3, 2023, HHS reported that it had no labs certified to conduct drug and specimen validity tests on oral fluid specimens.
- Collection devises need approved for DOT collection.
- Collector training processes and procedures need published. It's likely these will be similar to the training described in the 2019 "Mandatory Guidelines for Federal Workplace Drug Testing Programs", and specific to the testing instrument used.

It's also important to remember that the adoption of this final rule clears the way for oral fluid testing for Montana's non-CDL employees. Montana Code Annotated 39-2-207 reads, in part, as follows:

(1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer… Controlled substance and alcohol testing procedures for samples that are covered by 49 CFR, part 40, must conform to 49 CFR, part 40. …
(4) The collection, transport, and confirmation testing of … nonurine samples must be as stringent as the requirements of 49 CFR, part 40, in requiring split specimens as defined by the United States department of health and human services, requiring transport to a testing facility under the chain of custody, and requiring confirmation of all screened positive results using mass-spectrometry technology.

Professional Pointer: Until the DOT completes its work, employers with DOT transportation worker -compliant drug testing programs should consider whether the use of Oral Fluid drug testing is a good option. If so, they should update their DOT drug testing policies to incorporate the new procedures and to allow for these new tests

Resources:
DOT Summary of Changes
Final Rule
Montana Workforce Drug and Alcohol Testing Act

Independent Contractor Standard Changes (Again)

On June 13, 2023, the National Labor Relations Board (NLRB) once again altered the standard employers must use when determining whether a worker is an independent contractor. In *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023) (*Atlanta Opera*), the NLRB provided that, going forward, it will again look to a number of common-law factors in making that determination.

Where the Law Previously Stood

In 2014, in *FedEx Home Delivery*, 361 NLRB 610 (2014), the NLRB decided that its independent contractor analysis would be guided by traditional entrepreneurial driven common law factors and that no one factor would be determinative of the classification status.

In 2019, in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the NLRB shifted the criteria for independent contractor status by placing entrepreneurial opportunity at the center of the independent contractor analysis.

In its recent decision, the NLRB returned to the *FedEx* standard, which means the Board will now look to the following factors in making its assessment:*

1. How much control does the employer exercise over the details of the work?
2. Is the worker engaged in a distinct, from that of the employer, occupation or business?
3. Is the work typically done under the direction of the employer or by a specialist without supervision?
4. How much skill is required in the occupation?
5. Does the employer or the worker supply instrumentalities, tools, and the place of work?
6. How long did the person perform work for the employer?
7. What is the method of payment provided to the worker?
8. Is the work provided part of the employer's regular business?
9. Do the employer and the worker believe that they are creating an independent contractor relationship?
10. Does the worker have their own business?

* Though the NLRB provided these factors to consider when assessing whether a worker is an independent contractor or employee, this list is not exhaustive and when it comes to classifying workers, employers must look at the "big picture" and not put too much weight on any one factor.

This assessment is similar to that used by the IRS in determining whether a worker is an independent contractor.

Professional Pointer: Employers will want to review the use of "independent contractors" in their businesses and, where they will continue to be used, take steps to formalize the relationship and set out the terms, conditions, and expectations of the work.

Supreme Court finds Race Conscious Affirmative Action Programs Unconstitutional

Last month, the U.S. Supreme Court declared race conscious affirmative action policies in college and university admissions unconstitutional. Questions are now arising over whether the court's decision will affect diversity efforts in the workplace.

The recent decision is limited to higher education and doesn't directly affect employers governed by a different statute. But the ripple effects from the ruling could come quickly, starting with a decline in college graduates from underrepresented backgrounds, resulting in a decreased availability of highly qualified future workers and business leaders.

Going forward, it is likely that the next challenges will focus on workplaces with federally mandated Affirmative Action Plans and "self-imposed" Diversity/Equity/Inclusive workplace initiatives. These employers should continue to comply with the law, while thinking about how to make their existing programs able to withstand the challenges likely to come.

Read the decision: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina.*