EMPLOYMENT LAW UPDATE
SPRING 2014

PRIORITY Read

Beware the Ides of March: New OFCCP Rules on Veterans and Disabilities Took Effect March 24

By: Gary A. Chamberlin; chamberling@millerjohnson.com; 616.831.1709
and Kelley E. Stoppels; stoppelsk@millerjohnson.com; 616.831.1776

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enacted two new ground-breaking regulations implementing the Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). The final rules, effective March 24, require federal contractors and subcontractors to affirmatively recruit, hire, train, and promote qualified veterans and people with disabilities. The biggest change is newly required goals and benchmarks to measure federal contractors' progress in hiring individuals with disabilities and protected veterans.

Section 503 Rules Highlights:

Utilization goals. The final rule establishes a new nationwide 7 percent utilization goal for individuals with disabilities—by job group, or by total company for small employers. For the first time, contractors will be required to conduct an annual disability utilization analysis and assessment of problem areas and establish specific action-oriented programs and goals to address identified problems.

Invitation to self-identify. Contractors are required to invite applicants to self-identify as individuals with disabilities at both the pre-offer and post-offer phases of the application process. Contractors must also invite their employees to self-identify as individuals with disabilities in the *first year* and every five years after.

Data collection. Contractors are required to document and update annually several quantitative comparisons of the number of individuals with disabilities who apply for jobs and the number of individuals with disabilities who are hired.

Continued on next page.

MILLER JOHNSON
Attorneys and Counselors

New OFCCP Rules, *continued*

VEVRAA Regulations Highlights:

Hiring benchmarks. Under the final rule, contractors must establish annual hiring benchmarks for protected veterans. Contractors may choose a benchmark equal to the national percentage of veterans in the civilian labor force (currently 8 percent) or establish their own benchmarks using data from the Bureau of Labor Statistics and Veterans Employment and Training Service.

Invitation to self-identify. Contractors must invite applicants to self-identify as protected veterans at both the pre-offer and post-offer phases of the application process. Employees must also be invited to disclose their veteran status in the *first year* the rules go into effect and at 5-year intervals.

Data collection. Contractors are required to document and update annually several quantitative comparisons of the number of veterans who apply for jobs and the number of veterans who are hired.

Job listings. There are also significant changes for contractors who list job openings with state or local job service agencies (now called Employment Service Delivery Systems).

Penalties

Failing to implement an affirmative action plan (AAP) and these new obligations, when required, can be expensive. The OFCCP conducts periodic audits of covered contractors, including a desk audit, an on-site visit, and a further analysis off site. The audits often result in agency demands for significant back pay and hiring remedies. In addition, an audit can take two to three years from start to completion and requires an enormous amount of HR staff time and resources. The most stringent of all possible sanctions is that the OFCCP may disbar a contractor or subcontractor from receiving a federal contract or subcontract in the future.

We are available for on-site training of human resources and administrative professionals who are responsible for screening, tracking, and the employment hiring process. If you have questions, feel free to contact one of the authors or another member of Miller Johnson's Affirmative Action Plans and OFCCP Audits group.

OFCCP Veteran/Disability Compliance

Miller Johnson's Affirmative Action Plans and OFCCP Audits practice group has prepared a "OFCCP Veteran/Disability Compliance Kit" to use in implementing these radical changes. In addition to a complete explanation of the new requirements, it includes samples of the myriad types of notices and forms that must be integrated into the application process and tips on establishing an employment screening system and reconfiguring HR information systems. The kit contains sample language for all required notices to employees, labor organizations, and vendors/suppliers, and advice on using the new self-identification forms.

For more details, you may visit our website at www.millerjohnson.com or contact Gary Chamberlin at chamberling@millerjohnson.com.

Snow Storms, Wind Storms, and Power Outages: Oh My!

Make Sure You Have a Plan for Handling Weather Related Absences Before They Occur

By: Rebecca L. Strauss; straussr@millerjohnson.com; 269.226.2986

The winter of 2014 has taught all of us to expect the unexpected. The intensity and volume of winter storms took many of us by surprise, but plans for handling the absences caused by weather-related absences should be well-established at your organization. If you were caught off-guard when dealing with absences this winter, read on, and make sure your policies are updated and ready for weather emergencies this spring and all year long.

Can exempt employees' salaries be reduced for absences caused by weather or other similar circumstances?

Most employees who are exempt from the overtime requirements of the FLSA must be paid on a salary basis. Generally, this means that exempt employees must be paid for any week in which they work any part of the week. The law does provide for some permissible deductions, however. One is for "one or more full days for personal reasons, other than sickness or disability." The Department of Labor has taken the position that if your business is open and the employee chooses to take a full-day absence due to inclement weather, the absence can be considered a "personal reason," and you may deduct from the employee's salary for the *full-day* absence. Remember that this deduction is available in full-day increments only. If the exempt employee stays home in the morning and then arrives for the second half of the day, you may not deduct from the employee's salary for the partial-day absence. However, you can deduct partial-day absences from the employee's paid time off (PTO) bank.

If your business closes due to inclement weather or other disasters for less than a full week, you must pay the exempt salaried employees' full salary. Can you reduce the employees' PTO accrued time to cover the time off? Yes. The Department of Labor has stated that reducing PTO banks is not the equivalent of deducting wages from a salary. But be aware that even if the employee has no accrued leave in the leave bank, or has a negative balance, no deduction may be made to the employee's salary.

Won't this lead to abuse by exempt employees who may feel free to take partial-day absences because they know they will be paid for the full day?

The FLSA does not require you to let exempt employees come and go as they please. The FLSA prohibits most deductions from exempt salaries, but that is all it regulates—pay practices. You are free to set reasonable standards defining a full schedule and the number of absences permitted. The Department of Labor has said that "requiring an exempt employee to work a specified schedule" does not jeopardize the exempt status, and employers may require exempt employees to record and track hours. If an exempt employee is absent or tardy so often that it creates a performance concern, you are free to discipline the employee, through a warning, counseling, or other formal disciplinary action, but you must not deduct the pay for the absence or tardy unless it is a permissible deduction provided for in the FLSA.

What about non-exempt hourly employees?

Non-exempt hourly employees are paid for their hours worked. If they do not work because the business shuts down or because they are unable to make it to

Continued on next page.

Weather Related Absences, *continued*

work, they do not have to be paid. Consider allowing employees in this situation to have the choice of using accrued PTO to cover the absence to make up for lost income that week. Can it be required? Yes, but you may want to let the employee decide how to best manage their PTO bank.

Policies, procedures, and handbooks

By their very nature, weather and other emergency related absences are unplanned, and when they occur, your employees and your human resource team need a written resource to guide them. Make sure to review your policies, procedures, and handbooks to verify that they include information about how your organization will handle absences caused by weather-related emergencies.

If you have any questions about this article, you may contact the author. If you need assistance with your policies, procedures, and handbooks on this matter, please contact an attorney in Miller Johnson's Wage and Hour practice group.

Time Spent in Changing Clothes: An Exception to the FLSA

By: Aliyya Clement Rizley; rizleya@millerjohnson.com; 616.831.1712

The Fair Labor Standards Act (FLSA) generally requires that employers pay employees for all hours worked. In some circumstances, the time employees spend putting on or taking off required protective clothing before or after a shift may count as compensable "hours worked." However, in *Sandifer v. United States Steel Corp.*, the Supreme Court recently addressed an exception to the FLSA that allows parties to *collectively bargain* over whether "time spent in changing clothes … at the beginning or end of each workday" must be compensated. The Court held that time spent donning and doffing protective gear such as jackets, pants, hoods, hats, gloves, leggings, and boots could properly be excluded from compensable work time, consistent with the terms of the parties' collective bargaining agreement. The result is that employers may bargain with unions over the compensability of time spent donning and doffing protective gear, so long as the gear counts as "clothing" under the Court's definition.

If you have any questions, please feel free to contact your Miller Johnson Labor and Employment attorney.

Now the NLRB is Scrutinizing Non-Union Employers' Handbook Policies


By: Gregory P. Ripple; rippleg@millerjohnson.com; 616.831.1797
and Patrick M. Edsenga; edsengap@millerjohnson.com; 616.831.1713

Non-union employers and the National Labor Relations Board used to have an understanding. Although the National Labor Relations Act applies to all employers, the Board focused its efforts on enforcing the Act in union workplaces. But now the rapid decline of labor unions has forced the Board to expand its enforcement efforts to non-union employers in order to stay relevant.

Recently, the Board has focused on the employment handbooks used by non-union employers. The NLRB believes that employer policies may discourage employees from engaging in "concerted activity" in relation to their wages, hours, or other work conditions and may therefore violate the Act. An unfair labor practice charge challenging such a policy will not result in a fine or damages but the Board will seek to have it withdrawn or revised. Although the NLRB is not randomly auditing the policies of non-union employers, it often focuses on them during a union organizing campaign or an investigation into the termination of an employee. The Board may set aside an employer's election victory or force it to reinstate a terminated employee if it determines that an unlawful policy played a role in the outcome of the election or the termination decision.

Policies That Draw NLRB Scrutiny

Confidentiality. Be careful when drafting any policy that prohibits employees from discussing information about the company, coworkers, or the employee herself. If the policy broadly or generally prohibits employees from discussing these topics, the NLRB may find it unlawful because it restricts employees' ability to engage in concerted action.

Solicitation. Any policy that clearly prohibits solicitation on company premises will be considered unlawful by the NLRB. Your solicitation policies should only prohibit employees from soliciting during work time and in work areas.

Workplace investigations. The NLRB has found policies that provide a blanket prohibition on employee discussions of an ongoing internal investigation unlawful. You must have a legitimate reason for requiring confidentiality, case-by-case. Such reasons include protecting a witness from intimidation, preventing a cover-up, and ensuring that witness statements are not fabricated.

Employee conduct. If your handbook includes a blanket statement that employees must treat each other with "courtesy" or "respect," the NLRB may find the policy unlawful. From the Board's vantage point, the concerted actions of employees are not always courteous or respectful. Any policy addressing employee conduct should be more specific, for example "employees must be courteous to customers and suppliers."

Social media. The Board views social media as an important forum for employees to discuss workplace concerns, so your social media policy should not be overly broad and should be drafted carefully to avoid infringing on an employee's rights to engage in protected activity. Discipline under the policy should be applied on a case-by-case basis.

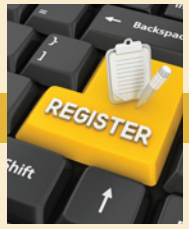
At-will employment provisions. Most employer handbooks include a provision that reminds employees their employment is at-will, and rightfully so. However, some go further and state that no one employer can alter or modify the employee's at-will status. The NLRB views this type of statement as untrue, overly broad, and likely to chill employees' participation in Section 7 activity. As a result, your handbook should make clear

Continued on next page.

NLRB and Handbook Policies, *continued*

that (only) certain employer representatives—perhaps the president and the vice president—can alter an employee's at-will status.

It can be difficult to determine which policies the NLRB is likely to challenge or find unlawful. However, you can reduce your risk by drafting policies with a specific purpose and avoiding broad prohibitions on employee actions without good reason. If you have any questions on this article or the NLRB in general, please contact the authors or an attorney in Miller Johnson's Labor and Employment group.



Upcoming Workshops

April
Background Checks/Criminal History

May
Record-Keeping
OSHA

June
Medical Leaves of Absence
Employee Handbooks

July
HIPAA

August
Job Descriptions
Health Care Reform

Save the Date for the Annual Seminar
October 14 in Kalamazoo
October 30 in Grand Rapids

For more details about these or for our complete schedule, you may visit our website at www.millerjohnson.com or contact Amy McCaffrey at 616.831.1886 or mccaffreya@millerjohnson.com.

Miller Johnson In the News

David Buday joined the Board of Directors for Lakeside for Children-Home of the Lakeside Academy. He will speak at Hospital Network Ventures' Annual Educational Retreat on June 6. His presentation will focus on "Changes in Employment Law That Matter To Health Care Executives."

David Buday, **Nate Plantinga** and **Sarah Willey** will speak at the Michigan Healthcare Human Resources Conference in East Lansing. On May 1, they will present on these topics: "Labor and Employment Law Developments—Staying Ahead of the Game" and "Unlocking the Hidden Potential of Performance Evaluations and Job Descriptions: What Lawyers Wish Every Human Resource Professional Knew."

Marcus Campbell presented "Health Care Provider Reimbursement Under Michigan's Workers' Compensation System" to the Michigan Alliance of Healthcare Access Professionals in the fall.

Gary Chamberlin will be doing a webinar "OFCCP's New Veteran/Disability Regulations Are Now in Effect. Are You Ready?" on April 17 for Meritas. He also did a webinar "Employment Record-Keeping and Management of Personnel Files: A lawyer's perspective" for Michigan Healthcare Human Resources Association (MHHRA) on March 18.

Keith Eastland spoke at the Associated Builders and Contractors (ABC) Michigan Legislative Conference in Lansing in March.

Bill Fallon spoke at Cornerstone University's Business Breakfast "Disciplining Employees: Not for the Faint of Heart" on March 20.

Jeff Fraser and **Tripp Vander Wal** presented the HR Legal Trends and Issues seminar for the Michigan Chamber of Commerce. It was held March 4 in Lansing and March 6 in Novi.

Peter Kok, **Jim Bruinsma** and **Nate Plantinga** did a Legal Update at the Human Resource Group (HRG) of West Michigan on March 20.

John Koryto was named chair of Miller Johnson's Employment and Labor section. He will also be facilitating "Inbound/Outbound Transfers of Global Executives," a Hot Legal Topic Roundtable Session at the Meritas Annual Meeting for US and Canadian firms. The 24th annual conference runs April 30 - May 2 in Boston.

Nate Plantinga was named vice chair of Miller Johnson's Employment and Labor section.

Rebecca Strauss is a contributing author for the Institute of Continuing Legal Education (ICLE). She is co-author of Chapter 12: Case Evaluation, Mediation, and Arbitration of the 2nd edition of Employment Litigation in Michigan. Rebecca was interviewed for the article "Job descriptions tell employment law story" in the *Grand Rapids Business Journal*. In January, she did a webinar for MHHRA on "Advanced Wage & Hour Issues Under the FLSA: Properly Counting Hours."

Tripp VanderWal presented on Health Care Reform at the South Central Human Resource Management Association meeting in Jackson on February 27.

Sarah Willey presented on March 27 on FMLA/ADA/WC for the South Central Human Resource Management Association in Jackson. She was recently elected to Family and Children Services' Board of Directors. She also volunteers as a coach for Girls on the Run in Kalamazoo.

MILLER JOHNSON
Attorneys and Counselors

GRAND RAPIDS
p 616.831.1700
f 616.831.1701

KALAMAZOO
p 269.226.2950
f 269.226.2951

www.millerjohnson.com

MANAGING MEMBER

Craig A. Mutch
616.831.1735
mutchc@millerjohnson.com

EMPLOYMENT LAW AND LITIGATION

David M. Buday
269.226.2952
budayd@millerjohnson.com

Marcus W. Campbell
616.831.1791
campbellm@millerjohnson.com

Andrew A. Cascini
616.831.1705
cascinia@millerjohnson.com

Gary A. Chamberlin
616.831.1709
chamberling@millerjohnson.com

Tony Comden
616.831.1757
comdent@millerjohnson.com

Keith E. Eastland
616.831.1749
eastlandk@millerjohnson.com

Patrick M. Edsenga
616.831.1713
edsengap@millerjohnson.com

William H. Fallon
616.831.1715
fallonw@millerjohnson.com

Jeffrey J. Fraser
616.831.1756
fraserj@millerjohnson.com

David J. Gass
616.831.1717
gassd@millerjohnson.com

Peter J. Kok
616.831.1724
kokp@millerjohnson.com

John F. Koryto
269.226.2979
korytoj@millerjohnson.com

Sara G. Lachman
616.831.1789
lachmans@millerjohnson.com

Craig H. Lubben
269.226.2958
lubbenc@millerjohnson.com

Jon G. March
616.831.1729
marchj@millerjohnson.com

Craig A. Mutch
616.831.1735
mutchc@millerjohnson.com

Peter H. Peterson
616.831.1741
petersonp@millerjohnson.com

Nathan D. Plantinga
616.831.1773
plantingan@millerjohnson.com

Gregory P. Ripple
616.831.1797
rippleg@millerjohnson.com

Aliyya A. Rizley
616.831.1712
rizleya@millerjohnson.com

Kelley E. Stoppels
616.831.1776
stoppelsk@millerjohnson.com

Rebecca L. Strauss
269.226.2986
straussr@millerjohnson.com

Michael E. Stroster
616.831.1780
strosterm@millerjohnson.com

Catherine A. Tracey
616.831.1792
traceyc@millerjohnson.com

Sarah K. Willey
269.226.2957
willeys@millerjohnson.com

Thomas R. Wurst
616.831.1775
wurstt@millerjohnson.com

EMPLOYEE BENEFITS

Mary V. Bauman
616.831.1704
baumanm@millerjohnson.com

Frank E. Berrodin
616.831.1769
berrodinf@millerjohnson.com

James C. Bruinsma
616.831.1708
bruinsmaj@millerjohnson.com

Kaley M. Connelly
616.831.1786
connellyk@millerjohnson.com

Tripp W. Vander Wal
616.831.1796
vanderwalt@millerjohnson.com

WORKERS COMPENSATION

Bert J. Fortuna, Jr.
616.831.1716
fortunab@millerjohnson.com

Miller Johnson is a member of Meritas, a global alliance of over 7,000 lawyers serving in more than 170 full-service law firms across more than 70 countries. For direct access to locally-based legal expertise worldwide, please visit the Meritas website at www.meritas.org.

U.S. News Media Group and Best Lawyers awarded Miller Johnson with top rankings for 25 practice areas in Grand Rapids and 8 in Kalamazoo as part of their 2014 "Best Law Firms" report. Achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise according to the report. Services ranked as Tier 1 include employee benefits, bankruptcy and creditor/debtor rights, corporate law, labor and employment, mergers and acquisitions, banking and finance, litigation, mediation, real estate, tax law, trusts and estates, and family law.