Among the many issues that often arise during a Department of Labor audit is whether an employer properly includes all compensation in the regular rate of pay when computing overtime. Of course, in order to compute overtime, we ordinarily take the regular rate of pay and multiply that amount by one-and-a-half to get the overtime rate. But what if during a week where more than 40 hours was worked, the employee has also received a shift differential, on-call pay, or holiday pay?

A helpful example comes from a recent case where the employer failed to include shift differentials -- enhanced hourly compensation for working generally undesirable shifts or days -- in the regular rate to dozens of employees over many years. The financial impact was significant, given that the employer was required to compute the regular rate by adding the many shift differentials paid over two years, recomputed the overtime calculations for the same period, and then pay the employees the difference between what they were paid previously, and the new overtime amount. Because the employer was also on the hook for liquidated damages and attorneys’ fees, this oversight turned into a significant financial event.

Unfortunately, as important as this issue is, the Fair Labor Standards Act does not clearly define what is included or excluded in the regular rate of pay. So over the years, it has been sorted out by various administrative regulations and court rulings. Here are some guidelines.

Generally, an employer needs to consider what is includable in the regular rate and what is excludable. Examples of includable payments are on-call pay, bonuses tied to production or effort, contest prizes, shift differentials, wage increases -- including retroactive increases, accrued sick leave bought by an employer, and certain stock option payments.

Excludable payments that need not be included in the regular rate are items such as discretionary bonuses, holiday pay, premium pay, idle time such as when weather conditions make it impossible to work, severance pay, show-up or reporting pay, and payments for the value of unused vacation time. Note that with excludable payments, what qualifies as a discretionary bonus can often be a tricky analysis. A discretionary bonus -- one that is not included in the regular rate -- is where the bonus is paid in recognition of services performed during a given period if (1) the fact that the payment will be made and the amount of the payment are determined at the sole discretion of the employer, and (2) the payment is not made based on any prior contract, agreement or promise causing the employee to expect the payment regularly. The best example of a discretionary bonus is a gift made at a holiday or other special occasion.

Non-discretionary bonuses -- that are included in the regular rate -- are payments that are announced to employees (say, in a handbook, compensation policy, or stated in a meeting) to induce them to work more steadily, rapidly, or efficiently. Non-discretionary bonuses also include retention, attendance, group production, and quality bonuses.

With this in mind, employers are encouraged to periodically review or audit their payroll practices and ensure that all appropriate items are included in the regular rate of pay when computing overtime payments. Inadvertent omissions are frequent and, unfortunately, can be expensive to remedy if not caught and remedied early.
The University of Texas Southwestern Medical Center v. Nassar: Retaliation Claims are Now More Employer Friendly

by C. Hunter Kitchens

Employee retaliation claims have for years concerned employers due to the likelihood of significant damages being awarded if liability is imposed. After all, juries are likely to severely punish an employer who is found to not only have discriminated against or harassed an employee, but also in some way retaliated against the victim for complaining about illegal conduct or engaging in some other protected activity. While this threat has certainly not disappeared, a recent Supreme Court ruling has, in some respects, evened the playing field for employers to defend retaliation claims.

For several years, Dr. Naiel Nassar was a member of the medical faculty at the University of Texas Southwestern (UTSW) Medical Center and also served as an assistant medical director at an affiliated clinic, Parkland Hospital. Many members of UTSW’s faculty serve as staff at Parkland Hospital.

In late 2005, Dr. Nassar sought to work at Parkland as a non-UTSW employee because, he claimed, his UTSW supervisor had discriminated against him and harassed him on account of her racial and cultural bias against Arabs and Muslims. Dr. Nassar claimed that his supervisor unfairly criticized his productivity and billing practices, and that she once remarked “Middle Easterners are lazy.” Ultimately Parkland offered Dr. Nassar a position as staff physician conditioned on him resigning from UTSW. He then resigned, stating to UTSW that his decision was based on his supervisor’s discriminatory and harassing conduct.

Before Dr. Nassar could begin at Parkland, he claims UTSW’s chair of internal medicine opposed Parkland’s hiring of him, claiming that UTSW had the right to fill open Parkland physician positions with UTSW faculty. Parkland then withdrew its offer to Dr. Nassar -- which led Dr. Nassar to file suit, claiming race discrimination and retaliation under Title VII. In sum, Dr. Nassar contended that he was forced out of his position at UTSW and blocked from obtaining a position at Parkland in retaliation for his complaining about his UTSW supervisor.

After trial and appeal, the issue before the Supreme Court related to how Dr. Nassar’s retaliation claim should be reviewed -- whether under a “motivating factor” test or, as argued by UTSW, he had to show “but for” causation. Said another way, the Court grappled with the issue of whether Dr. Nassar had to show he would not have been treated the same were it not for his complaints about his supervisor, or if he could win his retaliation claim by showing his complaints were merely a motivating factor. After a review of Title VII’s anti-retaliation provisions, the Court ruled in favor of UTSW on this issue, finding that Dr. Nassar had to meet the higher burden of showing that “but for”

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Enlarging the Workforce: The OFCCP Creates Benchmarks for Hiring Veterans and Individuals with Disabilities

by Bahar Azhdari

For the past forty years, the OFCCP has enforced the laws requiring federal contractors and subcontractors to affirmatively recruit, hire, train, and promote qualified veterans and people with disabilities. For the first time, however, the OFCCP has created metrics requiring contractors to establish annual hiring benchmarks and utilization goals for these same groups – effectively creating additional affirmative action obligations. Touting the new rules as creating additional affirmative action obligations, the OFCCP and the Department of Labor overlook the fact that the rules are, in reality, an added burden on federal contractors.

Federal contractors were already required to statistically track employment of women and minorities and to work towards equal employment opportunity for qualified veterans and individuals with disabilities. Now, based on new rules issued by the OFCCP, the approximately 200,000 contractors will be required to add extra columns to their tracking and recordkeeping requirements:

• the total number of job openings and jobs filled;

• the total number of job applicants for all jobs and the number of applicants known to be veterans or to have disabilities; and

• the total number of applicants hired and the total number of individuals with disabilities and veterans hired.

Specifically, the final rules under the Vietnam Era Veterans’ Readjustment Assistant Act requires contractors to establish hiring standards for veterans based on either “the current national percentage of veterans in the workforce” or their “own benchmark based on the best available data” and factors unique to their establishments. The current national percentage of veterans in the workforce, according to the OFCCP, is 8%. The rule increases accountability and record-keeping requirements, and it changes the way individuals are asked to self-identify. Prior to the new rules, contractors were required to offer applicants the opportunity to self-identify their veteran status post-offer. Under the new rules, contractors must offer candidates the opportunity to self-identify both before and after the

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Who is a “Supervisor”? And Who Cares?

By Brian Pierce

As part of its trio of employment cases this term, the Supreme Court took on the issue of who counts as a “supervisor” when an employee brings a harassment claim under Title VII. The Court rejected this argument and held that only those individuals with the authority to take tangible employment actions -- hire, fire, promote, demote, or discipline -- count as supervisors under Title VII.

Much of the mainstream media coverage of this decision framed the Court’s holding as a big win for employers, interpreting the decision to require an employer to show that she was discriminated against by a supervisor to state a claim under Title VII. But both the majority and the dissent make clear, however, that this is not true. Employees who are harassed by co-workers merely have a different (and heightened) burden of proof to succeed under Title VII: they must show that the employer negligently permitted the harassment.

Although employers are not completely relieved of liability for harassment by co-workers, the decision could still benefit employers by making it easier to obtain summary judgment. Vance’s and the EEOC’s definitions of a supervisor were extremely fact sensitive. They advocated that each plaintiff’s claim must be individually analyzed based on the alleged harasser’s direction and control over the employee’s daily activities. Because the inquiry is fact intensive, cases at the district court level were more likely to make it past summary judgment to get a jury’s decision on whether an individual was a supervisor. But now, if the facts are clear that the alleged harasser had the authority to hire, fire, promote, demote, or otherwise discipline the employee, it is unnecessary to ask the jury whether an alleged harasser should be considered a supervisor.

Going forward, employers should consider making clear which individuals have the power to make tangible employment decisions. Remember that the employer has a heightened burden in preventing harassment by supervisors than harassment by co-workers, so consider also limiting the decision-making power to as few people as reasonable under your particular business model. Doing so now may mean that future lawsuits can be resolved at summary judgment, rather than incurring the expenses -- both time and money -- involved in going to trial.

(retaliation claims continued from page 2)

his complaints, he would not have been forced to leave his UTSW position, and his position at Parkland would not have been blocked.

The Court’s analysis is rooted in the judicial and legislative treatment of Title VII’s discrimination and retaliation provisions. While Title VII was amended in 1991 to add the “motivating factor” approach to discrimination claims, Title VII’s separate retaliation provisions were not similarly amended. Accordingly, the Court concluded that retaliation claims must be proven according to traditional principles of but-for causation, not the heightened causation test stated in the anti-discrimination provisions of Title VII. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer. The Court remanded the case to the lower court for further proceedings.

While we fully expect employees to continue to assert retaliation claims, this case should be well received by employers. Indeed, Justice Kennedy noted that the heightened “but-for” standard of proof will assist in obtaining the dismissal of “dubious claims at the summary judgment stage.”

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offer phase in the application process. Contractors must also use specific language to push down the veteran requirements to any subcontractors, and they must use specific formats for listing job openings with local and state job services.

The final regulations under Section 503 of the Rehabilitation Act require contractors to establish a nationwide utilization goal of 7% for disabled individuals in each job group of their workforce and to conduct annual utilization analyses for such individuals. For contractors with less than 100 employees, the 7% goal is applied to the whole workforce as opposed to each job group. Currently, the unemployment rate for working-age individuals with disabilities is 15% – almost twice the rate for working-age individuals without disabilities. The rule also details specific actions contractors must take in the areas of recruitment, training, record keeping, and policy dissemination, including requiring contractors to invite current employees to self-identify as an individual with a disability every five years and to invite applicants to self-identify both before and after the offer phase in the application process. It is unclear how this self-identification requirement will apply in light of the EEOC’s regulations prohibiting disability-related inquiries.

The new rules, which go into effect 180 days after they are published in the Federal Register, appear to be all bark and no bite. The goals and benchmarks are “aspirational” only. If contractors do not meet the goals, they will not be subject to a fine, penalty, or any sort of sanction. Notwithstanding the lack of sanction, federal contractors and subcontractors should make preparations to begin implementing the new rules if they want to continue receiving the benefits of working with the federal government.
Waller Labor and Employment Practice Group

Bahar Azhdari
615.850.8848
bahar.azhdari@wallerlaw.com

Bob Boston
615.850.8953
bob.boston@wallerlaw.com

David Bujdos
615.850.8538
david.bujdos@wallerlaw.com

Waverly Crenshaw
615.850.8909
waverly.crenshaw@wallerlaw.com

Marcus Crider
615.850.8067
marcus.crider@wallerlaw.com

Marti Downey
615.850.8926
marti.downey@wallerlaw.com

Vinh Duong
615.850.8936
vinh.duong@wallerlaw.com

Jeb Gerth
615.850.8180
jeb.gerth@wallerlaw.com

Stan Graham
615.850.8935
stan.graham@wallerlaw.com

K. Coe Heard
615.850.8864
coe.heard@wallerlaw.com

Laurel Johnston
615.850.8551
laurel.johnston@wallerlaw.com

Aron Karabel
615.850.8771
aron.karabel@wallerlaw.com

C. Hunter Kitchens
615.850.8115
hunter.kitchens@wallerlaw.com

Bill McLaurin
615.850.8560
bill.mclaurin@wallerlaw.com

Andy Naylor
615.850.8578
andy.naylor@wallerlaw.com

Chen Ni
615.850.8854
chen.ni@wallerlaw.com

John Park
615.850.8767
john.park@wallerlaw.com

Mark Peters
615.850.8888
mark.peters@wallerlaw.com

Brian Pierce
615.850.8794
brian.pierce@wallerlaw.com

Max Smith
615.850.8707
max.smith@wallerlaw.com