# LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

## Special Labor and Employment Issue

This issue of the *Legal Advisor* is a special edition focusing entirely on Labor and Employment topics. The articles in this issue highlight challenges we often encounter and help clients maneuver in our labor and employment practice.

As we head into the second quarter of 2017, uncertainty about what is to come in the Trump Administration remains. Although Fair Pay and Safe Workplaces regulations have been revoked, the Fair Labor Standards Act (FLSA) salary basis test changes are still on hold and the Trump Administration has not addressed the federal contractor minimum wage or sick leave requirements. With potential budget cuts looming, the DOL will likely focus on enforcing laws where violations are prevalent and where there is no private right of action, including the Davis Bacon Act (DBA) and the Service Contract Act (SCA). We also expect employees frustrated by the EEOC and DOL to seek counsel and increasingly turn to wage and whistleblower complaints that can be filed directly in court. Additionally, states and localities are likely to continue to bypass the federal government and pass wage and sick leave laws themselves.

For federal contractors and multi-jurisdictional employers, having multiple wage and leave laws with which to comply is extremely challenging. In this edition, we bring you articles that will help you take proactive steps to avoid costly complaints and litigation as we move into the second quarter of 2017. Our team enjoyed putting this issue of *Legal Advisor* together and hope you find it engaging.

**Nichole Atallah**
Partner
Labor and Employment Group

### In This Issue



## What to Expect When You Are Expecting a Price Adjustment: The ABCs and CBAs of Increased Labor Rates

By Sarah Nash

The Agency accepted your bid and you have begun performance on the contract. You invested countless hours and dollars into providing the perfect, winning bid. But then the unthinkable happens, several months into performance, the DOL advises you that you have been underpaying workers in violation of the SCA. It turns out that the SCA was not properly incorporated into you initial contract, but the Government has now corrected the error through a contract modification. You now owe your employees backpay and will incur significant unanticipated costs to complete contract performance.

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Unfortunately, this situation is not uncommon. Whether a prevailing wage law is inadvertently omitted from a contract or the costs of complying with the prevailing wage law increase for some other reason, contractors can seek reimbursement from their contracting officer. This article addresses best practices in submitting price adjustment requests so that contractors can position themselves for prompt payment.

The SCA, along with the DBA, set minimum wage rates for federal contracts in the service and construction industries. Both acts require that prime contractors and subcontractors pay workers on such contracts not less than the wages and benefits included on the applicable wage determination, or in the case where workers have a collective bargaining agreement (CBA) in place, no less than the amount paid under the CBA by a predecessor contractor. However, as illustrated above, sometimes the appropriate prevailing wage law is left out of the solicitation or contract, the wrong wage determination is included, or the wage determination or CBA rates are increased. In any of these scenarios, the contract should be modified by the contracting officer to include the correct prevailing rates and, when that happens, the contractor is required to ensure that the construction or service employees working on the contract are paid the newly applicable rates.

Whatever the reason for the increase in labor rates, the important thing to remember is that the cost of these incidents need not necessarily be borne by the contractor. The price adjustment clauses of the Federal Acquisition Regulations (which are automatically incorporated into a contract alongside the prevailing wage laws) provide contractors working on firm-fixed price and labor-hour contracts with an avenue whereby they can request that the government "adjust" the price of a contract in order to make up for increased wages and benefits. If all requisite conditions are present, the government is contractually required to pay for the increased costs.

There are several important things to remember when leading up to and requesting a price adjustment:

1. Think carefully before including escalation due to labor costs when bidding on a DBA or SCA contract. Including escalation will prevent you from taking advantage of a price adjustments clause.

## SPECIAL FIRM ANNOUNCEMENT

We are pleased to announce that Peter Ford and Nichole Atallah have joined the firm's partnership. Peter and Nichole joined PilieroMazza within a few months of each other in 2011 and both have since become invaluable members of our team. Nichole leads our Labor and Employment Group, while Peter heads our Colorado office and practices in our Government Contracts, Small Business, and Business and Corporate Groups. Please join us in congratulating Peter and Nichole who will be outstanding additions to our partnership.

2. A price adjustment is based on the difference between what the contractor actually paid its employees before the change, and what the contractor is now required to pay employees as a result of the change. It is not based on the previous wage determination rates. Contractors need to keep this in mind when making increases to employee pay before the contract is modified to include new rates. If you provide increases earlier, you risk footing the bill.

3. A request for price adjustment must include supporting documentation (such as payroll data) showing the amounts that have already been paid and the amounts that will be paid to employees as a result of change in the contract.

4. A request for adjustment may include costs as a result of changes in social security, unemployment taxes, and workers' compensation insurance, but not changes to general and administrative costs or profit.

5. Price adjustments also include costs due to increased fringe benefit costs, such as health and welfare, vacation, holidays, and sick days. They do not, however, include costs that reimburse employees, such as for travel expenses, uniform allowances, or per diem rates – such costs are considered business expenses, not wages or fringe benefits.

Contractors should pay close attention to applicable wage determinations at every phase of a contract. This means being mindful of references in a solicitation to a prevailing wage law and whether there is an associated wage determination as well as whether any wage determination changes have been incorporated into the contract. When drafting a request for a price adjustment, make it as clear and concise as possible. Contracting officers are only human after all, and the easier for them

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to understand what is being asked of them, the easier it will be to process your request efficiently.

At the end of the day, it is the contractor's responsibility to request a price adjustment and a failure to do so – or for that matter, to do so but without success – does not eliminate the responsibility to properly compensate employees. This makes it critically important to pay close attention to how your price adjustment request is submitted to a contracting officer. Should your request be denied and you cannot resolve the government's concerns, you may need to file a claim to recover the funds owed to you.

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## Managing the Competing Obligations of the FMLA and ADA

By Tim Valley

An employee asks for over 12 weeks of leave for an illness under the Family and Medical Leave Act (FMLA)—does this also constitute a request for accommodation under the Americans with Disabilities Act (ADA)? The interplay between the ADA and the FMLA presents significant challenges for employers as the company grows. Employers with more than 15 employees must comply with the ADA, while employers with more than 50 employees must comply with both the ADA and the FMLA. Both require employers to provide work leave for various situations—a right which employers almost universally provide, regardless of size. However, the regulations of the two statutes do vary, despite a substantial overlap. Employers often find navigating these various regulations difficult, but they can take steps to ensure compliance with both.

Generally, the ADA requires employers to provide reasonable accommodations for employees with disabilities unless the accommodation would cause an undue hardship. The ADA defines disability broadly and the bar to establish undue hardship has gotten progressively higher. Leave, whether paid or unpaid, may constitute a reasonable accommodation. Similarly, under the FMLA, eligible employees have a right to take up to 12 weeks leave for their own serious health conditions or that of a family member. The FMLA provides for specific amounts of leave while the ADA requires reasonable accommodations without any established minimums for leave. Both statutes have specific regulations regarding how and when an employee can request leave and employers can obtain medical information. Sometimes both laws apply to an employee's leave request, or continued leave request, particularly if a serious health condition also constitutes a disability.

Employers generally run afoul of one or both of these laws when they maintain or apply workplace policies that are overly restrictive. Examples include leave policies that cap leave at a certain level or have strict parameters. Other challenging situations arise when employees returning to work require reassignment, further accommodations, or when employers require employees to be completely recovered before returning to work. Put simply, limiting leave to the minimum requirements of the FMLA could result in ADA violations. For example, an employee with a serious health condition has used all of their FMLA leave, but requests two more weeks of leave to recover. When considering whether to grant the request, employers must determine whether the employee's disability qualifies under the ADA and whether the requested accommodation of additional leave is reasonable. In other words, the ADA requires modifications of existing policies, even if they comply with the FMLA.

> "The FMLA provides for specific amounts of leave while the ADA requires reasonable accommodations without any established minimums for leave."

The following preventative measures will help you minimize liability in these types of situations.

**Communicate Effectively.** Employers should engage with employees throughout the process—from leave, during leave, and upon an employee's return. These conversations may include discussions about the appropriate reasonable accommodation, not just what the employee requests. Employers should also inform employees of their respective obligations.

Under the ADA, employers must engage in an interactive process to figure out how to reasonably accommodate a disability. Similar discussions happen with the FMLA.

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The employer should speak with the employee to figure out which statute applies. Employers should also consider leave requests for nonobvious disabilities and serious health conditions concerning mental health the same way they would consider something more obvious, like a surgery for a herniated disc. Notably, effective communication does not require extensive medical information. Indeed, requesting too much information could result in ADA and FMLA violations. Instead, employers should focus on the reasons the employee needs to take leave, when the leave will occur, and when the need will end.

**Get Informed.** Employers should learn about their obligations and their employees' rights under the ADA and the FMLA. This includes staying up to date on federal and state obligations. State laws are often more complex and arduous than their federal counterparts, but never less. Once informed, employers should educate managers, supervisors, and HR personnel. Employees often turn to these sources for information regarding their rights and this typically commences the applicable process under either statute.

**Update Handbooks and Policies.** Employers can use handbooks and policies to communicate with and inform all of their employees of the FMLA and ADA policies. Employers should update their handbooks to comply with federal and state laws regarding the ADA and the FMLA. Handbooks should contain information regarding when the statutes apply, employees' rights under both statutes, and points of contact for requests. Additionally, other leave and return to work policies should be exampled to ensure that they do not run afoul of either law.

**Get Organized.** Whether employees make a request under the ADA or the FMLA, employers will likely have to review sensitive medical information and various forms. Employers should establish procedures and secure spaces to store information to comply with regulatory obligations for both statutes. This could include appointing specific individuals to process and monitor leave requests.

With these strategies in mind, among others, you can approach these difficult situations with confidence. However, even the most prepared and knowledgeable employer will run into a situation implicating the ADA and FMLA that requires assistance. In those situations, having outside counsel review and provide advice will grant you additional peace of mind that you made the right call and will minimize the risk of a claim.

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## A $100 Mistake Can Become a $100,000 Judgment: Where Employers Go Wrong Under the Fair Labor Standards Act

By Matt Feinberg

In recent years, you may have seen or heard advertisements asking a generic question: "are you sure that your boss is paying you correctly?" The increased targeting of employers in the media means that companies, both large and small, are particularly susceptible to unpaid wage or overtime claims under the FLSA, the federal statute that establishes minimum wage and overtime payment obligations for companies. While the wage and overtime rules seem simple, they are actually quite complex and easy to violate. Plaintiffs' attorneys are often eager to file unpaid wage claims given that the FLSA includes a fee-shifting provision which allows attorneys to obtain large awards on even the most modest of claims. As a result, more and more FLSA-based lawsuits are being filed in state and federal courts. In fact, the number of FLSA-based suits filed in federal courts has increased annually since 2000, as has the average settlement cost in FLSA cases. The reality is that an employer's $100 mistake could turn into a $100,000 judgment.

So, where do employers go wrong? Although it is not an exhaustive list, the following five mistakes made by employers have contributed to a recent increase in FLSA litigation:

**Record Keeping and Record Retention:** The single greatest – and by far the most dangerous – pitfall for employers is incomplete record keeping. The employee-friendly nature of the FLSA means employers are penalized if they cannot adequately substantiate the basis for paying an employee a certain amount of money. As a result, even employers who are compliant with the wage payment requirements of the FLSA could face liability if their record-keeping is not up to snuff. It

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is, therefore, critical for employers to maintain detailed records of all employee regular and overtime hours worked; all amounts paid to employees; the source of all employee wages (whether it be from hourly wages, tips, bonuses, or commissions); the bases for any non-hourly pay (such as tips), including the method of calculation; and all deductions taken from employee pay. Without detailed records, employers could be facing an uphill battle in any FLSA-based litigation they encounter.

**Employee Misclassification:** Employee misclassification, a recent priority in the DOL's compliance and enforcement efforts, is another area where employers often fall victim in FLSA cases. Employers often misinterpret the rules for classifying an employee as exempt from overtime pay or as an independent contractor. Simply paying an employee a salary or issuing an IRS Form 1099 does not mean that the worker is classified correctly and, therefore, not due overtime pay or income tax withholding. On the contrary, it is the scope and nature of the tasks that the worker performs that determines how that worker should be classified. With an adverse ruling, misclassification can result in a large unpaid wage or overtime award from a court as well as the assessment of back taxes, penalties, and interest by the IRS.

> "The increased targeting of employers in the media means that companies, both large and small, are particularly susceptible to unpaid wage or overtime claims under the Fair Labor Standards Act."

**Off the Clock Time:** One of the trickiest wage payment problems for small- and medium-sized businesses is navigating proper wage payment practices for employees who have "off the clock" time as part of their regular workday or who are pressured not to record their overtime hours at all under an employment or government contract. Labor regulations require that employers compensate employees for their time spent performing the worker's "principle" activity or any function integral to that principle activity. The decision about whether a task is or is integral to a principle activity are made on a case-by-case basis. The determination is complicated by the fact that, sometimes, such tasks as changing into a work uniform; loading or unloading a vehicle; or carpooling to a job site, may be compensable hours where other times they may not. A thorough review of pre- and post-workday tasks is important to ensuring FLSA compliance.

**Tip Sharing:** A growing number of FLSA cases have arisen out of the food and beverage industry. Many of these cases relate to employee claims that a tip pool, where all servers or bartenders share in a joint "pool" of tips from the entire restaurant, was administered incorrectly. Whether a tip pool is properly administered depends on numerous factors, including the identity of the tip pool participants, the job duties of each pool participant, and the amount and type of deductions taken by the restaurant. When the employee-claimant is correct, or where an employer is unable to prove, through detailed records, that the tip pool was administered properly, the entire tip pool may be overturned, creating a large class of plaintiffs, each of whom holds a significant unpaid wage claim. Accordingly, the proper administration of a tip pool is critical to food and beverage companies avoiding FLSA complaints.

**Employer Response to Employee Complaints:** Perhaps the most avoidable mistake made by employers facing FLSA claims is a negative reaction to an employee's complaints about wage practices. The FLSA contains an anti-retaliation provision which establishes a distinct cause of action against an employer for any adverse employment action (such as termination, suspension, demotion, or ill-treatment) taken against an employee who has complained to a proper person about a potential regular or overtime wage payment problem. Employers must take employee complaints seriously and investigate employment practices where possible in order to protect themselves from potential FSLA complaints.

Ensuring wage payment compliance can be a complicated and often tedious challenge, sometimes with moving goalposts. As FLSA lawsuits increase, employers should be wary of possible pitfalls at all times so that they are in the best position to defend them when they arise. When it comes to the FLSA, an ounce of prevention is worth a pound of cure.

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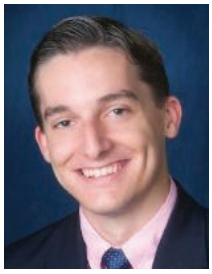
# GUEST COLUMN

## Six Steps Away from a Best Practices Employment Screening Program

By Ryan Haywood, Proforma Screening Solutions



Employment screening can seem like a straightforward task. Open an account, order the background check, and if it comes back clean you're done. Check the box and move on. What you soon discover are the nuances, legal issues, societal trends, and other considerations that complicate a seemingly simple task.

Over the past few years much has been written about several trends affecting companies' hiring practices:

- Criminal records and credit reports as a barrier to hiring.
- The great recession's continued impact on the economy, including the role of the long term unemployed.
- The macroeconomic trend of a global, talent-based economy.
- The ubiquitous use of employment screening creating a significant target for legislators, regulators, and the Plaintiff's bar.

As an employer, these trends and the attention surrounding your hiring and screening practices can leave you feeling overwhelmed. So much is written about what NOT to do. Not enough about what TO do. In this article we've compiled some top-recommended best practices for employment screening:

1. **Clearly Define the Purpose & Scope of Your Employment Screening Program:** Your background screening policy should explain the purpose of background screening and also define the scope of the program, or the types of positions that will be subject to background checks.
2. **Designate Responsibility & Authority for the Process:** Clearly designate who will be responsible for implementing and managing the employment screening program. Also define the types of employment decisions or "judgment calls" that can be made by each individual involved in administering the program.
3. **Describe the Legal Parameters & Guidelines:** Complex as it may be, a background screening policy must consider any federal, state, or local laws that affect how the organization will conduct screening. Often, these laws require specific background checks for certain positions. In creating your policy, you should specifically outline how your organization will adhere to Fair Credit Reporting Act requirements, EEOC guidelines, anti-discrimination laws, and any other related screening laws.
4. **Outline the Specific Process:** Having a good policy is one thing. A process to implement it is something else. Your process should detail step by step how the policy will be implemented. It should help both the subject of the report and the hiring manager understand what happens and when.
5. **Consistently apply the process across all applicants and employees:** In background screening the key to implementation is consistency. To avoid claims of discrimination, employers must never conduct background checks on a selective basis. Those applying or being retained for the same or similar positions must be subject to the same format of background check.
6. **Obtain consultation and services from an experienced screening provider:** Most companies simply do not have the in-house experience to manage the logistics around data collection and use for employment purposes. A background screening company can help you create the clarity, consistency, and congruency mentioned in the steps above and in the end, the cost of outsourcing this service is seldom more than it would cost to run the program using your internal staff.

Contributed by Ryan Haywood with Proforma Screening Solutions, a Lowers Risk Group company (http://www.proformascreening.com). Ryan can be reached via telephone at (540) 338-1885 or e-mail at rhaywood@proformascreening.com.

**For any questions or concerns about this issue, or to submit a guest article, please contact our editor, Jon Williams, at jwilliams@pilieromazza.com**

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