Weekly Wright Report (1/29/18)

EEOC RELEASES LATEST DATA

The EEOC has released its fiscal year 2017 enforcement and litigation data. The data shows that retaliation was the most frequently filed charge filed with the agency, followed by race and disability. The agency also received 6,696 sexual harassment charges and obtained $46.3 million in monetary benefits for victims of sexual harassment. Specifically, the charge numbers show the following breakdowns by bases alleged, in descending order:

- Retaliation: 41,097 (48.8 percent of all charges filed)
- Race: 28,528 (33.9 percent)
- Disability: 26,838 (31.9 percent)
- Sex: 25,605 (30.4 percent)
- Age: 18,376 (21.8 percent)
- National Origin: 8,299 (9.8 percent)
- Religion: 3,436 (4.1 percent)
- Color: 3,240 (3.8 percent)
- Equal Pay Act: 996 (1.2 percent)
- Genetic Information: 206 (.2 percent)

These percentages add up to more than 100 because some charges allege multiple bases.

THE LOSS OF THE DEDUCTION FOR EMPLOYEE TRANSIT SUBSIDIES

By Don Walsh

Effective January 1, 2018, the Tax Act eliminated the tax deduction benefit to employers who subsidize employees' transit and parking expenses. Employers can still provide parking or transit passes to employees, but the employer will no longer get to deduct the costs of that benefit. Employers who wish to avoid the loss of the tax deduction or the after-tax imposition of the parking cost on their employees will need to create a method to continue providing tax-deductible parking to employees. Pending modification of the Tax Act, this essentially would require employers to create some form of Qualified Plan which would allow the employee's wages to be increased and have the costs taken out pretax.

THE FALSE CLAIMS ACT – QUI TAM ACTIONS AN OVERVIEW

By Mike Stover

The federal civil False Claims Act ("FCA") was first enacted in 1863 to impose liability for presenting false claims to the government in order to prevent fraud by government contractors during the Civil War. 31 U.S.C. § 3729 et seq. The civil FCA originally allowed for qui tam or "whistleblower" actions by private citizens, but the FCA was later amended to bar such actions. In the late 1980's, Congress amended the FCA to once again permit qui tam actions.

The FCA's qui tam provisions allow a private individual to bring suit on behalf of the federal government. The individual, called a "relator," is granted certain rights under the FCA, but must also cooperate with the government. Any individual with knowledge of fraudulent activity against the government may file a claim as the plaintiff/relator, and the relator need not have been personally harmed by the defendant in order to bring a qui tam suit. The United States

Department of Justice ("DOJ") is given the chance to be substantially involved in a qui tam relator's suit from its outset. Qui tam plaintiffs are required to file their claims under seal and to leave them under seal for at least 60 days. Upon receiving notice of the complaint and a disclosure statement from the relator, the DOJ is required to investigate the relator's allegations of fraud. Upon completing its investigation, the DOJ may elect to: (1) intervene in the case, (2) decline to intervene or (3) move to dismiss the case.

Statistics indicate that the number of qui tam actions filed by private citizens has greatly increased in recent years and government-brought actions have steadily declined. In fiscal year 2016, more than $4.7 billion in settlements and judgments from civil FCA cases were recovered, of that amount $2.9 billion related to qui tam actions. For the period 2009 to 2016 the total recovery is $31.3 billion. Part of the reason for the explosion of qui tam suits is that if the action is successful the whistleblower can receive up to 30 percent of the recovery. Whistleblowers filed 702 qui tam suits in fiscal year 2016, that equates to 13.5 suits being filed every week. One of the largest qui tam cases in history involved swiss bank UBS, which at the time was the largest bank in the world. As a result of a whistleblower action, the U.S. recovered 13.7 billion in back taxes, civil fines and penalties and the relator received $104 million.

Of the $4.7 billion recovered in 2016, $2.5 billion came from the health care industry, including drug companies, medical device companies, hospitals, nursing homes, laboratories, and physicians. The next largest recoveries came from the financial industry in the wake of the housing and mortgage fraud crisis. Settlements and judgments in cases alleging false claims in connection with federally insured residential mortgages totaled nearly $1.7 billion in fiscal year 2016.

Relators are protected under the FCA. Section 3730(h) of the FCA, provides that any employee who is discharged, demoted, harassed, or otherwise discriminated against because of lawful acts by the employee in furtherance of an action under the FCA is entitled to all relief necessary to make the employee whole. Such relief may include: reinstatement, double back pay, and compensation for any special damages including litigation costs and reasonable attorneys' fees.

NEW PARTNERSHIP AUDIT RULES

By Don Walsh

Effective after December 31, 2017, the Federal income tax audit rules applicable to tax "partnerships" have been changed. These new rules apply to any entity classified as a "partnership" for Federal income purposes, including limited liability companies that have not made an election to be treated as something other than a partnership. Under prior law, the liability for audit adjustments were applied to those partners who were partners during the audit year in question. The new rules permit the IRS to assess and apply adjustments to the partnership for the year in which the adjustment is finally determined. This means that current partners might bear the economic burden of an assessment for an audit year in which they were not a member and for which they received no economic benefit. The new rules generally permit partnerships to push the economic burden onto the partners who were the partners during the audit year assuming there is an amendment to the Operating Agreement or

other governing document of the entity is generally required.

Under the new rules, the "partnership representative" replaces the "tax matters partner" under prior law and most operating agreements. A partnership representative is similar to the tax matters partner but has much broader powers and authority. The selection of the partnership representative has greater potential consequence than the selection of the tax matters partner.

CALCULATING FMLA LEAVE DURING HOLIDAYS AND OTHER BREAKS

By Laura Rubenstein

At times like holidays when many businesses close extra days, questions always arise regarding the calculation of FMLA leave during the holidays. Here is a quick refresher for 2018:

A. Calculating FMLA Leave During a Holiday Week

Let's use Thanksgiving Day as an example. If the employee gets Thanksgiving Day off as an employer-paid holiday and then takes the entire rest of work week off for an FMLA reason, the employer should count the entire workweek as one full week of FMLA leave used. The same reasoning would apply if the holiday occurred on any other day of the workweek and the employee was otherwise absent for the remaining work days that week. However, if the employee works any part of the workweek (e.g., he works Monday and takes the rest of the holiday week on FMLA leave), the employer cannot count the holiday as FMLA leave. In that case, the employer can count only Tuesday, Wednesday and Friday.

B. Calculating FMLA Leave During a Company Closure or School Break

If the employer shuts down operations for the entire week of the holiday or at the end of the year or if a school/university closes down for winter break, the regulations are clear: The days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. The employer cannot count the time against the employee's FMLA allotment, even if it is obvious that the employee would not have been able to perform the duties of the job during this break.

C. Calculating Intermittent FMLA Leave Where the Employee Works Part of a Holiday Week

What about calculating intermittent FMLA leave during a holiday week? If, for example, an employee works Monday of Thanksgiving week and is absent the rest of the week, there are only four workdays in this particular workweek, and he's missed Tuesday, Wednesday and Friday. So, he has used 3/4ths of a workweek of FMLA leave. Contrast this with a non-holiday week: If there was no holiday this particular week, and he worked only Monday, he would have used 4/5ths of workweek of FMLA leave.

Employers would be prudent to put clear FMLA leave policies with examples into their employee handbook as well as provide reminders to reduce the likelihood of confusion about how FMLA leave is calculated at holidays or other times of company closures. As with most things, proactivity is key. Confusion and disputes could be avoided with clarity upfront, in the form of written policies and procedures and appropriately timed reminders.