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FMLA

Recent FMLA Decision May Result In Leave Hoarding

By Jennifer R. Asbrock

Historically, most federal courts have recognized an employer's independent right to designate FMLA leave even against an employee's wishes, so long as the employer has reasonable verification that the leave was indeed taken for an FMLA-qualifying event. One of the first and leading cases on this subject was the Sixth Circuit case of *Wysong v. Dow Chem. Co.,* 503 F.3d 441, 448-50 (6th Cir. 2007), in which a plaintiff's FMLA claim for "involuntary leave" was rejected. The Sixth Circuit recognized that "[a]n involuntary-leave claim is really a type of interference claim" that may arise if "an employer forces an employee to take FMLA leave when the employee [for example] does not have a 'serious health condition' that precludes her from working." Under *Wysong*, an involuntary leave FMLA claim would ripen only when and if (1) the employee sought FMLA leave at a later date *and* (2) no FMLA leave was then available because it had been *wrongfully* designated to a past absence taken for a non-FMLA-qualifying purpose. The practical implication of *Wysong* and its progeny in other circuits is that employees have not been entitled to "hoard" FMLA leave for later use (and instead use only other forms of paid or unpaid leave) if their employer would prefer the "FMLA clock" to start ticking after an FMLA-qualifying event occurs.

But a recent Ninth Circuit decision may change the landscape of involuntary leave FMLA claims by allowing employees to decline use of their FMLA leave (and by prohibiting employers from designating FMLA leave against employees' wishes), even if an absence is admittedly taken for FMLA-qualifying events. *Escriba v. Foster Poultry Farms, Inc.,* 2014 U.S. App. LEXIS 3571 (9th Cir. Feb. 25, 2014). Notably, *Escriba* was decided by a panel that included a sitting judge from the Sixth Circuit who actually authored the opinion. The *Escriba* court appears to expand the Sixth Circuit's 2007 holding in *Wysong* beyond its original limits, so

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For more details on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

that any forced FMLA designation could be unlawful — even if the designation was for an FMLA-qualifying event. With the authoring judge being from the Sixth Circuit, the *Escriba* decision may signal a change in the law beyond that of the Ninth Circuit.

The *Escriba* court agreed with the employer, accepting the premise that the plaintiff could — and did — decline to use her available FMLA leave to preserve future FMLA time. Under these circumstances, the employer could lawfully terminate the plaintiff for failing to comply with the attendance policy when she took leave for an FMLA-qualifying purpose but specifically refused to take FMLA leave. While *Escriba* was ultimately favorable for the employer, the obvious implication is that if an employee has the power to decline use of FMLA leave, then that right may also preclude employers from designating FMLA leave against an employee's wishes, even if the leave is known to be for an FMLA-qualifying purpose.

The *Escriba* court focused on the FMLA regulations, which expressly state that the employer "should inquire further of the employee if it is necessary to have more information about *whether FMLA leave is being sought by the employee*." *See* 29 C.F.R. § 825.302(c) (emphasis added). The court explained that "[a]n employer's obligation to ascertain 'whether FMLA leave is being sought' strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA," and recognition of this declination right is necessary for employers to avoid "liability for forcing FMLA leave on the unwilling employee."

The bottom line is that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." The *Escriba* court applied this principle to find that "[i]f an employee does not wish to take [FMLA] leave but continues to be absent from work, then the employee must have a reason for the absence that is acceptable under the employer's policies, otherwise termination is justified." While this result may be favorable to employers in some circumstances, such as in the *Escriba* case, the flip side of the coin is that employers will face liability if they involuntarily

designate FMLA leave, a situation that can foster leave hoarding by employees who have large amounts of non-FMLA leave available to them.

Employers should carefully consider the implications of *Escriba* before involuntarily designating FMLA leave against an employee's wishes, as they might have done in the past. Employers should also review their non-FMLA leave policies to ensure that they can live with the amount of paid and unpaid leave that employees may have available, if they refuse to take their FMLA leave concurrently and instead choose to preserve it for later use as a last resort. Notably, the *Escriba* decision does *not* interfere with an employer's right to force employees to exhaust paid leave or workers' compensation leave concurrently with unpaid FMLA leave as permitted by 29 C.F.R. § 825.207 — but under *Escriba* such concurrent use of leave may only occur if employees choose to use FMLA leave to begin with. If the current contradictory holdings are eventually resolved along the lines of *Escriba*, when employees choose to take only the non-FMLA leave to which they are entitled, employers cannot force concurrent use of FMLA leave.

For more information, please contact Jennifer Asbrock or any member of our Labor & Employment group.

PPACA

Independent Contractor or Employee? Mistakes Now Result in an Increased Risk of Exposure

By Nancy M. Barnes

Companies have long faced exposure to penalties and fines for bringing on workers as independent contractors when the relationship is not clearly one that meets the requirements of the IRS test or the factors used by the Department of Labor (DOL) to identify independent contractors. For example, companies could rest assured that hiring an outside third party to complete a one-time project or provide short-term consulting services would almost surely meet the test requirements. But what about those instances where a former employee is brought in as an independent contractor on an extended basis? Or when an employee retires on Friday and comes back to work in a more limited role as an independent contractor on Monday, but sits at the same desk, performs the same functions and reports to the same supervisor?

Companies frequently consider entering into independent contractor relationships when they want to bring on workers for a short time to complete a limited project or assist in a transition phase, or when a former employee requests such an arrangement. In the past, the risks associated with this choice included penalties for failing to withhold payroll taxes, pay unemployment compensation insurance, provide workers' compensation coverage and pay Social Security contributions. In addition, such a decision could have an impact on employee benefit plans and eligibility for pension or retirement benefits. Those risks are not insubstantial, given that within the last two years alone, the DOL claims to have collected more than $18.2 million in back wages for more than 19,000 workers who were misclassified as independent contractors, amounting to a 97-percent increase in back wages collected over prior periods.

With the passage of the Patient Protection and Affordable Care Act (PPACA), however, employers face exponentially increased risks if they misclassify independent contractors and fail to account for them as employees. Moreover, these risks go far beyond failing to offer health coverage to those individual employees.

The implementation of PPACA adds another layer of potential liability for companies wishing to use independent contractors.

Why does the implementation of PPACA add another layer of potential liability for companies wishing to use independent contractors? Specifically, PPACA requires any applicable large employer (an employer with 50 or more full-time employee equivalents)[1] to offer health coverage or pay a penalty beginning in 2015. This is commonly referred to as the "pay-or-play mandate." Employers who hover around the 50-employee mark run a substantial risk of noncompliance if the reason they are below the 50-employee threshold is misclassification of independent contractors. The pay-or-play mandate first becomes effective in 2015 and requires applicable large employers to provide minimum essential coverage that is affordable and provides minimum value to at least 95 percent of their full-time employees and their dependents (70 percent of full-time employees and their dependents in 2015). Failure to do so can result in enormous penalties.

An employer who fails to offer minimum essential coverage to 95 percent of its full-time employees and their dependents (70 percent of its full-time employees and their dependents in 2015) is subject to a potential annual penalty in the amount of $2,000 times the number of full-time employees minus 30 (50 in 2015). The penalty amount is subject to inflation in future years.[2]

The pay or play mandate requires employers to carefully consider two questions: Does the possible addition of misclassified workers impact the total number of full-time employees of the company? Does the possible addition of the misclassified workers to the employee roster cause the company to offer health care coverage to a number of employees that falls below 95 percent (70 percent in 2015) of the total?

[1] Employers with fewer than 100 full-time employee equivalents are not subject to the PPACA requirements discussed herein until 2016.

[2] Penalties may also apply in the case of an employer who offers minimum essential coverage that is either unaffordable or fails to provide minimum value.

If the answer to these questions is yes, then the company should consider the risks associated with being subject to significant penalties for independent contractor misclassification under PPACA.

Obviously, proper classification is the key to avoiding these penalties, and employers can take steps proactively to put themselves in the best position to defend a designation of independent contractor should a question arise. Classification of a worker as either an employee or an independent contractor is based largely on whether the company has the right to direct and control the performance of services. Substantial case law has developed from cases involving employers, workers and the IRS.

The IRS focuses primarily on the "level of control" a company exercises when determining whether a worker is properly classified as an independent contractor. The 20 factors used to evaluate the right to control and the validity of independent contractor classifications include, among other things: training, degree of business integration, control of assistants, continuity and length of relationship, flexibility of schedule, ability to provide services to others, method of payment, provision of equipment, payment of expenses, termination provisions and the ability to realize a profit on the work. Of course, such an analysis is necessarily fact-intensive and will depend on the circumstances of each case. In addition, other federal agencies and the states have slightly different tests they may use to determine the proper classification of a worker.

The bottom line is that employers must now carefully evaluate the risks associated with the independent contractor designation and remain cognizant that potential exposure is not limited solely to fines or penalties related to the worker in question. Rather, if the designation puts the employer in a precarious position with respect to PPACA compliance, the better course may be to treat the worker as an employee and avoid possible penalties under PPACA. If a company decides to stick with an independent contractor designation, it should take steps to ensure the relationship meets most of, if not all, the factors considered under federal and applicable state laws.

For more information, please contact Nancy Barnes or any member of our Labor & Employment group.

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HR Update

Why Employers Should Prohibit and Address Workplace Bullying

By Heather M. Muzumdar & Megan S. Glowacki

Workplace bullying is not a new phenomemon. However, like the issue of bullying in schools, bullying at work has received more attention recently. A primary reason: social media. Because of social media, the act and effects of bullying can extend beyond the four walls of the office. Cyber bullying can take place when an employee posts on a blog, uses social media, or sends emails or text messages. Such off-duty, sometimes anonymous cyber bullying can permeate a workplace and create legal risks, though it is much more challenging for employers to address.

At the same time, employees who are victimized by bullying at work are lashing out against employers in social media, online forums and blogs. This also has the business community's attention, as defamation and reputational damage becomes easier to accomplish and harder to combat.

Currently, federal and state discrimination laws prohibit bullying or otherwise harassing an employee because of the individual's race, gender, disability, age, religion or other characteristic protected by federal or state law. However, not unlike the public demands by victims, parents and schools for efforts, support and tools to prevent and stop school bullying, employees and action groups are demanding a similar response from employers and legislators.

Over the last few years, nearly half of all states have at least considered whether to pass some sort of workplace bullying legislation. Legislation is pending in several states and generally seeks to prohibit workplace bullying even in the absence of a protected characteristic. The difficulty, of course, is designing a law that is workable, that employers can reasonably police and enforce, and that won't result in flooding the court system with every employee disagreement.

Yet, even if no state or federal workplace bullying law is passed, there is ample reason for employers to be proactive and address workplace bullying right now.

What Is Workplace Bullying?

The first step to addressing bullying is recognizing it. Although we know it exists, defining workplace bullying can be difficult. Workplace bullying can include repeated verbal abuse (such as being shouted or sworn at), unwarranted criticism, work sabotage (intentionally interfering with the ability to get work done resulting in performance deficiencies), exclusion or isolation, and other repeated or unreasonable conduct or behavior, whether verbal or nonverbal, that is threatening, humiliating or intimidating and creates a risk to health and safety. Often it is the repetitive nature of the behavior that crosses the line into bullying.

In a 2012 CareerBuilder survey, 35 percent of workers reported that they have felt bullied at work, and 16 percent of those workers reported suffering health-related problems as a result. While 17 percent of workers reportedly quit their job to escape bullying, the survey revealed that the vast majority of workers suffer in silence. Employees not only report feeling bullied by their immediate supervisor, but also by co-workers, customers and higher management.

Why Employers Should Act

Employers should take steps to stop workplace bullying for several business and legal reasons.

- **Bullying may be illegal harassment or retaliation**. Employers know that bullying an employee because of a legally protected characteristic, or in response to whistleblower or ethical complaints, is illegal. It is difficult to prevent and correct potential illegal harassment and retaliation claims while turning a blind eye to the very type of conduct that can be construed as harassment or retaliation under certain circumstances. Disgruntled employees can allege illegal conduct even in the absence of a protected class or activity. Employers are then left to defend these claims by arguing the supervisor is disrespectful to many employees, regardless of protected characteristics, an argument that is difficult to prove and is not readily accepted by juries. An employer can spend substantial amounts of time, energy and legal costs responding to demand letters, charges of

discrimination and defending litigation, even where no viable legal claim exists.

- **Bullying can be a sign of or lead to workplace violence.** Even if not illegal, workplace bullying should be prohibited because of the potential link to workplace violence. A bully's verbal and nonverbal conduct can be a sign of aggression and disregard for the well-being of others. A bully's unchecked behavior may escalate into physical violence. On the flip side, victims of repeated bullying in the workplace could retaliate with violence in the workplace. In either case, the employer may face claims of negligent hiring or retention, and injuries would be reportable under federal and state worker safety laws.
- **Effects on an employee's health.** It is well documented that bullying can take a toll on a person's emotional and physical health, and can have lasting effects. Bullied employees can suffer not only from mental health conditions, such as anxiety, depression and sleep disorders, but also physical manifestations of emotional stress. These physical and mental conditions can result in increased risks of accidents and injuries, including at the workplace.
- **Effects on employer productivity and costs.** Bullying can also affect an employer's bottom line. Many employers recognize that a toxic work environment results in loss of productivity and high turnover, and in turn, added recruiting and training costs. In cases of workplace bullying, costs and productivity are affected by increased workers' compensation claims, increased health insurance claims and requests for medical leaves of absence or workplace accommodation under federal or state laws.
- **Company reputational harm.** More now than ever, employees are taking to the Internet to voice concern over the their treatment and that of their co-workers. Depending on the circumstances, the employee's conduct may be legally protected under the National Labor Relations Act (even if the employer is not unionized), and there is little the employer can do. Other times, the conduct is not protected, yet employers still suffer from reputational harm even if they are eventually successful in having the post taken down. The best way to prevent an employee from broadcasting their employment concerns is providing them multiple ways to report their concerns internally and effectively and promptly investigating and responding to their concerns, and demanding a culture of respect.

How to Address Workplace Bullying

Here are some quick tips to prevent and address bullying in your workplace:

- **Add anti-bullying policy language**. Clearly communicate the company's anti-bullying stance, include information on how to report bullying and underscore that employees will not be retaliated against for reporting bullying. Policies should be closely reviewed and not overly broad. Employers must be careful to avoid prohibiting employees from engaging in certain communications protected under the National Labor Relations Act.
- **Training**. As with workplace harassment, simply having an anti-bullying policy isn't enough. Employers should conduct training with employees and supervisors to discuss and provide examples of appropriate workplace behavior and to reinforce expectations.
- **Implement reporting and investigation mechanisms**. Effective anti-bullying policies require implementation. An employer's investigation of allegations of bullying should be prompt, comprehensive and documented.
- **Enforcement.** The terms of an anti-bullying policy must be enforced. Employees who offend the anti-bullying policy should be subject to discipline, up to and including termination. When applicable, managers and supervisors should be held accountable for their failure to intervene or monitor their subordinates.

In our experience, promoting a culture of mutual respect and dignity in the workplace can go a long way toward improving morale and productivity of employees and minimizing the number and risk of legal claims.

For more information, please contact Heather Muzumdar, Megan Glowacki or any member of our Labor & Employment group.

Immigration

BIS Settlement Highlights Need for Export Control Compliance When Hiring Foreign Nationals

By James A. Losey & Sarah C. Flannery

On February 24, 2014 the U.S. Department of Commerce's Bureau of Industry and Security (BIS) announced a $115,000 civil settlement with Intevac, Inc. of Santa Clara, California for violations of the Export Administration Regulations (EAR), including allowing certain non-U.S. national employees access to controlled technology. The settlement emphasizes the need for companies to understand and comply with export rules when hiring non-U.S. nationals.

The *Intevac* Case

Over a five-month period in 2007, Intevac gave a Russian national employed at its Santa Clara facility access to EAR-controlled drawings and blueprints without first obtaining an export license, violating the EAR's so-called "deemed export" rule. Intevac later applied for an export license from BIS, but while the license application was pending, Intevac continued to allow the Russian national access to the controlled technology on the company's servers. In its penalty assessment, BIS considered Intevac's knowledge of these subsequent releases to be an aggravating factor. In addition, in 2010 Intevac allowed a Chinese national working at its subsidiary in Shenzhen, China to access EAR-controlled technology stored on an Intevac server in Santa Clara.

Deemed Export Rules

Under the EAR, the release of controlled technology to a foreign national in the United States is a "deemed export" to that foreign national's home country. The deemed export violates the EAR if an export license would have been required to actually export the technology to the foreign national's home country. This rule applies even if the foreign national is an employee of a U.S. company working in the United States under a valid employment visa.

U.S. Immigration Certification Requirements

On February 20, 2011 deemed export certification requirements took effect for the U.S. Citizenship & Immigration Service (USCIS) Form I-129 application. Form I-129, used by companies sponsoring foreign national employees for most employment-based visas, requires a "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States." The form now requires employers to certify they have reviewed the export control requirements applicable to that individual and determined whether a deemed export license is necessary. If a license is required, the employer must certify that it will restrict the individual's access to the controlled technology until the license is obtained. Falsely certifying that the foreign national will not have access to controlled technology on Form I-129 is a separate violation from any underlying deemed export violation.

Lessons Learned

While the EAR's deemed export rules have been around for years, the *Intevac* settlement shows that BIS still takes these rules seriously and will actively enforce them. This, coupled with the USCIS certification mandate, makes it imperative to assess potential export control requirements when applying for a work visa on behalf of a foreign national employee. The company's legal department or corporate compliance officer should be consulted and a determination made as to

whether an export license is required, and/or whether internal information access restrictions are needed.

Moreover, the *Intevac* case emphasizes the general need for companies with controlled technical information – whether stored on servers or in physical files – to have compliance procedures in place to mitigate the risk of deemed or actual export violations. Such information – which may be controlled under the EAR, the International Traffic in Arms Regulations (ITAR) or U.S. Department of Defense regulations – should be stored in clearly labeled files to which access can be selectively controlled. An access record should be kept and audits conducted periodically.

Finally, because many employees might find such procedures to be onerous – or, at the least, a diversion from their core duties – it is vital that all affected personnel receive training that explains the procedures, emphasizes the importance of compliance and notes the implications of noncompliance.

For more information, please contact Jim Losey, Sarah Flannery or any member of our Labor & Employment group.

Workers' Compensation

Abandonment of Workforce Precludes TTD Compensation

By Philip B. Cochran

In *State ex. rel., Roxbury v. Industrial Commission* (2014), 138 Ohio St. 3d 91, the Supreme Court of Ohio has reiterated that in the context of a workers' compensation claim, where an injured worker in Ohio voluntarily abandons the workforce for reasons unrelated to his or her industrial injury, the injured worker is not entitled to receive temporary total disability compensation (TTD). TTD is designed to compensate an injured worker for his or her lost wages resulting from an industrial injury. In this case, the Supreme Court of Ohio expanded the voluntary abandonment defense to include a fact analysis as to whether the injured worker's acts and omissions establish that he or she abandoned the labor market, thus precluding TTD.

Here, Ms. Roxbury (claimant) sustained a compensable injury in 2004. Her claim was allowed for lumbar sprain and related low back injuries. She did not work after the date of injury. She initially received TTD for her low back injuries until July 10, 2006, when the Industrial Commission held that her physical injuries had reached maximum medical improvement and denied further TTD. The claimant appealed the termination of TTD but later withdrew her appeal.

In 2007, the claimant filed a motion to add a psychological condition (dysthymic disorder) to her claim. In this motion, she also requested an award of TTD as a result of the psychological condition. A hearing officer allowed the condition of dysthymic disorder but disallowed her request for TTD, relying upon a medical report that opined the injured worker's depression (dysthymic disorder) was mild and not temporarily totally disabling.

The claimant later filed an application for permanent and total disability, alleging that her allowed conditions rendered her incapable of sustained remunerative employment. The Industrial Commission denied her application, finding that none of her allowed conditions rendered her unable to work.

The Supreme Court of Ohio has reiterated that in the context of a workers' compensation claim, an injured worker in Ohio who voluntarily abandons the workforce for reasons unrelated to his or her industrial injury is not entitled to receive temporary total disability compensation.

The claimant later filed another request for psychological TTD supported by a new report from a different physician. The Industrial Commission denied TTD, relying upon a report by a psychologist that opined the claimant's dysthymic disorder was not disabling. The claimant filed a request for a writ of mandamus with the Tenth District Court of Appeals. The Court of Appeals denied the writ, holding that the Industrial Commission properly denied TTD, finding that the claimant voluntarily abandoned the workforce. The claimant appealed this decision to the Supreme Court of Ohio.

The Supreme Court affirmed the denial of TTD. It held that voluntary abandonment is a question of fact for the Industrial Commission and that the Commission properly found the facts here established the claimant voluntarily abandoned the workforce. First, the claimant had acknowledged she had not worked since the date of injury in 2004. Her physical injuries (lumbar spine) were determined to have reached maximum medical improvement in July 2006, resulting in the termination of TTD. Second, considering all allowed conditions, the Industrial Commission denied TTD, finding the claimant capable of sedentary work regarding her physical conditions and capable of any work regarding her psychological conditions.

The Supreme Court of Ohio also relied upon the fact that the Industrial Commission denied TTD regarding the injured worker's psychological condition three times, finding that her allowed dysthymic disorder was not a disabling medical condition. Last, the court noted the claimant neither sought other work nor attempted vocational rehabilitation from the 2004 date of injury forward. Considering all of the facts above, the court held that the Industrial Commission properly concluded the claimant voluntarily abandoned the workforce for reasons other than her allowed industrial injuries. Her lack of wages, therefore, was not the result of her psychological condition, and the writ of mandamus was properly denied.

The voluntary abandonment defense continues to evolve in the context of a workers' compensation claim. The defense is established when an injured worker is terminated for violation of a known written work rule. Voluntary abandonment also applies when an injured worker voluntarily retires, provided the retirement is not injury-induced. In *Roxbury*, the Supreme Court of Ohio held that the voluntary abandonment defense also applies when facts and circumstances establish that the injured worker abandoned the entire labor market for reasons unrelated to his or her work-related injury.

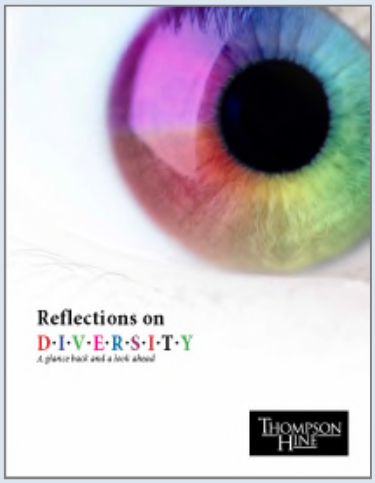
For more information, please contact Philip Cochran or any member of our Labor & Employment group.

Reflections on Diversity

A diversity lens acts as a filter affecting the way people view the world and interact with others. It is through this lens we see beyond our own perspectives to embrace different ideas and diverse voices.

"At Thompson Hine, we understand diversity is more than statistical data. It is, in fact, crucial to our ability to conduct business in today's increasingly interconnected world. Embracing an inclusive environment is simply the smart thing to do." – Robyn Minter Smyers, Partner and Chair, Diversity & Inclusion Initiative

Access this year's report here.



OSHA

OSHA Revises Standards for Electric Power Generation, Transmission & Distribution

By M. Scott Young

More than 40 years after the Occupational Safety and Health Administration (OSHA) last issued standards for electric power generation, transmission and distribution, revisions will go into effect on July 10, 2014. Some of the compliance requirements relating to the revised standards involving fall protection, minimum approach distances and arc-flash protection go into effect on April 1, 2015. OSHA last issued rules for electric power generation, transmission and distribution in 1972.

Employers who operate or maintain electric power generation, transmission and distribution lines or equipment will be impacted by these revised standards. Also, employers with employees who perform construction work on electric power transmission or distribution lines or equipment will be subject to these revised standards. Construction work covered by these new standards includes the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion and improvement of existing transmission and distribution lines and equipment. "State Plan" states must have job safety and health standards that are "at least as effective as" the new federal OSHA standards, and have the option to promulgate more stringent standards.

OSHA issued these new standards because it found that its previously enacted standards from 1972 were out of date. These revisions to OSHA's 40-year-old standards for electric power line work are intended to make them more consistent with the corresponding general industry standards and also revise the construction and general industry requirements. General industry and construction standards for electrical protective equipment are also revised under these new rules. The revisions to the construction standards make them more consistent with the general industry standards, with the purpose of enhancing worker safety.

OSHA estimates that its revised standards will result in an estimated monetized benefit of $179 million annually, with net benefits equal to about $130 million annually. In aggregate, OSHA estimates that the annualized cost for employers to comply with these new standards will be approximately $47 million to $50 million. OSHA estimates that the new standards will save nearly 20 lives and prevent 118 serious injuries annually.

Depending on the circumstance, the revised standards require one of three types of fall protection:

- **Personal fall arrest system.** A system used to arrest an employee in a fall from a working level.
- **Fall restraint system.** A fall protection system that prevents the user from falling any distance.
- **Work-positioning equipment.** A body belt or body harness system rigged to allow an employee to be supported on an elevated vertical surface, such as a utility pole or tower leg, and work with both hands free while leaning.

The new standards also require employers to protect an employee working at heights of more than 1.2 meters (4 feet) on a pole, tower or similar structure with appropriate fall protection, as specified in the revised standards.

In addition, the revised standards include minimum approach distance requirements that employees must maintain from energy-exposed energized arcs. Employers are required to base those distances upon formulas set forth

by the revised standards or follow default minimum approach distance tables contained in the revised standards.

Furthermore, the revised standards provide requirements relating to what an employer must do to protect employees from hazards posed by flames and electric arcs. These requirements include:

- Assessing the workplace to identify employees exposed to hazards from flames or electric arcs;
- Making reasonable estimates of the incident heat energy of any electric-arc hazard to which an employee would be exposed;
- Ensuring that employees exposed to hazards from flames or electric arcs do not wear clothing that could melt onto their skin or that could ignite and continue to burn when exposed to flames or the estimated heat energy;
- Ensuring that the outer layer of clothing worn by an employee is flame-resistant under certain conditions; and
- Subject to certain exceptions, ensuring that employees exposed to hazards from electric arcs wear protective clothing and other protective equipment with an arc rating greater than or equal to the estimated heat energy.

For more information on these new OSHA standards or other matters involving OSHA, please contact Scott Young or any member of our Labor & Employment group.