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A New Frontier: Accommodating Employees' Temporary Disabilities

By Aaron W. Tandy, Miami

More and more employers are confronting—and seeking guidance in responding to—requests from employees for accommodations to address temporary health conditions. Recent appellate decisions, a broad interpretation by the Equal Employment Opportunity Commission ("EEOC") of its regulations, and an expansive view by the Job Accommodation Network ("JAN")[1] of the requirement to provide such accommodations, signal that employers faced with such a request from employees who have suffered a temporary injury or illness should not reject it out of hand but should find a way to allow the employee to keep working during the duration of the transitory recovery period. Employers who take a more draconian approach run the risk of failing to accommodate an actual disability, albeit a temporary one,[2] or finding themselves facing a retaliation claim, even if the employee is adjudged not to have a disability requiring the accommodation sought.[3]

In 2008, Congress amended the Americans with Disabilities Act ("ADA") in response to a

See "A New Frontier," page 7

Wage Theft Ordinances: There's a New Sheriff in Town

By Christopher Shulman, Tampa

Most employment counsel, whether employee-side or management-side, are aware of the surge in claims under the Fair Labor Standards Act ("FLSA") in Florida over the past several years. Traditionally, these claims were either investigated and conciliated/litigated by the U.S. Department of Labor's Wage and Hour Division ("WHD") or by private counsel bringing suit in state or federal courts (or in private arbitration). Increasingly, however, there is a new sheriff in town: local governments that adopt so-called "wage theft" ordinances.

According to a study by Florida International University in 2012, WHD investigated and recovered money for Florida employees in over 9,100 complaints of wage theft between September 2008 and January 2011.[1] The study indicated that, all told, more than $28,000,000 was recovered (approximately $3,103, on average, per employee).[2] However, as you likely know, WHD investigates complaints only within the Department's jurisdiction (by dollar volume of sales or otherwise). To address this gap regarding FLSA and other wage non-payment claims, several Florida counties—and at

See "Wage Theft Ordinances," page 10

least one municipality—have enacted ordinances creating new administrative fora in which to address such claims.[3]

While the particulars of the ordinances differ, they all share a broad definition of wage theft.[4] For example, the Miami-Dade ordinance defines wage theft as the "fail[ure] to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation." The ordinance also provides that, whether pay is "daily, hourly, or by piece[,] in all cases [such wages] shall be equal to no less than the highest applicable rate established by operation of any federal, state or local law."[5] The City of St. Petersburg, whose ordinance is specifically patterned after Miami-Dade's, goes even further and expressly imports FLSA standards into the mix:

> *Wage rate* shall mean any form of monetary compensation which the employee agreed to accept in exchange for performing work for the employer, whether a salary, daily or hourly wage, or by piece, *and whether exempt or non-exempt from the Fair Labor Standards Act and other federal, state or local overtime laws.* In all cases the wage rate shall be no less than the highest applicable rate established by operation of any federal, state or local law.[6]

The ordinances also share a very low dollar threshold. Most provide that any complaint must allege wage theft of at least $60.00; Alachua County's ordinance appears to have no minimum requirement.

The ordinances provide a two-step process for addressing complaints of wage theft. They all start with an offer of mediation or a conciliation conference among the employee, the employer, and either (a) a mediator, usually a certified circuit civil or county mediator, or (b) another agency official, who serves as the conciliation "neutral," if conciliation is the process articulated by ordinance. If a deal is reached, that settles the matter. If no deal is reached (or if mediation/conciliation is rejected by the employer), the matter goes before a hearing examiner.[7] Some ordinances expressly provide for pre-hearing discovery while others do not.

The hearing examiner conducts a quasi-judicial hearing and makes a finding as to whether the employer has failed to pay the employee all that the employee is due (i.e., whether the employer committed wage theft). At the hearing, the employee bears the initial burden of proving that he or she earned wages within the relevant geographical limits and that the wages were not timely paid. The cases can include claims for work off the clock (with minimum wage or overtime implications), failure to pay overtime, improper deductions from pay, improper tip-pooling arrangements (e.g., where the employer included within the pool persons who are not customarily tipped or where the employer makes improper deductions from such tips), as well as a claim that an employer simply did not meet payroll. Most of the ordinances apply the FLSA's evidentiary consequences when an employer has not kept required time records; some import that "burden of imprecision" into the proceeding, regardless of whether the case involves an FLSA claim.

If there is a finding of wage theft, then the hearing examiner enters an order requiring the employer to pay the unpaid wages, plus double that amount as liquidated damages, plus attorneys' fees and costs, plus reimbursement

to the agency for its administrative costs incurred in convening the matter. Note that none of these ordinances requires proof of intent on the part of the employer and, for some, there is no requirement that the employee show a "willful" violation as a prerequisite for the liquidated damages. At least one, the St. Petersburg ordinance, mandates an award of liquidated damages: "Upon a finding by a hearing officer that an employer failed to pay wages, or a portion of wages, such violation shall entitle an employee to receive back wages in addition to liquidated damages and reasonable costs and attorney's fees from that employer as stated in the hearing officer's order."[8]

The hearing examiner's order is then enforceable in a court of competent jurisdiction. None of the ordinances appears to provide for appellate review or standards.[9] All, however, make it a violation to retaliate against someone for filing a complaint or otherwise participating in the wage theft administrative process.

So, if you represent employees or employers in connection with work performed within these local jurisdictions, you not only need to be mindful of WHD and the courts, but you should also remember the new sheriff in town: wage theft ordinances.

Christopher Shulman *is an attorney, mediator and arbitrator based out of Tampa who has conducted 2500+ mediations and 1400+ arbitrations (or similar decision-making processes)—a majority of which involved labor or employment issues. He is also a City of St. Petersburg wage theft ordinance hearing examiner.*

C. SHULMAN

Endnotes

1 *See Wage Theft: How Millions of Dollars are Stolen from Florida's Workforce*, https://risep.fiu.edu/research-publications/workers-rights-econ-justice/wage-theft/2012/wage-theft-how-millions-of-dollars-are-stolen-from-floridas-workforce.

2 *Id*. These cases were found in the following industries: accommodation and food services (18.4%); retail trade (9.9%); construction (9.6%); healthcare and social assistances (9.1%); administrative support & waste management & remediation services (8.9%); and manufacturing (5%); with other industries comprising the balance of the claims.

3 Miami-Dade County was the first to enact its ordinance, Miami-Dade County, Fla. Ordinances, ch. 22, §§ 22-1 – 22-8 (2010). As of December 2015, similar wage theft ordinances were enacted elsewhere: Broward County (Broward County, Fla. Ordinances, ch. 20½, §§ 20½-1 – 20½-9 (2013)); Alachua County (Alachua County, Fla. Ordinances, ch. 66, §§ 66.01 – 66.11 (2014)); City of St. Petersburg (St. Petersburg, Fla. Ordinances, ch. 15, §§ 15.40 – 15.46 (April 16, 2015)); Hillsborough County (Hillsborough County, Fla. Ordinance 15-25 (as yet uncodified; adopted October 21, 2015)); and, most recently, Pinellas County (Pinellas County, Fla. Ordinances, ch. 70, §§ 70-301 – 70-310 (November 10, 2015)).

4 Palm Beach County did not enact an ordinance but instead adopted a resolution funding the Legal Aid Society of Palm Beach County's Wage Recovery Program, which provides counsel to persons who claim their employers have not paid them wages owed. *See* http://www.legalaidpbc.org/press_wagetheft.php.

5 Miami-Dade County, Fla. Ordinances, ch. 22, §§ 22-2, 22-3.

6 St. Petersburg, Fla. Ordinances, ch. 15, § 15.41 (emphasis added).

7 Or "special magistrate" or "hearing officer." The nomenclature varies among ordinances. This article employs the term "hearing examiner," which is used in at least three of the ordinances.

8 St. Petersburg, Fla. Ordinances, ch. 15, § 15.42; *see also supra* § 15.41 ("Liquidated Damages").

9 Presumably, such review would lie in the appropriate state court, on petition for a writ of certiorari, with the writ's notoriously difficult burden of proof ("departure from the essential requirements of law causing irreparable harm that cannot be remedied on appeal").