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Briefly

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2020 TENNESSEE WORKERS' COMPENSATION LEGISLATIVE UPDATE

Fredrick R. Baker

"For the most part, these changes tend to favor the injured worker."

The Tennessee General Assembly passed two workers' compensation bills in 2020. Both implement important statutory changes. For the most part, these changes tend to favor the injured worker.

I. Tennessee Public Chapter 731 (Senate Bill 2190)

The more significant of the two workers' compensation bills for 2020 was Senate Bill 2190. This bill was signed by Governor Bill Lee on June 22, 2020.

A. Period of Compensation for Permanent Partial Disability

Permanent partial disability (PPD) under the current workers' compensation law is typically addressed at two separate points in the claim. The original award of PPD is calculated simply by multiplying the impairment rating by 450 weeks, and then multiplying the result by the employee's compensation rate. The result is a sum of money to which the employee is entitled regardless of his or her work status. However, the original award of PPD also creates a period of compensation, which is the amount of time represented by the original award. For instance, if the employee has an impairment rating of two percent (2%) to the body as a whole, then the period of compensation is nine (9) weeks – because two percent (2%) of 450 weeks is nine (9) weeks.

The period of compensation will begin on the date of maximum medical improvement and will expire at a specified date in the future depending on the number of weeks involved. On that date, the employee's work status is examined, and if the employee is not back at work at the same or greater wages for any employer, then the employee may be entitled to additional PPD based on the application of certain enhancement factors for work status, age, education, and unemployment rate. This additional PPD is referred to as the "resulting award" of PPD.

That two-part system looks fine on paper, but in practice, the system breaks down a bit when the employee has a small impairment rating. For instance, if the employee has an impairment rating of one percent (1%), then the period of compensation is only four and a half (4 1/2) weeks. In many cases, that period will have come and gone before the impairment rating is even known, let alone allowing enough time to settle the original award and then subsequently examine the employee's entitlement to a resulting award of PPD.

In Senate Bill 2190, the General Assembly has addressed this issue by adding an additional amount of time after which the employee's entitlement to a resulting award of PPD will be determined. That is, under the new law, the employee's entitlement to a resulting award of PPD will be determined as of the date the period of compensation expires, *or 180 days after the employee reaches maximum medical improvement, whichever is later.* The effect of this change will be to allow greater opportunity for employees with smaller impairment ratings to seek additional PPD if they do not return to work within 180 days of reaching maximum medical improvement.

Likewise, under prior law, the employee had one (1) year after the period of compensation expired to file a Petition for Benefit for Determination seeking additional PPD benefits. That time period has also been modified to allow the filing within one (1) year after the period of compensation expires, *or within one (1) year after the 180-day period after the employee reaches maximum medical improvement, whichever is later.*

B. Uninsured Employers Fund

The Uninsured Employers Fund (UEF) was created to help provide some compensation benefits to employees who suffered work injuries while working for employers who did not have workers' compensation insurance. To be eligible to

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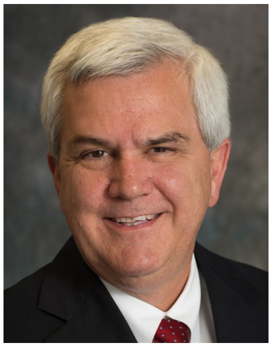
TWITTER CLATTER: WHEN EMPLOYEE SOCIAL MEDIA ACTIVITY MAKES YOUR HEAD HURT



Howard B. Jackson

"If the statement is clearly protected then the employer cannot take an adverse action … If some part of [it] is protected and other parts are not then the employer will want to think further and consider more questions."

Employers are increasingly dealing with situations where a member of the public complains about an employee's private social media activity. Generally, this involves an employee who in some way identifies themselves as an employee of the employer on the social media site and makes a comment that offends someone else. The someone else then sees fit to contact the employer and complain. Ironically enough this is frequently done via posting on the employer's own Facebook page. When this happens, what is the employer to do?

Is it Protected? One of the first questions to ask is whether there is something about the employee's post that is protected by law? There are several laws that may give protection to the statement the employee made.

For example, the National Labor Relations Act gives employees the right to engage in concerted activity for mutual aid and protection with regard to wages, hours and working conditions. If the post involves communication about workplace conditions it may fall into this category. It is not always obvious or easy to discern whether a comment falls within this category of protected communication. If unsure, this is a good time to consult labor counsel.

Equal Employment Opportunity (EEO) laws may also provide protection. If the post in some way opposes what the employee believes is a discriminatory condition at work then it could well be protected by anti-discrimination laws.

Many whistleblower laws could come into play. By way of example, a concern about safety could implicate OSHA, or a complaint about environmental impact could raise EPA concerns.

What about the First Amendment? Some are under the impression that an employee can say anything they want, particularly when off duty, because the First Amendment grants the right of free speech. For private employers, the First Amendment is not a concern. While the First Amendment prohibits the government from abridging certain rights, it does not prohibit private employers from taking action on the basis of employee speech.

For governmental employers, the First Amendment is a concern, however it does not protect all speech. In general terms a public employee's speech is likely protected when the employee speaks as a private citizen about a matter of public concern and where the speech does not interfere with the job.

If the statement is clearly protected then the employer cannot take an adverse action on the basis of the statement. If some part of the statement is protected and other parts are not then the employer will want to think further and consider more questions.

Does it Matter? It is worth asking whether the "offending" post actually matters? It seems that people can be offended by all manner of things these days, including harmless opinions, comments that are simply rude or plainly no more than a rant or tongue in cheek statement. It is not necessary to react to everything.

There are times when an employee's post is not outrageous but also not appropriate and not something you would want associated with the employer as an organization. In such cases simply bringing the employee's attention to the fact you have received a concern, and to the reality that their post is not something that you wish to have associated with the organization, may be sufficient. Where it is appropriate to do so, handling the matter in a low-key way such is this is best.

Suppose it really is awful? Employees have been known to post comments that are blatantly racist or sexist, or that advocate violence, or that are otherwise wholly inconsistent with the values of the organization. In these instances, the employer should follow its usual due process steps and speak with the employee before reaching a decision. Assuming the process leads to the conclusion that the employee in fact posted such remarks it is certainly appropriate to discharge from employment on the basis of the post.

Conclusion. When confronted with a social media post by an employee consider whether there is anything about the post that is protected. Think through whether the post really matters and if so, the nature of the most appropriate corrective step. Stay calm and work your process … that will lead you to a good result.

NEW DOL REGULATION ON FLUCTUATING WORKWEEK METHOD OF COMPUTING OVERTIME

Carole R. Merchant

"A significant area of confusion has long existed as to whether the fluctuating workweek method precluded an employer from paying bonuses or other premiums to employees ..."

On May 20, 2020, the U. S. Department of Labor announced a final rule that defines when and how employers may use the fluctuating workweek method of computing overtime. This final rule clarifies that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method under the Fair Labor Standards Act (FLSA). Additionally, the rule was revised to make it easier to read, so that employers will be able to better understand the fluctuating workweek method.

Section 7(a) of the FLSA requires employers to pay their nonexempt employees overtime pay of at least "one and one-half times the regular rate at which [the employee] is employed" for all hours worked in excess of 40 in a workweek. In other words, for each hour over 40 an employee works in a workweek, the employee is entitled to straight-time compensation at the regular rate and an additional 50 percent of the regular rate for that hour. The regular rate is computed for each workweek and is defined as "all remuneration for employment," save for eight statutory exclusions, divided by the number of hour worked.

Where an employee receives a fixed salary for fluctuating hours, an employer may use the "fluctuating workweek method" to compute overtime compensation owed, if certain conditions are met. 29 C.F.R. 778.114.

In the fluctuating workweek method, the employer must pay a fixed salary as straight time compensation for whatever hours the employee is called upon to work in a workweek. In order to compute the additional overtime an employee is owed, the fixed weekly salary, plus other remunerations, is divided by the number of hours the employee actually worked in the week to determine the week's base hourly rate or regular rate. Then the employee receives an additional ½ of the regular rate for each hour worked beyond 40 in the workweek.

A significant area of confusion has long existed as to whether the fluctuating workweek method precluded an employer from paying bonuses or other premiums to employees being paid by this method. Some courts held that certain types of bonuses were incompatible with the fluctuating workweek method, while others held that bonuses were compatible with that method. Additionally, a final rule issued by the Department of Labor in 2011 explicitly stated that the payment of bonuses and premiums beyond the minimum salary invalidated the payment method. These inconsistencies created practical confusion for the employers which this new rule addresses.

The new rule at 29 C.F.R. 778.114(a) lists the five circumstances which an employer must meet in order to use the fluctuating workweek method:

1. ***"The employee works hours that fluctuate from week to week."*** The regulation clarifies that there is no requirement that an employee's hours must fluctuate below 40 hours per week, so long as the employee's hours worked do vary.

2. ***"The employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many."*** Unlike the salary requirements for exempt executive, administrative and professional employees, the fluctuating workweek method does not allow for deductions from the guaranteed salary for employee absences. Salary deductions for days or hours not worked are considered as incompatible with the payment of a "fixed" salary under the fluctuating workweek method. An occasional disciplinary deduction from an employee's salary for willful absences or tardiness or for infractions of major work rules may be made provided that the deductions do not cut into the required minimum wage or overtime compensation.

3. ***"The amount of the employee's fixed salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest."*** The overall use of the fluctuating workweek method is not invalidated by occasional (an example of 5 workweeks in a year was provided) and unforeseeable workweeks in which the employee's fixed salary did not equal the minimum wage as long as a minimum wage adjustment was made and as long as the fixed salary was reasonably calculated to equal the minimum wage in foreseeable circumstances.

4. ***"The employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, commissions, hazard pay, or other additional pay of any kind not excludable from the regular rate under section 7(e)(1) through (8) of the Act) for the total hours worked each workweek regardless of the number of hours, although the clear and mutual understanding does not need to extend to the specific method used to calculate overtime pay."*** The employee must be clearly informed that he or she is being paid overtime according to the fluctuating workweek method.

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receive compensation from the UEF under the statute and prior law, an employee had to satisfy five criteria. First, the employee had to be employed by an employer who failed to properly secure workers' compensation insurance coverage. Second, the employee suffered an injury that would be considered compensable under the workers' compensation law, at the time the employer had no worker's compensation insurance coverage. Third, the employee was a Tennessee resident on the date of injury. Fourth, the employee provided notice within sixty (60) days after the date of injury to the Tennessee Bureau of Workers' Compensation of the injury and of the employer's failure to secure insurance coverage. Finally, the employee must have secured a judgment for workers' compensation benefits against the employer for the injury.

Senate Bill 2190 left this system mostly intact, but slightly modified the fourth element of employee eligibility to make it easier for an employee to seek benefits from the UEF. Specifically, the sixty (60) day notice requirement was extended to 180 days.

Senate Bill 2190 also removed a statutory requirement that the Court of Workers' Compensation Claims must convene a full and final hearing no more than sixty (60) days after the notice of hearing has been filed. This requirement was deemed to be unrealistic, and it was therefore deleted from the statute.

C. Effective Date

The statutory changes discussed above under Senate Bill 2190 are effective for injuries on or after June 22, 2020.

II. Tennessee Public Chapter 682 (Senate Bill 2189)

Senate Bill 2189 is a relatively narrow bill targeted at a very specific issue: jurisdiction and enforcement over out-of-state construction companies.

Under prior law, extra-territorial jurisdiction over out-of-state construction services providers was analyzed using the same statutory standard that would apply to any other employer. However, under Senate Bill 2189, a new scheme now applies for out-of-state construction companies.

Under the new law, any construction services provider performing work in the state of Tennessee must maintain workers' compensation insurance coverage throughout the duration of that work and must designate "Tennessee" in section 3A of the construction services provider's workers' compensation insurance policy or endorsement.

To help enforce this requirement, Senate Bill 2189 also added a new statutory mechanism to collect penalties issued against violators of the workers' compensation insurance coverage requirements, who try to avoid the penalties by closing the business down and opening a similar business under a new name. That will no longer work, because the Bureau can now seek to enforce penalties against a successor in interest.

Senate Bill 2189 was signed by Governor Lee on June 15, 2020, and it is effective as to penalties assessed on or after that date.

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5. ***"The employee receives overtime compensation, in addition to such fixed salary and any bonuses, premium payment, commissions, hazard pay and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay for that workweek. Since the salary is fixed, the regular rate of the employee will vary from week to week and is determined by dividing the amount of the salary and any non-excludable additional pay received each workweek by the number of hours worked in the workweek. Payment for overtime hours at not less than one-half such rate satisfies the overtime pay requirement because such hours have already been compensated at the straight time rate by payment of the fixed salary and non-excludable additional pay. Payment of any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind is compatible with the fluctuating workweek method of overtime payment, and such payments must be included in the calculation of the regular rate unless excludable under section 7(e)(1) through (8) of the Act."*** This section clarifies that employers may pay bonuses, premium payments, and other additional pay of any kind in addition to the fixed salary without invalidating the fluctuating workweek method of paying overtime. It also delineates the requirement that such payments must be included in determining the regular rate of pay on which the additional half-time will be based.

The final rule also provides specific examples of how to calculate additional overtime pay for employees being paid by the fluctuating workweek method.