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June 2019

FTC Enforcement Actions Related to Consumer Review Fairness Act

The Federal Trade Commission recently announced its first enforcement actions against businesses that allegedly violated the Consumer Review Fairness Act (CRFA). The CRFA makes it illegal for companies to include provisions in form contracts restricting a consumer's ability to communicate reviews and to penalize consumers who do review a business' goods, services, or conduct. The three businesses involved in the recent enforcement actions include an HVAC company, a flooring company, and a trail riding company. They are accused of including in their form contracts a confidentiality clause prohibiting customers from filing complaints with the Better Business Bureau, a non-disparagement clause, and a provision prohibiting customers from calling government agencies, including Animal Control, with concerns on the company's treatment of animals. All three contracts included financial penalties for violations. https://www.ftc.gov/tips-advice/business-center/guidance/consumer-review-fairness-act-what-businesses-need-know

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IMPORTANT: U.S. Department of Labor Issues FMLA Opinion

The U.S. Department of Labor (DOL) has issued an opinion letter which states that employers must apply leave under the Family Medical Leave Act (FMLA) concurrently with employer-provided paid leave. Thus - employers may no longer permit employees to use paid leave, such as vacation time, sick pay, short-term disability, paid time off, etc. - prior to tapping into their unpaid FMLA leave.

In a 2014 opinion, the Ninth Circuit U.S. Court of Appeals held that employees were allowed to use another type of leave, such as vacation time, for an FMLA-qualifying situation (instead of using FMLA leave) and essentially "bank" their FMLA-allotted time for a future event. However, the DOL has now rejected that opinion, and has clearly stated in its recent opinion that the FMLA prohibits employees from exhausting some or all of their paid leave prior to using their FMLA leave time when the reason for leave is FMLA qualifying.

Now, according to the DOL, the moment an employer learns that an employee's absence qualifies for FMLA leave, the employer must "start the clock" on the employee's allocated twelve (12) weeks allowed under FMLA. An employee may elect to substitute accrued paid leave for the unpaid FMLA leave, but the employee cannot delay the taking of FMLA leave until after the paid leave is exhausted.

The DOL's opinion also reaffirms that an employee's FMLA leave is limited to 12 weeks, even if the employer's leave policy provides a longer period of leave. As a result of DOL's new interpretation and application of the FMLA, employers and their attorneys should review all relevant employee policy manuals and statements, leave policy documents, and leave procedures for amendment if needed.

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Vehicle Sales and Service to Minors

High school students tend to visit dealerships for vehicle service or to buy a car during the spring and summer months. A minor can purchase a vehicle, but the dealer should be aware of certain pitfalls. Any vehicle contract with an individual under the age of 18 can be rendered null and void, as a minor may have the right to return a vehicle and demand reimbursement until the age of 18.

Dealers are advised to require a responsible adult to become the purchaser or co-purchaser of a vehicle. Common questions on sales, service and insurance include:

What about a buyer's order, lease or rental agreement? It is advisable to have the minor and an adult, usually a parent, sign the buyer's order, lease or rental agreement, as well as financing documents.

Are there special disclosure requirements for sales to a minor? No. However, as minors often purchase lower-cost, used vehicles, dealers should explain the warranty, if any, and request an adult co-purchaser acknowledge all aspects of the sale in writing.

How should repair orders be handled? Make certain that an adult is jointly or individually responsible for vehicle repairs. A minor authorizing extensive repairs could attempt to void a service bill based on the fact that he is under the age of 18, claiming that he is not responsible for payment.

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Background Checks on Minors

Question: Are we permitted to run background checks on minors?

Answer: Running a pre-employment background check on any job applicant requires consent, which forms a legally binding agreement. Minors, in most cases, are prohibited from entering into a legally binding agreement, which means consent from a parent or legal guardian is required before proceeding with the background check. The minor candidate would need to have their parent or legal guardian sign the authorization form. Third party background checks performed on minors fall under the federal Fair Credit Reporting Act (FCRA) with the same terms as background checks performed on those 18 and older.

You should note, however, that the majority of criminal records for minors are sealed, with the exception of when a minor is convicted as an adult. Further, because most minors are unable to obtain credit, a credit history would likely not exist. Consequently, you would more than likely make a hiring decision based on the minor's previous work experience, educational experience, and professional references. This begs the question of whether a background check on a minor is really a necessary policy. You may need to adjust your pre-employment hiring practices when hiring minors to adapt to these limitations. You may, after consulting with legal counsel, choose to create a pre-employment screening policy designed specifically for minors.

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Regulatory Refresh: Child Labor Laws

With the end of the school year approaching, your dealership may be considering hiring minors for summer work. Before you add them to your payroll, make sure you know what they are allowed to do on the job and what is prohibited by the law. Violators of child labor laws may be required to pay a civil penalty of up to $10,000 for each employee that is underage. Exemptions to the laws enforcing hours and minimum wage exist for dealers who employ their own children, but they must still comply with the laws regarding hazardous occupations.

http://labor.vermont.gov/wordpress/wp-content/uploads/WH-30-Information-for-Employer-Child-Labor-Law.pdf

http://labor.vermont.gov/wordpress/wp-content/uploads/WH-4-Child-Labor-Poster1.pdf

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IRS Updates Depreciation Limits for Passenger Vehicles

Revenue Procedure 2019-26 provides: (1) tables of limitations on depreciation deductions for owners of passenger automobiles first placed in service by the taxpayer during calendar year 2019; and (2) a table of amounts that must be included in income by lessees of passenger automobiles first leased by the taxpayer during calendar year 2019. The tables detailing these depreciation limitations and lessee inclusion amounts reflect the automobile price inflation adjustments required by § 280F(d)(7). For purposes of this revenue procedure, the term "passenger automobiles" includes trucks and vans. It will appear in IRB 2019-24 dated June 10, 2019.

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IRS Issues Cash Reporting Reminder

Federal law requires a person to report cash transactions of more than $10,000 to the IRS. Here are some facts about reporting these payments. For purposes of cash payments, a "person" is defined as an individual, company, corporation, partnership, association, trust or estate. People report the payment by filing Form 8300, Report of Cash Payments Over $10,000 Received in a Trade or Business.

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Auto Technician Shortage

NADA and ATD Leadership Search for the Next Generation of Service Techs

While overall employment at U.S. franchised new-car and -truck dealerships continues to rise, dealers say they are still having a hard time finding and hiring service technicians.

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A/C Technicians Must Be Compliant With EPA Recycle Regulations

As the warmer months arrive, so does repair work on vehicle air conditioner systems. The Environmental Protection Agency (EPA) is reminding dealers about complying with the agency's Air Conditioning Refrigerant Recycling Rule.

The EPA has increased its enforcement of the rule, and in the past has fined dealers across the country for alleged air conditioning refrigerant recycling violations. The Clean Air Act Amendments of 1990 require technicians who open refrigeration circuits in automotive air conditioning systems to be certified in refrigerant recovery and recycling procedures.

EPA Checking for Technician Certification

The EPA has focused on service departments where technicians lack certification cards. EPA officers will match technicians' photocopied certification cards against repair orders for the past three to four years to verify that a certified technician was doing A/C-related work. Technicians need to obtain A/C Technician Certification only once; but, because of turnover, service managers need to be sure technicians doing AC-related work are certified.

Equipment Must Also be Certified

In addition to properly training technicians, dealers are required to use approved recover/recycle equipment, and submit certification of equipment to the EPA. Also, if there is a change in ownership, the new owner of the equipment must certify equipment to the EPA within 30 days of the change of ownership.

New Refrigerants to be Recycled

The EPA also requires service technicians to recycle HFC-134a and other non-ozone-depleting refrigerants. Any equipment used to recover and recycle HFC-134a from air conditioners must meet EPA standards and be tested by an approved laboratory. Technicians currently certified for CFC-12 systems are certified automatically to handle non ozone-depleting chemicals.

Dealers Allowed to Buy and Sell Non-Ozone-Depleting Refrigerants

The EPA allows the sale of HFC-134a or any other non-ozone-depleting refrigerants, and, unless local regulations dictate otherwise, anyone may purchase these refrigerants in any size container. However, CFC-12 in units under 20 lbs. are restricted from being sold to a person who is not A/C-certified.

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Optional Policies Offer Protections to Dealerships

Dealerships that have not adopted the optional Voluntary Protection and Fair Credit model policies released by NADA, NAMAD, and AIADA should, in consultation with an attorney, carefully consider doing so.

Voluntary Protection Policy - The Voluntary Protection Products (VPP) model policy launched earlier this year helps dealers develop policies that ensure that the VPP sales process is both professional and customer friendly. NADA members can download a policy template and guide with the optional policy, instructions, and disclaimers for using the template on the NADA website:
https://www.nada.org/voluntaryprotectionproducts/

Fair Credit Policy - The optional Fair Credit Policy launched in 2014 and is designed to help dealers comply with fair credit laws while allowing customers to benefit from dealer-assisted financing. "This voluntary approach to fair credit compliance is designed to help dealers who adopt it to both promote their commitment to fair credit compliance and strengthen their ability to demonstrate that they have taken a consistent approach to the pricing of consumer credit," according to a memo announcing the program that was released by NADA, AIADA, and NAMAD.

NADA members can download information on the Fair Credit Policy, an editable version for dealers to modify to suit their businesses here: https://www.nada.org/faircredit/

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Preparing for New Overtime Thresholds Q & A

Question: What should employers do to prepare for the anticipated January 1, 2020, effective date of new DOL's white collar exemptions?

Answer: On March 7, 2019, the U.S. Department of Labor (DOL) announced a **proposed rule** to update and revise Fair Labor Standards Act (FLSA) white collar exemptions by raising the salary level for an exemption from $455 per week ($23,660 annually) to $679 per week ($35,308 annually), among other changes. The rule is expected to be adopted and become effective January 1, 2020. While it's too early to make any actual changes in response to the proposal, it's a good idea to start preparing now so you'll be ready if it becomes law, as experts anticipate it will.

Analyze cost impacts. You can begin to determine which employees are classified as exempt and earn $35,308 per year or less. Estimate the increased costs of either increasing their salaries to $35,308 per year or reclassifying the employees as nonexempt and paying overtime when they work more than 40 hours per week (or overtime hours worked based on your state's overtime laws). Again, hold off on any actual changes until the proposal becomes effective.

Review job descriptions. Take a look at your organization's job descriptions to ensure that they are accurate for the work that the employees actually perform. Update as needed. Review the classifications as exempt or nonexempt based on the "job duties test" as defined by the DOL.
Forecast overtime. Talk with the impacted employees and their managers to get an estimate of how much overtime per week they actually work.

Review your overtime policies. While employers must pay overtime per federal and state laws even if the overtime is not authorized, employers can limit the amount of overtime allowed and provide disciplinary action to employees who fail to follow policy.

Measure productivity. Now that some exempt employees may be reclassified as nonexempt, ensure that the extra hours worked result in measurable productivity. Many exempt employees did not track hours worked previously and may have worked longer hours when not absolutely necessary. Since that time will now be compensable time, employers should ensure that the overtime is warranted based on business demand.

Review meal and rest break rules.
Those employees who will be reclassified as nonexempt will be required to comply with state or company mandated meal and rest break requirements.
Review employee communications regarding policies, the enforcement of such policies, and how you will communicate these changes to those employees who will be affected by the change in status.

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Recalls

The following is a great Op-Ed written by my brilliant New Jersey counterpart Jim Appleton. If you missed it, click on the headline below:

Automotive News Op-Ed by Jim Appleton: The real recall problem: Carmakers aren't held financially accountable

The auto recall system is broken. More than 200 million vehicles nationwide have been placed under recall since 2013, yet 53 million of those vehicles are still in service. How is this possible? The root cause of the crisis is that the current recall system doesn't hold automakers financially accountable for slow-walking repair parts or failing to complete open recalls. The result is a system in which carmakers have a perverse financial incentive to stall and shift the financial burden of their manufacturing defects to dealers and consumers.

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