First & Foremosts

Legal Update
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Legal Update: National Labor Relations Act

Labor Board Revives Restrictions on Severance Pact Conditions

- McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO. Case 07–CA–263041
- Separation agreement is unlawful if it broadly restrict a worker's right to speak about the agreement or otherwise talk negatively about their former employer because they have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.
- Unlawful provisions generally* do not void the entire agreement, though this is assessed on a case by case basis.
- Applicable to both current and former employees.
- Generally not applicable to supervisors and independent contractors (though, the decision could apply to supervisors in certain cases).
- Decision has retroactive effect.
- Simply proffering an agreement, even if employee does not sign, is unlawful.
- Maintaining an agreement with unlawful provisions is an unfair labor practice, even if provisions are not enforced.
- Disclaimer language will not cure overbroad provisions.
- Decision may apply to other agreements.

NLRB Rules Employees May Tape Record Others in Violation of State Law and Employer Policy if Furthering Protected Concerted Activity

- Starbucks Corporation d/b/a Starbucks Coffee Company and Philadelphia Baristas United and Echo Nowakowska and Tristan J. Bussiere (04-CA-252338, et al.; 372 NLRB No. 50).

- An employee who makes an audio or video recording in the workplace may be engaged in activity protected by Section 7 of the Act depending on the facts.

- Employee recording may be immune from adverse action and can violate state law and employer policy if the recording is made to further protected concerted activity under Section 7.

Tesla Fails in Challenge to NLRB Ruling on Musk Union Tweet

- Tesla, Inc. v. NLRB , 5th Cir., No. 21-60285, 3/31/23.
- Elon Musk tweeted:

  > "Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare."

- Subsequently tweeted that he believed that the union "does not have individual stock ownership as part of the compensation at any other company," and as such, Tesla employees would lose stock options if they unionized because the union "does that."
- Court stated that Musk's first tweet violated Section 8(a)(1) of the NLRA because it could be reasonably understood by employees as a threat to unilaterally rescind stock options if employees unionized, and was NOT a prediction of what could happen.

Legal Update: Statutory Issues FLSA

U.S. Supreme Court Holds Six-Figure Worker Entitled to Overtime Pay

- Former offshore oil rig worker earned more than $200,000 per year
- He was paid on a day rate of $963 and was not guaranteed a weekly salary
- To be exempt executives must be paid on a salary basis, meaning their predetermined pay must be “calculated on a weekly, or less frequent basis” and not tied to the hours worked per week. They also must have a minimum pay threshold of $684 per week.
- Supreme Court concluded that this employee was non-exempt because he wasn’t paid a guaranteed weekly salary.
- *Helix Energy Sols. Grp., Inc. v. Hewitt* , U.S., No. 21-984, 2/22/23 .

Paid Time Off Isn't a Part of FLSA Salary, Third Circuit Says

- Employer, a home healthcare company, docked employee's paid time off for failing to meet productivity targets
- Employees challenged this action arguing that the points system used for productivity was a proxy for paying them based on hours worked despite their classification as salaried employees.
- Court held that the FLSA makes a clear distinction between salary and fringe benefits like PTO and deducting PTO doesn't change the guaranteed salary amount a worker receives at the end of a pay period.
- Accordingly the 3rd Circuit held that the employer did not improperly reduce worker salaries when deducting from PTO.
- *Higgins v. Bayada Home Health Care Inc.*, 3d Cir., No. 21-03286, 3/15/23.

Legal Update: New State and Local Laws

Most Virginia Employers Will Have to Offer Retirement Benefits

- Virginia new state law requires covered employers to either participate in a state-facilitated retirement program (RetirePath Virginia) or offer a separate qualified retirement plan to all eligible employees
- Covered employers are private employers that:
  - Have 25 or more employees;
  - Have been in operation for at least two years; and
  - Do not already offer a qualified retirement plan
- Employees are eligible to participate if:
  - Are at least 18 years old;
  - Work at least 30 hours per week; and
  - Are receiving wages
- Covered employers must register with RetirePath Virginia beginning July 1, 2023
- Must set up payroll deductions for their eligible employees

Need time off work for period pain? These countries offer ‘menstrual leave.’

- Spain became the first European country to entitle workers to PAID menstrual leave
- Other countries that offer menstrual leave:
  - Japan
  - Indonesia
  - South Korea
  - Taiwan
  - Vietnam
  - Zambia
- Future trend?

Illinois enacts law requiring employers to provide paid leave to employees to be used for any reason

- Paid Leave for All Workers Act
- Requires private employers to provide earned paid leave to employees to be used for ANY reason
- Employees
  - Are entitled to earn and use up to 40 hours of paid leave during a 12 month period
  - Are not required to provide a reason for the leave, or any documentation or certification in support for their need to take leave
  - Must be able to carry over any unused, accrued leave, unless they are provided a lump sum of leave
- Employers not required to pay out any accrued, unused leave at termination, unless the paid leave taken is charged or credited to an employee's paid time off bank or vacation leave bank
- This law goes into effect on January 1, 2024

New Jersey Amends its mini WARN ACT

- Requires employers to give 90 days notice prior to any mass layoff, transfer of operations or plant closing
- All employees are counted to determine whether an employer is covered under the law and whether an employer is required to provide the notice
- Covered employers are required to pay severance to employees who are affected by the employment loss
  - One week per each full year of employment the employee has worked for the employer, or severance required by a collective bargaining agreement, whichever is greater
  - Additional severance is required if an employer fails to provide the requisite 90 days' notice
- Amendments went into effect on April 10, 2023

NYC Restricts Use of AI in Hiring and Employment Decisions

- Law prohibits employers from using Artificial Intelligence and algorithm-based technologies for recruiting, hiring, and promotion within the city unless:
  - The tool is subject to a bias audit that is conducted no more than one year prior to the use of the tool, and
  - A summary of the results of the bias audit tool and the distribution date of the tool has been made publicly available on the employer or the employment agencies website prior to using the tool.
- Must provide notice to applicant or employee prior to using tool
- Law will be enforced starting July 5, 2023.

DC Enacts Attorney General Civil Rights Enforcement Clarification Amendment Act of 2022

- Attorney General has the ability to bring a lawsuit against any employer believed to be violating the DC Human Rights Act
- Lawsuit can be brought at any time
- Ability to bring a lawsuit is independent of any other actions or remedies available to an individual claiming to be discriminated against
- Penalties:
  - If the employer has never been found to have committed a prior unlawful employment practice the Attorney General can obtain a penalty of up to $10,000 per violation.
  - If the employer has been found to have committed one unlawful employment practice in the past 5 years, the Attorney General can obtain a penalty of up to $25,000 per violation.
  - If the employer has been found to have committed two or more unlawful employment practices in the past 7 years, the Attorney general can obtain a penalty of $50,000 per violation.

Updated FCRA Summary of Consumer Rights Released

- Consumer Financial Protection Bureau published an updated version of the Summary of Consumer Rights to disseminate under FCRA
- Employers must begin using the updated Summary of Consumer Rights beginning March 20, 2024
- Copy of updated Summary here: A Summary of Your Rights Under the Fair Credit Reporting Act

Legal Update: Americans with Disabilities Act

Vague Description of Medical Condition and Post-termination Diagnosis of Disability Fails to Establish Disability Discrimination

- General Motors terminated an employee for attendance issues after providing her a final written warning.
- During internal appeal through GM's internal grievance process, employee diagnosed with Persistent Depressive Disorder and a brain tumor.
- Employee sued for disability discrimination based on that diagnosis and claimed that her comments to her supervisor that shew as "suffering" and "depressed" were sufficient to establish disability.
- Court concluded she failed to establish disability discrimination because her disability was unknown until after her termination and that her comments to her supervisor only "reference[d] general ailments" such as her "head… really hurting" having a "fever and other symptoms" or simply being "sick" and therefore were not sufficient to apprise her manager of a disability especially when the herself was unaware of her disability.
- Further her "single, unsubstantiated statement that she was depressed without any corroborating medical evidence and without ever having sought medical help, [which] she consistently presented … as a workplace conflict, not a disability."
- *Hrdlicka v. General Motors, LLC*, No. 22-1328 (6th Cir. 2023).

Employee Unable to Travel for Work Not Entitled to Accommodation

- Employee had serious health problems and eventually had a heart transplant
- Returned to work with the following restrictions:
  - No travel by plane or train;
  - No more than 10-12 hours a week of driving time; and
  - Remain at all times within a three-hours' driving distance.
- Job description and employee's own testimony supported that the role required in person work.
- No other available positions for which Employee qualified
- When the employee became unable to perform one or more essential job functions, he became unqualified to perform the job, thereby losing protections under the ADA.
- *George v.* Molson Coors Beverage Company USA, LLC, Case No. 1:20-cv-01914 (D.C. Cir. March 28, 2023).

Staffing Company agrees to provide ASL interpreters to Deaf Applicants to Settle ADA Discrimination Claim

- Deaf applicant sought warehouse position with client of staffing agency
- Staffing agency cancelled the assignment before employee started because the client/employer did not have ASL interpreters available
- However, client/employer was willing to employ applicant
- EEOC filed suit
- Staffing Firm and EEOC settled the case for monetary relief, and a consent decree requiring among other things, that the Staffing firm adopt a policy requiring it to furnish deaf applicants with ASL interpreters and train managers and supervisors on deaf communication and the limitations of using written notes.
- *EEOC v. Lyneer Staffing Solutions, LLC.*, Civil Action No. 22-cv-02454-ELH

Reassignment of a Disabled Employee to a Vacant Position

Not a Required Reasonable Accommodation

- Hospital's policy was to hire the "most qualified applicant" for each position
- Disabled Employee needed reassignment as an accommodation.
- Court held the Hospital could apply its policy to hire the most qualified applicant event when that resulted in no accommodation for the employee, in most cases
- Court noted that an ADA plaintiff could potentially show "special circumstances" that make an exception to the most qualified policy.
- *EEOC v. Methodist Hospitals of Dallas*, 2023 U.S. App. LEXIS 6598 (5th Cir. 2023).

Legal Update: Wage & Hour and FMLA

New Guidance on Federal Protections for Nursing Workers

- Department of Labor issued new Fact Sheet and FAQs regarding the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

Department of Labor, Wage and Hour Division (WHD) issues Field Assistance Bulletin No. 2023-1, "Telework Under the Fair Labor Standards Act and Family and Medical Leave Act"

- Short breaks (breaks of 20 minutes or less) compensable time regardless of whether employee works remote or at employer worksite.
- For longer breaks, employee must be completely relieved of duty to be considered non-compensable time, regardless of employee work location.
- Employers must provide a reasonable break time and a place other than a bathroom for the employees to express breast milk at the employee's work site, including when an employee is teleworking at their home or another location.
- For FMLA eligibility purposes, the employee's personal residence is not a worksite. When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made.
- Field Assistance Bulletin No. 2023-1

Indefinite Use of FMLA to Limit Employee Workday

- US Department of Labor, Wage and Hour Division, Opinion Letter FMLA2023-1-A
- An eligible employee with a serious health condition that requires a reduced work schedule indefinitely may use available FMLA leave to limit their workday
- If employee never exhausts their FMLA leave, they may work a reduced schedule indefinitely

Legal Update: Title VII & Discrimination Laws

Offensive Music at Work Creates Legal Headaches for Employers

- Recent cases have alleged that obscene and misogynistic music played in the workplace created a hostile work environment in violation of Title VII.
  - Music allegedly included references to violence against women, gendered expletives and other sexual material.
  - Employer's failure to take prompt remedial action to end the harassment after employee complaints arguably created a hostile work environment.
  - *Israel v. Tesla, Inc. et al, 3:22-cv-00462 (D. Nev. 2022)*
  - *Sharp, et al v. S&S Activewear, LLC, 3:20-cv-00654 (9th Cir. 2020)*
  - Recommendations:
    - Consider prohibiting all sexually or racially offensive content in the workplace rather than applying a ban on certain types of music.
    - Treat complaints of offensive music as seriously as other complaints of a hostile work environment.
    - Remember state and local law may set a lower standard for harassment.

Seattle's Caste Bias Bill Renews Calls for Federal Guidance

- Seattle first in the nation ordinance to ban caste bias
- “Caste” defined as “a system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion
- Advocacy groups pushing the EEOC to offer guidance or a policy memo on caste discrimination. Desire it to be covered by Title VII of the 1964 Civil Rights Act because the law already prohibits discrimination as to ancestry and lineage. The EEOC has remained silent.
- Case filed on the issue of caste discrimination in California state court. Plaintiff alleging he was denied for promotions due to his status as part of the Dalit caste.

Job Search Website Agrees to Remove References to Work Authorizations to Settle National Origin Discrimination Claims

- DHI Group operates a job-search website for technology professionals.
- Multiple charges of national origin discrimination were filed against DHI when customers posted positions that excluded those of American National Origin, thereby deterring a class of workers from applying.
- Under the Conciliation Agreement, DHI agreed to:
  - Rewrite its programming to “scrape” for potentially discriminatory keywords such as “H1B” or “Visa” near the words “only” or “must” in customer job postings;
  - Revise its guidance to customers to include instructions to avoid language such as “H-1Bs Only” or “H-1Bs and OPT Preferred;” and
  - Compensate the estate of the original complainant

Size discrimination may limit job prospects. New York City may ban it.

- New York City Council introduced legislation that would prohibit discrimination based on **height** and **weight** in the workplace unless either are bona fide occupational qualifications.
- Michigan is the only state that bans weight based discrimination
- Washington State considers obesity a disability
- Currently New York state, Massachusetts, Vermont and New Jersey all considering similar legislation.

J&M INDUSTRIES SUED BY EEOC FOR AGE DISCRIMINATION

- Company Manager repeatedly asked employee as she approached her 65th birthday:
  - When are you going to retire?
  - Why don't you retire at 65?
  - What is the reason you are not retiring?
- Employee told Manager she had no plans to retire
- Subsequently, employer eliminated Employee's position due to economic uncertainty.
- One month later, employer hired a man in his thirties for the same position employer claimed to have eliminated.

Improving Communication in The Workplace - A Manager's Guide

- How to Improve Communication in the Workplace by Alison Robins & Erika Khanna
- 13 tips to upgrade your communication at work:
  - Practice authentic Communication
  - Create a communication-friendly culture
  - Keep workplace communication constant
  - Hold weekly team meetings
  - Offer a platform for anonymous feedback
  - Collect employee feedback
  - Communicate face-to-face
  - Master your body language
  - Know when less is more
  - Take time to listen, properly
  - Personalize your communications: know your audience
  - Set aside time for non-work related discussions
  - Prioritize workplace communication training
- https://officevibe.com/blog/improve-communication-at-work

Thank You!

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