First & Foremosts

Legal Update
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Title VII & Discrimination Laws

Supreme Court Guts Long-Standing Religious Accommodation Test

- Groff worked for the US Postal Service and refused to work Sundays for religious reasons
- USPS tried to accommodate first by transfer to a location without Sunday deliveries and then by allowing others to volunteer for his shifts. But there weren't always volunteers.
- Groff received progressive discipline when he did not work Sundays when no one else would. Eventually he was terminated.
- Groff sued for Religious discrimination.
- Title VII requires employers to accommodate an employee's religious practice unless doing so would impose an undue hardship on the conduct of the Employer's business.
- Prior standard for undue hardship was "more than *de minimis*"
- Court held that Title VII's use of the term "undue" implies something more than "small and trifling" which is the *de minimis* standard.
- Court held that the new standard for undue burden requires the employer to show that the burden of granting an accommodation would result in "**substantial increased costs**" in relation to the conduct of its particular business. It is a fact specific inquiry which will be different depending on the context.
- *Groff v. DeJoy,* 600 U.S. ___ (June 29 2023).

Duty to accommodate religion does not require affiliation with formal religious group per the EEOC

- EEOC sued for an employer's failure to grant a religious accommodation to an employee who desired to have a beard
- Employee did not belong to a formal religious denomination but held a Christian belief that men must wear beards.
- According to the EEOC, the employer denied the request for accommodation because the employee was unable to provide substantiation of his beliefs or a supporting statement from a certified or documented religious leader.
- The EEOC's position is that the duty to accommodate exists whether or not the employee is a member of a formal religious group.
- *EEOC v. Triple Canopy Civil Action No. 1:23-cv-1500 (D. D.C. 2023).*

EEOC Sets Strategic Plan for 2022-2026

- To accomplish the EEOC's mission to prevent and remedy unlawful employment discrimination and advance equal employment opportunity for all, the EEOC outlined its strategic goals and objectives.
- Highlights of the new Strategic Plan include;
  - Increased focus on systemic discrimination
  - Increased monitoring of conciliation agreements
  - Enhanced intake services and improving overall service to the public
  - Leverage technology and innovative outreach strategies to expand the agency's reach to diverse populations, vulnerable communities, and small, new and disadvantaged or underserved employers
  - Promote promising practices that employers can adopt to prevent discrimination in the workplace.

EEOC Settles First Ever Discrimination by Artificial Intelligence Case

- EEOC Settles First-of-Its-Kind AI Bias in Hiring Lawsuit
- EEOC alleged employer programmed recruitment software to automatically reject older applicants
- Defendants denied the allegations but entered into a consent decree to settle the case on August 9, 2023
- Under the terms of the Consent Decree:
  - Employer will pay $365,000 to a group of rejected job seekers age 40 or over
  - Employer must: provide notice of the consent decree to managers and employees involved in hiring; adopt robust anti-discrimination policy and complaint procedures; conduct four-hour training programs to review obligations of defendants under anti-discrimination laws; submit biannual reports to EEOC detailing all complaints of discrimination received and how resolved
- *EEOC v. iTutorGroup, Inc. et al., Docket No. 1:22-cv-02565 (E.D.N.Y. August 9, 2023).*

EEOC Updates Guidance on Visual Disabilities in the Workplace

- Commission outlined:
  - When an employer can ask an employee or applicant about visual disabilities
  - How they should treat voluntary disclosures related to visual disabilities
  - When an employer can ask if vision impairment may be causing performance problems
  - Examples of the types of reasonable accommodations applicants or employees with visual disabilities may need both to perform the essential functions of their position but also related to the terms, conditions, and privileges of employment
  - How to address Safety Concerns
  - Steps employers can take to help ensure AI decision making tools do not screen out or otherwise unfairly disadvantage applicants or employees with disabilities
- https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilities-act?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Americans with Disabilities Act

EEOC Issues Proposed Regulations Interpreting Pregnant Workers Fairness Act

- Expansive definition of “pregnancy, childbirth, or related medical conditions”
- Physical or mental condition can be modest, minor, or episodic.
- Broad definition of “qualified employee or applicant” eligible to receive accommodations- can suspend performance of essential function if certain factors meet
- To request accommodation, an applicant or employee needs to inform employer that they:
  - Have a limitation; and
  - Need an adjustment or change to work.
- Limitations on requesting supporting documentation
- Certain accommodations virtually always considered “reasonable” and would not pose undue hardship

11th Circuit Holds Adverse Act Needed for ADA Accommodation Claim

- *Beasley v. O'Reilly Auto Parts*, 69 F.4th 744 (11th Cir. 2023)
- Employee requested text summaries of meetings and interpreter on multiple occasions.
- Employer did not consistently provide text summaries, and did not provide interpreter.
- Employee sued employer for failure to accommodate his disability under the ADA.
- 11th Circuit held that for employer to be liable for failure to accommodate the employee's disability under the ADA, the employee must show that the failure negatively impacted his hiring, advancement, discharge, compensation, training, and privileges of employment.

Is Overtime an Essential Function? It Can Be!

- *Cuellar v. Geo Group, Inc.,* 2023 U.S. App. LEXIS 17840 (5th Cir. 2023)
- Detention officer diagnosed with sleep apnea, request that he not be scheduled for shifts longer than 12 hours.
- Job description, employee manual, and CBA included language that overtime was required for position.
- Employer denied employee accommodation request. Employee sued under the ADA and Texas state equivalent.
- 5th Circuit held overtime was an essential function of the position, and employee was not a qualified individual with a disability entitled to an accommodation. Employer prevailed.

7th Circuit Holds Regular, In-Person Attendance Essential Function of Executive Director Job

- *Kinney v. St. Mary's Health, Inc.,* 2023 WL 5006849 (7th Cir. Aug. 7, 2023)
- Executive Director of Imagining Services at hospital requested to work remotely during COVID-19 pandemic because she could not wear a face mask due to anxiety
- Court held that essential functions of position must be performed in person.
- Court looked to:
  - Job description
  - Colleagues' testimony

7th Circuit Holds Employer May Need to Accommodate Transportation Issues Under the ADA

- *Equal Emp. Opportunity Comm'n v. Charter Commc'ns, LLC*, 75 F.4th 729, 732 (7th Cir. 2023)
- Employee with cataracts had difficulty driving at night.
- Employee requested to change his schedule for 30 days, twice. Employer denied the second request.
- Employee sued, alleging that his employer failed to accommodate him under the ADA.
- 7th circuit held that employee ***may*** be entitled to a work-schedule accommodation ***if commuting to work is a prerequisite to an essential job function,*** such as attendance in the workplace, and if the accommodation is reasonable under all the circumstances

National Labor Relations Act

NLRB Adopts New Standard for Employer's Work Rules under NLRA

- NLRB in *Stericycle, Inc.* overturned *Boeing and LA Specialty Produce* and built upon and revised the 2004 standard set forth in *Lutheran Heritage Village–Livonia*
- Majority opined that prior decisions failed to account for the economic dependency of employees on their employers.
- To maintain employment, employees will construe an ambiguous rule to prohibit activities protected by the NLRA. Therefore, the work rule will restrain such activity.
- Under the new standard the General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights. If the GC does so, then the rule is presumptively unlawful.
- The Employer may rebut the presumption by proving the rule advances a legitimate and substantial business interest AND the employer is unable to advance that interest with a more narrowly tailored rule
- If the employer proves its defense, then the work rule will be found lawful to maintain
- This is a case by case review. The categories established by *Boeing* are no longer in effect.

NLRB Returns to 2014 Independent Contractor Standard under NLRA

- In *Atlanta Opera,* the Board concluded that stylists for the Atlanta Opera were employees not independent contractors
- The Board returned to the standard set forth in the 2014 decision of *FedEx Home Delivery* that set forth a list of factors to be considered to determine independent contractor status with no one factor given extra weight.
- The Board added the factor of whether the worker is rendering services as part of an independent business
- The Board rejected the Board's 2019 *SuperShuttle DFW, Inc*. decision that emphasized the importance of entrepreneurial opportunity in determining independent contractor status.

Board Details Potential Remedies for Repeated or Egregious Misconduct.

- In *Noah's Ark Processors, LLC D/B/A/ WR Reserve*, the Board set forth the potential remedies it will consider in cases involving employers who have shown "repeated or egregious disregard for employees' rights under the NLRA
- Potential remedies include:
  - Requiring a reading and distribution of the Notice and Explanation of Rights to employee, including potentially requiring those involved in the violations to participate in or be present for the reading
  - Mailing the Notice and Explanation of Rights to the employee's homes
  - Requiring a person who bears significant responsibility in the Employer's organization to sign the Notice
  - Publication of the Notice in local publications of broad circulation and local appeal
  - Requiring that the Notice/Explanation be posted for an extended period of time
  - Permitting representatives of the Board to inspect the Respondent's bulletin boards and records to determine and secure compliance with the Board's order

NLRB Narrows Employers Ability to Punish Workplace Profanity

- In *Lion Elastomers LLC II*,, the Board overruled the prior Board's 2020 *General Motors*'s decision regarding when a an employer may discipline a worker for racist, sexist, homophobic, and other profane speech or conduct in the context of workplace activism and union related activity.
- The employer disciplined and terminated the employee after he engaged in a heated exchange with managers about working conditions.
- The employee was agitated, continued to interrupt meetings with repeated questions, raised his voice, refused to allow others in the room to complete their statements, attempted to leave the room, and used an accusatory tone when addressing others in the room.
- The employer said the firing was warranted based on the conduct, but the Board disagreed because he was engaged in protected activity and ordered the Company to reinstate him.
- The Board held that various setting-specific standards must, again, be applied to determine whether a relevant disciplinary action is a violation of the NLRA:
  - Employee conduct toward management in the workplace
  - Employee posts on social media and most conversations among employees in the workplace
  - Picket line conduct

NLRB may issue bargaining order absent successful election under new decision

- In *Cemex*, the Board issued a decision that sets forth a process that will allow it to order an employer to recognize and bargain with a union as representative of the workers without an election.
- "An employer violates [the Act] by refusing to recognize, upon request, a union that has been designated as [a] representative by the majority of employees in an appropriate unit unless the employer promptly files a petition … to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition. […]"
- "However, if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order."

Family Medical Leave Act

DOL Issues Opinion Letter on Calculating FMLA Leave Used During Week with Holiday

- When an employee takes a full workweek of FMLA leave during a week that includes a holiday, the employee uses a full week of FMLA leave.

- When a holiday falls during a week when an employee is taking less than a full workweek of FMLA leave, the holiday is not counted as FMLA leave unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day.

FLSA & Wage and Hour Law

Cracker Barrel Faces New Class Action Wage and Hour Lawsuit

- Plaintiff filed a class action alleging that Cracker Barrel has a common practice of asking employees to complete tasks that don’t generate tips, and not paying them the federal minimum wage in violation of the FLSA.

Labor Department Sets Arbitration Clauses as Enforcement Target

- Mandatory arbitration agreements will not insulate employers from prosecution for illegal provisions.

- Department of Labor announced that it is heightening efforts to prosecute employers that use mandatory arbitration clauses in employment contracts in an effort to side step federal law and shield itself from being sued for unlawful wage and hour practices.

DOL Issues New Davis Bacon Rules

- Many significant changes set forth in the new rules for construction contractors performing work under federal government contracts or with federal funding.
- The DBRA's purpose is to ensure employers on federally funded or assisted construction projects pay locally prevailing wages to construction workers and to prevent the unintended consequence of depressing workers' wages during the government's construction contracting activity.
- Changes include the following:
  - Creating new efficiencies in the prevailing wage update system and making sure prevailing wage rates keep up with actual wages which, over time, would mean higher wages for workers.
  - Returning to the definition of "prevailing wage" used from 1935 to 1983 to ensure prevailing wages reflect actual wages paid to workers in the local community.
  - Periodically updating prevailing wage rates to address out-of-date wage determinations.
  - Providing broader authority to adopt state or local wage determinations when certain criteria are met
  - Issuing supplemental rates for key job classifications when no survey data exists.
  - Updating the regulatory language to better reflect modern construction practices.
  - Strengthening worker protections and enforcement, including debarment and anti-retaliation provisions.

https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon

State and Local Laws

New Employment Laws in Maryland

- Expedited increase of minimum wage
- Expanded scope of non-compete ban for low-wage workers
- Amendments to anti-discrimination law to allow Attorney General to investigate and file suit
- Amendments to Paid Family and Medical Leave law

Illinois Biometric Privacy Cases Jump 65% After Seminal Ruling

- Law requires companies that collect biometric data, which includes fingerprints and facial recognition, to receive written consent from employees and customers and to develop a written policy about its collection, retention, and destruction

- Decision issued by the Illinois Supreme Court in February of this year that held every instance of collecting biometric data without consent is a separate violation of the law

‘No Mercy’ Ruling Leaves Employers Sweating Late Paychecks

- Treble damages awarded under Massachusetts wage and hour law regardless of employer intent, and regardless of severity of violation of the law.

New Jersey Equal Pay for Temporary Workers

- Law applies to temporary workers assigned by a temporary staffing agency to perform work in certain occupations.

- Law requires temporary workers to be paid at least the same average rate of pay and have access to the same benefits(or the cash equivalent) as the client employer's regular employees performing the same or substantially similar tasks.

- Temporary staffing firms and client employers may be held jointly and severally liable for violations of the law.

Illinois Requires Equal Pay for Temporary Workers

- A temporary worker who is assigned to work at a third-party client company for more than 90 calendar days must be paid at a rate equal to the lowest-paid comparable employee of the third-party client company.

- Upon request, a third party client must provide a temporary service agency with necessary information related to the workers job duties, pay, and benefits.

New York Passes Bill to Ban Non-Compete Agreements

- New York Bill prohibits non-compete agreements.
- Non-compete agreement defined as any agreement between an employer and a covered individual that prohibits or restricts the covered individual from obtaining employment after conclusion of the employment with the employer
- Provided that the agreement does not otherwise restrict competition, under the bill employers would still be allowed to enter into agreements that included:
  - Nondisclosure of trade secrets, and confidential and proprietary information, and
  - Non-solicitation of clients of the employer that the worker learned about during their employment.

Colorado Enacts New Protections for Employees

- New law:
  - Substantially limits employers' use of non-disclosure agreements,
  - Lowers the burden of proof for workplace harassment claims; and
  - Imposes new recordkeeping requirements on employers with employees working in Colorado

COVID

EEOC published final updates to Covid-19 technical assistance, "What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws."

- https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

- End of the COVID-19 public health emergency does not mean employers can automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances
- In certain cases employers may have to provide qualified employees with accommodations for long COVID that do not pose an undue hardship.

Thank You!

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