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E-UPDATE

October 31, 2017

RECENT DEVELOPMENTS

Baltimore City Enacts Displaced Service Workers Protection Ordinance

The Baltimore City Council recently passed a bill that grants broad protections to service employees working on contracts that are taken over by a new company.

General Overview of the Law

Under the Ordinance, companies that are awarded contracts to perform security, janitorial, building maintenance, or food preparation must make offers of employment to any predecessor contractor's service employees employed at an affected site for a 90-day transition period or until the successor no longer provides services at that site, whichever is earlier. The Ordinance provides a narrow exception to this duty to offer employment, if fewer employees are required to perform work for the successor contract. The successor contractor also is prohibited from discharging a service employee in the 90-day transition period without just cause. At the end of the 90-day period, the successor contractor is required to perform a written performance evaluation for each employee and offer continued employment to those whose performance is satisfactory.

The Ordinance requires the entity that has awarded the service contract to ensure that the terminated contractor posts a notice regarding the pending termination and employee rights under the Ordinance at all affected worksites, except in case of public universities.

Specific Provisions of the Ordinance

A covered "service contract" is a contract for security, janitorial, building maintenance, food preparation or non-professional health care services at the following facilities:

- a private elementary or secondary school;
- a public or private college or university;
- an institution such as a museum, casino, convention center, arena, stadium, or music hall;
- multi-family residential building or complex with more than 30 units;
- a commercial building or office building occupying more than 50,000 square feet;
- an industrial facility, such as a pharmaceutical laboratory, research and development facility, or product fabrication facility; or
- a distribution center.

Covered "service employees" include full-time or part-time employees in the following categories:

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- building service employee, including a janitor, security officer, groundskeeper, concierge, door staffer, maintenance technician, handyman, superintendent, elevator operator, window cleaner or building engineer
- food service worker, including a cafeteria attendant, line attendant, cook, butcher, baker, server, cashier, catering worker, dining attendant, dishwasher, or merchandise vendor

It does not include a managerial or confidential employee, or an employee who works in an executive, administrative or professional capacity.

A "successor contractor" under the Ordinance is any contractor that employs more than 20 employees companywide and that:

- is awarded a service contract to provide, in whole or in part, services that are substantially similar to those provided at any time during the previous 90 days;
- has purchased or acquired control of a property in the City where service employees were employed at any time during the previous 90 days; or
- terminates a service contract and hires service employees as its direct employees to perform services that are substantially similar.

Obligations to Employees Under the Ordinance

The entity that is awarding the contract is obligated, at least 15 days before a service contract is terminated, to request that the terminated contractor give to both that entity and the successor contractor a complete list of the name, date of hire, and job classification of each service employee working on the service contract. The awarding entity also must, as noted above, ensure that the terminated contractor conspicuously posts at any affected worksite (with the exception of public universities) a written notice to all affected service employees describing the pending termination of the service contract and employee rights provided by the Ordinance.

The successor contractor must make, at least 10 days before commencing work on the contract, written offers of employment to the terminated contractor's employees, with a copy to any labor union that represents the employees. The offer must state the date by which the service employee must accept the offer, and allow the service employee at least 10 days after receiving the notice to accept the offer. A successor contractor need not make offers to all employees at the site if it determines that fewer employees are needed to perform the work than were employed by the predecessor. In that case, the successor contractor must retain employees by seniority within each job classification, maintain a preferential hiring list of those employees not retained and, if additional workers are needed in the initial 90-day period, rehire from the list.

Enforcement

Employees who are not offered employment or who are discharged during the transition period may file complaints with the Baltimore City Wage Commission. The Commission may also file a complaint against a contractor. The Commission investigates complaints, and makes a finding as to whether or not probable cause exists for the complaint. The Commission has the authority to issue subpoenas for witnesses and documents.

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If the Commission finds no probable cause for the complaint, it is dismissed. If the Commission finds probable cause, however, it will engage in a settlement conference to "persuade" the contractor to cease its illegal action, reinstate any affected employees, and pay those employees all wages and other compensation they would have otherwise received.

If no settlement agreement is reached within 30 days or the contractor fails to comply with any agreement, the Commission may issue a final order requiring reinstatement, wages plus 10% interest, and injunctive relief. In addition, a penalty may also be imposed, with each day that a violation continues constituting a separate offense: $250 per violation for a 1st offense; $500 per violation for a 2nd offense; and $1000 per violation thereafter.

Practical Considerations

The Displaced Service Workers Protection Ordinance is strikingly similar to a 2012 law passed in Montgomery County. Like the Montgomery County law, the Ordinance does not limit the right of service contract companies in Baltimore City to set the initial terms of any employment offer (e.g. wage rates, fringe benefits, hours of work), although the right of such employers to hire whomever they choose has been constrained by the law. Baltimore City also has legislatively abrogated the at-will nature of the employment relationship between a successor employer and any employee hired from the terminated contractor's staff – at least for the first 90 days of a service contract. Terminations during this period will have to be justified by "just cause." If the predecessor contractor was terminated because it failed to address inadequate service by its employees, the successor will have to document and, if challenged, defend terminations under the law as it deals with the inherited problem.

Finally, where the employees performing under a service contract are represented by a union, the obligation to offer all of the predecessor's employees employment will translate to a duty to recognize and bargain with their union if, as is likely, a majority of them continue employment with the successor. This is because a successor's duty to recognize a union with whom the predecessor had a bargaining relationship is triggered if a majority of the new hires are union-represented. As such, service contracting companies that have historically staffed contracts with crews comprised mostly of their own established employees (and, consequently, been able to remain non-union) may find that the potential collective bargaining consequences of this City Ordinance make certain contracting opportunities in Baltimore City no longer desirable.

Trump Administration Reverses Course on Transgender Discrimination

On October 4, 2017, Attorney General Jeff Sessions issued a memorandum to all U.S. Attorneys, stating that, going forward and contrary to its previous stance, it is the Department of Justice's position that Title VII's prohibition on sex discrimination does not encompass discrimination based on gender identity.

In the memorandum, the Attorney General observed that, while Title VII prohibits sex discrimination based on "sex stereotypes," it does not prohibit gender identity discrimination. This is the position that had historically been taken by the EEOC before its sudden expansion of Title VII under the Obama administration to include both sexual orientation and gender identity discrimination within its ambit.

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The Attorney General reiterated that, "The Justice Department must and will continue to affirm the dignity of all people, including transgender individuals." He also stated that the Department will enforce other federal laws that prohibit gender identity discrimination in certain contexts (not including employment).

This is just the latest example of reversals of Obama-era positions under the Trump administration. As we have previously noted, the DOJ under President Trump has now rejected the National Labor Relations Board's assertion that arbitration agreements containing waivers of the right to bring class or collective actions violate employee's rights under Section 7 of the National Labor Relations Act. The DOJ has also recently rejected the Equal Employment Opportunity Commission's assertion that sexual orientation is covered by Title VII.

Employer's Effective Response to Harassment Complaint Undermines Title VII Claim.

In a case that highlights the importance of a prompt and effective response to complaints of harassment or discrimination, the U.S. Court of Appeals for the 4th Circuit tossed an employee's Title VII claims.

Background of Case. In *McKinney v. G4S Government Solutions Inc.*, a security officer working for a subcontractor at an army ammunition plant was allegedly subjected to harassment over a period of years, consisting of racist comments, a noose, and co-workers using a white sheet to mimic a KKK hood. Although his employer's policy stated that complaints should be made to a supervisor, manager or corporate Human Resources, he complained of the noose and sheet incidents only to a non-employee ranking officer at the plant.

A senior VP of his employer was informed of the complaint, met with the security officer, apologized, affirmed that the company prohibited such conduct, and stated that there would be an investigation. He gave the security officer his card and personal cell phone number, and told him to call if there were any other concerns. The VP then arranged for HR to conduct an employee census regarding employee morale, ethics violations and leadership issues.

During the census, the HR representative was told of the employee's complaint, and conducted an investigation. The security officer was assured that there would be no retaliation, and the individuals involved in the alleged harassment were warned to treat the security officer with respect. Nonetheless, the security officer claimed that he was subjected to retaliation, including being asked if he was going to quit, damage to his car, being micromanaged, and being excluded from meetings.

While the investigation was ongoing, the prime contractor informed the subcontractor that it wanted the project manager, a subcontractor employee who happened to be the primary harasser, removed from the project. The project manager was then terminated by the employer. As for the other allegations, the individuals involved denied that they had engaged in the supposed harassment. Nonetheless, they were required to undergo diversity training.

Since then, the security officer received two promotions with raises. He acknowledged that he had not been subjected to any further harassment, and that the VP continued to check in with him.

The Court's Ruling. The court first noted that the security officer had not been subjected to any tangible employment action on which a Title VII claim could be based, in that the actions about

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which he complained did not affect his salary, benefits or work responsibilities. In fact, he had received favorable employment actions – promotions with raises.

The court also determined that the actions taken by the employer in response to the complaint were appropriate. Under Title VII, the employer is required to take reasonable steps to stop harassment. Given the dispute over whether the individuals engaged in the alleged conduct, the court deemed the diversity training to be "prompt and proportional."

Of particular interest, the security officer had alleged that the employer's response was inadequate because the project manager was fired at the request of the contractor, and not solely in response to his complaint. The court stated that even if the employer had mixed motives for its actions, the issue before the court was "the effectiveness of an employer's remedial action, not the motivation underlying it."

The court also noted that the security officer had unreasonably failed to utilize the complaint procedure implemented by the employer, in that he never brought his concerns to a supervisor, manager or HR. Instead, his only complaint was to a non-employee.

Lessons Learned. As discussed further in the Top Tip below, the employer's actions in this case provide a helpful model for preparing for and responding to harassment claims. Taking such actions can help an employer address concerns appropriately when they arise and hopefully avoid litigation. But if litigation ensues, these actions will also help an employer avoid liability.

TAKE NOTE

EEOC Releases New Resource Document on Harassment. The Equal Employment Opportunity Commission has issued a new document in its "What You Should Know" series for employees: "What to Do if You Believe You Have Been Harassed at Work."

The document instructs the employee first to ask the harasser to stop. If the employee is uncomfortable doing so or the behavior continues, the document then directs the employee to obtain and review the employer's anti-harassment policy and follow the steps set forth in the policy. If no policy exists, the employee is instructed to talk with a supervisor to ask for help. The document also notes that employees are protected from retaliation for making a harassment complaint. It further informs employees of their right to file a charge of discrimination with the EEOC, Finally, it provides links to additional workplace harassment resources.

Post-Termination Payback of Outstanding Commission Draw Violates FLSA. While a draw against future commissions is lawful, requiring a salesperson to pay back outstanding draws constitutes a violation of the Fair Labor Standards Act, according to the U.S. Court of Appeals for the 6th Circuit.

In *Stein v. HHGregg, Inc.*, the court confirmed that, with regard to commissioned sales people, it is lawful to provide an advance "draw" against future commissions for pay periods in which the earned commissions fall below the minimum wage rate in order to ensure compliance with the FLSA's requirement to pay at least the minimum wage "free and clear" for all hours worked in a workweek. Any draw would be paid back through deductions when commissions are earned in the future.

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The court also held, however, that requiring payback of any outstanding draws after termination of employment is unlawful, because it requires the return of wages that have been already delivered, in violation of the "free and clear" minimum wage requirement. Thus, employers of commissioned employees should recognize that draws used to meet the minimum wage requirement are not recoverable if an employee terminates before the draw has been "earned" back.

Court Confirms Payment Required for Breaks Less Than 20 Minutes. An employer's creative attempt to avoid payment for break time by recasting it as "flexible time" was rejected by the U.S. Court of Appeals for the 3rd Circuit.

Although the Fair Labor Standards Act does not require employers to provide breaks, if breaks are provided, FLSA regulations require employers to compensate employees for breaks lasting 20 minutes or less. In *Sec'y U.S. Dept. of Labor v. American Future Systems, Inc. dba Progressive Business Publications,* the employer implemented a new "flexible time" policy under which employees could log off their computers at any time and for any length of time, but that the logged-off time would not be paid unless it lasted less than 90 seconds. The employer argued that the logged-off time was not "hours worked" under the FLSA and therefore need not be paid. The court, however, found the employer's argument "cannot withstand scrutiny" and the "log off" times were clearly breaks under the FLSA.

The employer also argued that the court should analyze whether breaks are predominantly for the benefit of the employer or the employee, and those that benefit the employee need not be paid. The court also rejected this argument, affirming the clear FLSA rule that any breaks less than 20 minutes must be paid.

The lesson here for employers is quite simple – any and all non-working time lasting less than 20 minutes must be paid.

OTHER NEWS AND EVENTS

Mark J. Swerdlin Wins Arbitration Case. Mark Swerdlin successfully defended a major food manufacturer that had subcontracted a project that the Union contended was exclusively bargaining unit work. The arbitrator found the work was a "shared responsibility" that had been performed previously by both bargaining unit and non-bargaining unit employees and therefore the company was within its rights under the collective bargaining agreement's (CBA) subcontracting language to bring in a contractor. The arbitrator also agreed that past practice supported the company's position, and that the assigned work did not fall within the CBA's definition of "temporary labor" that would have disallowed the subcontracting.

Elizabeth Torphy-Donzella Authors Article, "Laws at Odds: The Medical Peer Review Privilege from Disclosure and the National Labor Relations Act." Elizabeth Torphy-Donzella, with the assistance of our law clerk Jeremy Himmelstein, authored this article, which was published in the October 2017 issue of Bender's *Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Four SR Attorneys Speak at HFAM Conference. At the recent 2017 Health Facilities Association of Maryland conference in Ocean City, Maryland, Elizabeth Torphy-Donzella and Fiona Ong

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presented a session on "The Art of Accommodation," and Lindsey White and Shelby Skeabeck presented a session on "Laws You May Have Missed."

Teresa D. Teare Speaks at International Conference. Teresa D. Teare was a presenter at the JunHe International Labor and Employment Law Conference in Shanghai, China on October 17, 2017. Teresa spoke about trends in discrimination and harassment claims to a group of international business executives.

TOP TIP: Preparing for and Responding to Harassment Claims – A Roadmap

As discussed above in *McKinney v. G4S Government Solutions Inc.*, an employer's preparation for and response to an employee's harassment complaint can make all the difference when addressing employee concerns and in defending against a claim if litigation ensues. The actions of the employer in that case provide a good roadmap (with a few editorial additions) for others.

Develop and implement a harassment policy with multiple avenues of complaint – managers, supervisors and Human Resources.

- Train supervisors and managers on the policy and on the employer's obligations under anti-discrimination and anti-harassment laws generally.
- Ensure that supervisors and managers report any complaints of harassment that they receive immediately to Human Resources (or top management, if there is no HR), regardless of whether or not they believe there is merit to the complaint.
- Meet with the complainant promptly to assure him/her that the company prohibits harassment and prohibits retaliation for bringing complaints, to obtain details about the concerns, and to inform the complainant that any new or additional concerns should be reported immediately.
- Conduct an immediate investigation into the complaint, including speaking with the alleged harasser(s) and any possible witnesses. It may be wise to consult with outside employment counsel at this point, to ensure that the investigation is appropriately structured and executed.
- Remember that you can request but not require interviewees to keep the matter confidential.
- Warn the alleged harasser(s) not to retaliate against the complainant. Consider separating the harasser(s) and complainant for (at least) the duration of the investigation.
- Make a determination as to whether or not the alleged conduct occurred and whether it constitutes harassment. Then take action that is proportional to the determination.
- Follow up with the complainant regarding the results of the investigation and any actions taken (although specifics about any disciplinary action should not be shared – you can say the harasser "has been counseled" or "has been disciplined"). Reiterate that retaliation is prohibited, and that any concerns should be immediately reported.
- Continue to check in with the complainant periodically to make sure that there are no further issues.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Be Careful of What You Say About Your Former Employee…, by Fiona Ong, October 25, 2017. (Selected as a "noteworthy" blog post by Employment Law Daily)

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- Bring In Your Parents Day? by Fiona Ong, October 19, 2017.
- The EEOC's Civility Training Program – Watch Out For That NLRB Charge! by Lindsey White, October 12, 2017. (Selected as a "noteworthy" blog post by Employment Law Daily)
- Lessons from Shake Shack: A Higher Minimum Wage = A Loss of Jobs by Fiona Ong, October 5, 2017. (Selected as a "noteworthy" blog post by Employment Law Daily)

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