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E-UPDATE

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RECENT DEVELOPMENTS

Fourth Circuit Expands Joint Employer Definition Under the Fair Labor Standards Act

On January 25, 2017, the U.S. Court of Appeals for the Fourth Circuit (which covers Maryland, Virginia, West Virginia and the Carolinas) announced a new and expansive standard for determining if two legally separate entities are joint employers for purposes of Fair Labor Standards Act ("FLSA") liability. The standard is likely to render companies that use subcontractors for labor jointly responsible for minimum wage and overtime violations.

Facts of the Case: In *Salinas v. Commercial Interiors, Inc.*, a framing and drywall subcontractor ("J.I.") owned by two brothers provided labor to Commercial Interiors, a company that offered general contractor and finishing services to clients. Virtually all of J.I.'s business was with Commercial. The drywall laborers supplied by J.I. were employees of J.I.

According to the undisputed facts, J.I. was responsible for hiring and firing laborers and for paying them, although on a few occasions, Commercial issued paychecks to some laborers. At one point, Commercial directed some J.I. laborers to fill out employment applications with Commercial at a site that mandated certain insurance benefits for laborers (It did so because J.I. had difficulty in enrolling in the program.) Commercial played a role is determining the daily and weekly schedules of the laborers, determining the start and end times and, on occasion, directing laborers to work additional hours. Commercial's superintendent also communicated site-specific staffing needs to J.I., who assigned laborers according to these requests. Employees signed in each day on timesheets provided by Commercial, and Commercial's foremen reported their time worked each day to Commercial's main office. Commercial, not J.I., retained records of time worked.

In addition, the J.I. laborers and supervisors wore shirts and hats bearing Commercial's logos. They performed their work using tools and equipment provided by Commercial. Commercial foremen gave instructions to J.I. foremen about projects to be completed, and the J.I. foremen translated the instructions to the largely Spanish-speaking laborers. At times, Commercial was the sole supervisory authority on the job. J.I. employees were required to attend weekly meetings and periodic safety meetings conducted by Commercial.

The laborers sued J.I. and Commercial for wage and hour violations under Federal and Maryland law, arguing that they were joint employers of the plaintiffs. The district court granted summary judgment to Commercial, applying a test that turned on the generally recognized and bona fide nature of the relationship between companies and subcontractors and evidence that the arrangement

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was not created to avoid legal obligations under the FLSA. A jury found J.I. liable to the plaintiffs and J.I. went out of business. The plaintiffs appealed the dismissal of Commercial.

The Court's Rulings: The Fourth Circuit reversed the lower court and, under a new test for determining joint employer liability, found that Commercial was a joint employer of the J.I. laborers as a matter of law. In a lengthy opinion, the Fourth Circuit panel held, "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two or more persons' or entities' combined influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor."

According to the Fourth Circuit, focusing in the first instance on the relationship between the **putative joint employer and the worker**, rather than on the relationship between **the putative joint employers themselves** did not shed light on whether the two **entities** were joint employers. The question of whether two employers are joint employers "requires courts to determine whether the putative joint employers are not wholly disassociated or, put differently, share or codetermine the essential terms and conditions of a worker's employment." Economic dependence of the worker on the employer(s) is relevant to whether there is an independent contractor or employment relationship, which should not be examined in this context before the joint employer question is resolved.

The Fourth Circuit identified a set of six non-exclusive factors that courts should consider in determining if two entities are joint employers. They are:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
>
> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
>
> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

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The Court emphasized that **one factor alone** may be sufficient to conclude that two entities are "not completely disassociated" so as to render them joint employers if the facts supporting that factor demonstrate that the entity has a "substantial role" in determining the workers' terms and conditions of employment.

Under the facts before it, the Court found ample evidence that Commercial was the joint employer of J.I.'s laborers. Commercial jointly supervised the work of the laborers, which satisfied the first factor. As to the second factor, although Commercial did not formally hire or fire J.I.'s laborers, Commercial exercised authority over the laborers' hours of work, days of work, staffing of projects, and in some cases, when they could incur overtime. As such, the two entities were not "completely disassociated." Viewing the third and fourth factors together, the Court acknowledged that the two companies did not share any ownership interest. However, the Court found Commercial was the nearly exclusive source of J.I.'s work and, after J.I. went out of business, Commercial continued to do business with the former J.I. owners under a new company. Thus, this demonstrated a degree of permanency in the relationship and control by Commercial of the subcontracting entity so as to conclude that they were not "completely disassociated." The fifth factor – work at the putative joint employer's site – manifestly was established and buttressed, said the Court, by the fact that Commercial required the laborers to sign in and out with Commercial's foreman. As to the sixth factor, Commercial's provision of tools and equipment used to perform the work were responsibilities normally discharged by an employer. Furthermore, while Commercial did not issue paychecks, it kept track of the laborers' time and maintained records, which also generally are employer responsibilities.

Having found that Commercial and J.I. were joint employers, the court then turned to the second question: whether in their "one employment" the labors were employees or independent contractors. The question turns on the economic dependency, if any, of the workers on the employer. The Court specified another six factors for this separate inquiry under established Circuit precedent: "(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business." The Court did not, however, have to analyze these factors because the laborers already had been conceded to be employees of J.I. and thus, by definition, were "necessarily economically dependent on Commercial and J.I. in the aggregate."

Practical Impact: The Fourth Circuit has aligned itself with the DOL's expansive position on joint employment under the FLSA adopted by the past Administration. Under this standard, traditionally recognized general and subcontractor relationships, which necessarily involve some coordination, are not entitled to different treatment. With the standard being "complete disassociation" between the contracting companies, it is likely that most relationships will be found to be joint. Moreover, under the Fourth Circuit's standard, the reasonableness of a company's decision to contract out employment services or its good faith does not have any impact on whether there is joint employment. The breadth of the FLSA and the liberal interpretation of the employer/employee make for a different legal liability outcome than might apply in the commercial context.

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While this case could well lead to greater liability of contractors for wage claims by subcontractor or agency employees, some of this can be dealt with through contractual indemnification agreements, as well as requirements that subcontractors agree that they will comply with all laws, including the FLSA. That, of course, requires that the third party providers be adequately capitalized so that, in the event of FLSA claims, the receiving employer is not "the only man standing" when such claims are pursued.

Finally, it is important to note that the Court made clear that the standards announced are not necessarily applicable to other statutes, like Title VII and the National Labor Relations Act, that have a narrower definition of the "employer/employee" relationship.

Fourth Circuit Applies New Joint Employer Standard to Independent Contractors

In a decision issued the same day as *Salinas v. Commercial Interiors, Inc*., in which the U.S. Court of Appeals articulated a new and expansive standard for establishing joint employer status under the Fair Labor Standards Act, the Fourth Circuit applied *Salinas* to a case involving independent contractors.

Facts of the Case: In *Hall v. DIRECTV*, satellite television technicians alleged that DIRECTV, along with its subcontractors (including DirectSat), through a "web of agreements with various affiliated and unaffiliated service providers," jointly employed them and was therefore jointly and severally liable for purported FLSA violations. According to the plaintiff technicians, although they were designated as independent contractors, "DIRECTV dictated nearly every aspect of Plaintiffs' work through its agreements with the various providers that directly employed technicians."

DIRECTV moved to dismiss the plaintiffs' claims. The district court applied a two-step inquiry to the plaintiffs' claims – with the first question being whether the individual worker is an employee of each putative joint employer, and if the answer was "yes," turning to the second question of whether an entity other than the direct employer is a joint employer of the worker. The district court determined that, in this instance, the plaintiffs had failed to allege sufficient facts to establish the joint employer relationship, and therefore dismissed the FLSA claims against DIRECTV.

The Court's Rulings: The Fourth Circuit reversed the district court's dismissal. It found that the trial court had inverted the relevant inquiry as to joint employer status. Noting that it had addressed the proper order of analysis in FLSA joint employment action in a prior case, *Schultz v. Capital Int'l Securities Inc.*, the Fourth Circuit stated that the first step is to "determine whether the defendant and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work." The second step of the analysis asks whether the worker is an employee or independent contractor – the answer to which depends in large part on the answer to the first question. The Fourth Circuit further explained that "the joint employment doctrine is premised on the theory that, when two or more entities jointly employ a worker, the worker's entire employment arrangement must be viewed as 'one employment' for purposes of determining whether the worker was an employee or independent contractor under the FLSA." (internal quotations omitted).

The Fourth Circuit explained that this two-step analysis "will not automatically render every independent contractor who performs services for two or more entities an 'employee' within the FLSA's scope. Rather, under this two-step inquiry, individual who bear true hallmarks of

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independent contractor status will remain outside of the FLSA's scope even if they perform work for two or more entities that are 'not completely disassociated' with respect to those individuals' work."

With regard to the two-step analysis, the Fourth Circuit noted that the district court had also applied the wrong test for joint employment, rather than the newly-articulated test from *Salinas.* The use of the wrong, "unduly restrictive" test meant that the district court had erred in granting the motion to dismiss. Further, the Fourth Circuit noted that the district court had also erred in concluding that a majority of factors must weigh in favor of joint employment for it to exist.

The Fourth Circuit then applied the correct legal standards to the plaintiffs' claims. First, the Fourth Circuit found the plaintiffs had sufficiently alleged that DIRECTV and its subcontractors, through various provider agreements and standards, "shared authority of hiring, firing and compensation." Thus, the plaintiffs had made out a plausible claim that DIRECTV and its subcontractors were "not completely disassociated."

Next, the Fourth Circuit turned to the question of whether under the plaintiffs' "one employment" with DIRECTV and its subcontractors, the plaintiffs had sufficient alleged that they were employees rather than independent contractors. Relying upon the six-factor independent contractor test identified in our discussion of the *Salinas* case, the Fourth Circuit determined that the plaintiffs had sufficiently alleged that they were effectively economically dependent on DIRECTV. DIRECTV "collectively influenced nearly every aspect of Plaintiffs' work as DIRECTV technicians" – including hiring, compensation, training, control of the manner and timing of installations, and dress.

In conclusion, the Fourth Circuit found that the plaintiffs had adequately alleged that DIRECTV and its subcontractors were joint employers of the technicians, and that the plaintiffs were economically dependent upon them, meaning that they were employees rather than independent contractors.

Practical Impact: In conjunction with the *Salinas* case, this case vastly expands the likelihood that joint employer status will be found in many more situations – and that it will be more difficult to establish independent contractor status.

NLRB, EEOC and DOL Issue Joint Fact Sheet on Retaliation

The National Labor Relations Board, the Equal Employment Opportunity Commission, and the Department of Labor (along with two of its sub-agencies – the Office of Federal Contract Compliance Programs and the Occupational Safety and Health Administration) issued a joint Fact Sheet, "Retaliation Based on the Exercise of Workplace Rights Is Unlawful." The Fact Sheet, which is available in 14 languages in addition to English, explains that the agencies will protect all employees from retaliation by employers for exercising workplace rights.

A theme that runs throughout the Fact Sheet is unauthorized/undocumented workers. The Fact Sheet repeatedly emphasizes that a worker's immigration status is irrelevant to the protections of the various workplace laws administered by these agencies, although in some cases, it may affect the remedies available. The Fact Sheet reviews the following laws:

- **The Fair Labor Standards Act** – workers are protected from retaliation for asserting minimum wage and overtime claims, or for cooperating in an FLSA investigation.

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- **The Occupational Safety and Health Act** – the law prohibits retaliation for exercising rights under OSHA, including filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, reporting an injury, and raising a safety or health complaint with the employer.
- **Whistleblower laws enforced by OSHA** – these laws protect workers from retaliation for reporting violations related to these laws.
- **Equal Employment Opportunity Laws enforced by the OFCCP** – employees are protected from retaliation because they filed complaints of discrimination with the OFCCP, their employer or others, or they participated in a discrimination investigation or contract compliance evaluation, or engaged in activity related to the administration of other EEO laws.
- **Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act** – under these laws, which are enforced by the EEOC, employees are protected from retaliation if they filed charges of discrimination with the EEOC, complained to their employers or other covered entities about discrimination, or participated in an investigation or lawsuit.
- **The National Labor Relations Act** – employees may not be subjected to retaliation for exercising their rights to form, join or assist a labor organization for collective bargaining, working together to improve terms and conditions of employment, or (conversely) refraining from such activity.
- **The Immigration and Nationality Act and Certain Nonimmigrant Visa Programs** – the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the Civil Rights Division of the Department of Justice enforces the anti-discrimination provisions of the INA. Employees are protected from retaliation for filing discrimination charges with the OSC, cooperating with an OSC investigation, contesting potential violations of the law, or asserting INA rights on behalf of themselves or others. The DOL's Wage and Hour Division enforces the worker protections in the H-1B, H-2A, and H-2B visa programs. Employers may not retaliate against H-2A and H-2B workers who file a complaint, testify in a proceeding, consult with an attorney or legal assistance program, or assert INA or visa program rights on behalf of themselves or others. H-1B workers are protected from retaliation for disclosing program violations or cooperating in compliance proceedings.

The Fact Sheet provides resources on the remedies that may be recovered for violations of these anti-retaliation prohibitions.

OSHA Releases Anti-Retaliation Guidance

The Occupational Safety and Health Administration announced that it was issuing a guidance document, "Recommended Practices for Anti-Retaliation Programs," intended to assist employers with creating workplaces free from retaliation. OSHA's recommendations, which are not mandatory, are intended to be adaptable to all employers.

Protections against retaliation. The guidance first discusses the whistleblowing protections offered by 22 federal statutes enforced by OSHA, noting that employers may not retaliate against an employee for engaging in activities protected by those statutes. Such activities include, among other things: filing a report with a governmental agency about possible violations; reporting a possible

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violation to an employer; reporting a workplace illness, injury or hazard; cooperating with law enforcement; and refusing to violate the law.

What is retaliation? The guidance explains that retaliation is any adverse action that is taken because the employee engages in a protected activity, which can chill an employee's willingness to raise workplace concerns. It also discusses the types of adverse employment actions that could constitute retaliation: firing or laying off; demoting; denying overtime or promotion; disciplining; denying benefits; failing to hire or rehire; intimidation; making threats; blacklisting; reassignment to a less desirable position or actions affecting prospects for promotion; reducing pay or hours; and more subtle actions such as isolating, ostracizing, mocking, or falsely accusing the employee of poor performance.

Creating an anti-retaliation program. The guidance outlines five key elements of an effective anti-retaliation program, with numerous and specific suggestions on how to implement each of these elements:

1. Management leadership, commitment, and accountability.
2. System for listening to and resolving employees' safety and compliance concerns.
3. System for receiving and responding to reports of retaliation
4. Anti-retaliation training for employees and managers
5. Program oversight

The guidance concludes by providing information about how employees may contact OSHA with any concerns, whether in person, by telephone, by mail, or online.

TAKE NOTE

D.C. – New Law Banning Credit Inquiries. The District of Columbia Council has passed a law that bans employers from inquiring into, request or using an applicant's or employee's credit information, or from taking employment action based on such information. "Credit information" is defined as "any written, oral, or other communication of information bearing on an employee's creditworthiness, credit standing, credit capacity, or credit history." The affected methods of inquiry include application forms, interviews and credit history checks. An amendment to the law provides for several exemptions applicable to private employers:

- Where D.C. law requires an employer to require, request, suggest or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee's credit information.
- Where an employee is required to possess a security clearance under D.C. law.
- Financial institutions, where the position involves access to personal financial information.
- Where an employer requests or receives credit information pursuant to a lawful subpoena, court order, or law enforcement investigation.

The law imposes a penalty of $1000 for a first violation, $2500 for a second violation, and $5000 for subsequent violations. The law will take effect following the Mayor's approval, a 30-day period of Congressional review, and publication in the District of Columbia Register.

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DOL – Increased Penalties. Less than six months after the Department of Labor increased the civil money penalties that can be imposed for violations of the laws that it enforces, it has announced additional increases. As we previously reported in our July E-Update, due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose. These increases will take effect for penalties assessed after January 13, 2017, based on violations occurring after November 2, 2015.

- **Fair Labor Standards Act.** For repeated or willful violations of the FLSA's minimum wage or overtime requirements, the maximum monetary penalty will increase from $1,894 to $1,925. Penalties for violation of the FLSA's child labor restrictions will increase from a maximum of $12,080 per under-18 worker to $12,278, while violations resulting in the child's death will increase from a maximum of $54,910 to $55,808, which may be doubled for repeated or willful violations.
- **Employee Polygraph Protection Act.** The penalty for violations of EPPA increases from $19,787 to $20,111.
- **Family and Medical Leave Act.** The penalty for failing to comply with the posting requirement increases from $163 to $166.
- **Occupational Safety and Health Act.** The maximum penalty for other-than-serious, serious, and failure-to-abate violations increases from $12,471 to $12,675. The maximum penalty for willful and repeat violations increases from $124,709 to $126,749.

FLSA – Emotional Distress Damages. The U.S. Court of Appeals for the Fifth Circuit concluded that the Fair Labor Standards Act allows an employee to recover damages for emotional distress due to retaliation. The damages provision of the FLSA permits a retaliation victim to receive "legal or equitable relief," including "employment, reinstatement, promotion, the payment of wages lost and an additional equal amount as liquidated damages." In *Pineda v. JTCH Apartments, L.L.C.*, the Fifth Circuit determined that this language encompassed the payment of damages for the employee's emotional injuries suffered as the result of the employer's illegal retaliatory conduct. In so holding, the Fifth Circuit joined the two other federal appellate courts – the Sixth and Seventh Circuits – that have also found emotional distress damages available for FLSA retaliation claims.

FMLA – Posting Violation. A Maryland federal court held that employees cannot sue their employer for failing to post the required Family and Medical Leave Act notice. Employers who are covered by the FMLA are required to display in a "conspicuous" place a poster that informs employees of their rights under that law. In *Antoine v. Amick Farms, LLC*, employees claimed that the employer's failure to comply with the poster requirement prevented them from learning of their entitlement to legally protected FMLA leave. The court, however, determined that there was no private right of action to enforce this notice requirement; under the law, only the Department of Labor had the authority to enforce it. Nonetheless, we recommend that covered employers should take care to comply with the posting requirement.

FCRA – Disclosure Requirements. A recent case reminds employers of the importance of complying with the Fair Credit Reporting Act's very technical disclosure requirements. As we previously discussed in our January 2016 E-Update's Top Tip, the FCRA applies where an employer uses a third-party consumer reporting agency to conduct background checks (including criminal and

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credit checks) on its applicants and/or employees. The FCRA requires, among other things, that before conducting any background check, the employer provide to applicants a "clear and conspicuous disclosure" in writing that informs them that a consumer report (i.e. background check) may be obtained for employment purposes. The FCRA also requires that the employer obtain written authorization from the applicant to conduct the background check. The disclosure must be in a document that consists solely of the disclosure, or the disclosure and the authorization only. In *Syed v. M-I, LLC*, the disclosure form also included a liability waiver, by which the applicant waived his rights to sue the prospective employer and its agents for any FCRA violations. The U.S. Court of Appeals for the Ninth Circuit found that the inclusion of this waiver violated the FCRA.

ADEA – "Subgroup" Disparate Impact Claim. The U.S. Court of Appeals for the Third Circuit found that the Age Discrimination in Employment Act permits a "subgroup" of employees to bring a claim that others in the ADEA-protected group of employees age 40 and over received better treatment. In so holding, the Third Circuit disagreed with the Second, Sixth and Eighth Circuits, who have refused to recognize such a claim.

In *Karol v. Pittsburgh Glass Works, LLC*, a group of employees age 50 or more claimed that they were negatively impacted in a company reduction in force based on their age as compared with those younger, which included 40-50 year olds also protected by ADEA. The employer argued that ADEA does not permit claims by subgroups of the protected class. The Third Circuit, however, quoting the U.S. Supreme Court, held that "ADEA protects against *age* discrimination as opposed to 40 or over discrimination." (Emphasis in original, internal quotations omitted).

For employers in the Third Circuit (which includes Delaware, New Jersey and Pennsylvania), this means that in preparing for a RIF or other layoff, they must take care to evaluate whether there is a negative impact on employees based on more specific ages – not just all those age 40 and over.

NEWS AND EVENTS

Webinar. On Wednesday, March 1, at 12:30 p.m. Eastern time, Shelby Skeabeck will be presenting a Bloomberg BNA webinar, "Best Practices for Transgender Employees." Along with her co-panelists, Shelby will be discussing this fast-developing area of law and will offer suggestions on best practices to benefit both employers and employees. This webinar has been approved for 1 CLE, HRCI and SHRM credit for attendees. For more information and to register for this webinar, click here. The cost of the webinar is $229; however, you can receive a 25% discount off the registration fee with the following code: **FIRMDISC17.**

Elizabeth Torphy-Donzella authored an article, "Second Circuit Joins the Chorus of Courts of Appeals Ratifying NLRB's Specialty Healthcare Unit Determination Standard," for the January issue of Bender's Labor and Employment Bulletin. This is a monthly newsletter that covers issues of significance to labor and employment practitioners. Liz's article addresses the upholding by federal courts of the National Labor Relations Board's revised test for determination of the appropriate bargaining unit for purposes of collective bargaining.

Fiona Ong was quoted in a Society for Human Resource Management article, "EEOC Publishes Guidance to Reduce National Origin Discrimination," published on January 5, 2017. Fiona provided

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advice on how companies can utilize the EEOC's guidance to minimize the risk of national origin discrimination claims.

On December 15, 2016, Lindsey White presented a webinar, "**Murky Waters: Successfully Navigating an EEOC Investigation and Litigation**," on behalf of hrsimple.com, the publisher of the Maryland Human Resources Manual and similar publications in other states.

TOP TIP: Document! Document! Document!

All too often, an employer becomes frustrated with an employee's continuing poor performance or conduct and wants to terminate – but lacks the documentation to establish the performance and conduct issues and to demonstrate that the employee was counseled about them. There are many reasons that managers give for the lack of documentation – not wanting to create a negative disciplinary history for the employee, not having the time to do so, not being aware of the need to document, etc.

This lack of documentation, however, creates significant risk for an employer who chooses to move forward with the termination. Factfinders, whether the Equal Employment Opportunity Commission or a judge or a jury, hold employers to a higher standard when it comes to documentation. Frankly, without contemporaneous, written evidence of the issues, the factfinder will be likely to conclude that the employer is just making them up. And without documented, typically progressive counseling about those issues, there is the sense that the employee has been denied the notice and opportunity to fix the problems. Without evidence to support the employer's reason for termination, the factfinder will be likely to find that the termination was actually for an impermissible reason – such as discrimination or retaliation.

A recent case provides a good example of the benefits of documentation. In *Sieden v. Chipotle Mexican Grill, Inc.*, a restaurant General Manager was terminated two months after informally complaining about his supervisor's comment that the GM was "hiring too many Hmong people." He claimed that his termination was in retaliation for his complaint about the supervisor's racist comment. The company was able to demonstrate, however, that the termination was based on his poor performance. Specifically, the company had documentation establishing that the GM had been counseled on his performance prior to his complaint, and significant responsibilities had been removed. Moreover, his most recent performance evaluation also included those concerns. Given this documentation, the U.S. Court of Appeals for the Eighth Circuit found that the employer had a legitimate reason for the termination, and the employee could not demonstrate that the reason was a pretext for discrimination.

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