SHAWE ROSENTHAL LLP

E-UPDATE

July 31, 2017

RECENT DEVELOPMENTS

Important New Agency Documents for Employers

Federal agencies have released several documents of significant interest to employers: a revised mandatory I-9 Employment Eligibility Verification form, a new version of the mandatory USERRA poster, an electronic OSHA form for the upcoming requirement to report electronically workplace injuries and illnesses, and a revised online OSHA whistleblower complaint form.

New Mandatory I-9 Form. The U.S. Citizenship and Immigration Services has released a new I-9 form, and all employers are required to begin using the new form for their new hires no later than September 18, 2017. Until September 18, employers may either use the new form or continue using the old form. Failure to comply with the requirement to use the new form after that date may result in significant fines.

New USERRA Poster. The Department of Labor has released a new version of the mandatory poster informing employees of their rights under the Uniformed Services Employment and Reemployment Rights Act. All employers are required to display, in the area where such notices are customarily displayed, the DOL's USERRA poster. Notably, the DOL states that employers may continue to use the July 2008 and October 2008 versions.

New Electronic OSHA Form for December 1 Injury and Illness Reporting. On August 1, 2017, the Occupational Safety and Health Administration will launch a web-based electronic form, to be used by employers to submit required injury and illness data from their 2016 Form 300A.

As we previously discussed in our May 2016 E-Update, OSHA issued a final rule requiring employers with 250 or more employees to submit electronically information from Forms 300 (Log of Work-Related Injuries and Illnesses), 300A (Summary of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Report). In addition, employers with 20-249 employees in specifically-identified industries with historically high rates of workplace injuries and illnesses will be required to submit electronically information from Form 300A. This electronic reporting requirement was originally to begin in July 2017, but OSHA has now announced that the implementation date has been pushed to December 1, 2017.

Employers will be able to access the electronic form from a new webpage, which also contains information on reporting requirements, frequently asked questions, and a link for requesting assistance.

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New Online OSHA Whistleblower Complaint Form. OSHA has also released a revised version of its online whistleblower complaint form, through which employees may report alleged violations of the 22 whistleblowing statutes administered by OSHA (including under the Dodd-Frank Act, the Sarbanes-Oxley Act, the Affordable Care Act, or OSHA). Employees may use this form, or may file written complaints by fax, mail, or hand delivery, or telephonic complaints by contacting the agency or an OSHA regional or area office.

The revised form provides guidance through the complaint-filing process. Of particular note, the revised form now contains pop-up boxes that inform employees about other agencies that may be interested in the type of misconduct alleged by the employee, thereby potentially enabling other agencies to become involved.

Employees' Disloyal Posters Exceeded Protected Right to Engage in Concerted Activities.

The U.S. Court of Appeals for the 8th Circuit found that employees' posters, which suggested that their employer's sandwiches posed a health threat to customers, were so disloyal that they exceeded the employees' right to engage in concerted activities under the National Labor Relations Act.

Facts of the Case: In *MikLin Enterprises dba Jimmy John's v. NLRB*, the union focused organizing efforts at the company's 10 Jimmy John's sandwich shops on a paid sick leave campaign among the employer's workers. The union created a poster with two identical sandwiches, one purportedly made by a sick worker and one by a healthy worker. It stated:

> CAN'T TELL THE DIFFERENCE?
>
> THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T GET PAID SICK DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK.
>
> WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST.

These posters, which also contained the Company owner's personal telephone number, were distributed to more than 100 media outlets and subsequently plastered all over the city. Management removed the posters, but the Company owner was bombarded with calls from people who thought it was unsafe to eat at the stores. Six employees who coordinated the poster attack were fired, and three others received written warnings.

The National Labor Relations Board concluded that the Company had violated the NLRA, which "protects employee communications to the public that are part of and related to an ongoing labor dispute," such as the media releases and posters. While communications may be "so disloyal, reckless, or maliciously untrue as to lose the Act's protections," the Board found that these communications did not rise to that level. A three-member panel of the 8th Circuit enforced the Board's determination, but the Company was granted rehearing *en banc*, meaning a hearing by all the judges of the 8th Circuit.

The Court's Decision. The *en banc* 8th Circuit turned to the Supreme Court decision, *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, in which the Supreme Court stated that "[t]here is no

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more elemental cause for discharge of an employee than disloyalty to his employer." The Supreme Court further made clear that communications are disloyal if they "mak[e] a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in an manner reasonably calculated to harm the company's reputation and reduce its income."

The 8th Circuit then rejected the Board's position that communications are disloyal only if they are "maliciously motivated to harm the employer," noting that the *Jefferson Standard* principle includes an objective component that focuses not on the employee's purpose, but on the means used. The 8th Circuit also noted that the Board's position seeks to protect any public communication intended to advance employees' aims in a labor dispute, regardless of the manner and extent of any harm to the employer, contrary to the holding in *Jefferson Standard*. The 8th Circuit went on to state that the proper inquiry is "whether employee public communications reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or services."

In this case, the allegations of contaminated food were likely to have a "devastating impact" on the Company's business. Moreover, the statement, "We can't even call in sick" was actually "materially false and misleading," as the Company complied with state Department of Health regulations requiring employees to call in sick if they experienced flu-like symptoms. Accordingly, the 8th Circuit found these communications so disloyal that they lost the protections of the NLRA.

Lessons Learned. The good news for employers is that there are limits on what employees can communicate to the public during the course of a labor dispute.

Employer May Be Required to Permit Medical Marijuana Use as Reasonable Accommodation

Massachusetts' highest state court ruled that an employer can be held liable under state anti-discrimination laws for firing an individual for using medical marijuana.

Background. The case of *Barbuto v. Advantage Sales and Marketing, LLC* involved a medical marijuana user who tested positive for marijuana use during a pre-employment drug test. The employer had a policy prohibiting individuals who test positive from being employed, so the individual was terminated after her first day on the job.

She sued the employer for violating her rights under Massachusetts' anti-discrimination law to be free from "handicap" discrimination. The employer argued that, because marijuana is an illegal drug under federal law, she was not a "qualified handicapped person" because the only accommodation she sought was a federal crime.

The Court's Decision. The Massachusetts Supreme Judicial Court ruled that the plaintiff could pursue claims against her employer on the basis of "handicap" discrimination under state law because of her medical marijuana use. The Court found the fact that marijuana is listed as illegal under federal law did not make the accommodation of medical marijuana use *per se* unreasonable. It noted that "[t]he only person at risk of Federal criminal prosecution of medical marijuana is the employee" and that no liability would attach to the employer by permitting an employee to continue off-site use of medical marijuana.

The Court further also noted that to find the requested accommodation *per se* unreasonable out of respect to federal law "would not be respectful of the recognition of Massachusetts voters, shared by

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the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."

The Court also ruled that, even if the use of medical marijuana was an unreasonable accommodation, the employer should have engaged in the interactive process with the individual to ascertain whether another accommodation, such as other medications, could have provided the employee with an effective accommodation.

The Court recognized that an employer might be able to establish undue hardship, if it could prove that the use of marijuana by an employee would violate an employer's contractual or statutory obligation, and thereby, jeopardize the company's ability to perform its business. Specifically, the Court referenced the fact that transportation employers are subject to regulations promulgated by the U.S. Department of Transportation that prohibit any DOT-covered safety-sensitive employee from using marijuana. The Court also recognized that federal government contractors are obligated to comply with the Drug Free Workplace Act. Additionally, the Court noted that an employer could show a safety risk to the public, the employee, or her fellow employees from the continued use of medical marijuana or from the potential that marijuana use would impair an employee's work performance.

The case makes clear though that the Massachusetts medical marijuana act does not require an employer to permit ***on-site*** marijuana use as an accommodation to an employee. The case did not address the recreational use of marijuana.

What This Means for Employers. Up until this month, courts addressing the issue of medical marijuana users in the workplace had consistently held that, because marijuana use is still illegal under federal law, employers were not required to permit the use, even outside the workplace and outside of work hours, of medical marijuana as a reasonable accommodation. And certainly, it would not be considered a reasonable accommodation under the federal Americans with Disabilities Act. However, this decision provides a new and strikingly different approach to the issue under a state disability discrimination law that may have some appeal to other states. Employers will need to pay close attention to how the state courts in those states in which they have operations react to this issue in the future.

DOL Regulation Prohibiting Employer Retention of Tips Is Invalid - And Will Be Rescinded

The U.S. Court of Appeals for the 10th Circuit found invalid the Department of Labor's regulation that prohibits employers from retaining tips regardless of whether they utilize the tip credit towards the minimum wage requirement. Moreover, the DOL proposes to rescind the regulation.

Background. Under the Fair Labor Standards Act, an employer may take a tip credit toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage ($7.25/hour). Tipped employees are defined as those who customarily and regularly receive more than $30 per month in tips. The FLSA does not address who owns the tips; however, the DOL issued regulations in 2011 providing that tips are the property of the employee and may not be used by the employer for any purpose other than the tip credit.

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In *Marlow v. The New Food Guy, Inc.*, a caterer paid its employees well in excess of the minimum wage and retained customer gratuities. A server sued, arguing that the tips should not have been retained by the caterer.

The Court's Decision. The 10th Circuit, however, found that the DOL lacked the authority to implement this regulation. In so holding, the 10th Circuit explicitly disagreed with the 9th Circuit, which upheld the regulation in *Oregon Restaurant & Lodging Ass'n v. Perez*, a case that is being appealed to the Supreme Court.

The DOL Intends to Rescind the Regulation. On July 20, 2017, the Trump administration released its Unified Agenda of Regulatory and Deregulatory Actions, and announced that it intends to issue a proposed rule in the next month to rescind this tip credit regulation. This is part of the Trump administration's stated plan to reverse anti-business regulations that had been imposed by the Obama administration.

TAKE NOTE

DOL To Revive Opinion Letters. The Department of Labor announced that it will once again begin issuing opinion letters, a practice that had been discontinued in 2010 Opinion letters respond to a specific wage-hour inquiry from an employer or other entity to the DOL, and represents the DOL's official position on that particular issue. Other employers may then utilize these opinion letters as guidance.

The DOL has established a webpage where existing opinion letters and other guidance are available. Employers may also request an opinion letter through the webpage. The DOL is selective in determining to which requests it will respond.

DOJ Rejects EEOC's Expansion of Title VII to Include Sexual Orientation. In a closely-watched case pending before the U.S. Court of Appeals for the 2nd Circuit, *Zarda v. Altitude Express dba Skydive Long Island*, the Department of Justice has taken the position that Title VII's prohibition on sex discrimination does not include sexual orientation.

In this case, a panel of the 2nd Circuit had previously held that Title VII does not cover sexual orientation; however, the full (*en banc*) 2nd Circuit has now agreed to decide the matter. The EEOC has consistently asserted, including in this case, that sexual orientation discrimination is sex discrimination under Title VII, and the federal circuit courts that have addressed this issue thus far are split, as we discussed in our April 2017 E-Update and March 2017 E-Update.

The DOJ filed a brief in this case, in which it rejects the EEOC's position, stating that the EEOC is "not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade." Of interest, this is the second time in weeks that the Trump DOJ has expressly rejected a position asserted by a sister agency, whom the DOJ would normally represent in court. As discussed in our June 2017 E-Update, the DOJ has now asserted to the Supreme Court that waivers of the right to bring class or collective actions over employment-related disputes cannot be precluded by the National Labor Relations Act, and should be enforced under the Federal Arbitration Act – contrary to its prior position under the Obama administration.

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Single Use of N-word Can Create Hostile Work Environment. The U.S. Court of Appeals for the 3rd Circuit found that a single sufficiently severe racial epithet might be enough to create a hostile work environment in violation of Section 1981.

In *Castleberry v. STI Group*, the 3rd Circuit first clarified that a viable hostile work environment harassment claim requires conduct that is sufficiently severe or pervasive to alter the work environment and interfere with the employee's performance. Relying upon Supreme Court precedent, it rejected the trial court's holding that the conduct must be both severe and pervasive.

Next, the federal courts generally have found that isolated racial epithets do not meet the severe or pervasive standard. The 3rd Circuit, however, recognized the possibility that a single use of the "N" word by a supervisor might be enough to support a hostile work environment claim. This ruling, which follows a recent similar ruling from the 2nd Circuit as discussed in our May 2017 E-Update, potentially makes it easier for employees to establish a claim of a racially hostile work environment.

Attendance Is Essential Function for Temporary Employee. A leave of absence is not a reasonable accommodation for a temporary employee, according to the U.S. Court of Appeals for the 10th Circuit.

In *Punt v. Kelly Services*, a temporary employee was diagnosed with cancer soon after beginning an assignment at GE, and began missing work, which required another temp to cover her duties as a receptionist. She was terminated from her assignment at GE, and subsequently sued both GE and staffing agency for a failure to accommodate under the Americans with Disabilities Act.

The 10th Circuit, however, found that the employee had not requested a plausibly reasonable accommodation because she did not provide information as to the expected duration of her impairment and how much leave she would need. In addition, the 10th Circuit held that leave was not a reasonable accommodation for a temporary employee, because her requested accommodation would have required GE either to function without a receptionist or to accept a "super-temporary" employee to fill in for her. Moreover, reporting to work was a necessary part of the job that, based on her work history and vague requests for leave, she could not fulfill.

This decision suggests that the reasonable accommodation obligation for host employers using temporary staffing agency employees may not be as extensive as that for regular employees.

New Delaware Law Prohibits Pay History Inquiries. Joining Massachusetts, Oregon, New York City and Philadelphia in an attempt to address the gender pay gap, Delaware has passed a law prohibiting employers from asking applicants about their compensation history. Under the new law, which takes effect in December 2017, employers may not seek the applicant's compensation history from the applicant or former employers. Compensation is broadly defined as wages and "benefits and other forms of compensation." Applicants, however, may voluntarily disclose their compensation history and, under those circumstances (and contrary to the other jurisdictions' laws), the employer is not prohibited from setting pay based on that information.

The employer is specifically permitted to discuss and negotiate compensation, as long as it does not request or require the applicant's compensation history. Also unlike the other jurisdictions' laws,

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employers may request and obtain compensation history after making a job offer with terms of compensation, solely in order to confirm the applicant's compensation history.

NEWS AND EVENTS

70th Anniversary Celebration. We will be celebrating our 70th anniversary at a gala dinner on October 26, 2017. More information and invitations to our clients and friends are forthcoming.

SR Client Conference. Our client conference will be held on October 26-27, 2017 in Annapolis, Maryland. We will be providing information and updates on legal developments relevant to your business. Further information on the conference and registration is forthcoming.

Press. The Baltimore Sun published "Earle K. Shawe, tough-minded New Deal labor lawyer who later represented management of major corporations," on July 7, 2017.

Press. The Daily Record published a front-page article, "Earle K. Shawe, pioneer in labor law, dies at 104," on July 7, 2017.

Press. The Baltimore Business Journal published an article, "Earle K. Shawe, 'dean of labor lawyers,' dies at 104," on July 5, 2017.

Article. Fiona W. Ong and Elizabeth Torphy-Donzella authored an article, "Maternity and Parental Leave Policies: A Trap for the Unwary," published in the July 21, 2017 issue of The Daily Record (subscription required for access).

Article. Mark J. Swerdlin authored an article, "Seventh Circuit Holds that Collective Bargaining Agreements may not Restrict an Employee's Right to Sue in Court Unless they Contain Clear and Unmistakable Terms," which was published in the July 2017 issue of Bender's Labor and Employment Bulletin, a monthly newsletter for labor and employment practitioners (subscription required for access).

TOP TIP: Document Deviations From Normal Procedures!!!

In a prior Top Tip, we discussed the importance of documenting an employee's performance issues, but it is equally important to document any decisions to deviate from normal procedures, as the failure to do so can suggest improper motives for the deviations.

In *Bulifant v. Delaware River & Bay Authority*, the employer used a system that ranked applicants numerically in four core competencies - functional and technical skills, safety, customer service, and peer relationships - based on their responses to preset questions. These rankings were an "important guide," and applicants were typically hired in order of their ranking, but managers were permitted to deviate from the rankings to accomplish other goals, such as diversity. In accordance with the employer's normal process, an explanation for such deviations should be given when they occur.

Several older applicants were rejected in favor of lower-ranking younger applicants and sued, alleging age discrimination. The employer was unable to offer any contemporaneous documentation as to the rationale for the decisions, and the U.S. Court of Appeals for the 3rd Circuit found that this lack of documentation was evidence of pretext for age discrimination. The employer's attempt to

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offer a post-hoc explanation was not sufficient to overcome the finding of discrimination in light of the failure to follow the employer's normal process. Also of significance, the stated reason of promoting diversity fell apart because one of the lower ranked applicants hired was, like two of the applicants who were skipped over, a white male.

This case provides an important warning to employers to ensure that the reasons for any deviations from normal employment action processes – hiring, promotions, performance evaluations, etc. – should be documented contemporaneously with the decision not to follow the normal process. And it goes without saying that the reasons should be carefully examined to make sure that they are legitimate business-related reasons.

RECENT BLOG POSTS

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

- The NLRB Thinks High School Sports Referees Can Unionize! by Elizabeth Torphy-Donzella (Selected as a "noteworthy" blog post by the Employment Law Daily)
- The Government Seems Confused About Class Action Waivers by Fiona W. Ong and Elizabeth Torphy-Donzella (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Earle K. Shawe – The Passing of a Labor Law Pioneer by Fiona W. Ong
- OSHA's Guidelines for Employees Working during the "Dog Days of Summer" by Shelby Skeabeck

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