SHAWE ROSENTHAL LLP

E-UPDATE

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RECENT DEVELOPMENTS

NLRB Issues Advice Memo on Social Media Rules

The National Labor Relations Board released yet another batch of Advice Memoranda this month. Advice Memoranda contain the recommendations of the Office of General Counsel to the Board on specific issues. Most of the memos were either prepared years ago or are of limited interest. One more recent memo, however, offers guidance on social media rules – a topic of perpetual interest to employers, both union and non-union alike.

In *CVS Health* (Sept. 5, 2018), the OGC applied the *Boeing* analysis to several handbook rules and policies. As the Board set forth in the 2017 case, *The Boeing Company* rules (which we discussed in detail in a December 2017 E-lert) are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. In the current memo, the OGC examined provisions contained in the Code of Conduct, the Handbook, and the Social Media Policy, as follows:

Policies found to be lawful:

- A restriction on who can speak on an employer's behalf in social media. (Category 1)
- A restriction on the use of the company logo on social media accounts or the use of the company name as part of a social media account name or URL. (Category 1)
- A civility rule stating in relevant part: "Do not be disrespectful or break the law: You should not post anything discriminatory, harassing, bullying, threatening, defamatory, or unlawful." (Category 1)
- A prohibition on disclosing "personal information" about colleagues and others, as it is explicitly placed in the context of Social Security numbers and account information as examples of "personal information." (Category 1)
- A prohibition taking photos from non-public areas or internal meetings and sharing them on social media. (Category 1)
- A requirement to keep communications and information from internal communications programs confidential. (Category 2) While the communications may cover matters related to the terms and conditions of employment, employers are permitted to keep their *presentations* about such matters confidential. In addition, a savings clause specifically clarifies that the rule does not limit employees' legal right to use social media to speak about "working conditions, wages, or union-related topics or activities with others inside or outside the Company, or to restrict any other legal rights."
- A requirement to use disclaimers on personal social media accounts if speaking about the company, stating, e.g., "All thoughts my own" for word-restricted platforms or, more

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One South Street, Suite 1800, Baltimore, MD 21202
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formally, "The opinion expressed in this post and in any corresponding comments are the personal opinions of the original authors, not those of [Company]." (Category 1)

- A requirement to leave "professional employee recommendations, references or testimonials" to the formal process. The use of "professional" is intended to protect the company's legitimate managerial interests regarding references for employees, and is akin to the lawful rule that only authorized employees may speak on the employer's behalf. (Category 1)
- A statement that social media is not the appropriate venue to voice complaints about the company that could be resolved more constructively through appropriate channels consistent with the company's commitment to a diverse and safe workplace. The policy also permits employees to use social media to voice complaints or criticisms, but not in a discriminatory, harassing, defamatory, or threatening way. (Category 2)

Policies found to be unlawful:

- Requirements for employees to identify themselves by name if they mention the company or discuss their work on social media. (Category 2)
- Prohibitions on disclosing "employee information," which could be reasonably read to include employee contact information and other non-confidential employment-related information. (Category 2)

Notably, the OGC found a generic "savings clause," stating that the rule was not intended to interfere with any rights provided by the National Labor Relations Act, to be ineffective, as employees "do not necessarily know the full panoply of their rights under the NLRA." On the other hand, the more specific savings clause, described above, was effective.

NLRB Expands Property Owners' Rights to Deny Third Party Access

In *Bexar County Performing Arts Center Foundation*, the National Labor Relations Board, in a 3-1 decision, overruled existing precedent, and established a new framework to determine whether a property owner has lawfully prohibited employees of one of its licensees from accessing the property to engage in protected activity.

Existing Standard: In *New York, New York Hotel & Casino*, the Obama Board held that employees of an onsite contractor who worked regularly and exclusively at a restaurant on the property were permitted to engage in Section 7 activity *unless* the property owner established that the activity would "significantly interfere" with the use of its property or could be restricted for another legitimate business reason. In *Simon DeBartolo Group*, the Obama Board expanded its *New York, New York* holding, and required that a property owner permit access to an off-duty contractor employee even though they did not work "exclusively" on the owner's property.

Background: The Bexar County Performing Arts Center Foundation (BCPAF) operates the Tobin Center in San Antonio, Texas. The Tobin Center has three primary tenants: the San Antonio Symphony (the Symphony), Ballet San Antonio (the Ballet), and Opera San Antonio. The Symphony regularly provides musicians to perform live music during the Ballet's performances at the Tobin Center. On one occasion, however, the Ballet used recorded music for its performance. Symphony employees, who are represented by a union, distributed handbills to the Ballet's patrons to encourage them to support the use of live music at the Ballet's performances. The handbilling occurred on a sidewalk directly in front of the Tobin Center, and on property owned by BCPAF.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

BCPAF, which maintained and consistently enforced its no-solicitation policy, instructed police to remove Symphony employees and sympathizers who were handbilling on its property.

The Board's Ruling: The Board held that the employer may exclude off-duty employees of one of its licensees from using its property to engage in Section 7 activity unless (1) those employees work both "regularly" and "exclusively" on the property, and (2) the property owner cannot show that the licensee's employees have at least one reasonably non-trespassory means to communicate their message. Thus, the Board reinstated the "exclusivity" requirement that had been eliminated in *Simon DeBartolo Group*, and will no longer require a property owner to show "significant interference" or a legitimate business reason before excluding off-duty employees of its licensees.

Here, the Board found Symphony musicians used the Tobin Center only 22 weeks per year, and thus did not work "regularly" at the Tobin Center. Additionally, because the Symphony performed 20% percent of their rehearsals and shows at venues other than the Tobin Center, Symphony musicians did not work "exclusively" at the Tobin Center. As to the second prong, the Board concluded that Symphony musicians had reasonable, nontrespassory alternative means to communicate their message. For example, the musicians could handbill on a public sidewalk across the street from the Tobin Center, or reach its audience through social media. Thus, the Board held that BCPAF did not violate Section 8(a)(1) of the NLRA by removing off-duty Symphony musicians handbilling on its private property.

Takeaway: As in *UPMC*, a case that we discussed here, this Board continues expanding employer property rights. Here, property owners that allow a licensee's employees to work on their property may properly prohibit these off-duty employees from using their property to engage in Section 7 activities, absent "regular" and "exclusive" employment on the property, as well as a complete absence of nontrespassory alternative means to communicate their message.

NLRB Issues Management-Friendly Proposed Rule to Revise Election Procedures

A majority National Labor Relations Board (NLRB) issued a Notice of Proposed Rulemaking proposing three amendments to so-called "blocking charges," the voluntary recognition bar, and recognition in the construction industry. The Board contends that these proposed amendments will better protect employees' rights to choose whether or not to be represented. In effect, however, they are a continuation of the current Board's retreat from the pro-union positions staked out by the Obama Board.

The first amendment would modify the Board's blocking charge policy. Unions often file unfair labor practice charges that serve to block representation elections, particularly where the petition is filed by employees seeking to decertify the union. The election is blocked while the charge is processed. The current policy often allows unions to avoid an election for months or years, and, in some cases, an election is never held. The Board's proposed rule would establish a vote-and-impound procedure when a party requests blocking the election based on a pending unfair labor practice charge. Rather than waiting for the charge to be resolved before a vote is held, the election would be held and the ballots would be impounded until the charge is resolved. In dissent, Member McFerran argued that the proposed rule will require employees to vote in "an atmosphere of collusion," and, in some cases, will waste the agency's limited resources by holding elections that will ultimately have to be rerun.

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One South Street, Suite 1800, Baltimore, MD 21202
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The proposed rule's second amendment would modify the Board's current voluntary recognition bar. The amendment would reinstate a notice requirement and 45-day open period for filing an election petition following an employer's voluntary recognition of a union. This would effectively reinstate the Board's 2007 decision in *Dana Corp.*, 351 NLRB 434 (2007), which created the notice requirements and open period, only to be overruled by the Obama Board's decision in *Lamon's Gasket Co.*, 357 NLRB 739 (2011). Under the proposed rule, for a voluntary recognition to bar a subsequent representation petition – and for a post-recognition collective-bargaining agreement to serve as a contract bar to a decertification or rival petition – employees must receive notice that voluntary recognition was granted, and a 45-day period within which to file an election petition.

Lastly, the Board proposed enhancing a union's burden of proof to establish a bargaining relationship – a relationship under Section 9(a) of the National Labor Relations Act (NLRA) that can bar petitions for a Board election – with employers in the construction industry. In the construction industry, collective bargaining relationships can be established under Section 8(f) of the NLRA. These 8(f) bargaining relationships allow employers and unions to enter into agreements setting workers' terms and conditions of employment even where a union has not demonstrated that it is supported by a majority of employees. An 8(f) relationship, however, cannot bar a petition for election, including a decertification petition. In *Staunton Fuel*, 337 NLRB 717 (2001), the Board held that the 8(f) relationship can be converted to a 9(a) relationship, thereby barring an election petition, based on contractual language alone and without extrinsic evidence that the union is supported by a majority of employees. The proposed rule would overrule *Staunton Fuel* and require unions to present extrinsic evidence that a 9(a) relationship was created based on a contemporaneous showing of majority employee support (e.g., authorization cards signed by a majority of employees).

The Board's proposed amendments will roll back existing barriers to employees' ability to rid themselves of a union that is not supported by a majority of employees. Public comments on the Board's proposed rule are currently due on or before October 11, 2019, and may be submitted through the Federal Register website.

DOL Issues Opinion Letter on FMLA Leave for School Meetings to Discuss IEPs

The Department of Labor (DOL) has released a new opinion letter under the Family and Medical Leave Act (FMLA). Opinion letters respond to a specific wage-hour inquiry to the DOL from an employer or other entity, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters as general guidance.

FMLA2019-2-A: The DOL found that employees may take FMLA leave to attend **school meetings to discuss their disabled child's Individualized Education Program (IEP)**. Under the Individual with Disabilities Education Act, public schools must develop IEPs for children receiving special education and related services (such as counseling, medical or psychological services, physical therapy, audiology or speech-language pathology services, etc.). Multiple individuals have input into the IEP, including parents, teachers, administrators, and those providing related services. There may be regular meetings for these individuals to review the child's educational and medical needs, well-being and progress.

According to the DOL, as long as the child has a serious health condition certified by a health care provider, the parent may take FMLA leave to attend IEP meetings to discuss the child's educational

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

and special medical needs, even where no doctor is in attendance. Such attendance is "essential to [the employee's] ability to provide appropriate physical or psychological care" to the child.

The OFCCP On Fire – Compliance Assistance Guides, Proposed Religious Exemption Rule, and Contractor Assistance Portal

It has been another busy month at the Office of Federal Contract Compliance Programs, which has issued a dizzying array of new resources for government contractors, as follows:

Compliance Assistance Guides. The OFCCP has posted eight new compliance assistance guides on its website:

- **OFCCP At A Glance:** Introduces the agency, its mission, the equal employment opportunity laws it enforces, an overview of federal contractor obligations, and workers' rights.
- **What Federal Contractors Can Expect:** Provides general expectations that guide interactions between contractors and the OFCCP.
- **Postings and Notices Guide & Checklist:** Focuses on many of the posting and notice requirements that a contractor must comply with regardless of the size of its workforce.
- **Applicant Tracking Guide:** Provides definitions for Internet and traditional applicants, identifies applicant records that contractors must keep, and provides other key terms to know.
- **Applicant Tracking FAQs:** Includes common questions and answers regarding applicants and contractor recordkeeping obligations.
- **Section 503 Recordkeeping Guide:** Identifies which records must be kept by covered contractors and how long the records must be kept.
- **VEVRAA Recordkeeping Guide:** Identifies which records must be kept by covered contractors and how long the records must be kept.
- **EO 11246 Recordkeeping Guide:** Identifies which records must be kept by covered contractors and how long the records must be kept.

In addition, the OFCCP will be posting additional updated guides "soon": Technical Assistance Guide: Supply & Service; Technical Assistance Guide: Construction; and Technical Assistance Gude: Education. These guides will provide a general overview of contractor obligations in each of these areas.

Proposed Religious Exemption Rule. The OFCCP has issued a Notice of Proposed Rulemaking "intended to clarify the civil rights protections afforded to religious organizations that contract with the federal government" by offering "the broadest protection permitted by law." Under the proposed rule, "religious organizations may make employment decisions consistent with their sincerely held religious tenets and beliefs without fear of sanction by the federal government."

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The proposed rule is intended to clarify the scope and application of the religious exemption in light of recent developments, including Supreme Court rulings and Executive Orders. Among other things, it clarifies that, in addition to churches, the exemption covers employers organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with and in furtherance of a religious purpose. Moreover, religious employers may condition employment on compliance with religious tenets, as long as they do not discriminate on other protected bases. This particular provision has caused concern, as some have interpreted it to permit discrimination against LGBTQ individuals.

The proposed rule is open for public comment until September 16, 2019. Comments may be submitted through the Federal Register website. Once the comment period has closed, the OFCCP will review the submissions and then issue a final version of the rule.

Contractor Assistance Portal. The OFCCP launched its new Contractor Assistance Portal, intended to improve compliance assistance and increase transparency. Contractors may use the Portal to ask questions anonymously and receive verified answers, search a database of frequently asked questions, and access reference and compliance assistance materials.

Court Finds Bargaining Agreement Vests Lifetime Medical Benefits for Retirees

In *Kelly v. Honeywell International, Inc.*, the U.S. Court of Appeals for the Second Circuit held that an effects bargaining agreement ("EBA") unambiguously vested medical coverage for retirees who retired prior to the expiration of the EBA and their surviving spouses.

In 1993, Textron Corp. began negotiating a sale of its plant in Stratford, Connecticut to AlliedSignal, Inc. Textron and the local unions negotiated, and AlliedSignal approved, several agreements including an EBA, which specifically concerned "the financial and economic impacts and effects of a potential sale of assets" to AlliedSignal.

The EBA outlined medical benefits for union retirees as follows:

> All past and future retired employees and surviving spouses shall continue to receive ... full medical coverage as provided in the ... Group Insurance Agreement, as now in effect or as hereafter modified by the parties for the life of the retiree or surviving spouse.

Following the termination of the agreements in 1997, AlliedSignal, which later assumed the Honeywell name, continued to provide retirees with medical benefits without interruption until December 2015, when it undertook a review of its agreements in light of the Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*. In *Tackett*, the Supreme Court held ordinary principles of contract law govern the interpretation of collective bargaining agreements, including provisions about retiree health benefits, as long as such principles are not inconsistent with federal labor policy. Following the review, Honeywell announced its intent to terminate retiree medical coverage. The retirees brought suit over Honeywell's decision to terminate their medical coverage, claiming they were entitled to medical coverage for their lifetimes.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The Second Circuit explained that for welfare benefits to be vested, there must be written language that ties the benefits that a recipient will receive to that recipient's lifetime or to an indefinite duration. The court had "little trouble" concluding that the language in the EBA constituted affirmative lifetime language.

In addition, the Second Circuit found that the EBA expressly prohibited Honeywell from unilaterally cancelling retiree medical benefits because of language requiring both parties to agree to modify retiree benefits. The Second Circuit also rejected Honeywell's argument that the general duration clauses in the EBA and CBA prevented retiree medical benefits from vesting. According to the Second Circuit, reading the durational clauses to prevent vesting would violate the ordinary contract principles by rendering the lifetime language in the EBA superfluous.

Takeaways: The Second Circuit noted examples of contractual language that can reasonably be interpreted to create a promise to vest lifetime benefits because such language measures the duration of a retiree's benefits by the retiree's lifetime:

- Retirees' benefits will remain at a stated level "for the remainder of their lives."
- Retirees would receive benefits "for the lifetime of the pensioner."

The court also noted examples of contracts that did not contain any affirmative lifetime language:

- A contract stating that the retiree health benefits "shall remain in effect for the term of this ... Labor Agreement."
- A summary plan description stating, "The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. The company also reserves its right to amend each of the Plans at any time."

TAKE NOTE

No Violation of NLRA for Misclassification of Workers as Independent Contractors. In yet another retreat from the positions staked out by the National Labor Relations Board under the Obama administration, the current Board has now stated that the misclassification of workers as independent contractors is not a violation of the National Labor Relations Act.

Back in 2015, the Board's Office of General Counsel issued an advice memo in *Pacific 9 Transportation Inc.*, in which the OGC asserted that the misclassification of independent contractors is a violation of the Act. This was followed by another advice memo from 2017 in *Telemundo Television Studios*, in which the OGC reiterated the same position. This position was adopted by an administrative law judge in the *Velox Express, Inc.* case. The decision was quite controversial, and General Counsel Peter Robb indicated an interest in reviewing this issue, as set forth in his December 1, 2017 memorandum, GC 18-02 "Mandatory Submissions to Advice." The Board then invited briefing on this issue, and has now issued a decision in the *Velox Express, Inc.* case, overturning the ALJ's opinion and stating that "an employer's misclassification of its employees as independent contractors does not violate the Act."

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One South Street, Suite 1800, Baltimore, MD 21202
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Perfect Attendance Program Violated the FMLA. The U.S. Court of Appeals for the Sixth Circuit found that a company's perfect attendance program, which excused paid time off but not Family and Medical Leave Act leave or certain other unpaid time off, violated the FMLA.

In *Dyer v. Ventra Sandusky, LLC*, the company implemented an "Attendance Point Reduction Schedule" under which points accumulated under a no-fault attendance policy would be reduced for 30 days of perfect attendance. Under the program, paid time off for vacation, bereavement, jury duty, and holidays counted as "time worked," as did unpaid time for military duty and union leave; however, the 30-day clock was reset for FMLA leave and other unpaid leaves. An employee who took FMLA leave for migraines was eventually terminated because of his non-FMLA attendance. He sued, arguing that each time he used FMLA, his 30-day clock was reset, which interfered with his ability to have his attendance points reduced.

The Sixth Circuit found that, by resetting the clock every time the employee took FMLA, the employer denied him the point reduction benefit enjoyed by employees not taking FMLA. Consequently, the perfect attendance program interfered with the employee's rights to take FMLA. The Sixth Circuit found it an open question whether FMLA leave was treated the same as other equivalent non-FMLA leaves.

This case emphasizes the need for employers to ensure that those on FMLA enjoy the same benefits of employment as other employees.

Employee Must Participate in Interactive Reasonable Accommodation Process. Reiterating perhaps an obvious point, the U.S. Court of Appeals for the Eighth Circuit rejected an employee's failure to accommodate claim under the Americans with Disabilities Act in part because of the employee's lack of participation in the reasonable accommodations process.

In *McNeil v. Union Pacific Railroad Co.*, the employee was a railroad dispatcher, an essential function of which was the ability to work overtime. Because of a medical condition, she was temporarily excused from overtime work. The employee's doctor subsequently provided a note imposing an indefinite restriction on overtime work, which the railroad deemed to be unreasonable. The employee contended that her restriction was only temporary, and the railroad instructed her to provide an updated doctor's note. When she failed to do so, she was terminated.

The Eighth Circuit found that the employee's failure to provide the requested medical information doomed her claim, as she was responsible for stalling the interactive process. She had also declined the railroad's offer to help her develop a plan for her "vocational future." This case highlights the fact that the interactive process requires interaction from both the employer and the employee.

Bonuses Paid By Third Party Not Necessarily Included in Employee's Regular Rate. The U.S. Court of Appeals for the Third Circuit rejected the Department of Labor's position that all third-party bonuses must necessarily be included in an employee's regular rate of pay for purposes of computing overtime.

In *DOL v. Bristol Excavating, Inc.*, a contractor's employees were eligible for the client company's bonus programs (for efficiency, for pacesetting, and for safety), which were calculated by the client company and paid to the contractor, who then deducted taxes and fees before issuing payment of the bonus to the employee, separately from any paycheck. The DOL asserted that these third-party

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One South Street, Suite 1800, Baltimore, MD 21202
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bonus payments should automatically be included in the calculation of the employees' regular rate of pay because they were renumeration for employment.

The Third Circuit found the DOL's position to be unsupported by the Fair Labor Standards Act, case law or agency practice. Rather, the Third Circuit relied upon a 1954 Supreme Court case, *Walling v. Youngerman-Reynolds*, which stated "[t]he regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek." In the current case, there was no explicit agreement to include the bonus payments in the regular rate of pay. The existence of an implicit agreement depended on "whether the specific requirements for receiving the payment are known by the employees in advance of their performing the relevant work; whether the payment itself is for a reasonably specific amount; and whether the employer's facilitation of the payment is significantly more than serving as a pass-through vehicle."

In the present case, the Third Circuit found an open question as to whether the employees knew of the specific requirements to earn the efficiency and pacesetter bonuses, and it was therefore unclear as to whether an implicit agreement existed as to those bonuses. As to the safety bonus, however, the Third Circuit found an agreement, as the employees knew of the specific criteria used to determine the bonus – no accidents or injuries on the job – and the amount of the bonus. In addition, the contractor was involved in the management of the program as it was responsible for tracking and reporting which employees earned the safety bonus.

But-For Causation Standard Applies to ADA Discrimination Claims. The U.S. Court of Appeals for the Ninth Circuit overruled its own precedent in holding that the but-for causation standard, and not the motivating factor causation standard, applies to claims of discrimination under the Americans with Disabilities Act.

In the 2005 case of *Head v. Glacier Northwest, Inc.*, like seven of its sister circuits, the Ninth Circuit found that a plaintiff need only show that age was a motivating factor in an adverse employment decision, and not that it was the sole cause (but-for) of the decision. Subsequently, the U.S. Supreme Court issued its decision in *Gross v. FBL Financial Services, Inc.*, in which it held that the but-for causation standard applied to claims under the Age Discrimination in Employment Act. The Supreme Court also declined to extend the motivating factor causation standard to Title VII claims in *University of Texas Southwestern Medical Center v. Nassar*, finding the but-for standard to apply in that context as well.

In light of the Supreme Court's application of the but-for standard to ADEA and Title VII claims, the Ninth Circuit found that *Head* was no longer good law, as the same discrimination standards apply to the ADA. Accordingly, in *Murray v. Mayo Clinic*, the Ninth Circuit overruled *Head* and adopted the but-for causation standard for ADA discrimination cases. In so doing, it joined the other circuits – the Second, Fourth and Seventh – that have reconsidered this issue following the issuance of the Supreme Court's decisions in *Gross* and *Nassar*.

Employee Bound by Emailed Arbitration Agreement Despite Denial of Knowledge. Although the employee denied he ever saw the emailed mandatory arbitration agreement, the U.S. Court of Appeals for the Seventh Circuit found the agreement to be enforceable based on the employer's notification actions.

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In *Gupta v. Morgan Stanley Smith Barney, LLC*, the employer sent a revised arbitration agreement to all employees, stating that it was mandatory unless the employee individually elected to opt out. The email, which contained a link to the opt-out form, also clearly stated several times that if the employee did not opt out within the 30-day deadline, continued employment would be deemed consent to the terms of the agreement. The employer also posted continual reminders of the deadline on the company intranet, and repeatedly stated that silence would be construed as acceptance of the agreement. The employee did not respond to the email or opt out, and he continued to work for another four years.

Under Illinois law, an individual may agree to a contract by his actions, rather than by signature, and silence may constitute acceptance if reasonable under the circumstances. In this case, the Seventh Circuit found that in the context of the employer's repeated efforts to ensure that employees were notified of the new agreement and the deadline for opting out, as well as the consequences of not opting out, the employee's silence and continued employment indicated agreement to be bound by the arbitration agreement.

The enforceability of a contract is a matter of state law, and not all states permit employers to construe silence as consent to the agreement. Nonetheless, this case reinforces the need for employers to make thoughtful and thorough efforts to inform employees of new policies and agreements.

Employees Do Not Have the Right to Dictate the Reasonable Accommodation. The Americans with Disabilities Act and the Rehabilitation Act (applicable to federal sector workers) require employers to provide reasonable accommodations to enable disabled employees to perform their essential job functions or enjoy the privileges and benefits of employment, but as the U.S. Court of Appeals for the Seventh Circuit made clear, the employee is not able to dictate what that accommodation should be.

In *Yochim v. Carson*, an attorney for the U.S. Department of Housing and Urban Development sought a reasonable accommodation of full- or part-time telecommuting. The employer, however, offered other accommodations, such as a modified work schedule and flexible leave, that would have addressed her needs. The attorney refused such accommodations, insisting on telecommuting, which was denied.

The Seventh Circuit rejected her failure to accommodate claim, finding that the employer had offered reasonable accommodations – just not the accommodation the attorney wanted. As other cases have made clear, if multiple reasonable accommodations are available, the employer may choose the accommodation. It need not be the best or most effective accommodation, as long as it enables the employee to perform her essential job functions.

NEWS AND EVENTS

Shawe Rosenthal Conference. We hope you will join us for our biennial conference, which will be held on Friday, October 4, 2019 at Oriole Park at Camden Yards. Our sessions will cover a variety of labor and employment issues relevant to your workplace, including:

* Exploring Wage and Hour Law at the Federal and State Level.

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* Marijuana and Opioids at Work.
* #MeToo Developments: Pay Equity, Salary History Bans, Mentoring, and More.
* A Headache for Employers: Sick Leave, ADA and FMLA.
* Compliance with New State Laws in the Mid-Atlantic Region (including Non-Competes and Restrictive Covenants).
* The NLRB in the Trump Administration.

We will begin with breakfast starting at 8:00 a.m. Friday morning, October 4, with presentations from 8:30 a.m. to 4:20 p.m. After the sessions, please join us for a cocktail reception and a tour of Oriole Park at Camden Yards, followed by a raffle (prizes include sports tickets, aquarium tickets, and a handbook review up to $2,500 value).

Our conference has been approved for SHRM 6.00 (HR (General)) recertification credit hours. Shawe Rosenthal LLP is recognized by SHRM to offer Professional Development Credits (PDCs) for SHRM-CP or SHRM-SCP. In addition, this program has been submitted to the HR Certification Institute for review.

The registration fee of $499 includes sessions, seminar materials, breakfast, lunch, the tour of Oriole Park, and cocktail reception (hotel room charges are not included). In addition, attendees will also receive a complimentary copy of the 2019 Maryland Human Resources Manual, published by the Maryland Chamber of Commerce and authored by our firm, a $260.00 value.

To register: contact us at conference@shawe.com.

Honor. J. Michael McGuire has been recognized by *Best Lawyers*™ as the 2020 Labor Law – Management "Lawyer of the Year" and Teresa D. Teare has been named the 2020 Litigation – Labor and Employment "Lawyer of the Year" in the Baltimore area. In addition, eight other attorneys were also listed in *The Best Lawyers in America*© 2020: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, and Elizabeth Torphy-Donzella. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation.

Victory. Lindsey White and Paul Burgin were successful in defending a suit filed in the Circuit Court for Prince George's County by a former employee alleging national origin discrimination and retaliation. After a lengthy discovery period, Lindsey and Paul secured a voluntary dismissal on behalf of their client, a non-profit that serves developmentally disabled adults.

Article. Mark J. Swerdlin authored "Professors Are Not Automatically Entitled to Same Pay" for the Society for Human Resource Management's June 27, 2019 *Court Report*, which is a feature of its *HR Magazine.*

TOP TIP: EEOC's Criminal Background Check Guidance Enjoined by Fifth Circuit – What Does This Mean for Employers?

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The U.S. Court of Appeals for the Fifth Circuit found that the Equal Employment Opportunity Commission exceeded its authority when it issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII," and the Fifth Circuit therefore prohibited enforcement of the Guidance against the State of Texas. The impact of this decision on other employers is less clear.

The EEOC's Guidance was issued in 2012 to replace some earlier policy statements on this issue, following a 2007 federal court decision that criticized those earlier guidelines. While the EEOC reiterated its consistent position that employers must consider (1) the nature of the crime, (2) the time elapsed, and (3) the nature of the job, it further suggested that employers should conduct an "individualized assessment" with regard to each applicant to determine if the policy as applied is job related and consistent with business necessity. With regard to this individualized assessment, the EEOC provided in the 2012 Guidance a new list of factors that employers should consider (claiming all the while that it was simply compiling past information):

- The facts or circumstances surrounding the offense or conduct.
- The number of offenses for which the individual was convicted.
- Older age at the time of conviction, or release from prison.
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct.
- The length and consistency of employment history before and after the offense or conduct.
- Rehabilitation efforts (e.g., education/training).
- Employment or character references and any other information regarding fitness for the particular position.
- Whether the individual is bonded under a federal, state, or local bonding program.

At the time that the EEOC released its Guidance, we blogged about the impact of this, stating that, "The bottom line is that the Commission's claim that the updated rules do not reflect a substantive change in its enforcement policy or the guidelines it expects the courts to apply is disingenuous." Nonetheless, the EEOC has relied upon this guidance in bringing suit against a number of employers over their background check policies.

In *State of Texas v. EEOC*, a lawsuit brought by the EEOC challenging the State's ban on hiring felons in certain State agencies, the State questioned the EEOC's authority to issue the Guidance. The Fifth Circuit agreed with Texas that the Guidance was a substantive rulemaking that is subject to legally required notice and opportunity for public comment under the Administrative Procedures Act, with which the EEOC had not complied. The Fifth Circuit barred the EEOC from enforcing its Guidance against the State.

As for other employers, those in the Fifth Circuit would arguably be covered by this ruling, but it is not binding as to employers outside of that jurisdiction. Consequently, we would expect the EEOC to continue to apply the Guidance in other jurisdictions. While those other employers could similarly

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

argue that the Guidance is unenforceable, it is possible that a different court could side with the EEOC. But even if the Guidance were ultimately found to be wholly unenforceable, the general principles articulated in it, which are drawn from prior caselaw, may still be applicable to a discrimination claim. Thus, employers should continue to be thoughtful when considering an applicant or employee's criminal background, and should do so on an individualized basis.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com