

February 28, 2020

RECENT DEVELOPMENTS

More NLRB Advice Memos – Social Media Activity and Scope of Contract Language

In the latest batch of Advice Memoranda from the National Labor Relations Board, the Office of General Counsel (OGC) offers further guidance to employers, both unionized and non-union. Advice Memoranda contain the recommendations of the OGC to the Board on specific issues. While several are years old and of limited interest, two more recent memos provide guidance on the issues of protected v. unprotected social media activity and scope of contract language.

[Google Inc.](#) (May 30, 2018). The OGC found that the employee was engaged in concerted activity that is protected by the National Labor Relations Act in posting comments on the employer’s internal social networking platform that questioned the scope of the employer’s antiharassment policies with regard to criticisms of workplace diversity and inclusion initiatives and that complained about bullying of politically conservative employees.

The OGC acknowledged that employers have a strong interest in promoting workplace diversity, and must be permitted to “nip in the bud” the kinds of conduct that could lead to a hostile environment, rather than waiting until one has been created before taking action. Thus, highly offensive comments about other employees and managers relating to protected personal characteristics may be unprotected even if they involve concerted activities regarding working conditions. In this case, however, the OGC found that the employee’s comments, which raised the free speech rights of employees skeptical of diversity and inclusion efforts, although “insensitive,” did not rise to that level of offensiveness and could not be reasonably believed to lead to a hostile work environment. Thus, these comments were protected under the Act.

[Frazer & Jones Co.](#) (January 15, 2020). The OGC applied the Board’s newly-adopted contract coverage test in *MV Transportation*, which we discussed in our [September 2019 E-Update](#), to whether mandatory Saturday overtime was subject to bargaining. In *MV Transportation*, the Board overturned its prior “clear and unmistakable waiver” standard, instead adopting the “contract coverage” standard, under which an employer’s unilateral change will not violate the NLRA if the change was “within the compass or scope” of the language in the agreement granting the employer the right to act unilaterally. If, however, the agreement does not cover the employer’s disputed action, the employer will have violated the NLRA unless it establishes that the union waived its right to bargain over the change, or that the employer was privileged to act unilaterally for some other reason (e.g., economic exigency).

In the present case, the OGC found that the parties’ collective bargaining agreement provided specific language as to overtime practices and, therefore, gave the employer the right to unilaterally

assign a certain amount of mandatory overtime each week. Thus, under *MV Transportation*, the employer's conduct was within the scope of the CBA language and thereby lawful.

“The ADA Does Not Protect Persons Who Have Erratic, Unexplained Absences, Even When Those Absences Are a Result of a Disability.” So said the U.S. Court of Appeals for the Seventh Circuit, in finding that an employee was not qualified for her job based on attendance and performance reasons unrelated to her disability.

Background of the Case. In *Stelter v. Wisconsin Physicians Service Ins. Corp.*, prior to sustaining a back injury at work, an employee was counseled for her attendance (for which she had repeatedly failed to provide notice) and performance issues. These issues continued following her return to work with no restrictions, and she was further counseled, placed on a performance improvement plan and then terminated. She sued, alleging discrimination and retaliation under the Americans with Disabilities Act.

The Court's Decision. Stating that “the ADA does not shelter disabled individuals from adverse employment actions,” the Seventh Circuit found that the employee was not qualified for her job because of the documented attendance and performance issues, which predated her disability. It rejected the employee's argument that the stated termination reasons were pretext for discrimination, and found that the employer honestly believed in the reasons. The Seventh Circuit went on to note that erratic absences for which no notice was provided – even if caused by a disability – are not protected by the ADA, asserting, “The fact is that in most cases, attendance . . . is a basic requirement of most jobs.”

Finally, the Seventh Circuit also rejected the employee's claim that the employer had failed to provide reasonable accommodations because she failed to show that she had requested any accommodation. As the Seventh Circuit stated, “A plaintiff typically must *request* an accommodation for [her] disability to claim that [s]he was improperly *denied* an accommodation under the ADA.” (Emphasis in original).

Lessons for Employers. This case offers several points of significance to employers. First, an employee can be held accountable for providing proper notice of absences, even if the absences are due to a disability. Second, it is important to document performance and attendance issues, as such documentation will support an employer's defense against discrimination claims. And third, an employer is not required to engage in an interactive discussion about reasonable accommodations unless an accommodation is requested or, under Equal Employment Opportunity Commission guidance, it is clear that the employee requires one.

TAKE NOTE

New Form I-9 Issued, Begin Using No Later Than 5/1/2020. The United States Citizenship and Immigration Services has issued a [new version of Form I-9](#), which is used to verify the identity and employment authorization of employees. Its use is mandatory as of May 1, 2020. Until that date, employers may continue using the older version, dated July 17, 2017, although USCIS directs employers to begin using the new form as of January 31, 2020.

Employers are required to complete I-9 forms no later than the first day of employment for all new hires, citizen and noncitizens alike. Although the new paper form changes only the expiration date to

10/31/2022, employers must use the updated form. The electronic version contains minor changes, such as an expanded list from which to select the Country of Issuance for passports in Section 1 of the form.

Inability to Work for Specific Supervisor ≠ Disability. Reiterating the long-standing principle under the Americans with Disabilities Act that an employee must be unable to work a broad class or range of jobs, the U.S. Court of Appeals for the Second Circuit found the employee, who could not work only for his supervisor, not to be disabled within the meaning of the ADA.

In *Woolf v. Strada*, an employee attributed his worsening migraines, which increased his risk for heart attack or stroke, to work-related stress that would be ameliorated by a transfer or reassignment to another supervisor. Following a six-month period during which he took paid intermittent leave, he was terminated for poor performance. He sued, arguing that the employer had failed to provide him with a reasonable accommodation of a transfer or a new supervisor.

Noting the well-established understanding that “an employee's inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working,” the Second Circuit found that the employee was not disabled because he could still perform a broad range or class of jobs. Consequently, he was not entitled to the protections of the ADA.

This decision again confirms that employees who attribute stress-related health conditions to working for a particular supervisor are not entitled to a change in supervisors. We note, however, that a change in supervisory methods may be required as an accommodation, as discussed in our blog post, [A New Boss Is Not a Reasonable Accommodation](#).

Pre- and Post-Shift Activities May Be Compensable Work. Such activities for prison guards, which included security screenings and shift transition briefings, were found to be integral and indispensable to their principal security activities, according to the U.S. Court of Appeals for the Tenth Circuit.

Under the Fair Labor Standards Act, employees are entitled to be compensated for all hours worked. The Portal-to-Portal Act confirms, however, that employees need not be compensated for activities that are preliminary or postliminary to their principal activities. Activities that are compensable include any that are “integral and indispensable” to the principal activities. An activity meets this standard if it is one that the employee cannot ignore in order to perform the principal activities.

In *Aguilar v. Management & Training Corp.*, the Tenth Circuit found that the pre-shift screenings to ensure that weapons and other contraband are not brought into the prison were integral and indispensable to the prison guards’ principal activities of providing prison security and searching for contraband. Because the guards’ work hours began with the screening, the activities that followed were also compensable: pre- and post-shift briefings between incoming and outgoing guards, collecting and returning keys and specialized equipment (like handcuffs, radio and pepper spray), and walking to and from their posts.

With regard to post-shift activities, the Tenth Circuit found that the last activity – the return of specialized equipment – was also integral and indispensable, in that the guards would be impaired in the performance of their security duties without such equipment. Moreover, this equipment was not

generic in nature, but closely tied to the guards' work. The other post-shift activities that occurred prior to that activity were therefore also compensable.

Be Clear About What Accommodations Are Being Provided. A recent case reminds employers about the need to be very clear about what accommodations are being provided to disabled employees.

In *Kassa v. Synovus Financial Corp.*, a network support analyst with bipolar and intermittent explosive disorders requested to be excused from certain customer service calls and to continue being allowed to take short breaks that would enable him to control his anger. The U.S. Court of Appeals for the Eleventh Circuit found that answering customer service calls was an essential function of the analyst's job, and therefore his requested exemption was not reasonable. As to the short breaks, however, the employee testified that his prior supervisor had permitted him to take such breaks, with positive results, but that all such accommodations stopped when he was assigned to the new supervisor. Although the new supervisor testified that he allowed employees to take breaks when they became frustrated, the Eleventh Circuit found that the analyst's testimony should be given credit at this stage of the case, and refused to dismiss this denial of accommodation claim.

It appears the supervisor/employer was not clear with the employee regarding the continuation of his requested accommodation of short breaks. The lesson that can be drawn is that employers should be very clear about what accommodations are being provided, and document those accommodations, so there can be no doubt about what was discussed and agreed upon.

No Pretext Where Employer Had "Honest Belief" in Employee's Misconduct. An employer is entitled to take action based on its honest belief that an employee has engaged in misconduct, reiterated the U.S. Court of Appeals for the First Circuit.

In *Robinson v. Town of Marshfield*, a fire chief retired following an investigation in which it was concluded that he had violated conflict-of-interest laws. The fire chief argued that the town's concerns about his conflicts of interest were a pretext for age discrimination, because there was evidence that he had complied with the laws. The First Circuit, however, held that the issue was not whether a jury could have found that he complied with the laws, but whether the employer honestly believed that he had violated those laws. Thus, this case offers employer's reassurance that taking adverse actions based on an honest belief that the employee engaged in misconduct, as demonstrated by reasonable actions to verify such misconduct, will not violate anti-discrimination laws.

Employer May Establish Qualifications for Promotional Decisions. An employee's belief that she was better qualified than the successful candidate was not determinative, according to the U.S. Court of Appeals for the Seventh Circuit.

In *Robertson v. State of Wisconsin*, the employee had complained of discrimination by her director, which was verified through an investigation. The director resigned, and the employee, who was named the acting director, subsequently applied for the position. Another candidate was selected, and the employee sued, alleging that her non-selection was retaliation for her discrimination complaint.

The Seventh Circuit rejected her contention that she was "objectively the most qualified candidate." Although the employee had certain experience relevant to the position, which the other candidate

lacked, the employer asserted that the successful candidate had superior educational qualifications, and demonstrated vision and the ability to lead – qualities that the employer was seeking and that were demonstrated by the successful candidate in the course of the interview process. The Seventh Circuit noted that the employee’s own perception of her qualifications were not determinative unless there could be no reasonable dispute that she was better qualified, which was not the case here. The Seventh Circuit noted that it would not “second guess an employer’s facially legitimate business decision.”

This case reiterates the principle that the employer may establish the legitimate requirements for a position and determine who is the best-qualified candidate.

Employees Who Have Signed Arbitration Agreements Waiving Their Rights to Participate in an FLSA Collective Action Need Not Be Provided Opt-in Notice. The U.S. Court of Appeals for the Seventh Circuit established a standard for when a court may authorize notice to potential plaintiffs of their opportunity to join a “collective action” (i.e., a lawsuit on behalf of a group of similarly situated employees) under the Fair Labor Standards Act, even where the employees have allegedly entered into mutual arbitration agreements that waived their rights to join the action.

In *Bigger v. Facebook, Inc.*, the defendant-employer argued that notice of the opportunity to join the collective action should not be delivered to employees who entered arbitration agreements that waived their right to join such action. The Seventh Circuit, however, set forth the framework under which the question of whether such notice may nonetheless be provided, finding that notice may be authorized “unless (1) no plaintiff contests the existence or validity of the alleged arbitration agreements, or (2) after the court allows discovery on the alleged agreements’ existence and validity, the defendant establishes by a preponderance of the evidence the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice.” The Seventh Circuit noted that courts are not required to simply take defendants at their word that such agreements exist. If the defendant employer is able to make the showing that the employees, in fact, entered into such agreements, however, then the court would not be permitted to authorize notice.

Philadelphia’s Salary History Ban Is Upheld. The U.S. Court of Appeals for the Third Circuit overturned a federal district court’s partial injunction of Philadelphia’s ordinance intended to help address the gender and racial pay gap by banning employers from asking about or relying upon an applicant’s salary history.

As we had discussed in our [May 2018 E-Update](#), the district court found the ordinance to be illegal to the extent it prohibited an employer from asking about an applicant’s salary history (the “Inquiry Provision”), but that it legally prohibited employers from relying on such history in establishing an employee’s salary (the “Reliance Provision). In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, the Third Circuit affirmed the district court’s ruling as to the legality of the Reliance Provision, but reversed the district court’s ruling that the Inquiry Provision violated the First Amendment’s free speech protections. While acknowledging that the provision restricted speech, the restriction was permissible given that Third Circuit found that there was substantial evidence of the possibility that the restriction could favorably impact the government’s interest in mitigating the racial and gender pay gap.

DOT Advises Caution as to CBD Use. The Department of Transportation prohibits the use of marijuana by DOT-regulated safety-sensitive employees (e.g. commercial truck drivers), and has now addressed the use of increasingly prevalent cannabidiol (CBD) products.

As explained in the February 18, 2020 [DOT CBD Notice](#), THC is the primary psychoactive component of marijuana, which belongs to the cannabis family. CBD products are derived from hemp, a variety of cannabis that is bred to contain little to no THC; any concentration of up to 0.3% THC is not a controlled substance. The DOT reminds employers and safety-sensitive employees that the DOT requires testing for marijuana, not CBD. However, because CBD products are not regulated, they may contain more THC than indicated on product labels. The DOT states that “CBD use is not a legitimate medical explanation for a laboratory-confirmed marijuana positive result.” Thus, according to the DOT, regulated safety-sensitive employees “should exercise caution when considering whether to use CBD products.”

More generally, however, there are no workplace protections for the use of CBD by employees. Employers may implement whatever policies they like regarding CBD use, including a complete ban, except to the extent that CBD use may be a reasonable accommodation for an employee’s disability under the Americans with Disabilities Act or corresponding state disability laws.

NEWS AND EVENTS

Article – [Fiona W. Ong](#)’s article, “Maryland’s General Assembly Overrides “Ban the Box” Veto – What’s Next for Employers,” was featured as a [guest blog](#) by the Maryland Chamber of Commerce.

Testimony – On February 24, 2020, [Fiona W. Ong](#) testified before Maryland’s House Economic Matters Committee on the proposed Paid Family Leave Program bill. On behalf of the Maryland Chamber of Commerce, Fiona expressed concerns about the impact of the bill on the business community. Fiona’s testimony and response to the legislators’ questions may be viewed [here](#), starting at approximately 1:44. This hearing was covered, and Fiona referenced, in an article, “Family Medical Leave Insurance Legislation Gets First Airing of Session,” on [Marylandmatters.org](#).

TOP TIP: CDC Provides Coronavirus Guidance to Employers

Last month, pending official guidance for employers from the Centers for Disease Control on how to address Coronavirus (which has now been named COVID-19), we provided recommendations to employers in our January Top Tip – [Coronavirus in the Workplace: A Practical Guide for Employers](#), which extrapolated from CDC guidance on past outbreaks. Now, the CDC has issued guidance specific to COVID-19 that offers suggestions for employers to take now to address illness generally in the workplace, to plan for a possible COVID-19 outbreak in the U.S. and to consider in developing an outbreak response plan.

Recommended Strategies to Use Now. We summarize the CDC’s detailed recommendations as follows:

- Actively encourage sick employees to stay home. The CDC also encourages employers to ensure their policies are consistent with public health guidance, and are flexible with regard

to caring for sick family members. It also recommends that employers communicate with their temporary staffing agencies about sick employees and leave policies. It further suggests that employers should not require return to work clearance from doctors, who may be too busy to provide timely notes.

- Separate employees who become sick at work from other employees and send them home.
- Emphasize respiratory etiquette and hand hygiene. Provide posters to remind employees, as well as tissues, no-touch disposal containers, alcohol-based hand sanitizer, and soap and water.
- Perform routine environmental cleaning of frequently-touched surfaces. Provide disposable wipes for additional cleaning.
- Advise employees before traveling to check the CDC's updated Traveler's Health Notices, to self-monitor for signs of illness, and obtain any necessary medical care.
- Employees with sick family members should notify their supervisors and refer to CDC guidance for risk assessment.
- If an employee has confirmed COVID-19, notify co-workers so they can conduct a risk assessment as to potential exposure, while maintaining confidentiality as required by the Americans with Disabilities Act.

Planning for a Possible Outbreak. The CDC asserts that employers should be prepared to respond in a flexible way. It identifies some key considerations in determining appropriate responses:

- Disease severity in the community.
- Impact of the disease on vulnerable employees, such as those who are older or with chronic medical conditions.
- Preparation for increased absences. This includes business continuation plans, cross-training employees, and possible changes to business practices (e.g. alternative suppliers, prioritizing clients, partial suspension of operations) to ensure maintenance of critical operations.
- Authorize local managers to take appropriate action based on conditions at separate facilities.
- Coordination with state and local health officials.

Developing an Infectious Disease Outbreak Response Plan. The CDC suggests that any plan be flexible, with input from employees. Employers should review the plan in a manner that will identify gaps or problems. Employees should be educated as to the plan. Employers should share best practices with other businesses. The CDC provides the following recommendations for a plan:

- Identify possible work-related exposure and health risks to employees.
- Review policies and practices to ensure consistency with public health guidance and workplace laws.
- Explore social distancing strategies such as telecommuting and flexible work hours to increase physical distance between employees, and minimize contact with the public.
- Identify essential business functions, essential jobs or roles, and critical elements within supply chains, and plan for disruptions to these.
- Set up authorities, triggers, and procedures for activating and terminating the outbreak response plan, altering business operations, and transferring business knowledge to key employees.

- Plan communications on the outbreak plan and COVID-19 information.
- Institute flexible workplace and leave policies for employee and family illness, as well as possible school closures.
- Learn about the public health plan for the local community. Establish channels of communication with local public health officials.
- Consider canceling non-essential business travel per CDC guidance, as well as large work meetings or events.

RECENT BLOG POSTS

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

- [NLRB Issues Final Joint Employer Rule, Making Such Findings Less Likely](#) by [Fiona W. Ong](#), February 25, 2020.
- [Must an Employer Pay for Medical Marijuana?](#) by [Alexander Castelli](#), February 20, 2020 (featured on [HRSimple.com](#)).
- [Methadone User Can Sue Under ADA](#) by [Alexander Castelli](#), February 12, 2020.
- [“\[M\]aintaining consciousness is a basic element of any job”](#) by [Fiona W. Ong](#), February 5, 2020.