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E-UPDATE

June 30, 2020

RECENT DEVELOPMENTS

DOL Offers COVID-19 Guidance on Enforcement Action Damages, Summer Jobs for Teens, and Summer Camp Closures

The Department of Labor issued several field bulletins this month on issues related to COVID-19 and school children, as well as damages in enforcement actions. Field bulletins provide guidance to DOL staff and employers in response to questions that have arisen in field operations.

Practice of Seeking Liquidated Damages in Settlements in Lieu of Litigation - FAB No. 2020-2. In the past, the DOL's default policy was to seek liquidated damages in addition to back wages from employers when seeking to settle administrative investigations into employee complaints of Fair Labor Standards Act violations. In compliance with President Trump's executive order to remove regulatory and enforcement barriers to economic prosperity in light of COVID-19, effective July 1, 2020, the DOL will no longer seek liquidated damages in settlement if any of the following circumstances exist:

- there is not clear evidence of bad faith and willfulness;
- the violation(s) were the result of a bona fide dispute of unsettled law under the FLSA;
- the employer has no previous history of violations;
- the matter involves individual coverage only;
- the matter involves complex section 13(a)(1) (white collar) and 13(b)(1) (motor carrier) exemptions; or
- the matter involves State and local government agencies or other non-profits.

When schools that are physically closed are considered in session for purposes of Child Labor - FAB No. 2020-3. Child labor laws regulate the employment of children under 16 years old in agricultural and non-agricultural settings. Specific limitations on when and how many hours may be worked vary depending on whether school is in session. Because many schools are physically closed, the DOL now clarifies that such schools are considered to be in session if they require students to attend through virtual or distance learning. If such attendance is not required, school is not in session, thereby permitting longer hours of work.

In addition, summer sessions typically are considered to be outside of school hours. Due to the pandemic, however, if a school has decided to implement mandatory summer sessions to make up for lost instruction time, such mandatory sessions are viewed as extensions of the regular schedule, and the school would be in session for purposes of the child labor laws.

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FFCRA leave based on the closure of summer camps, summer enrichment programs, or other summer programs - FAB No. 2020-4. The Families First Coronavirus Response Act, which applies to most employers with 500 or fewer employees, provides leave to eligible employees for the COVID-19-related closure of a child's school or place of care. The DOL clarifies that places of care include summer camps and summer enrichment programs. To support a request for leave, the employee must provide an explanation of the reason for leave (i.e. closure of a summer place of care) and a statement that the employee is unable to work because of that reason, along with the name of the child, the name of the summer camp, summer enrichment camp, or other summer program, and a statement that no other suitable person is available to care for the child.

Unlike a regular school, attendance and even enrollment at summer camps and programs was prospective when the closures due to the pandemic began, and therefore, according to the DOL, the requirement to name a specific summer camp or program may be satisfied if the child, for example, applied to or was enrolled in the summer camp or program before it closed, or if the child attended the camp or program in prior summers and was eligible to attend again. There may be other circumstances that show an employee's child's enrollment or planned enrollment in a camp or program. A parent's mere interest in such a camp or program, however, is not enough.

Developments in the NLRB's Revised Representation Election Rule – Where Is It Now?

On June 1, 2020, the National Labor Relations Board implemented many of its proposed changes to the rule governing representation elections, in which employees vote on whether they wish to be represented by a union. (We wrote about the final rule here.) These changes were unaffected by a federal judge's eleventh-hour grant of injunctive relief that will hold up implementation of other changes included in the final rule.

Implemented Changes: Many of the election rule changes have gone into effect. The highlights include:

- *Increasing Time Between Petition and Pre-Election Hearing*: Pre-election hearings will now be scheduled 14 *business* days after a petition for representation is filed. Previously, the hearing was scheduled eight *calendar* days after the petition was filed. Additionally, Regional Directors will have greater discretion to postpone hearings. Under the previous rules, a moving party had to show "special circumstances" to receive an extension of up to two days, and "extraordinary circumstances" to receive a longer extension. The new rules do not require such showings.

- *Statements of Position*: The non-petitioning party – typically, an employer – must file its statement of position on the appropriate parameters of the proposed employee voting unit within eight business days after receiving the notice of election. Under the old rules, the filing deadline was seven calendar days. Additionally, the petitioning party – unions, typically – must file a statement of position responding to the issues raised in the non-petitioning party's statement of position. This statement of position must be filed three business days before the hearing. Previously, the petitioning party was not required to file a statement of position. This change will alert non-petitioning parties to the petitioner's legal position prior to the day of the pre-election hearing. Again, these deadlines may be extended at the discretion of the Regional Director.

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- *Post-Hearing Briefs*: Parties now have a right to file post-hearing briefs. Previously, post-hearing briefs could be filed only if approved by the Regional Director.

Many of these changes will extend the time between the filing of a petition and an election, which benefits employers. Employers will now have more time to convey its position to employees prior to an election. Other implemented changes are set forth in General Counsel Peter Robb's guidance memorandum.

Stalled Changes: On May 30, 2020, the U.S. District Court for the District of Columbia enjoined the implementation of several rule changes set forth in the final rule. The Court held that the enjoined changes were not lawfully promulgated because the NLRB did not follow the public notice-and-comment procedures required when federal agencies promulgate substantive rules (rather than procedural rules for which no such notice-and-comment procedures are required). The enjoined changes include:

- Expansion of pre-election litigation of voting eligibility issues;
- Extending the number of days from issuance of a Regional Director's decision to an election;
- Extending the time for an employer to serve the Voter List on the petitioner;
- Clarifying the categories of employees who may serve as election observers;
- Timing of Regional Director certification of representatives.

The Board intends to appeal the district court's decision to the D.C. Circuit. We will keep you updated regarding future developments.

Employers Have No Duty to Bargain Over Discipline with Union Prior to First CBA

The National Labor Relations Board (NLRB) reversed a 2016 decision that required employers to bargain with a newly-certified union prior to imposing "serious discipline" before the employer and union reached an initial collective-bargaining agreement (CBA).

Background: That 2016 case, *Total Security Management*, required employers to provide a union with notice and an opportunity to bargain over discretionary elements of an existing disciplinary policy before imposing serious discipline, including demotion, suspension, and discharge. This obligation arose where the employer and union had not yet reached an initial CBA. Failure to provide such notice and an opportunity to bargain violated Section 8(a)(5) of the National Labor Relations Act (NLRA). Under *Total Security Management*, the employer would violate the NLRA even where it did not change a pre-existing disciplinary policy or practice, but merely continued to exercise discretion in imposing discipline.

Facts: In *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, the union won an election in 2012. For years, the employer challenged the union's certification and refused to bargain. During that time, the employer suspended three employees and discharged a fourth, pursuant to a discretionary disciplinary policy. Ultimately, the courts upheld the union's certification. The union filed charges alleging that, under *Total Security Management*, the employer

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unlawfully failed to provide the union with notice and an opportunity to bargain over the discipline. Applying *Total Security Management*, an administrative law judge held that the employee discipline – which occurred prior to the parties reaching an initial CBA – violated Section 8(a)(5) of the NLRA.

Decision: In *Care One*, the Board reversed *Total Security Management*. In doing so, the Board reinstated pre-2016 precedent that did not impose a pre-discipline bargaining obligation where employers sought to discipline unionized employees not yet covered by an initial CBA. Thus, even where an employer exercises discretion in the imposition of discipline, the employer does not have an obligation to notify and bargain with the union prior to issuing the discipline. In this case, the Board shifted away from analyzing whether the discipline involved managerial discretion, acknowledging that most disciplinary decisions involve some degree of managerial discretion. Instead, the Board focused on the fact that the employer had applied its established disciplinary policy and had not materially changed employees' working conditions in issuing the discipline. Accordingly, the Board found that the employer did not violate the NLRA.

Employer Takeaway: This decision returns to employers the ability to impose discipline on newly unionized employees not yet subject to a CBA without first notifying and bargaining with the union. This includes discipline that may involve managerial discretion. The discipline, though, should be consistent with disciplinary policy and practices that existed prior to the employees choosing union representation.

DOL Released New FLSA Opinion Letters on Targeted Topics

This past month, the U.S. Department of Labor released several new opinion letters of rather targeted interest. Opinion letters respond to a 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 for guidance. In this instance, the letters offer guidance on very specific exemptions from the Fair Labor Standards Act's minimum wage and overtime pay requirements: the outside sales exemption in the context of using an employer's mobile assets and for product demonstrators, manufacturer incentive payments and the minimum wage, and the commission standard for retail or service commission sales exemption.

Outside Sales Exemption and Use of Employer's Mobile Assets - FLSA2020-6. The FLSA provides an exemption for outside sales employees whose primary duty is to make sales and who are customarily and regularly away from the employer's place of business in performing that primary duty. The DOL found that salespeople who travel in stylized trucks to high-population areas and events to sell products and service contracts to consumers qualify for the outside sales exemption.

Third-Party Incentive Payments and the Minimum Wage - FLSA2020-7. The DOL noted that third party incentive payments for work done on behalf of the employer may be credited towards an employer's minimum wage obligation where the parties agree. Such agreement may be implied based on the particular circumstances, including the understanding and practices of the parties. Relevant factors include (1) whether the specific requirements for receiving the payment are known

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by the employees in advance; (2) whether the payment is for a reasonably specific amount; and (3) whether the employer's facilitation of the payment is more than serving as a pass-through vehicle. In this case, sales incentive payments from automotive manufacturers were found to be wages, as the employees knew of the specific incentive program terms, while the dealerships learn the program terms, communicate them to the employees, and work with the program sponsors to determine when payments should be made.

Outside Sales Exemption and Product Demonstrators - FLSA2020-8. Salespeople who travel to non-third-party retail operations (e.g. trade shows, home and garden shows, and fairs) and set up displays to exhibit and demonstrate products for sale qualify for the outside sales exemption, according to the DOL. The primary duty of those employees is to make direct sales, and they perform that duty away from the employer's place of business.

At a third-party retailer, like a big-box store, however, sales are typically made through the retailer rather than directly. Thus, the salespeople will only qualify for the exemption if they obtain a commitment to buy from the customer and are credited with the sale. No exemption exists if their work is general promotional work intended to stimulate overall sales for their own employer.

Retail or Service Commission Sales Exemption - FLSA2020-10. The FLSA provides an exemption where an employee is employed by a retail or service establishment at a regular rate of pay that exceeds one and a half times the minimum wage rate, and more than half their compensation for a representative period consisting of not less than a month is commissions. In the case of new employees or a new store opening where it is not clear if commissions will constitute more than half of compensation during the representative period, an employer may apply the exemption simultaneously with the beginning of the representative period. But if, at the end of the initial representative period, the requirement that commissions represent more than half of compensation has not been met, the employer must pay the overtime premium for any overtime hours worked during that period. The employer could then start a new representative period and again prospectively claim the exemption, subject to the same overtime caveat if the commissions standard is not met.

Maryland Appellate Court Finds Non-Renewal of Employment Agreement to Constitute Wrongful Termination

In *Miller-Phoenix v. Baltimore City Board of School Commissioners*, the Maryland Court of Special Appeals held for the first time that an employee may bring a claim for wrongful termination (also known as "wrongful discharge" or "abusive discharge") when an employer decides to terminate an employment agreement for a specific period where the parties anticipated the reasonable possibility of renewal.

Facts of the Case: Following the expiration of his teaching certificate for failure to submit renewal documentation, a middle school teacher was issued a conditional certificate and given instructions for reinstatement of his full certificate. He was informed that his regular contract was consequently terminated and he needed to sign a provisional contract with a one-year term in order to maintain his

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employment. The day after signing the provisional contract, he emailed his principal, stating that he intended to submit a workers' compensation claim for post-traumatic stress disorder. He submitted the claim two months later. Four months after that, in April 2017, the School Board informed the plaintiff his provisional contract would not be renewed and that, as a result, his employment would end on June 30, 2017.

The employee filed a lawsuit alleging, among other claims, that he was wrongfully terminated because the School Board had discharged him in retaliation for filing his workers' compensation claim. The trial court held that a wrongful termination claim could not be based on the non-renewal of a contract.

The Court's Decision: Under Maryland law, employment is at will, which means, absent a contract to the contrary, either the employer or the employee may terminate the employment relationship at any time, with or without cause or notice. An exception to the at will rule is when the motivation for the termination "contravenes some clear mandate of public policy." Courts have held that terminating an employment relationship for filing a workers' compensation claim is a violation of public policy.

The Board argued that Maryland appellate courts have applied the tort of wrongful termination only to employees at will and contractual employees in the middle of their contractual terms. The Court found, however, that the distinction did not matter. The Court explained that that "society's interest in deterring conduct that contravenes important public policies is no less important at the end of a contract's term than during it." The Court further stated that employees who are at the end of the term of a renewable contract are similarly vulnerable as those employed at will because, in both circumstances, the employee lacks any contractual rights or other protection against the termination of the employment relationship for any reason, or no reason at all.

The Board also argued that terminations caused by the non-renewal of a term employment contract should not be subject to wrongful termination claims because it is the predetermined termination date of the contract, and not any action by the employer, that causes the employment to end. The Court rejected that argument because it did not account for the fact that many term employment contracts are entered with the reasonable possibility or mutual expectation that they will be renewed if the employee adequately performs the job. The Court stated that in those circumstances, it is the employer's decision not to renew the contract that causes the employment to end. The Court further stated that "[w]hether a termination is accomplished passively (by choosing to forgo renewal of a renewable contract) or actively (by firing an employee), if an employer's motivation for ending the employment relationship 'contravenes some clear mandate of public policy' . . . we can think of no reason why the law should tolerate it." The Court explained that if it were to adopt the Board's argument, "employers who engage employees under renewable term contracts would be free to terminate those relationships antithetical to public policy, while employers who engage employees on an at will basis would not."

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Importantly, the Court recognized that not all term employment contracts are entered with the reasonable possibility that they will be renewed. Term contracts may be seasonal, tied to a project of limited duration, designed only for short-term employment or training on a non-continuing basis, or entered into with an expectation that they will not be renewed. Accordingly, the Court held that in order for plaintiffs alleging a claim for wrongful termination by non-renewal to satisfy the element of causation, they "must plead and prove that the contract was subject to a reasonable possibility of renewal."

What This Means for Employers. It is likely that this case will be appealed, which means that Maryland's highest state court will weigh in on whether an employee may bring a claim for wrongful termination based on an employer's decision to not renew a term employment contract. For the time being, however, employers should approach non-renewal decisions with care.

TAKE NOTE

Minimum Wage Increase – D.C. and Montgomery County. Although the federal minimum wage rate remains the same at $7.25, several local jurisdictions in the mid-Atlantic region will see an increase in the minimum wage rate on July 1, 2020.

- **District of Columbia -** The minimum wage rate will increase to $15.00 per hour for all employees, regardless of employer size. The base rate for tipped employees will increase to $5.00 per hour; if the employee's tips plus the base rate do not equal the minimum wage, the employer must make up the difference. The required poster is available here.

- **Montgomery County, Maryland** – The minimum wage rate will increase to $14.00 per hour for employers with more than 50 employees, $13.25 for mid-sized and certain other employers, and $13.00 for small employers. Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.

"Transfer" Following Job Elimination Triggered Non-Compete Countdown. A recent case warns employers that there may be non-compete implications when employees are transferred to a new job after a position elimination – an issue of particular relevance in the current economic climate.

In *Russomano v. Novo Nordisk, Inc.*, an employee had a non-compete agreement that prohibited him from working for a competitor for 12 months following his termination. He was notified that his position was being eliminated and he would be terminated on Friday, August 3, 2018, but he was invited to apply for open positions within the company. He applied for and was selected for a new position, and the company sent him a letter confirming his "transfer," with the new position beginning on Monday, August 6, 2018 – three days after the previously designated separation date. He did not sign a new non-compete agreement. In 2020, the employee resigned and took a position with a competitor – which his former employer claimed to be a violation of his non-compete.

Rejecting the former employer's argument that the employee had been continuously employed and that he had simply been transferred to a new role, the U.S. Court of Appeals for the 1st Circuit held that the letter notifying him of his job elimination was unambiguous in stating that his position ended on August 3, and that the offer letter for the new position was equally unambiguous that it started on

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August 6. Thus, his employment terminated on August 3, triggering the one-year non-compete period, which expired in August 2019, well before he began working for the competitor in 2020.

This case offers several lessons for employers with regard to non-compete agreements and layoffs. If an employee is selected for layoff but invited to apply for other positions, it is important to make clear that there is no termination of employment if the employee is selected for another position. In addition, it is wise to have employees execute a new non-compete agreement each time they change job positions.

Second Circuit Upholds Fluctuating Workweek Method of Calculating Overtime. The U.S. Court of Appeals for the Second Circuit addressed for the first time the use of the fluctuating workweek (FWW) method, upholding the employer's calculation of overtime pursuant to that approach.

The fluctuating workweek (FWW) method of computing overtime is an alternative method of computing overtime for non-exempt salaried employees under the Fair Labor Standards Act. If there is a clear and mutual understanding that the salary covers straight time pay for all hours worked, whether few or many, the additional overtime compensation is one-half the regular rate. For instance, if an employee's salary is $800 per week, and the employee works 50 hours, the regular rate is $16 per hour ($800/50). One-half the regular rate is $8 per hour. For the overtime, the employer owes an additional $80 (10 x $8).

In *Thomas v. Bed Bath and Beyond Inc.*, the plaintiffs challenged their employer's use of the FWW method. In affirming the use of the FWW method, the Second Circuit held that it does not require an employee's hours to fluctuate above and below 40 hours per week. The Second Circuit further held that the employer's practice of permitting employees to take paid days off on later dates after working on holidays or previously scheduled days off is consistent with the FWW method.

Weingarten Rights Not Triggered By Reciting Facts About Attempts to Communicate with Union. In a case that exemplifies the importance of word selection, the U.S. Court of Appeals for the D.C. Circuit found that an employee did not invoke his right to union representation at a disciplinary meeting by reciting facts about his past communication with the union, absent a clear assertion of his desire for such representation.

"Weingarten rights" arise out of *NLRB v. J. Weingarten, Inc.*, in which the U.S. Supreme Court upheld a National Labor Relations Board decision that an employee was entitled to union representation in an investigatory interview that could lead to discipline. The Board has developed a reasonably calculated notice standard, under which the employee must affirmatively request representation in order to trigger such rights.

In *Circus Circus Casinos, Inc. v. NLRB*, the employee was summoned for an investigatory interview into allegations of possible misconduct. According to the employee when he arrived, he did not see a union representative. He then told the company managers, "I called the Union three times [and] nobody showed up, I'm here without representation." He was not offered representation, and the company proceeded with the interview. He was subsequently terminated for the alleged misconduct, following which he filed unfair labor practice charges with the Board. The Board found a violation of his Weingarten rights.

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The D.C. Circuit determined that the Board's interpretation of "request" was too broad. According to the D.C. Circuit, under the reasonably calculated notice standard, such requests may take the form of straightforward demands, ("I need a union steward"); questions about the need for assistance ("should I have a union representative present?"); or requests for delay or an alternative representative. Mere statements of fact, such as in this case, do not constitute an affirmative request for representation.

No Sex Discrimination Because Employer May Determine Required Qualifications. In rejecting a female plumber's sex discrimination claim arising from her non-selection for several positions, the U.S. Court of Appeals for the 6th Circuit reiterated that the employer may decide who is best qualified to fill the positions in question.

In *Gibson v. MGM Grand Detroit, LLC*, a female plumber claimed that she was not selected for several positions based on her sex, as male candidates with less seniority were awarded the positions. The 6th Circuit, however, found that the employer had offered a legitimate reason for her non-selection – that it found the other candidates more qualified based on their hotel experience and continuing education. In this case, there was no evidence to suggest that the reliance on these other qualifications was based on sex. The 6th Circuit held that "employers could look at qualifications not expressly articulated in the job description and give greater weight to some qualifications over others." Thus, this case provides support for employers' ability to determine what qualifications – unrelated to sex, of course – are most important in selecting a successful candidate.

NLRB Permits Employers to Search Company Devices and Employee Property, Including Cars. In *Verizon Wireless*, the National Labor Relations Board held that employer rules authorizing the monitoring of company electronic devices and searches of employee property, including cars, were lawful.

First, the Board noted that, under existing precedent, employers lawfully may monitor its employees' company-issued computers and devices for legitimate management reasons, and consequently may implement a policy to inform its employees of such monitoring.

The Board then applied its *Boeing* standard to a rule authorizing searches of employee property, including cars, on the employer's premises. In *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), the Board divided workplace rules into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful under the National Labor Relations Act. The Board found that employees would reasonably understand the purpose of the car search rule to be, as stated in the policy, "to protect company assets, provide excellent service, ensure a safe workplace, and to investigate improper use or access." Moreover, while the rule reserves the right by management to undertake such searches, there is nothing that suggests such searches would take place routinely or frequently. The employer's interest in promulgating the rule was "compelling," the employees would reasonably not understand the rule to prevent the exercise of their rights under the NLRA, and the rule was thereby a lawful Category 1 rule.

This case supports the ability of employers to take reasonable, common-sense measures to ensure the safety and security of its property and its personnel in the workplace.

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Employee Must Be Actually Offended In Order to Sustain Harassment Claim. A recent case reiterates the obvious but important principle that, in order to sustain a harassment claim, the complaining employee must show that they were, in fact, offended by the alleged harassment.

In *Gibson v. Concrete Equipment Co.*, the U.S. Court of Appeals for the 8th Circuit rejected a female employee's claim of sexual harassment based on crude, sexually charged behavior from her male co-workers, including vulgar comments and an attempt to grab her breast. Notably, the employee had been warned about her use of sexual language with co-workers, and she had provided a letter and a picture she had drawn that contained profane language to two foremen.

In order to establish a claim of sexual harassment, the employee must be able to show, among other things, both that the conduct was objectively hostile and that she subjectively perceived it as abusive. The 8th Circuit found the fact that the employee engaged in similar behavior to be evidence that she did not find such behavior unwelcome or offensive.

NLRB Retreats From Overly Restrictive Definition of "Solicitation." The National Labor Relations Board overruled its own precedent in finding that an employee who encourages another employee to vote for a union has engaged in solicitation that may lawfully be prohibited during their working time.

Long-standing precedent permits employers to prohibit "solicitation" during an employee's working time. In the 2005 case of *Wal-Mart Stores* and the 2014 case of *ConAgra Foods, Inc.*, the Board held that that, in order to constitute impermissible union solicitation, the solicitor must present a union authorization card during the interaction and that the interaction must constitute a "significant interruption" of work. In *Wynn Las Vegas, LLC*, however, the Board rejected this restrictive definition. Rather, it held that "solicitation for or against a union also encompasses the act of encouraging employees to vote for or against union representation," even without the presence of a union authorization card. The Board also rejected the premise that there must be any interruption of work – let alone a significant one – in order to constitute a violation of a no-solicitation rule.

This is another instance of the Board stepping back from what employers believed to be the overly union-friendly decisions that issued primarily under the Obama administration. The previous iteration of the Board's interpretation rendered solicitation rules virtually useless. This decision applies a more sensible approach to an employer's right to prohibit solicitation during working time.

Under ADA, Whether Impairment is "Minor" is Separate Inquiry from "Transitory." The U.S. Court of Appeals for the 3rd Circuit stated that the exemption of "transitory and minor" impairments from the protections of the Americans with Disabilities Act requires an employer to establish that the impairment in question is both transitory and minor.

The Americans with Disabilities Act sets forth a three-prong definition of "disability": (1) the individual has a physical or mental impairment that substantially limits one or more of their major life activities; (2) they have a record of such an impairment; or (3) they are regarded as having such an impairment. Under the ADA, an employer may assert the defense that "transitory and minor" impairments do not fall within the "regarded as" prong. "Transitory" is defined as lasting 6 months or less, while "minor" is undefined.

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In *Eshleman v. Patrick Industries, Inc.*, the employee had surgery to remove a nodule on his lung and a respiratory infection, which collectively lasted less than 6 months. Conflating "transitory" with "minor" in applying the 6-month limitation, the employer argued that the employee was not disabled within the meaning of the ADA. The 3rd Circuit, however, noted that, as set forth in the ADA regulations, an employer must establish that the impairment was both transitory and minor. An impairment that is transitory but not minor falls outside the exemption. Accordingly, it was necessary to separately evaluate whether the employee's impairment was "minor," which is a determination that must be made on a case-by-case basis. According to the 3rd Circuit, relevant factors include the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention is anticipated or necessary—as well as the nature and scope of any post-operative care.

NEWS AND EVENTS

Appointment -Teresa D. Teare was elected as Chair Elect of the Council for Maryland State Bar Association's Labor and Employment Section, at the MSBA annual conference, which took place virtually in June 2020. In addition, Lindsey A. White was elected to the Council. The Council serves as the governing and leadership body for the Section.

Article - Lindsey A. White authored "COVID-19 antibody testing: Useful screening tool or impermissible medical examination?" which was featured as a Practice Tip in the June 5, 2020 edition of *Labor and Employment Daily*, a publication of Wolters Kluwer.

Article - Elizabeth Torphy-Donzella authored an article, "*Durham v. Rural/Metro Corp.*: The Pregnancy Discrimination Act Five Years After *Young v. United Parcel Service*," which was published in the June 2020 issue of *Bender's Labor and Employment Bulletin*, a monthly newsletter for labor and employment practitioners.

Presentation – Lindsey A. White was a speaker at "Legal Considerations for Reopening," a June 25, 2020 webinar for HopkinsLocal, a Johns Hopkins initiative to create economic growth within the community. Lindsey discussed employee relations in the context of the COVID-19 pandemic.

TOP TIP: Masks/Face Coverings in the Workplace Uncovered! What Can Employers Require?

As offices and other workplaces reopen, employers are struggling with the issue of masks and face coverings in the workplace. There has been much confusion about whether and when cloth face coverings are required, and what are an employer's obligations with regard to their use.

There is a distinction between cloth face coverings, surgical masks, and respirators. The Occupational Safety and Health Administration recently issued FAQs to clarify this, as we discussed in detail in our blog post, "OSHA Speaks: Face Coverings, Masks and Respirators – Oh My!" To briefly reiterate the key points about face coverings, they are used to contain potentially infectious respiratory droplets produced when talking, sneezing and coughing. They do not protect the wearer from infection, are not considered personal protective equipment (PPE), and are not an adequate substitute for PPE (where PPE is required after an employer conducts a hazard assessment). They

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may be homemade or commercially manufactured, and may be disposable or reusable (after washing/cleaning).

Surgical masks, on the other hand, are typically FDA-cleared as a medical device. They can be used to contain respiratory droplets to prevent the spread of COVID-19. They can protect workers against potentially infectious splashes and sprays (although not airborne transmissible infectious agents). If they are used for this protective purpose, they are PPE; if they are used simply to contain respiratory droplets, they are not PPE.

The CDC is recommending the universal use of cloth face coverings in public in order to slow the spread of COVID-19 and, to the extent that surgical masks are becoming more available, they may also be used for this purpose. Many state and local jurisdictions have mandated the use of face coverings in certain businesses, like retail and food service. But such orders typically do not apply to other private workplaces.

Consequently, for these employers, the use of face coverings is left to their discretion. This use is a scientifically-supported best practice to reduce or prevent the spread of infection – and arguably may even be considered part of an employer's obligation to provide a safe workplace under OSHA's general duty clause – but there are different levels of use that may be required:

- All employees may be required to wear face coverings or masks at all times within the office.

- All employees may be required to wear face coverings or masks only if they will be within 6 feet of any other person while in the workplace, whether in a communal area or private office. (Note that this option does not prevent the spread of the virus to surfaces).

- All employees may be required to wear face coverings/masks if they are walking through or working in communal areas of the workplace (entrances, hallways, conference rooms, break rooms, rest rooms, etc.) or are within 6 feet of anyone else. If they are alone in an enclosed private office, they could remove the face coverings/masks to work.

There may be situations in which employers would need to make exceptions to any face covering requirement. One is if the face covering poses a hazard to the employee during the performance of a particular task – such as potentially being caught in machinery, trapping dangerous chemicals, or interfering with the use of required PPE. Another is if the employee has a disability that prevents them from wearing a face covering – in which case the employer must engage in the interactive process under the Americans with Disabilities Act to determine if a reasonable accommodation can be made. Similarly, an employee may make a request not to wear a face covering for religious reasons, which would trigger the interactive process under Title VII. Whether or not an employer would have to excuse an employee from wearing a mask as a reasonable accommodation would depend on the circumstances and the outcome of the interactive process.

Employers may wish to consider providing the face coverings/masks, but do not have to, except in states where employers are required to reimburse all business expenses (like California and Illinois, among others). But it may be wise to do so to reinforce the employer's commitment to a safe workplace, to encourage the use of face coverings/masks, and for purposes of employee morale.

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If employers choose to require the use of face coverings in the workplace, they should instruct employees on how to wear the face coverings/masks (i.e. over the nose and mouth). Unfortunately, many people do not seem to understand how the face covering should be worn. The instruction doesn't have to be a formal, in-person training. Written directions or, better yet, a graphic is sufficient. (A formal "training" is only required for respirators such as N95 masks, which are not at issue here.) The CDC has provided a poster on this topic, which may be displayed throughout the workplace: https://www.cdc.gov/coronavirus/2019-ncov/downloads/cloth-face-covering.pdf.

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