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E-UPDATE

July 31, 2020

RECENT DEVELOPMENTS

Maryland Expands Face Coverings Requirement to Most Workplaces and Imposes Travel Restrictions

Maryland's Governor issued an Order expanding the mandated use of face coverings to almost all private workplaces, effective 5:00 p.m. on July 31, 2020. In addition, new travel restrictions were also announced, including "strongly recommending" 14-days quarantine periods for certain travel.

Face Coverings. Governor Hogan had previously issued a face coverings order that directly impacted retail and food service employees, while leaving the decision whether to require or request face coverings in other types of private workplaces up to the employer. His July 29, 2020 order now expands the required use of face coverings to essentially all private workplaces in Maryland.

"Face coverings" are defined as a covering that fully covers a person's nose and mouth, including scarves, bandanas, and (newly added) plastic full-face shields. Of relevance to employers, the Order requires the use of face coverings in the following circumstances:

- "Indoors at any location where members of the public are generally permitted, including without limitation, Religious Facilities, Retail Establishments, Foodservice Establishments, Fitness Centers, Gaming Facilities, Indoor Recreation Establishments, and Personal Services Establishments." This would include employees, as well as members of the public.
- "Outdoors and unable to consistently maintain at least six feet of distance from individuals who are not members of their household." Thus, outdoor workers coming into regular proximity with co-workers and others are covered by the order.
- "Engaged in work in any area where . . . interaction with others is likely, including without limitation, in shared areas of commercial offices." This broad category captures almost all work environments. "Shared areas" is not defined, but we would expect it to apply to office areas such as lobbies, elevators, break rooms, hallways, restrooms, conference rooms, copy rooms, and shared office spaces, at a minimum. It would also apply to areas like warehouses, loading docks, and production floors. A single occupant of an enclosed office space would not be required to wear a face covering while working in that space.

The Order contains some exceptions to the face coverings requirement, of which the following may apply to employees:

- Where the individual's bona fide disability or medical condition makes such use unsafe.
- Where those with hearing impairments or other disabilities need to see the mouth for communication.

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- If such use would subject the person to an unsafe working condition, as determined by federal, state, or local occupational safety regulators or workplace safety guidelines.

Unlike orders in some other states, the Maryland Order does not address the verification of an individual's disability or medical condition. Thus, the normal protocols under the Americans with Disabilities Act and state law should apply to an employee seeking an exemption from the face coverings requirement as a reasonable accommodation for a disability or medical condition. The employer should engage in the interactive process with the employee regarding the request for accommodation, through which the employer may obtain information from the employee's medical provider regarding the nature, severity and duration of the employee's impairment and substantiating why the impairment prevents the employee from wearing a face covering. The employer may also explore alternative accommodations with the employee and their doctor, as the employee is not necessarily entitled to their desired or the best accommodation – just one that is effective.

Notably, given that clients and patrons of businesses may also have disabilities that impact their ability to wear a mask safely (or communicate with those who are masked), companies should consider adding to signage that communicates the masking requirement information on alternative methods for disabled individuals to access products or services, such as calling a number to receive personal assistance outside the building or alerting an employee of a hearing impairment that will enable alternative methods of communication (such as paper and pencil) to be used. This will avoid placing employees in the position of potentially mishandling requests for accommodation, thereby risking violations of the ADA's public accommodation requirements.

Travel Restrictions. Separately, Governor Hogan also issued a "travel advisory" on July 29 that "strongly recommends" Marylanders not travel outside of the State and, among other recommendations, suggests that anyone returning from a State with a COVID-19 infection rate of 10% or above promptly get tested upon return and self-quarantine until the test results are received (excluding travel to the District of Columbia and Virginia). The Advisory specifies that essential workers traveling and returning to Maryland to perform essential work are exempt from the quarantine recommendation and also excludes employee commuters who leave/enter the state on a daily basis and have work-based COVID-19 screening procedures. It is unclear whether the recommendation to quarantine after certain travel has the status of a quarantine "order" that would trigger a right to emergency paid sick leave under the Families First Coronavirus Response Act. And if the FFCRA does not apply, employers will need to evaluate whether such leave will otherwise be paid.

NLRB Advice Memos Offer COVID-19 Guidance to Employers

The Office of General Counsel (OGC) of the National Labor Relations Board issued a slew of Advice Memoranda this month that offer some guidance to employers, both unionized and non-union. Advice Memoranda contain the recommendations of the OGC to the Board on specific issues. Several of the memos addressed issues related to the COVID-19 pandemic, including the decision to permit telework and the obligation to bargain with an employees' union concerning layoffs.

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Mercy Health General Campus: The OGC first determined that the hospital-employer did not violate Section 8(a)(5) of the NLRA by expanding its work-from-home policy for non-bargaining unit employees but not bargaining unit employees. The unionized registered nurses (RNs) were never permitted to work from home due to their face-to-face patient care duties. Thus, the employer did not make any change to bargaining unit employees' terms and conditions of employment. Nor was there any evidence of anti-union motive in the employer's decision to expand the work-from-home policy for non-union employees. The OGC also determined that the employer did not violate Section 8(a)(5) by (1) unilaterally modifying the attendance policy to exclude absences resulting from potential risk of exposure to COVID-19 from discipline or other adverse consequences, and (2) pausing all attendance-related discipline.

It is the OGC's view that in emergency situations employers should be permitted to act unilaterally provided the unilateral action is "reasonably related to the emergency situation." However, after the unilateral decision is implemented, the employer "must negotiate over the decision (to the extent there is a decisional bargaining obligation and its effects within a reasonable time thereafter." The Board found that the changes at issue here were reasonably related to the emergency circumstances presented during the early stages of the COVID-19 emergency. This Advice Memo is helpful to employers who must act expeditiously at the onset of emergency circumstances.

Larry Peel Co.: The employer discharged an employee soon after the employee's request to work from home. The OGC determined that the employee was not engaged in protected concerted activity by texting with the employer's controller regarding COVID-19 health and safety concerns, because the controller was a supervisor and not an employee. But even if the controller was an employee, the OGC concluded that the employer did not have knowledge of the protected concerted activity because it was unaware of the texts and the work-from-home request was individual in nature.

Children School Services: Here, the employer, which supplies nursing services in D.C. city schools, did not violate the NLRA when it unilaterally laid off employees in response to the citywide closure of schools due to COVID-19. The OGC determined that the employer's actions were privileged by the CBA. Applying the recently-adopted "contract coverage" standard (which we wrote about here), the OGC concluded that the CBA included a broad management rights provision that permitted the employer a general right to lay off employees. Thus, the decision to lay off employees during the closure was "within the compass or scope" of the contractual provisions.

Additionally, the OGC held that the employer's offer of temporary assignments related to COVID testing did not violate the NLRA. The OGC reasoned that the CBA's broad zipper clause foreclosed any obligation to engage in effects bargaining with the union concerning the temporary assignments. Specifically, the zipper clause stated that "any matters not specifically and expressly covered by this [CBA] shall remain within the sole right and discretion of [the employer]." In any event, though, the OGC determined that the employer engaged in sufficient bargaining prior to implementation of the temporary assignments.

RS Electric Corp.: This case dealt with union representative access to the employer's facility. The parties' CBA provided the union with the right to access job sites "at any reasonable time." At the onset of the COVID-19 emergency, the employer required that the union representatives provide

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one-hour notice of its intent to access employer jobsites to allow the employer to ensure adequate safety precautions. The union, however, demanded immediate and unrestricted access. The OGC concluded that it was not clear that the union's demand was "reasonable," and the Union did not seek to bargain over the employer's view of reasonableness. Further, the OGC noted that the employer was privileged to require one hour advance notice under the "contract coverage" standard.

U.S. Supreme Court Holds Employment Discrimination Claims of Religious School Teachers Are Barred by the First Amendment

On July 8, 2020, the United States Supreme Court in a 7-2 decision held that the "ministerial exemption" which prohibits courts from considering employment disputes of certain employees of religiously affiliated organizations, applied to two Catholic school lay teachers. Therefore, their claims of discrimination under the Age Discrimination in Employment Act and the Americans with Disabilities Act were foreclosed by the First Amendment to the United States Constitution.

Facts of the Case: *Our Lady of Guadalupe v. Morrissey-Berru* involved separate claims by primary school teachers that were consolidated by the Court. Both were "lay teachers" at Catholic schools, meaning that they taught the general curriculum to their students.

Like all teachers in the Archdiocese of Los Angeles, Morrisey-Berru and Beil were expected to serve as "catechists," responsible for the faith formation of students (although neither held any formal ordination or religious designation by the Church). This requirement was reflected in their annual teaching agreements and the faculty handbooks. The annual teaching agreements and faculty handbooks also made clear that they had to serve as models of Catholic faith principles, incorporate Catholic principles into lay subjects, and recognize that the religious development of students was the first goal of the schools. The evidence of record established that among many other religious activities and duties, each of them provided religious instruction to students, prayed with them daily, and attended mass with their students.

Both brought discrimination claims against their schools when their contracts were not renewed. Morrisey-Berru claimed that the school based its decision on her age in violation of the Age Discrimination in Employment Act. Beil asserted a claim under the Americans with Disabilities Act when she was discharged after requesting leave for breast cancer treatment. In both cases, lower courts granted summary judgment in favor of the schools, holding that the "ministerial exemption" recognized by the Supreme Court in *Hosanna Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) precluded the courts from adjudicating their claims due to the risk of becoming entangled in religious matters. Also in both cases, the U.S. Court of Appeals for the Ninth Circuit reversed the grants of summary judgment, reasoning that the lack of a formal title of "minister" and the lack of formal religious training was more significant than the other evidence of the roles each fulfilled in advancing the religious mission of the schools.

The Court's Decision. In a 7-2 decision authored by Justice Alito, the Supreme Court reversed the Ninth Circuit's decisions. Acknowledging that religious institutions do not enjoy complete immunity from secular laws, the Court nonetheless has long recognized that they do enjoy autonomy under the First Amendment in internal management decisions that are central to religion. The "ministerial

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exemption" was crafted to prevent courts from reviewing the *bona fides* of internal employment decisions involving employees "holding certain important positions within churches and other religious institutions." Because the early cases involved ordained ministers for the most part, the term "ministerial exemption" was adopted.

When the exemption reached the Supreme Court in *Hosanna-Tabor*, the Court held that a teacher who held the title "minister" and taught a curriculum to primary school students that was imbued with religion could not assert a claim of disability discrimination. Although not an ordained minister as a "called teacher" rather than a lay teacher, she had achieved through training a specifically recognized religious status.

Although each of the teachers in the current case was lay rather than called, the Court majority concluded that the nature of their duties and positions posed the risk of entanglement between secular law and religion that would violate the First Amendment were their discrimination claims to be adjudicated. The Court majority noted that relying on titles such as "minister" was itself problematic because religions are not uniform in how they determine religious status. The mere act of trying to evaluate what titles "count" would involve courts in an impermissible inquiry. For similar reasons, evaluating what training qualifies as sufficient to confer this status would require courts to decide whether the religious institution's criteria are sufficiently religious.

As Justice Alito wrote:

> What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.

The Court held simply that "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

In the dissent's view (Justices Sotomayor and Ginsburg), the teachers' claims of discrimination should not have been foreclosed under the First Amendment because they were lay teachers who taught primarily secular subjects, had little formal religious training, and were not even required to be Catholic.

Lessons Learned. The Court's decision should not be viewed as cavalierly allowing religious schools to discriminate with impunity against employees. Rather, it represents a recognition that secular intervention into the motive for employment decisions concerning employees who serve a religious mission poses a risk to the First Amendment rights that Congress has no authority to abridge by statute.

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NLRB Provides Guidance on a Multitude of Workplace Rules

Generally applicable to all employers – union and non-union alike – the National Labor Relations Board issued several decisions this month that explored what it deemed to be permissible and impermissible workplace rules under the National Labor Relations Act.

In *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), the Board set out a new standard for determining whether a facially neutral work rule, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the NLRA to engage in concerted activities for the purpose of mutual aid or protection. The Board divided workplace rules into three categories, depending on whether they: (1) are lawful, either because (a) when reasonably interpreted, they do not prohibit or interfere with the exercise of protected rights or (b) the potential adverse impact on protected rights is outweighed by the employer's legitimate business justifications; (2) warrant individualized scrutiny; or (3) are unlawful under the NLRA.

In *Motor City Pawn Brokers, Inc*. and *G&E Real Estate Management Services, Inc*., the Board found the following rules to be **lawful**:

- **Rules prohibiting the disclosure of confidential information**, which contained numerous examples of the types of obviously proprietary information at issue. Thus employees would reasonably understand the rules to prohibit the disclosure of legitimately confidential and proprietary business information rather than information pertaining to their terms and conditions of employment. (Category 1(a))
- **Rules establishing employee standards of conduct**, specifically prohibiting conduct including inappropriate language, badmouthing, spreading rumors, bullying, and "conduct which is detrimental to our goals." The Board found these to be "commonsense, facially neutral rules" requiring employees "to foster harmonious interactions and relationships in the workplace and adhere to basic standards of civility." (Category 1(a))
- **Rules prohibiting disparagement of the employer**, including statements or conduct, including while off-duty, that cause injury to the employer's reputation, business and standing in the community. Although such rules could interfere with employees' Section 7 rights, that was outweighed by the employer's legitimate business justifications (which the Board broadly found to be "self-evident" despite not being actually articulated by the employer). (Category 1(b))
- **Rules limiting employee use of the Internet**, by restricting use of the Internet for business purposes only. The Board stated that there was no protected right to use the employer's resources to access the Internet. (Category 1(a))
- **Rules limiting employee social media activity,** by prohibiting disclosure of sensitive and proprietary information on social media in one case, and by more broadly limiting what employees could say on social media in the other. The restrictions in the first case were limited to obviously proprietary information and would not prohibit disclosure of information about employees' protected activities. In the second case, the restrictions clearly applied where the employee was speaking on behalf of the company, while other parts of the rule make it clear that personal social media activity is not prohibited. (Category 1(a))

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- **Rules providing for discipline for frivolous/false complaints of harassment**, as it is clear that employees would not be disciplined for innocent factual errors, and therefore there was no interference with their Section 7 rights. (Category 1(a))
- **Rules limiting outside business relationships**, such as other employment or business activities, with examples provided in the policy. The Board found such rules, which are "common," ensure regulatory compliance and aim to prevent conflicts of interest from outside work activities. (Category 1(a))
- **Rules about requests for references and employee information**, which require all such requests to be forwarded to Human Resources and prohibit company employees from providing such information without permission. Such rules would not be read to prohibit protected communications about wages or other terms and conditions of employment. (Category 1(a))
- **Rules restricting use of company property** for the company's benefit and business purposes, which the Board found to be a general declaration of the employer's property rights and not a blanket prohibition of solicitation or other protected activity. (Category 1(a))
- **Rules restricting outside speaking and writing activities relating to the Company** to those for which prior approval has been obtained. The Board found that this policy would be reasonably interpreted to pertain only to professional speaking or writing engagements that could be viewed by the audience as speaking on behalf of the Respondent and not as applying to speaking at a union meeting or other protected activity. (Category 1(a))

The following rules were found to be **unlawful**:

- **Rules making arbitration the exclusive method of resolving any statutory claim**, without exception, as they interfere with employees' rights to file charges with the Board, to participate in Board processes, or to access the Board's processes.
- **Provisions requiring employees to indemnify the employer** for costs and fees of any claims arising from a breach of the employees' employment agreements, by imposing prohibitive financial burdens on employees.
- **Provisions designating the employee handbook to be confidential** and prohibiting its disclosure.
- **Rules that interfere with employees' rights to communicate with, associate with, or solicit other employees**, without exceptions for non-work time or non-work areas.

Notably, the Board left open the question of whether the employer's restriction of email to business use only was permissible in light of its recent *Caesars Entertainment* decision, in which it stated that "an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other." (Emphasis added. We discussed this decision in detail in a December 18, 2019 E-lert). The *Motor City Pawn Brokers* parties had not addressed whether this exception applied.

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One South Street, Suite 1800, Baltimore, MD 21202
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TAKE NOTE

DOL Revises Model FMLA Forms and Solicits Input for Possible Revisions to FMLA Regulations. This month, the U.S. Department of Labor released revised and "streamlined" optional forms that employers can use in administering leave under the Family and Medical Leave Act.

Employers covered by the FMLA must comply with quite technical notice and designation requirements. Although use of the DOL's model forms is not required, such use assures employers of their compliance with the content mandates for these notices. According to the DOL, "Significant updates include fewer questions that require written responses, replaced by statements that can be completed by checking a box, and – in support of minimized contact – electronic signature features."

The revised forms are as follows:

- WH-380-E: FMLA Certification of Health Care Provider for Employee's Serious Health Condition
- WH-380-F: FMLA Certification of Health Care Provider for Family Member's Serious Health Condition
- WH-381: FMLA Notice of Eligibility and Rights & Responsibilities
- WH-382 : FMLA Designation Notice
- WH-384 : FMLA Certification of Qualifying Exigency for Military Family Leave
- WH-385 : FMLA Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave
- WH-385V : FMLA Certification for Serious Injury or Illness of a Veteran for Wage and Hour Division Military Caregiver Leave

In addition, the DOL issued a Request for Information, asking employers and employees to provide input as to what changes to the FMLA regulations they would like to see in order "to better effectuate the rights and obligations under the FMLA." The public may submit comments here until September 15, 2020.

NLRB Proposes Rollback of Requirement to Provide Unions with Personal E-mail Addresses, Phone Numbers. On July 29, 2020, the National Labor Relations Board issued a proposed rule that would repeal the Obama-era mandate that employers provide unions and other parties with employees' personal e-mail addresses and phone numbers, if available, prior to union elections. Additionally, the proposed rule would allow employees on military leave to vote by absentee ballot.

It is well established that an employer is required to provide a union with a list of voters in advance of an NLRB election. From 1966 until 2014, the employer was required to provide the union only eligible voters' names and addresses. In 2014, the Board implemented a controversial rule that drastically changed many representation case ("R-Case") procedures. One such change required that employers provide unions with additional information on the Voter List, including available personal e-mail addresses, home phone numbers, and cell phone numbers of eligible voters. In doing so, the Obama Board effectively subordinated employee privacy considerations to unions' ability to more easily organize employees.

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

The proposed rule returns to the pre-2014 requirement that employers provide only the names and addresses of eligible employees. In the proposed rule, the Board reasoned that the current requirement to turn over personal e-mail addresses and phone numbers "affords insufficient weight to employee privacy interests" and eliminating this requirement will "redress this imbalance." Interested parties may submit comments to the proposed rule here until September 28, 2020.

If the proposed rule becomes final, it will mark yet another rollback of the Obama Board's R-Case procedure overhaul. In late 2019, the Board revised a number of the 2014 procedures, as we discussed in our December 13, 2019 E-lert. Those revisions largely went into effect on June 1, 2020.

This is unquestionably good news for employers (and many employees). Assuming the proposed rule becomes a final rule, employee privacy will be protected and unions will lose one of their most effective organizing tools: access to employees' personal e-mail addresses and phone numbers.

NLRB Weighs In On Arbitration Agreements. The National Labor Relations Board issued two decisions addressing the legality of arbitration agreements. The Board has previously held that arbitration agreements that explicitly prohibit the filing of charges with the Board, or with administrative agencies generally, violate the National Labor Relations Act. (We wrote about that here.) In both cases, the Board analyzed a similar but distinct issue: whether employees would reasonably read an arbitration agreement to prohibit or restrict the filing of charges with the Board where the agreement did not explicitly restrict or prohibit the filing of charges with the Board. The Board utilized its now ubiquitous *Boeing* framework – under which work rules are divided into Categories 1 (lawful), 2 (requires individualized scrutiny), or 3 (unlawful) – to analyze the agreements.

Different Results: First, in *Hobby Lobby Stores, Inc.*, the Board held that the arbitration agreement did not unlawfully restrict employee access to the Board and its processes. The agreement required that all employment-related disputes be arbitrated. The agreement specifically excluded benefit claims under unemployment or workers' compensation laws. Additionally, the agreement included a "savings clause" that the parties "understand they are not giving up any substantive rights under federal…law (including the right to file claims with…government agencies)." While the agreement did not expressly state that employees retained the right to file charges with the Board, the Board held that an objectively reasonable employee would understand that the savings-clause language "permits the filing of a claim with any federal administrative agency, including the Board." Thus, the employer did not violate the NLRA by maintaining the arbitration agreement.

In *20/20 Communications*, however, the Board reached a different conclusion. There, the arbitration agreement provided that while an employee agreed to submit all employment disputes to arbitration, the employee did not "waive his or her right to file an administrative complaint with the appropriate administrative agency." If the *Hobby Lobby* result was indicative, had the employer stopped there, the agreement likely would have passed muster with the Board. The agreement, however, went on to stay that the employee "knowingly and voluntarily waive[s] the right to file, or seek or obtain relief" seeking to recover or monetary damages or injunctive relief. The Board held that the reasonable employee would interpret this provision to prohibit the recovery of backpay or other monetary remedies that may be ordered by the Board, and thus the arbitration agreement interfered with employees' access to the Board and its processes, and violated the NLRA. The Board reasoned that

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prohibiting the recovery of backpay or other monetary remedies ordered by the Board interferes with the Section 7 right of employees to utilize the Board's processes.

Takeaways: Employers requiring arbitration of employment disputes should be mindful of these decisions. First, employers do not have to explicitly state that the arbitration requirement does not prohibit employees from filing charges with the Board (thought it may be a best practice to eliminate any doubt), *provided* the agreement states that the employee may file claims with government agencies. But arbitration agreements confining monetary relief to the arbitral process will be considered an unlawful prohibition or restriction to the Board's processes, in violation of the NLRA.

Don't Delay in Providing Reasonable Accommodations. A recent federal appellate case offers a lesson to employers regarding the need to handle reasonable accommodation requests from employees with disabilities with reasonable promptness and appropriate follow up.

In *McCray v. Wilkie*, the employee's job responsibilities included driving a van. The employee requested a new van because of knee pain, which the organization's ergonomics expert determined was caused by lack of leg room that apparently exacerbated his disability (for which he had not previously requested any accommodation). Despite the employee's repeated requests, a new van was not provided for 11 months.

As the U.S. Court of Appeals for the Seventh Circuit noted, an unreasonable delay can constitute a denial of reasonable accommodation under the Rehabilitation Act (which applies to the government and incorporates the same legal standards as the Americans with Disabilities Act). In determining whether a delay is unreasonable, a court looks at the totality of the circumstances, including, but not limited to, factors such as "the employer's good faith in attempting to accommodate the disability, the length of the delay, the reasons for the delay, the nature, complexity, and burden of the accommodation requested, and whether the employer offered alternative accommodations."

In the present case, the Seventh Circuit found that to replace the van was not particularly complex or burdensome. Of additional significance, it noted that, during the 11-month lag period, "there was no dialogue with [the employee] about what else could be done and on what timeline, an omission that could be understood to violate the [the employer's] duty to engage in an interactive process with its employee in an effort to arrive at an appropriate accommodation, and also as evidence of his employer's lack of good faith."

Takeaways: Thus, employers should keep in mind that straightforward reasonable accommodation requests should be provided in a reasonably prompt fashion, and that if there will be a delay in providing an accommodation, it is important to explore with the employee whether alternative accommodations exist, either in lieu of or pending the delayed accommodation.

Title VII Covers Intersectional "Sex-Plus-Age" Claims. For the first time, a federal appellate court has recognized that Title VII prohibits discrimination on the basis of sex-plus-age – in agreement with the Equal Employment Opportunity Commission's previously-asserted prohibition on intersectional discrimination.

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In *Frappied v. Affinity Gaming Black Hawk, Inc.*, the U.S. Court of Appeals for the Tenth Circuit addressed sex-plus-age claims brought by a group of older women whose employment had been terminated. The Tenth Circuit first noted that Title VII prohibits discrimination based on race, color, sex, religion and national origin, including any combination of those characteristics. The Tenth Circuit further found that Title VII prohibits "sex-plus" discrimination where the "plus" characteristic is not covered by Title VII or, indeed, any other statute. The Tenth Circuit relied upon the recent Supreme Court opinion in *Bostock v. Clayton County, Ga.*, in stating, "so long as sex plays a role in the employment action, it has no significance that a factor other than sex might also be at work, even if that other factor play[s] a more important role [than sex] in the employer's decision." (Internal quotations omitted).

The Tenth Circuit went on to note that its prior caselaw, which required that a female sex-plus plaintiff prove that the subclass of women to which she belongs was treated unfavorably as compared to the plus-equivalent subclass of males, was not in line with *Bostock*'s focus on individual discrimination. A female need only show that she was terminated because of her sex – and not that the employer discriminated against her entire subclass.

Moreover, the fact that the Age Discrimination in Employment Act provides relief for age discrimination claims does not prevent a plaintiff from asserting a sex-plus-age claim under Title VII, as the two statutes address different types of discrimination. The Tenth Circuit rejected the argument that all discrimination claims with an age-related component must be brought under the ADEA, noting that the ADEA was intended to broaden protections for workers, not to limit them.

Takeaways: This case is significant for several reasons. First, it constitutes the first recognition of a sex-plus-age claim by a federal appellate court. And second, it is one of the first decisions to apply the legal analysis of Title VII underlying the landmark *Bostock* decision (which interpreted "sex" under Title VII to include sexual orientation and transgender status) to focus on the individual, rather than a class. As this court recognized, this change in focus will expand the field of those protected by Title VII.

A Genetic Mutation May Constitute a Disability Under the ADA. The U.S. Court of Appeals for the Sixth Circuit held that a genetic mutation could, in fact, qualify as a disability under the Americans with Disabilities Act - the first time this issue was addressed at the federal appellate court level – although whether it did so in this case was sent back to the trial court for resolution.

Under the ADA, a disability is defined (as relevant here) as a physical or mental impairment that substantially limits a major life activity. In *Darby v. Childvine, Inc.*, the employee had the BRCA1 genetic mutation, which substantially increases the risk of breast, as well as other, cancer. Cancer is expressly recognized as a disability under the ADA, but, as the Sixth Circuit noted, "a genetic mutation that merely predisposes an individual to other conditions, such as cancer, is not itself a disability under the ADA." Thus, the Sixth Circuit stated, "To qualify as a disability,… a condition must substantially limit a major life activity, not merely have the potential to cause conditions that do."

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In the current case, however, the employee did not point to the potential for cancer, but rather that employee's mutation caused abnormal cell growth of precancerous cells, which she alleged to substantially limit the major life activity of normal cell growth. The Sixth Circuit found that this allegation was sufficient to state a possible claim under the ADA, but expressly stated that it was not deciding whether the employee was, in fact, substantially limited in a major life activity. That determination would need to be resolved at the trial court level with further discovery.

Federal Appellate Courts Apply Different Analyses of "Transitory and Minor" Impairments Under the ADA. The U.S. Court of Appeals for the Fifth Circuit found that an employee's impairment lasting less than six months was "transitory and minor," and therefore she was not entitled to the protections of the Americans with Disabilities Act. The Fifth Circuit's holding, however, is at odds with that of the Third Circuit, which we discussed in the June 2020 E-Update.

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 six months or less, while "minor" is undefined.

In *Lyons v. Katy Independent School District*, the Fifth Circuit held that "[a]ny impairment as a result of [the employee's] lap band surgery was objectively transitory and minor by her own admission, because the actual or expected duration of any impairment related to the lap band procedure was less than six months." This stands in striking contrast to the Third Circuit's approach, in which the issue of whether an impairment is "transitory" is separate from whether it is "minor," and an impairment that is of short duration, while "transitory," may not necessarily be "minor." The Third Circuit expressly rejected the employer's conflation of the "transitory" and "minor" requirements in applying the six-month limitation. Thus, these cases illuminate a circuit split on the interpretation of the ADA's "transitory and minor" provision.

Employers May Make Hiring Decisions Based on Applicant Interviews. A federal appellate court reiterated the should-be-obvious points that employers may make hiring decisions based on how applicants perform in interviews and that an applicant's assessment of their own qualifications is not determinative under federal antidiscrimination laws.

In *Pribyl v. County of Wright*, the employee challenged her non-selection for promotion as discriminatory based on her sex, arguing that she was the most qualified for the position. The employer, however, asserted that all the members of the interview panel agreed that she interviewed poorly compared to the other candidates. The U.S. Court of Appeals for the Eighth Circuit stated that, even assuming the employee was the most objectively qualified, the employer "is still entitled to compare candidates' interview performances when making its decision." Moreover, the Eighth Circuit dismissed as "irrelevant" the employee's own perception of her interview performance, stating that, "it is the employer's perception that is relevant, not the applicants' subjective evaluation of their own relative performance."

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

NLRB Provides Guidance on In-Person Election Protocols. The National Labor Relations Board's Office of General Counsel released a memo, **GC 20-10,** that provides guidelines for conducting manual elections during the pandemic.

The memo reiterates that Regional Directors have the authority to make initial decisions about how elections are conducted on a case-by-case basis, considering numerous variables that include: "the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality." The ultimate authority, however, is reserved to the Board.

The memo covers:

1) Election mechanics (e.g. timing of release of voters, handling of ballots, content of election agreements, booths)
2) Company and individual certifications, forms for which are attached to the memo, as to cleaning of the polling area and illnesses in the workplace, as well as individual tests and exposures.
3) Notification to the Regional Director of those in the facility on election who test positive during the subsequent 14 days.
4) Election arrangements to be contained in the Election Agreement (e.g. social distancing requirements, barriers, masks and PPE, etc.)
5) Travel logistics for Board Agents

EEOC Seeks to Increase Voluntary Resolutions Through Pilot Programs. This month, the Equal Employment Opportunity Commission announced two six-month pilot programs intended to increase voluntary resolutions of charges of discrimination.

The ACT (Access, Categories, Time) Mediation pilot expands the categories of charges eligible for mediation – the process by which the charging party and the employer can seek to resolve a pending charge prior to the EEOC's determination of merit. Moreover, in contrast to before, where charges were only referred to mediation prior to the investigation process, the program now generally allows for mediation throughout an investigation. The EEOC is also facilitating virtual mediations.

The EEOC engages in conciliation an attempt to resolve a charge in which discrimination is found following an investigation. The conciliation pilot program adds the requirement that conciliation offers be approved by the appropriate level of management before they are shared with respondents. This is intended "to drive greater internal accountability and improve the EEOC's implementation of existing practices."

These changes – particularly the content and timing expansion of the mediation program – are good news for employers interested in pursuing a quicker and potentially less costly resolution to charge filings.

Shawe Rosenthal LLP
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(410) 752-1040 www.shawe.com

NEWS AND EVENTS

Honor - Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for Q2 2020 - Employment - U.S. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the fifth consecutive quarter and sixth time overall that Fiona has received this honor.

Presentation – Lindsey A. White was a presenter for the Maryland State Bar Association, Labor and Employment Law Section's "Legal Summit Series: LGBTQ Employee Rights Before the Supreme Court and Beyond" on July 29, 2020.

TOP TIP: CDC Updates Guidelines On When COVID-19-Positive Workers Can Return

The Centers for Disease Control and Prevention has revised its guidance on when those with COVID-19 may be released from self-isolation and thereby return to work.

Previously, the CDC had identified two different strategies for this determination: symptom-based and test-based. Under the latter, an individual could stop self-isolating once symptoms abated and the individual had two consecutive negative COVID-19 tests at least 24 hours apart. **The CDC no longer recommends the test-based strategy in general**, since studies have shown that the vast majority of those who test negative also meet the criteria of the symptom-based strategy. The test-based strategy may still be used for those who are severely immunocompromised, in consultation with infectious disease experts.

Additionally, **the CDC updated its symptom-based strategy**. The CDC now states that self-isolation of **those with symptoms** may be discontinued when:

- At least 10 days (up to 20 for those with severe illness) have passed since symptom onset and
- At least 24 hours (previously 72 hours) have passed since resolution of fever without the use of fever-reducing medications and
- Other symptoms (previously limited just to respiratory symptoms) have improved

Those without symptoms may discontinue self-isolation after 10 days have passed from the positive COVID-19 test.

RECENT BLOG POSTS

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

- Hey CEOs – Be Careful About Diversity Hiring Quotas! by Fiona W. Ong, July 29, 2020
- NLRB Catches Up to the #MeToo and BLM Movements by Parker E. Thoeni, July 23, 2020
- DOL Provides COVID-19-Related Guidance on FLSA, FMLA and FFCRA by Fiona W. Ong, July 20, 2020

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

- Let's Be Clear – The "C" Word Is Not a Compliment by Fiona W. Ong, July 15, 2020 (Selected as a "noteworthy" blog post by Labor & Employment Daily)

- No, Your CEO Did Not Really File For Unemployment Benefits by Alex I. Castelli, July 9, 2020

- Masks/Face Coverings in the Workplace Uncovered! What Can Employers Require? by Fiona W. Ong, July 1, 2020

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