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E-UPDATE

October 30, 2020

RECENT DEVELOPMENTS

More Employees in Quarantine? CDC Expands Definition of "Close Contact" with an Individual with COVID-19

In revising its definition of who is considered to be in "close contact" with a person infected with COVID-19, the Centers for Disease Control and Prevention (CDC) significantly expanded the universe of individuals who might be required to self-isolate. This has an impact on whether exposed employees will be able to report to the workplace.

As employers likely know, the CDC has recommended that individuals should quarantine for 14 days following "close contact" with an infected individual. (Employees in critical infrastructure industries, however, need not quarantine; they may continue to work while complying with protocols that include self-monitoring, wearing a face mask, and observing social distancing guidelines).

New Definition. Previously, the CDC had defined close contact as being within 6 feet of an infected individual for a period of 15 minutes, which was understood to be a single consecutive period. In the updated guidance, however, the CDC now defines "close contact" to be "within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection)." (Emphasis added). The CDC clarifies that this means shorter individual exposures are added together to reach the cumulative total.

The CDC also sets forth factors to consider when defining close contact, including: proximity (closer distance likely increases exposure risk), the duration of exposure (longer exposure time likely increases exposure risk), whether the infected individual has symptoms (the period around onset of symptoms is associated with the highest levels of viral shedding), if the infected person was likely to generate respiratory aerosols (e.g., was coughing, singing, shouting), and other environmental factors (crowding, adequacy of ventilation, whether exposure was indoors or outdoors). The CDC further makes clear that the **use of a face covering is not relevant** in assessing close contact.

New Challenges for Employers. This definition raises several challenges for employers. We note that application of this new definition may be difficult, as most people do not track their interactions in minimal increments. However, it is clear that many people who previously did not meet the timing aspect of the "close contact" definition will now do so. In accordance with an employer's duty to maintain a safe workplace under OSHA's general duty clause, such employees will be required to quarantine whenever these cumulative contacts meet the CDC definition, which means they will not be able to report to the workplace. While those employees who can perform their work remotely will be able to continue to work, those whose physical presence is required in the workplace will not.

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

Employers should be aware that recently-enacted State and local COVID-19 leave laws, as well as existing sick and safe leave laws, may apply to the quarantine period. More specifically, for employers covered by the Families First Coronavirus Response Act, to the extent that the employee's health care provider recommends that they be quarantined, in accordance with these CDC guidelines, the employee would be entitled to the two-week paid sick leave allotment provided under the FFCRA, at least until the end of 2020, when the law is set to expire.

OSHA Clarifies COVID-19 Reporting (Not Recording) Requirement

The Occupational Safety and Health Administration issued new FAQs regarding the reporting of work-related COVID-19 cases, providing much-needed clarification to employers.

Hospitalizations. Under the Occupational Safety and Health Act, employers must report (within 24 hours) hospitalizations that occur within 24 hours of a work-related incident. In the context of COVID-19, OSHA states that the work-related exposure to COVID is the triggering "incident" and thus is reportable if the hospitalization occurs within 24 hours of such exposure. The employer must report such hospitalization within 24 hours of knowing both that the employee has been hospitalized and that the reason for the hospitalization was a work-related case of COVID-19.

Fatalities. Employers must report any fatalities if they occur within 30 days of the work-related incident, meaning the work-related exposure to COVID-19. The employer must report the fatality within eight hours of knowing both that the employee has died, and that the cause of death was a work-related case of COVID-19.

Reporting v. Recording. OSHA further clarifies that these limitations only apply to reporting; employers who are required to keep illness and injury records must still record any work-related hospitalizations or fatalities of COVID-19 that occur outside of the reporting period. OSHA has provided prior guidance on work-relatedness determinations for COVID-19 cases, which we discussed in our May 29 E-Update.

EEOC Proposes Changes to Its Conciliation Process to Provide More Information to Employers

The Equal Employment Opportunity Commission has issued a Proposed Rule to amend its conciliation process, for the stated purpose of enhancing its effectiveness and accountability in resolving findings of unlawful discrimination by employers.

Background. Under Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and the Age Discrimination in Employment Act, employees may file a charge of discrimination with the EEOC, and if the EEOC finds reasonable cause to believe discrimination exists, it must then attempt to resolve the matter through conciliation. Over the years, there have been challenges to the adequacy of the EEOC's conciliation process, culminating in the 2015 case, *Mach Mining, LLC v. EEOC,* in which the Supreme Court laid out certain requirements for the process while noting the EEOC's "wide latitude" and "expansive discretion" over the conciliation process. Thus, the EEOC asserts, "Recognizing this power, it is important that the Commission clearly articulate the steps of the conciliation process so that the parties understand what to expect."

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

The Proposed Rule. The EEOC proposes that it will provide the following in any conciliation:

1. A summary of the facts and non-privileged information that the Commission relied on in its reasonable cause finding, and in the event that it is anticipated that a claims process will be used subsequently to identify aggrieved individuals, the criteria that will be used to identify victims from the pool of potential class members;
2. A summary of the Commission's legal basis for finding reasonable cause, including an explanation as to how the law was applied to the facts, as well as non-privileged information it obtained during the course of its investigation that raised doubt that employment discrimination had occurred;
3. The basis for any relief sought, including the calculations underlying the initial conciliation proposal; and
4. Identification of a systemic, class, or pattern or practice designation.

The EEOC further proposes that respondents will have 14 days in which to respond to any conciliation proposal.

Next Steps. The EEOC seeks public comment on the proposed provisions above, as well as whether the required disclosures must be made in writing. The EEOC has set an expedited 30-day period for public comment on its proposed Rule, rather than the usual 60 days. Comments may be submitted here until November 9, 2020. Once the comment period has closed, the EEOC will review the comment and may make revisions before issuing the Final Rule.

TAKE NOTE

EEOC Clarifies No Cause Finding ≠ No Merit. In issuing a Final Rule that authorizes the digital transmission of charge-related documents, the Equal Employment Opportunity Commission also took the opportunity to explain that a "no cause" finding at the conclusion of its investigation into an employee's charge of discrimination is not necessarily a finding that the charge has no merit.

Employees who believe they have been subjected to discrimination under federal antidiscrimination laws must first file a charge of discrimination with the EEOC before they can bring suit. If, following an investigation (by either the EEOC or a local/state fair practices agency), the EEOC finds no reasonable cause to believe an unlawful employment practice has occurred (known as a "no cause determination"), it then issues a written Dismissal and Notice of Right to Sue.

The EEOC has modified the language of the Dismissal to clearly state that, although the EEOC is choosing not to proceed with the investigation, it is making no finding as to the merit of the discrimination claim. According to the EEOC, this change is intended to ensure that employees, employers and courts understand that private proceedings or litigation may still lead to court findings of discrimination or settlements.

Employees May Be Disciplined for Abusive Conduct, Even in Context of Protected Activity. Affirming that employees may be disciplined for abusive conduct that might otherwise be protected by the National Labor Relations Act (NLRA), the National Labor Relations Board remanded a case to the administrative law judge (ALJ) to analyze whether the employee in this case was lawfully disciplined for his inappropriate conduct during a safety meeting.

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

In *Wismettac Asian Foods, Inc.*, an employee voiced group concerns in a safety meeting with other employees and supervisors present. While voicing these concerns, which occurred during a hotly-contested union campaign, the employee interrupted a supervisor, raised his voice, and crossed his arms over his chest. The employer issued the employee a verbal counseling for his conduct during the safety meeting. The ALJ determined that the employee did not lose the Act's protections. In analyzing this issue, the ALJ analyzed the issue under the Board's now-outdated *Atlantic Steel* standard for assessing whether an employee loses the Act's protections through words or conduct while engaging in protected concerted activity. Following the ALJ's decision, however, the Board held in *General Motors* that it would no longer apply the *Atlantic Steel* test when analyzing whether an employer has unlawfully disciplined an employee for allegedly engaging in abusive conduct during the course of activity protected by the Act. Instead, the Board will assess whether the employer would have taken the same action absent the employee's protected activity (we discussed *General Motors* here). Accordingly, the Board remanded the case to the ALJ to apply the *General Motors* standard to the facts of this case. We will keep you updated regarding developments in this case.

The Board also held that the employer violated Section 8(a)(3) of the NLRA when it refused to rehire a union supporter for using profanity during a group meeting. The individual had previously worked for a staffing agency and was displaced when the staffing agency terminated its contract with the employer. When the employee applied directly with the employer, the employer refused to consider or rehire the employee. The Board affirmed the ALJ's finding of a violation, noting that while the employer articulated a legitimate reason or not considering for rehiring the individual – i.e., his use of profanity during a group meeting – the employer failed to establish that it would have taken the same action absent the individual's union activity. The employer thus failed to meet its burden under the Board's familiar *Wright Line* burden-shifting framework.

This case reinforces that employers may discipline employees for engaging in abusive conduct even while the employee is engaged in conduct protected by the NLRA. But an employer must be able to establish that it would have taken the same action against the employee even absent his or her protected conduct. As the Board explicitly stated in this case, it is not sufficient to merely articulate a legitimate reason for discipline; the evidence must establish that the employer would have taken the action absent the employee's protected activity.

OFCCP Provides More Resources for Government Contractors. Continuing with its spate of activity, the Office of Federal Contract Compliance Programs has issued a number of new resources for government contractors and subcontractors:

- Employment Referral Resource Directory. The OFCCP has updated its Employment Referral Resource Directory (ERRD), which lists government and nonprofit organizations as references to assist federal contractors' hiring of qualified veterans, individuals with disabilities, women and minorities. The updated ERRD has an improved search function and is more user friendly.
- FAQs on Executive Order 13950 (D&I Training). The OFCCP issued Frequently Asked Questions on President Trump's Executive Order (E.O.) "Combating Race and Sex Stereotyping" in workplace diversity and inclusion training. Of particular interest, the FAQs clarify that, while unconscious or implicit bias training is not necessarily prohibited, it is prohibited "to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously."

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- Request for Information on D&I Training. As directed by the same E.O., the OFCCP also "invites" the public to provide information regarding workplace training that involves race or sex stereotyping or scapegoating. Employers who question whether their training is compliant with the E.O, may submit their materials for review. OFCCP states that it will not take enforcement action based on such submission, as long as the employer promptly comes into compliance, as directed by OFCCP.
- Executive Order 13950 Landing Page. The new landing page on the OFCCP's website contains the FAQs and RFI referenced above, along with hotline information for complaints.

A Voluntary Transfer Is Not an Adverse Employment Action. The U.S. Court of Appeals for the Fourth Circuit affirmed the rather obvious point (although apparently not to the employee) that when an employee voluntarily requests – and the employer agrees – to a transfer, the employee has not experienced an adverse employment action for purposes of the Americans with Disabilities Act.

In *Laird v. Fairfax County, Virginia*, an employee with multiple sclerosis was initially granted generous accommodations that eventually proved to be unworkable. The employee filed a charge of discrimination with the Equal Employment Opportunity Commission, which was resolved by granting her request for a lateral transfer. Finding the new job not to her satisfaction, she then sued her employer for "demoting" her.

The Fourth Circuit, however, stated that her claim "fails for a simple reason: If an employee voluntarily requests a transfer, and the employer agrees to it, there is no actionable adverse action." It cited to a sister Circuit in further asserting, "a transfer cannot be 'because of a disability' if it occurred as the result of an employee's own request."

Montgomery County Vastly Expands Definition of "Harassment." Employers with employees in Montgomery County should be aware that illegal "harassment" is now defined more broadly than under Maryland state or Federal law.

The expanded county law does the following:

- Specifically prohibits harassment on the basis of any protected characteristic (i.e. race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, genetic status, or disability).
- Broadly defines "harassment" to include verbal, written or physical conduct, even if the conduct does not meet the "severe or pervasive" standard applicable under prior County (or State/Federal) law, as long as the conduct is:
    1. Based on a protected characteristic;
    2. One of the following applies: (1) Submission to the conduct is made a term or condition of employment, (2) Submission to or rejection of the conduct is the basis for employment decisions, or (3) the conduct unreasonably interferes with the individual's work performance or creates a work environment that is perceived by the individual to be abusive or hostile; and
    3. A reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance.
- Also broadly defines "sexual harassment" to include unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature. Similarly, this conduct does not need to meet the "severe or pervasive" standard, as long as it meets (2) and (3) above.

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

The expansion of the law means that employees in Montgomery County will be able to establish a harassment claim more easily than before, even for conduct that does not meet Federal or State standards for such claims. (Interestingly, New York State recently adopted this same standard, and we expect to see similar legislation popping up in other states). Employers covered by Montgomery County's law should review their harassment policies and procedures to ensure compliance with the new standard.

What Temporal Proximity Supports an Inference of Causation for a Retaliation Claim? The U.S. Court of Appeals for the Fourth Circuit provided some guidance on this issue in a recent case involving an employee's claims of discrimination and retaliation.

In *Ali v. BC Architects Engineers, PLC*, the employee alleged, among other things, that she was denied a promotion in retaliation for complaining of race discrimination three months earlier. She also alleged that she was terminated in retaliation two weeks after making another race discrimination complaint. The Fourth Circuit held that a three-month period was long enough to weaken any inference of causation, citing to both Supreme Court (three to four months) and its own precedent (10 weeks). On the other hand, two weeks was sufficiently "close temporal proximity" to support a retaliation claim.

Different "Economic Realities" Tests Exist for Determining Independent Contractor Status. As we previously noted in discussing the Department of Labor's Proposed Rule on determining independent contractor v. employee status, there are many versions of the test across agencies and courts, leading to much confusion for employers – and the latest demonstration of this comes out of the U.S. Court of Appeals for the Sixth Circuit.

In *Gilbo v. Agment, LLC*, the Sixth Circuit articulated a broad "economic realities" test under the Fair Labor Standards Act, consisting of six factors: 1) the permanency of the relationship between the parties; 2) the degree of skill required for the rendering of the services; 3) the worker's investment in equipment or materials for the task; 4) the worker's opportunity for profit or loss, depending upon his skill; 5) the degree of the alleged employer's right to control the manner in which the work is performed; and 6) whether the service rendered is an integral part of the alleged employer's business. The Sixth Circuit then applied these factors to find that exotic dancers were, in fact, employees (e.g. worked exclusively for the employer, little skill required, little investment, little control over profit/loss, significant control by employer, part of employer's business).

Notably, the Sixth Circuit's (six-factor) "economic realities" test differs from the DOL's proposed (two core factors and three additional factors) "economic realities" test under the FLSA. Again, employers must be cognizant of what are the various tests, and which test applies – which will depend on the law in question and the jurisdiction.

Shared Services Does Not Necessarily Make Affiliated Companies a Single Title VII Employer. The U.S. Court of Appeals for the Seventh Circuit refused to allow an employee to sue a dealer network with which his employer was affiliated, finding no evidence to support the employee's attempt to pierce the dealerships' corporate veils and combine them for purposes of Title VII coverage.

In *Prince v. Appleton Auto, LLC*, the employer was a member of a network of five affiliated but corporately distinct used car dealerships, of which the same individual was the majority owner. The members received management services from another company that was also owned by that

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

individual. Because the employer had fewer than 15 employees, it was not subject to Title VII. Thus, the employee sought to "pierce the corporate veil" (i.e. combine the affiliates in order to hold them liable for each others' legal violations) in order to trigger Title VII coverage for his race discrimination claim.

Although "the overlap between these companies was substantial," with the same owner for each entity, the management company providing extensive shared services, group social functions for all employees, and a shared network website, the Seventh Circuit nonetheless refused to combine the dealerships for purposes of Title VII coverage. It stated, "Piercing the corporate veil for the purpose of employee aggregation requires a plaintiff show more than a degree of integration of corporate operations."

Rather, under state law governing the piercing of corporate veils, the Seventh Circuit found that the "determinative question" is "whether the two entities neglected forms intended to protect creditors from being confused about whom they can look to for the payment of their claims." In this case, they did not. Each dealership and its LLC owner were distinct corporate entities, as each: properly maintained corporate formalities and records; was separately billed by the management company; paid for the use of the network trademark and website; had its own General Manager, bank accounts and financial reports; filed and paid its own taxes; paid its own employees; and entered into its own contracts.

This case recognizes the reality that "[f]irms too tiny to achieve the realizable economies of scale or scope in their industry will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership." And that in so doing, as long as they maintain their corporate formalities, they may still remain exempt from Title VII. As the Seventh Circuit explains, this exemption "was not to encourage discrimination by them but rather to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail."

"Me Too" Evidence May Be Admissible for Discrimination Claim. Employers should be warned that other employees' accounts of their own experiences with discrimination may be admissible to support a plaintiff's individual discrimination claim.

In *Pineda v. Abbott Laboratories, Inc.*, the plaintiff brought a number of claims against his employer, including under the Age Discrimination in Employment Act. The federal district court initially threw out this claim, but the U.S. Court of Appeals for the Ninth Circuit found that it had erred, in part by disregarding "me too" evidence from other employees. The company had argued that at least some of these other employee declarations were irrelevant because the employees reported to other supervisors. The Ninth Circuit, however, noted that several employees reported to the same supervisors as the plaintiff, and, further, that "all of the declarations may offer relevant information about organizational practices."

Company managers sometimes discount anecdotal accounts as "hearsay," and believe that such accounts cannot or should not be relied upon. But this case provides a warning that these accounts may play a role in a discrimination lawsuit.

Shawe Rosenthal LLP
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NEWS AND EVENTS

Appointment – Lindsey A. White was appointed as the Programming Chair (Employer side) for the American Bar Association's Labor and Employment Technology Committee.

Presentation – Fiona W. Ong was a panelist at the Fashion Law Institute's 10th annual Symposium: Silver Linings. Fiona joined the General Counsel of a fashion group, a Deputy Commissioner from the New York City Commission on Human Rights, and the founder of the Fashion Innovation Alliance to present "Sterling Intentions: Is your diversity & inclusion plan legal?" The October 9, 2020 presentation may be viewed here.

Publication – Our firm authored the "USA - Trends and Developments" chapter for Chambers and Partners' 2020 Global Employment Practice Guide. A pdf of the chapter is available here.

Publication – Our firm authored the "Maryland Law and Practice" chapter for Chambers and Partners' 2020 U.S. Regional Employment Practice Guide. A pdf of the chapter is available here.

Publication – On behalf of Lexology, our firm authored the Maryland chapter of the "Employment: North America" Guide (Lexology PRO subscription required).

Article – Parker E. Thoeni, Lindsey A. White, and Chad M. Horton, with the assistance of law clerk Amelia Green, authored "Employer Mandatory Vaccination Policies in the Time of COVID-19: Practical Considerations for Health Care Employers," which was published in the *January-June 2020 Labor Activity in Health Care Semi-Annual Report* for the American Society for Health Care Human Resources Association.

TOP TIP: Voting Leave Laws in the Mid-Atlantic

Election Day is Tuesday, November 3, 2020, and many states require employers to provide employees with paid or unpaid leave to vote. Although early voting or vote-by-mail has been implemented in numerous states, employers may still need to provide leave on Election Day. Below is a summary of voting leave laws in the Mid-Atlantic region.

- **Delaware**: None
- **District of Columbia**: Employers must provide two hours of paid leave if the employee would have been scheduled to work during the time for which the leave is requested. The employee must request the leave a "reasonable" time in advance. The employer can schedule the leave, including during an early voting period or at the beginning or end of the employee's shift.
- **Maryland**: Employers must provide up to two hours of leave if the employee does not have two non-work hours during the period polls are open. The leave is paid if the employee provides proof of voting (a State form).
- **New Jersey**: None

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- **New York**: Employers must provide up to two hours of paid leave during the time polls are open if the employee does not have at least four consecutive nonworking hours during the period polls are open in which to vote. Employees must provide at least two working days' and up to ten working days' notice of the need for leave.

- **Pennsylvania**: None

- **Virginia**: None

- **West Virginia**: Employers must provide up to three hours of paid leave if the employee does not have three hours of nonworking time during the period polls are open in which to vote. Employees must request the leave in writing three days prior to the election. Employers in essential government, health, hospital, transportation, and communication services, and in production, manufacturing and processing works requiring continuity of operations may schedule the voting leave to avoid impairment or disruption of essential services and operations.

RECENT BLOG POSTS

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

- My Zoom Trial by Eric Hemmendinger, October 29, 2020

- Extraordinary Employee Excuses: Attendance Is Not an Essential Job Function of a Greeter? by Fiona W. Ong, October 22, 2020

- #NoHelmetsAtWork by Elizabeth Torphy-Donzella, October 14, 2020 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- Does the DOL Really Know Its Own FMLA Regulations? by Fiona W. Ong, October 6, 2020 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

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(410) 752-1040 www.shawe.com