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E-UPDATE

January 29, 2021

RECENT DEVELOPMENTS

Under the Biden Administration, Turbulence Awaits Employers at the NLRB

President Joe Biden wasted little time in making his mark on the National Labor Relations Board ("NLRB" or "the Board") – a development of import to all employers, as the law it enforces, the National Labor Relations Act, protects the rights of all employees, not just union members, to engage in concerted activity regarding the terms and conditions of their employment (i.e. Section 7 rights).

Within minutes of being sworn in, the Biden administration requested the resignation of NLRB General Counsel (GC) Peter Robb. When Mr. Robb declined to resign his position as the head of the independent federal agency, he was summarily fired. The next day, President Biden requested the resignation of Acting GC Alice Stock, who had been elevated from her previous Deputy GC position following the firing of Mr. Robb. When she too refused to resign, she was terminated.

While it is customary for an incoming administration to make appointments to vacancies on the five-member Board, no President has summarily fired the incumbent GC prior to the end of the GC's Senate-confirmed four-year term. The only other time the NLRB's General Counsel was relieved of his position by an incoming President was in 1950 when Harry S. Truman sought and received the resignation of GC Robert Denham. These quick and unprecedented actions – Mr. Robb's ouster was the first time a NLRB GC had been terminated by an incoming President – signals a sharp leftward turn for an agency seemingly intent on unwinding Mr. Robb's and the majority Republican Board's achievements over the last four years.

In a more typical move, President Biden also elevated to Chairman the Board's only Democratic member, Lauren McFerran, replacing Republican John Ring who will remain a Board Member. The Biden administration will have the opportunity to fill an open seat and to replace Republican Board member William Emanuel when his term ends in August. This will create a Democratic majority on the Board for the first time since September of 2017.

Peter S. Ohr, previously the Regional Director of the NLRB's Chicago field office, has been named Acting GC until the Biden administration nominee is confirmed by the Senate.

Making Union Organizing Easier. We expect the new GC and the eventual Biden Board to use rulemaking and adjudication to overturn major Trump Board decisions. The intent and effect of these reversals will make it easier for unions to organize. Specifically, we expect the Biden Board to issue a slew of decisions and rules that will:

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- **Permit Micro-Units**: It will not take long for a case to reach the Board where a union seeks to represent a small pocket of employees within an employer's larger, functionally integrated operation. The Biden Board is expected to overturn the 2017 decision in *PCC Structurals* and return to the Obama-era standard requiring an employer to establish that additional employees it seeks to add to the union's preferred petitioned-for unit have an "overwhelming community of interest" with the petitioned-for unit. In practice, this elevated burden is virtually impossible to meet. Consequently, unions will organize smaller groups of employees who support the union with little concern that the employer may be able to add to the voting unit other employees who share something less than the overwhelming community of interest with the union's preferred bargaining unit.

- **Allow Employee Use of Employer E-mail Systems for Union Organizing:** The Trump Board concluded that employees do not have the right to use employer IT resources to engage in Section 7 activity, which includes organizing efforts, unless e-mail is the only reasonable means for employees to communicate with each other. The Biden Board is likely to return to a standard identical or similar to the Obama Board's decision in *Purple Communications*, which concluded that employees have a protected right to use employer resources for non-work purposes.

- **Revising Election Procedures - A Return to "Ambush Elections":** The Trump Board used rulemaking to extend the number of days between a union petition and an election. By pushing back an employer's deadline to file a statement of position and increasing the number of days between a petition and pre-election, among other procedures, employers were given additional time to communicate its message to employees. The Biden Board will likely seek to return to the Obama-era "quickie election" rules that will shorten the time between petition and election, thereby increasing the likelihood of unionization.

- **Ease Restrictions on Non-Employee (i.e. Union Organizer) Access to Employer Property:** The Trump Board issued several decisions strengthening employer property rights and narrowing the rights of non-employees seeking to engage in union organizing and other Section 7 activity on employer property. The Biden Board is expected to roll back those decisions and permit non-employees to access an employer's private property to engage in union activity even if that employer does not permit other third parties to use its property for similar activities.

- **Return to the Less-Exacting *Browning Ferris* Joint Employer Standard:** The Biden Board is expected to chart a return to the joint employer standard established in the 2015 *Browning Ferris* decision, which was overturned by Trump Board rulemaking. The *Browning Ferris* standard found a joint employer relationship even where an alleged joint employer did not exercise "direct and immediate" control over essential working conditions, and where a company's control over another business's workers was "indirect, limited and routine, or contractually reserved but not exercised." A lesser joint employer standard would require both joint employers to bargain with the union representing employees of the joint employers.

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Reversing Other Major Trump Board Decisions. In addition to overturning the decisions discussed above, the Biden Board should be expected to roll back Trump Board decisions:

- **Standard for Analyzing Facially Neutral Work Rules:** The Board's 2017 decision in *Boeing Co.* established a framework for analyzing work rules that, on their face, do not violate the NLRA. The result in most post-*Boeing* cases has been a finding that the contested rules did not violate the NLRA. Expect the Biden Board to revisit the appropriate standard for analyzing these work rules, and the resulting standard to produce more decisions finding the contested work rules to violate the NLRA.

- **Employer Unilateral Changes:** The Trump Board's decision in *MV Transportation* made it easier for employers subject to a collective-bargaining agreement to implement unilateral changes without first notifying and bargaining with its employees' union. Expect the Biden Board to return to a legal standard making it more difficult for an employer to act unilaterally without bargaining.

- **Withdrawal of Recognition:** The Trump Board also made withdrawing recognition of a union an easier and more straightforward process. The Biden Board is likely to nix this holding, as well, if given the opportunity.

PRO Act. Additionally, Democrats have made no secret of their desire to pass legislation that will further union organizing. The Protecting the Right to Organize (PRO) Act would not only codify several outcomes sought by the Board, but also provide the following gifts to unions and employees:

- Ban right-to-work laws, which prohibit employers and unions from negotiating provisions requiring that employees pay union dues as a condition of employment.
- Provide a private cause of action for certain violations and provide for compensatory damages to claimants.
- Reinstate the "Persuader Rule," which requires various employer disclosures, some of which arguably interfere with the attorney-client privilege.
- Eliminate the prohibition of secondary boycotts, thereby subjecting employers to labor disputes to which they are neither a party nor capable of fixing.
- Limit who can be classified as independent contractors.

In summary, turbulent days are ahead for employers. The employer-friendly decisions issued by the Trump Board will be overturned and replaced by decisions and rulemaking providing for union-friendly and pro-employee standards and outcomes. We encourage employers to take immediate steps to prepare for the above changes by training their supervisors and managers on maintaining a positive work environment where employees would not seek or be open to union organizing. As always, we will keep you updated regarding developments at the NLRB.

It's Going to Be a Bumpy Ride - The Changes (So Far) to DOL and EEOC Employment Standards Under President Biden

It should be a surprise to no one that the Biden Administration is taking immediate and decisive steps to reverse many of the business-friendly positions that were set forth by the U.S. Department of

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Labor and the Equal Employment Opportunity Commission under the Trump Administration. Here is a brief overview of the actions as of January 30, 2021:

- In a very typical move for a new administration, President Biden issued a memo freezing agency rulemaking pending review. Any rules that have not yet been published in the Federal Register are to be withdrawn. In addition, the agencies should "consider" 60-day (or longer) postponements and additional comment periods for already published rules that have not yet taken effect. This would include the following recently-issued rules of some significance:

    - **Employee v. Independent Contractor:** The DOL issued a Final Rule making it easier to achieve independent contractor status under the Fair Labor Standards Act (FLSA), which we discussed in our January 6, 2021 E-lert. The rule is scheduled to take effect on March 8, 2021. Given the controversy over this rule, we expect that it will not take effect as is.

    - **Tipped Employees:** The DOL also issued a final rule that revises its tipped employee regulations to conform with amendments that were made to the Fair Labor Standards Act by the Consolidated Appropriations Act of 2018. This rule is scheduled to take effect on March 1, 2021. Given that the Biden Administration has withdrawn a recently-issued opinion letter that relied on this rule, there may be further changes to the rule before it is allowed to take effect.

    - **EEOC's Conciliation Procedures:** On January 14, 2021, the EEOC issued a Final Rule for the stated purpose of streamlining its conciliation process for resolving findings of discrimination. This rule, which is scheduled to take effect on February 16, 2021, was approved by a 3-2 vote, and with the change in administration, it may be revisited.

    - **Wellness Programs Under the ADA and GINA**: Earlier this month, the EEOC issued proposed rules under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act addressing the incentives employers could offer as part of wellness programs that ask about employees' health and/or ask them to undergo medical examinations. These rules have now been withdrawn.

- **Protecting Workers from COVID-19:** President Biden issued an Executive Order on Protecting Worker Health and Safety that directs the DOL's Occupational Safety and Health Administration to do the following, among other things: issue further guidance to employers on workplace safety during the pandemic; consider whether to issue emergency temporary COVID-19 standards, focus enforcement efforts on violations putting the greatest number of employees at risk.

- **Expanding "Sex" Under Federal Anti-Discrimination Laws to Include Sexual Orientation and Gender Identity.** Following the Supreme Court's landmark ruling extending discrimination protections under Title VII to gay and transgender employees, which we discussed in a June 15, 2020 E-lert, President Biden has now issued an Executive

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Order Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. The EO affirms the Supreme Court's reasoning that "sex" under Title VII necessarily includes sexual orientation and gender identity, and extends it to all other federal anti-discrimination laws, including Title IX of the Education Amendments Act, the Fair Housing Act, and the Immigration and Nationality Act.

- **Revoking Trump's "No Divisive Training" Order:** As we previously discussed, President Trump's Executive Order prohibiting "divisive" training by government contractors was extremely controversial, and has recently been enjoined by a federal court. Now, President Biden has issued an Executive Order Advancing Racial Equity and Support for Underserved Communities Through the Federal Government that revokes that order and further directs agencies to assess equity in its programs and policies, to identify and remove barriers to equity, and to promote equitable delivery of government benefits and opportunities, among other things.

President Biden has also indicated that he intends to seek an increase in the minimum wage to $15/hour, as well as paid leave mandates, among other things on the employment front. We will keep you posted on these efforts.

"Workplace-based testing should not be conducted without the employee's informed consent."

So says the Centers for Disease Control and Prevention (CDC) in its new guidance on workplace testing programs, which adds to its previous guidance, Testing Strategies: Considerations for Non-Healthcare Workplaces. In the new guidance, the CDC focuses on the need for informed consent for workplace testing by employees and discusses the required disclosures for such consent.

The CDC states that employers should take the following measures when developing a testing program in order to support appropriate decision-making by employees:

- Ensure safeguards are in place to protect an employee's privacy and confidentiality.
- Provide complete and understandable information about how the employer's testing program may impact employees' lives, such as if a positive test result or declination to participate in testing may mean exclusion from work.
- Explain any parts of the testing program an employee would consider especially important when deciding whether to participate. This involves explaining the key reasons that may guide their decision.
- Provide information about the testing program in the employee's preferred language using non-technical terms. Consider obtaining employee input on the readability of the information. Employers can use this tool to create clear messages.
- Encourage supervisors and co-workers to avoid pressuring employees to participate in testing.
- Encourage and answer questions during the consent process. The consent process is active information sharing between an employer or their representative and an employee, in which the employer discloses the information, answers questions to facilitate understanding, and promotes the employee's free choice.

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The CDC also discusses what should be contained in the disclosures, acknowledging that much of the following information are addressed in the FDA's Emergency Use Authorization Fact Sheet, which must be given to all individuals prior to receiving the vaccine:

- The manufacturer and name of the test
- The test's purpose
- The type of test
- How the test will be performed
- Known and potential risks of harm, discomforts, and benefits of the test
- What it means to have a positive or negative test result, including:
  - Test reliability and limitations
  - Public health guidance to isolate or quarantine at home, if applicable

In addition, the CDC states that employers should be prepared to address the following:

- General considerations, such as why testing is being offered, frequency of testing and consequences of refusing the test.
- Scheduling and payment, including who schedules the appointments, whether the employee is paid for travel and testing, who pays for the test and any required follow-up care, and accommodations or alternatives to testing.
- Testing site, such as who administers the test, where the test will be done, and whether any screening will be required prior to the test.
- Communication and interpretation of results, including who interprets the results, how and to whom results are communicated, and what happens if the employee tests positive.
- Privacy, such as what personal information must be provided by the employee, how and for what period it is retained, and how it will be kept confidential and secure.
- Seeking additional help or reporting injuries, such as who to contact for additional information or assistance.

NLRB Finds Social Media Rules Lawful – For Now

The National Labor Relations Board (the "Board") concluded that an employer did not violate employees' rights under the National Labor Relations Act (NLRA) to engage in concerted activity regarding their terms and conditions of employment by maintaining several contested provisions in its social media policy.

In *Medic Ambulance Service*, the Board utilized its now familiar *Boeing* framework, under which facially neutral work rules are divided into three categories: whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful. The Board reversed the Administrative Law Judge (ALJ) and held that the employer's work rules prohibiting the following conduct were lawful: (1) disclosure of confidential information; (2) use of the employer's name to disparage causes or people; (3) posting photos of coworkers; (4) sharing employee compensation information; and (5) disparaging the employer or others.

Prohibiting Disclosure of Confidential Information: The rule admonished employees to not disclose "confidential or proprietary information regarding the [employer] or coworkers." The next

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sentence states that employee use of copyrighted or trademarked information, trade secrets, or other sensitive action could subject an employee to legal action. The ALJ found that the rule would restrict employees' NLRA right to discuss and share information about their coworkers. The Board reversed, concluding that the express prohibition was limited to use of copyrights, trademarks, trade secrets, and other sensitive information. Moreover, the Board reasoned that rule does not specifically reference employees' contact information, wages, or other terms and condition of employment, and, thus, an objectively reasonable employee would not understand the rule to prohibit the sharing of information related to employees' terms and conditions of employment.

Use of Employer's Name to Disparage Causes or People: This rule prohibited employees from using the company's name "to endorse, promote, denigrate…any product, opinion, cause or person." The ALJ concluded that the rule was "extraordinarily broad" and could be read to interfere with employees' protected right to seek outside support concerning their terms and conditions of employment, and any business justification was outweighed by the rule's impact on employees' NLRA rights. The Board, however, noted that the social media policy included a guideline that employees must make it clear that the views expressed on social media were the employee's alone and did not represent the employer's views. The Board concluded that, when the context of the entire policy was considered, the objectively reasonable employee would understand that this rule is aimed at preventing employees from speaking on the employer's behalf. The Board also rejected the argument that a reasonable employee would understand the rule to prohibit employees from referring to the employer by name in a post critical of the employer's terms and conditions of employment.

Posting Photos of Coworkers: The rule prohibited employees from posting photos of coworkers without their consent. A related procedure prohibited the posting of employer-owned equipment or employees without written permission. The Board found that the contested rule included a sentence asking employees to be "respectful of the privacy and dignity of your coworkers." Within that context, and the related procedure's prohibition on posting photos of company equipment, the Board concluded that the rule's purpose was aimed at the employer's confidentiality interests, as well as employees' privacy and dignity interests. Thus, the Board concluded that an objectively reasonable employee would not understand the rule to prohibit protected Section 7 activity, but, rather, ensuring that employees would not post photos of each other on social media without the other employee's consent.

Sharing of Employee Compensation Information: The contested language in this rule required employees to forward "all telephone calls regarding a current or former employee" to their supervisor. The rule goes on to specify the employer representatives who may "give out any information on current or former employee compensation." The ALJ concluded that the rule restricted employees' right to share wage information, and any business justification did not outweigh the impact on employees' NLRA right to share compensation information. The Board disagreed, concluding that the rule, read as a whole, was intended to apply only when someone telephoned the employer seeking information about a particular employee, including how much he or she makes. The Board reasoned that limiting who may disclose this sensitive information ensure that it is given only to those entitled to receive it, and a reasonable employee would understand that the rule did not restrict employees from discussing their wages with each other or to disclose them to a union.

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Disparaging the Employer or Others: The rule admonished employees not to use blogs, social networking sites, or personal websites to disparage "the company, its associates, customers, vendors, business practices…or other employees of the company." The Board reversed the ALJ's finding of a violation, reasoning that the employer has a legitimate business justification in prohibiting employees from disparaging it or its products to its customers and the public, which outweighs the rule's potential to interfere with Section 7 rights.

Practical Impact: This decision is another in a long line of employer-friendly work rule decisions by the Trump Board. But storm clouds loom on the horizon. President Joe Biden has installed the Board's lone Democrat, Lauren McFerran, as Board Chair. Chair McFerran has written several scathing dissents in response to the holdings of the Republican majority in work rule cases, and has repeatedly criticized the *Boeing* framework as flawed. We expect that when a Democratic majority controls the Board – which could occur as soon as this summer – *Boeing* will be revisited and likely reversed. Of course, we will keep you updated regarding those developments.

TAKE NOTE

Non-U.S. Citizens Working Outside U.S. Are Not Covered by ADEA Disclosure Requirements

Joining its sister agencies at the Department of Labor in the flurry of last minute guidance under the Trump Administration, the Equal Employment Opportunity Commission provided an opinion letter on the application of the Age Discrimination in Employment Act's requirements to non-U.S. citizens working outside the U.S.

Under the Older Workers Benefit Protection Act, which amends the ADEA, employers seeking a release of claims in connection with an exit incentive or other termination program must provide specific information regarding the job titles and ages of all individuals eligible or selected for the program, as well as those who are not. In the opinion letter, EEOC stated that employers need not include non-U.S. citizens working outside the U.S. in such disclosures because they are not considered "employees" for purposes of ADEA, which covers only workers in the U.S. or U.S. citizens working for U.S. employers in another country.

What Else Did the EEOC Do in January 2021?

In addition to the opinion letter and the rules on conciliation procedures and wellness programs discussed elsewhere in this E-Update, the Equal Employment Opportunity Commission also engaged in the following actions of interest to employers this past month:

- It scheduled the opening of the EEO data collections following the pandemic-related postponements. Of relevance to private employers with 100 or more employees and government contractors and first tier contractors with 50 or more employees, the **2019 and 2020 EEO-1 component 1 data collection** (i.e. the traditional demographic workforce data) will open in April 2021.
- It unveiled a **new Systemic Enforcement at the EEOC webpage** to provide more information to employers about the administrative and litigation tools used to identify and address systemic discrimination practices.

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- It approved a **revised** **Compliance Manual on Religious Discrimination**. The manual was updated to include caselaw development on the issues of harassment and reasonable accommodations, and an expanded discussion of the defenses available to religious employers. This revision, however, was issued by a 3-2 vote of the Commissioners, and may be subject to further action given the change in administration.

Proper Calculation of Overtime Pay When An Employee Works Two Jobs for the Same Employer

The U.S. Department of Labor recently issued an opinion letter on how to properly calculate overtime pay for employees working two different jobs at two different rates of pay.

As noted above, opinion letters represent the DOL's official position on a particular question from an employer or other entity, and provide guidance to other employers facing similar circumstances. With regard to an employee working two jobs at different rates of pay, the employee's regular rate of pay for the workweek is the weighted average of the two rates. The employee's total earnings for the workweek from both jobs are added and then divided by the total number of hours worked at both jobs to determine the regular hourly rate, which may then be used to calculate the overtime premium (i.e. 1½ times the regular rate for all hours worked over 40 in the workweek). The DOL then provided an actual example of a tipped employee who works as a server and a bartender, showing the calculation of straight-time wages, the regular rate, and overtime pay.

OFCCP Opines on Scope of Legal Protection for Religious Liberty in the Workplace

The Office of Federal Contract Compliance Programs under the Trump Administration issued an opinion letter in response to a specific employer's request for clarification on the scope of workplace legal protections for religious liberty. The letter, however, provides guidance to federal contractors generally on this issue – pending further action by the Biden Administration.

While government contractors must not discriminate against applicants and employees on the basis of religion, and must provide reasonable accommodations for religious needs absent an undue hardship, Executive Order 11246 provides an exemption for religious entities with respect to the employment of individuals of a certain religion, In addition, the OFCCP notes that the Religious Freedom Restoration Act may require an exemption or accommodation for a contractor under Executive Order 11246, and further that a judicially recognized "ministerial" exemption may apply for those working at a religious organization under certain circumstances.

The OFCCP also found unlawful discrimination in the following scenarios:

- An employee/applicant suffers adverse employment action because the employer believes they have religious values that others may find offensive (*e.g.*, attended a particular religious school, attends a sex-segregated synagogue, wears a hijab)
- An employee/applicant suffers adverse employment action because they are a member of a religion that has taken public policy positions that others may find offensive (*e.g.*, supporting/opposing the State of Israel, opposing late-term abortions)
- An applicant/employee suffers an adverse employment action because, during non-work hours, they attended or otherwise supported a synagogue/church-sponsored cause or event

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that others may find offensive (*e.g.*, an anti-war rally, the March for Life, or a rally opposing anti-Semitism)

- An employee suffers an adverse employment action because, during a company-provided rest break in which coworkers were discussing current events or social issues, the employee stated – in a respectful manner – that they have religious views that others may find offensive (e.g., belief in traditional marriage or, conversely, support an expanded definition of the family) and they were not previously told that such comments were unwelcome
- An applicant/employee suffers an adverse employment action because, either during an interview or before first reporting for work, the employee informs the employer about a religious requirement that necessitates an accommodation (e.g., the inability to work on the Sabbath or other religious holy days, the need to have a personal microwave for kosher food), without the employer demonstrating an undue hardship
- An applicant/recently hired employee is let go because he or she requested an accommodation for religious observance, with no opportunity to discuss with the employer the reasons for the needed accommodation or possible solutions (*e.g.*, needing to leave work early on Friday afternoons in the winter to be home before the Sabbath begins at sundown), without the employer demonstrating an undue hardship

Fifth Circuit Provides Framework for Assessing Propriety of FLSA Collective Actions

Noting that courts "apply ad hoc tests of assorted rigor in assessing whether potential members are 'similarly situated'" for purposes of establishing a wage-claim collective action under the Fair Labor Standards Act, the U.S. Court of Appeals for the Fifth Circuit has articulated a "workable, gatekeeping" framework to be applied at the outset of litigation.

In *Swales v. KLLM Transport Services, LLC*, the Fifth Circuit rejected a test that would permit conditional certification of the collective action and notice to potential plaintiffs, prior to determining whether such individuals were sufficiently "similarly situated" to join the collective action. Rather, the Fifth Circuit asserted that, "In our view, a district court must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.' Only then can the district court determine whether the requested opt-in notice will go to those who are actually similar to the named plaintiffs." Thus, as an initial matter, a district court should identify "what facts and legal considerations will be material" to the similarly-situated determination and authorize preliminary discovery accordingly – which will vary from case to case. This ensures that notice of the action is sent only to potential plaintiffs, and not those who would not qualify.

"Building for the Future" Is Not Necessarily Age Discrimination

Noting that "[c]onduct that, standing alone, may raise questions about discrimination may turn out to be innocuous when viewed in context," the U.S. Court of Appeals for the Seventh Circuit rejected a doctor's failure to hire claim under the Age Discrimination in Employment Act, despite an interviewer's note that the doctor was "at end of career."

In *Marnocha v. St. Vincent Hospital and Health Care Center, Inc.*, the doctor challenged the selection of a younger applicant for the open position. The employer was able to demonstrate, through its record, that the younger applicant outperformed the doctor in the interview process, with

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a plan for transition, proactive research, and energy, in contrast to the doctor's dismissive attitude towards her need for training and the existence of medical advances over the last 15 years. And while one interviewer made a note that the doctor was "at end of career," he explained that he "want[ed] to build for 20, 30 years in the future, not just for the next five years." The Seventh Circuit observed that, "We have previously explained that the description of a plaintiff as a "later career person" is "not an inevitable euphemism for old age." The Seventh Circuit further noted that there was nothing to indicate that the interviewer steered the rest of the panel away from the applicant, as each member independently reached the same hiring decision. And further, seeking an employee with a "high energy level," without more, does not indicate an inappropriate focus on age.

This case is interesting because it supports the ability of employers to plan for the future, as long as they are doing so without expressly relying on age as a factor in their decision-making process. It also supports the use of an applicant's energy level as a legitimate factor. And it reinforces the wisdom of building a strong record as to the legitimate reasons for the selection, as well as a warning to avoid writing down statements that could be misinterpreted as being discriminatory.

Courts Are Divided on Whether Employers and Employees Can Contractually Agree to Shorter Limitations Periods

Last month, as we discussed in our December 2020 E-Update, the U.S. Court of Appeals for the Fourth Circuit issued a case holding that employers and employees can contractually agree to shorten the statute of limitations (i.e. the time within which a claim must be filed) for statutory employment claims, such as discrimination. But this month, the Sixth Circuit reached the opposite conclusion.

In *Thompson v. Fresh Products, LLC*, the Sixth Circuit reaffirmed its long-standing position that statutes of limitations set forth in federal discrimination laws, such as Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, are substantive rights that cannot be waived. Thus, a circuit split exists on this issue, and whether employers may rely on a contractual agreement to shorten limitations period will depend on the circuit in which the employer is located – with many circuits yet to weigh in. This split may ultimately need to be resolved by the Supreme Court. Employers considering such a contractual provision should consult with counsel regarding its enforceability in the applicable jurisdiction.

Court Condemns Employer's Attempt to Place the Burden of Responding to Customer Harassment on the Employee

A recent case provides a good reminder to employers that their response to an employee's complaint of harassment must be prompt as well as effective – and that directing the employee to address the harasser herself is not appropriate.

In *Christian v. Umpqua Bank*, the employee complained of being stalked (e.g. unwanted letters, flowers, watching, comments about her to her colleagues) by a customer. The customer was eventually barred from the bank and his account closed. The employee sued for harassment, but the federal district court threw out the employee's claims, in part on its determination that the employer had responded promptly and effectively to the employee's complaint.

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The U.S. Court of Appeals for the Ninth Circuit, however, found that there were questions as to whether the employer took prompt, appropriate and effective actions. It noted that, although the employer allegedly decided not to permit the harasser to return to the bank, it did not actually inform him of that decision for many months. Moreover, the Ninth Circuit noted that the employer failed to take any other action to end the harassment, such as creating a safety plan for the employee, securing a no-trespassing order, or discussing the situation with security or Human Resources. As the Ninth Circuit flatly stated, "Inaction is not a remedy reasonably calculated to end the harassment, and we refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser . . . voluntarily elects to cease his activities." Although the harasser was eventually told not to return and his account closed, this occurred more than a half-year after the stalking began, which the Ninth Circuit found to be "glacial."

The Ninth Circuit also rejected the employer's attempts to place the burden of stopping the harassment on the employee. With regard to the employer's argument that the employee had volunteered to call the harasser, it stated, "we refuse to accept the notion that a victim's own actions immunize her employer from liability for ongoing harassment." And it found "unreasonable" the employee's managers repeatedly suggested that she hide from the harasser in the bathroom.

The lesson from this case is that employers should be proactive and prompt in addressing employee concerns about harassment, and that employees should not be tasked with addressing the harassment themselves – particularly if such efforts prove to be ineffective.

D.C. Bans (Almost All) Non-Compete Agreements

The District of Columbia will soon impose what is arguably the most sweeping non-compete ban in the country. With a few limited exceptions, the Ban on Non-Compete Agreements Amendment Act of 2020 ("the Act") prohibits the use of non-competition agreements across all income levels both during and after employment.

Non-Compete Agreements**.** "Employee" is defined as someone who performs work in D.C. and any prospective employee "who an employer reasonably anticipates will perform work on behalf of the employer in the District." The Act's only exceptions to the definition of employees is for "medical specialists," who are licensed physicians that have completed a medical residence and earn $250,000 or more per year, volunteers, religious laypeople, and—rather oddly—casual babysitters who work in a residence. The Act also will permit a non-compete agreement if it is entered into contemporaneously with an agreement between the seller of a business and one or more buyers of the business.

Once the law is effective, employers will be prohibited from requesting that an employee enter into an agreement that includes a non-compete provision. Any such non-compete agreements entered into after the Act's effective date will be void as a matter of law. The Act will not apply retroactively, so pre-existing agreements (that are otherwise legally compliant) should remain in effect.

Workplace Policies and Other Actions**.** Employers will also be barred from having workplace policies that prohibit an employee from 1) being employed by another person, 2) performing work or providing services for pay for another person, or 3) operating the employee's own business. Essentially, employees will be able to compete with their employers while they are employed.

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The Act expressly permits the use of confidentiality agreements, and is silent on restrictions on employee and customer solicitation.

Employers may also not retaliate against employees for refusing to enter into a non-compete agreement, failing to comply with an agreement or policy that is unlawful under the Act, or requesting the information that is required to be provided through the Act's notice provision (discussed below). Employers will also be prohibited from retaliating against employees for asking, informing, or complaining to an employer, co-worker, lawyer, governmental agency about the validity of a non-compete or workplace policy that the employee reasonably believes is prohibited.

Notice**.** Employers should also take particular note that the Act will require employers to provide all employees—even those with valid non-compete agreements entered into prior to the Act—with a notice that states: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Act of 2020." Employers must provide the notice to all employees within 90 days of the Act's effective date. Employers must provide the notice to any new hire within 7 days of the start date, and to inquiring employees within 14 days of the request.

Enforcement**.** The Mayor and Attorney General will administer and enforce the Act, and may promulgate regulations that provide further clarity. An aggrieved individual may pursue relief through an administrative complaint or a civil action.

The law becomes effective following a 30-day Congressional review period and publication in District of Columbia register. In the meantime, employers with employees working in D.C. are wise to review and revise their agreements now for future use.

Worker Recall and Retention Mandates Imposed on D.C. Hospitality, Retail, and Service Contractor Employers

Like Baltimore City's law that was passed last month, as discussed in our December 2020 E-Update, the District of Columbia City Council passed a law that imposes reinstatement and retention obligations on certain hospitality employers, as well as retail employers and service contractors.

The Displaced Workers Right to Reinstatement and Retention Act of 2020 was signed by the Mayor on January 13, 2021, and will take effect after a 60-day period of Congressional review and publication in the D.C. Register. It applies through June 30, 2023. It imposes certain reinstatement mandates on hotels with 50 or more employees as of December 1, 2019, as well as restaurants, bars, entertainment venues and retailers with 50 or more employees and contractors of 25 or more employees in food services, janitorial or building maintenance services, health care, or security services as of March 1, 2020. These employers must make a written reinstatement offer to employees who were laid off after March 1, 2020 (December 1, 2019 for hotel employees) once the same or substantially similar positions reopen (unless the employee is exempt under the Fair Labor Standards Act, received severance pay or was terminated for cause) before extending offers to any new employees. The law also requires that, where there is a change in control, the new employer must retain the current or reinstated employees for a 90-day transition period.

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NEWS AND EVENTS

Webinar Recording – Teresa D. Teare moderated a January 21, 2021 webinar, "Employment Law in the US: A Year in Review," presented by the Employment Law Alliance, of which our firm is a member. Topics discussed include: Diversity and inclusion; FFCRA and leave policies; Workplace safety and remote working; Equitable wages and benefits; and Politics in and out of the workplace. A recording of the webinar may be accessed here.

Testimony – On January 28, 2021, Fiona W. Ong testified before Maryland's Senate Finance Committee on the proposed Paid Family Leave Program bill. On behalf of the Maryland Chamber of Commerce, Fiona expressed concerns about the impact of the bill on the business community

Presentation – Lindsey A. White presented "Remote Work and Politics/Social Media in the Workplace" to the Healthcare Council, a consortium of Baltimore metro area hospitals and long term care facilities, on January 25, 2021.

Resources – Our Vaccines in the Workplace: A Practical Guide for Employers article was featured in the Maryland Chamber of Commerce's COVID-19 resources website.

TOP TIP: No, You May Not Pay Her Less Because Her Husband Works!

This was the (obvious?) message delivered by the U.S. Court of Appeals for the Seventh Circuit in reviving a teacher's pay discrimination claims under Title VII and the Equal Pay Act.

In *Kellogg v. Ball State Univ.*, the school articulated several non-discriminatory reasons for why the female teacher was paid less than male counterparts, such as salary compression and qualification differences. Crediting these reasons, the district court threw out the claims on summary judgment, and the teacher appealed.

In reversing the district court's grant of summary judgment, the Seventh Circuit pointed to the teacher's starting salary negotiations 12 years prior, in which the school's co-Executive Director refused to increase her pay and, according to the teacher, commented that she did not need any more money because her husband worked at the school, so "they would have a fine salary." The Seventh Circuit found that the teacher "suffered the effects of this outdated and improper approach to her starting pay" throughout her 12-year tenure. The fact that it was said well outside the statute of limitations period (i.e. the time period during which a claim may be brought) did not matter, because under the paycheck accrual rule, a plaintiff suffers actionable harm with each affected paycheck within the limitations period.

This case reminds employers to focus on the value of the role and the employee's qualifications in determining pay, rather than the individual personal circumstances of the employee unrelated to their performance of the job. This is the approach that many states and local jurisdictions are taking in enacting salary history bans and pay transparency laws, which are intended to address the longstanding issues with pay discrimination that many women face.

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RECENT BLOG POSTS

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

- Paying Employees for Travel Time on a Partial Telework Day? The U.S. Department of Labor Weighs In… by Courtney B. Amelung, January 26, 2021
- More Guidance from the CDC on Workplace Vaccination Programs by Fiona W. Ong, Parker E. Thoeni, and Lindsey A. White, January 21, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)
- Can Employers Terminate for Off-Duty Conduct (Say, Like Storming the Capitol)? by Fiona W. Ong, January 15, 2021
- DOL's Final Rule Makes It Easier to Achieve Independent Contractor Status - But Will It Take Effect? by Fiona W. Ong, January 6, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

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