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E-UPDATE

February 26, 2021

RECENT DEVELOPMENTS

NLRB Finds Distribution of Employee Handbook to Unionized Employees Lawful, But Troubling Signs for Employers in Dissent

A divided National Labor Relations Board held that an employer's issuance of an employee handbook addressing terms and conditions of employment covered by a collective-bargaining agreement (CBA) did not violate the National Labor Relations Act (NLRA). But a partial dissent by Chairman McFerran, currently the Board's lone Democrat, is troubling for unionized employers who generally understand that the employee handbook policies do not supersede or otherwise alter the existing CBA.

Facts: In *Stericycle*, the employer issued a new version of the company's employee handbook to all its employees, including at two locations that are unionized. Several handbook policies conflicted with CBA policies concerning attendance, work rules, overtime, and time off, among other subjects. The employer did not represent to employees that the handbook superseded the CBA. Indeed, the first page of the handbook noted that "[s]ome benefits may not apply to union team members and in some cases these policies may be impacted by collective bargaining agreements." Nor did the employer apply the handbook in a manner inconsistent with the terms of the CBA.

Decision: A two-member majority held that the employer did not violate the NLRA by unilaterally distributing the handbook to unionized employees without bargaining with the union first. The Board dismissed the allegation, concluding that the handbook was "not intended to modify, alter, or change the existing contract," and reversed the administrative law judge's finding of a violation. The Board reasoned that the employer did not claim to be changing any terms and conditions established by a CBA, nor did it assert that the handbook superseded the CBA. Rather, the handbook made clear that the CBA trumped the policies in the handbook and that some terms may differ for unionized employees.

Chairman McFerran dissented from the majority's conclusion. She would have found the unilateral distribution of the handbook to violate the NLRA. Specifically, McFerran reasoned that the handbook conflicted with several key provisions of the CBA, and addressed other mandatory subjects of bargaining not expressly addressed by the parties' CBA.

Takeaway: Though the handbook distribution was found to be lawful, there are troubling signs for employers lurking in McFerran's dissent. Many employers have partially unionized workforces. These same employers are often parties to several CBAs, in some cases with differing terms and conditions in each, or even with different unions. Rather than issue site-specific handbooks at every location where it is a party to a CBA, employers often issue a company-wide handbook with a

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carveout that the terms and conditions established by the handbook do not supersede, alter, or modify working conditions for employees subject to a CBA. But, if McFerran's dissent is an indication – and we think that it is – a soon-to-be Democrat-controlled Board would find this reasonable and efficient practice to be unlawful, unless the employer first bargains with the union prior to issuing the handbook. One could reasonably ask over what the employer must bargain where, as is often the case, it is making no effort to change any of the unionized employees' terms and conditions of employment, regardless of whether the term or condition is spelled out in the CBA. We will keep you updated if this issue is teed up by unions for consideration by a Democrat-controlled Board – Republican member William Emmanuel's term expires in August, and thus Democrats may control the Board as early as this fall.

A Change of Opinion (Letters): The DOL Continues Its Retreat from Business-Friendly Positions

Employers may be saddened - but not surprised - by the U.S. Department of Labor's about-face under the Biden administration on a number of issues of interest to businesses. The latest actions involve the withdrawal of Fair Labor Standards Act opinion letters on independent contractor status, tipped employees, and sleep time.

Opinion letters respond to an inquiry from an employer or other entity regarding DOL-enforced laws, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters for guidance. Employers may not rely on withdrawn letters, however.

Independent Contractor v. Employee: As we discussed in our April 2019 E-Update, **FLSA2019-6**, which dealt with service providers for a virtual marketplace company, set forth a controversial new analysis that made the finding of independent contractor status more likely. This analysis was subsequently reiterated in the DOL's revised final rule, issued in early January 2021 (discussed in our January 6, 2021 E-lert). On the eve of the change in administration, the DOL then released **FLSA2021-8** and **FLSA2021-9**, both of which applied the new independent contractor analysis, respectively in the context of distributors of a manufacturer's food products and tractor-trailer truck drivers. On February 5, 2021, however, the DOL proposed to delay the effective date of the final rule to allow "additional opportunity for review and consideration of the rule." All three of these letters have now been withdrawn. In light of these actions, conventional wisdom expects substantial revisions to the final rule, once again favoring a finding of employee status.

Tipped Employees: FLSA2021-4 addressed whether a restaurant may institute a tip pool under the FLSA that includes both servers, for whom the employer takes a tip credit, as well as hosts and hostesses, for whom a tip credit is not taken. The FLSA provides that an employer who takes a tip credit may include only employees who customarily and regularly receive tips, such as restaurant servers and bartenders, in mandatory "tip pools" (*i.e.*, the practice of requiring employees to contribute a certain amount of tips into a collective pool that is divided among employees). The DOL promulgated regulations in 2011 that applied this restriction on mandatory tip pools to all employers, whether or not those employers make use of the tip credit. In December 2020, the DOL issued a final rule reversing the restriction on tip pooling practices of employers that did not utilize the tip credit, as discussed in our December 2020 E-Update. On February 5, 2021, however, the DOL proposed to delay the rule, which was scheduled to take effect in March 2021. The DOL then withdrew this opinion letter and, on February 25, 2021, formally delayed the rule for 60 days for

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"additional review and consideration," presaging a return to the prior restriction on all employers, regardless of the tip credit.

Sleep Time for Truck Drivers: FLSA2019-10, which we summarized in our July 2019 E-Update, addressed the issue of sleep time for truck drivers. Prior guidance from the DOL found that only up to 8 hours of sleeping time may be excluded in a trip 24 hours or longer, and no sleeping time could be excluded for trips under 24 hours. The DOL rejected such guidance as "unnecessarily burdensome for employers" in FLSA2019-10, instead stating that "the time drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non-working time that is not compensable." However, with the withdrawal of this letter, the prior guidance has been reinstated and the under-24 hour period of duty prohibition on non-compensable sleeping time and the 8-hour limitation on sleeping time in a period of duty exceeding 24 hours once again applies to truck drivers.

The Latest Mask Guidance from the CDC

The Centers for Disease Control and Prevention (CDC) continues to revise its guidance on the use of masks to prevent the spread of COVID-19. Since we issued our February 18, 2021 blog post, The Latest COVID-19 Workplace Guidance from the CDC: More on Masks, Returning to Work After Infection, and Vaccine Communications to Employees, the CDC has further updated its Types of Masks guidance and Your Guide to Masks.

The CDC continues to emphasize that masks should fit snugly. Both cloth masks and disposable masks should have multiple layers and nose wires, and the cloth masks should be tightly woven. The CDC also offers the following recommendations to improve fit and protection:

- Wear two masks (disposable mask underneath **AND** cloth mask on top)
- A cloth mask can be combined with a fitter or brace
- Knot and tuck ear loops of a 3-ply mask where they join the edge of the mask
  - Fold and tuck the unneeded material under the edges (See: https://youtu.be/UANi8Cc71A0external icon).

As to other types of face coverings, the CDC cautions that KN95 masks should not be layered. It also warns of counterfeit KN95 masks. Neck gaiters should have two layers or be doubled. And the CDC states that face shields are not recommended, as their effectiveness is still unknown. Scarves, balaclavas and ski masks are not a substitute for masks, and should be worn over a mask.

As we suggested in our blog post, employers may wish to consider recommending employees to double-mask in order to further reduce the risk of spread. If so, they should consider providing disposable masks to employees, who may not otherwise be able to find or afford them, to use with their own cloth masks (unless the employer is also already providing cloth masks). Of course, employers must be receptive to concerns about difficulty breathing, and may need to provide reasonable accommodations for disabled employees who may not be able to tolerate a double mask (or even a single one). But given how many people's masks do not fully cover the nose and mouth, it is most important for employers to make sure employees are wearing masks correctly!

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TAKE NOTE

Section 1981 Is a "Bulletproof Vest," Not a "Full Suit of Armor" Against Discrimination. In addition to seeking recourse for race discrimination under Title VII, an employee may also bring a claim under Section 1981. But, as the U.S. Court of Appeals for the First Circuit noted, the scope of 1981 is more limited.

Section 1981 prohibits race discrimination in the making of contracts, including employment contracts. It also has been read to prohibit retaliation against those who oppose such discrimination. In *Alston v. Spiegel*, a Black firefighter brought Section 1981 claims against his employer and an individual member of the town's governing body, in addition to others, for the termination of his employment and other retaliation. The First Circuit dismissed the claims, finding no basis that race played a part in his termination.

Specifically as to the retaliation claim, the First Circuit found that the individual's alleged conduct of making negative statements to the firefighter's supporter, even if retaliatory in an ordinary sense, did not support a retaliation claim under Section 1981 because it did not connect the individual to any injury to the firefighter's contractual relationship with his employer. The First Circuit asserted that, "Section 1981 is not a full suit of armor – a strange remedial provision designed to fight racial animus in all of its noxious forms," but "[r]ather, it is a bulletproof vest, designed specifically to safeguard contractual relationships."

An Employee Claiming Retaliation Must Rebut All, Not Just Some, of the Reasons for Her Termination. The U.S. Court of Appeals for the Eighth Circuit rejected an employee's argument that she need only show that some of the employer's reasons for her termination were a pretext for retaliation under Title VII, where the reasons were not so intertwined such that rebutting some cast the rest in doubt.

In *Kempf v. Hennepin County*, the employee filed suit, alleging that her termination was in retaliation for an informal complaint of gender discrimination. The employer argued that the termination was supported by four incidents of misconduct. The employee argued that two of the incidents were pretextual, but because she failed to address the remaining two incidents, the trial court found those incidents justified dismissal of her claim. The employee appealed the dismissal arguing that she need not rebut all the employer's reasons.

The general rule is that, in order to sustain a discrimination or retaliation claim, an employee must show that each of an employer's reasons for an adverse action is pretextual. An exception to this rule, articulated by the Seventh Circuit and here adopted by the Eighth, is where "multiple grounds" are offered by the employer are "so intertwined, or the pretextual character of one of them so fishy and suspicious" that questions are raised about the other grounds. In order to make this showing, the Eighth Circuit noted that the employer's reasons must be "so factually intertwined or dependent on one another that showing pretext on one raises a genuine question as to whether the other reasons are valid." Here, the employee argued that the incidents were intertwined in that all occurred within a three-week period, but the Eighth Circuit found that more than temporal proximity was required where all the incidents were quite different in type and character.

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A Showing of Damages Is Necessary In Order to Recover Under the FMLA. An employee can only recover for a violation of the Family and Medical Leave Act if they actually suffered harm, according to the U.S. Court of Appeals for the Seventh Circuit.

In *Hickey v. Protective Life Corp.*, an account executive was told that, after his return from extended FMLA leave, he would be reassigned to a territory closer to his home, that he would no longer service certain accounts, that he would need to build up his book of business, and that his commissions would be guaranteed for six months. He was terminated shortly after his return to work for reasons unrelated to his FMLA leave. He then sued, alleging that he was not reinstated to his former or an equivalent position as required by the FMLA.

As the Seventh Circuit noted, under the FMLA, an employer who interferes with an employee's FMLA rights "shall be liable to any eligible employee affected ... for damages equal to ... the amount of ... any wages, salary, employment benefits, or other compensation denied or lost to such employee *by reason of the violation*." (Emphasis in original). It also provides for other actual monetary damages, such as providing care, and equitable relief. In this case, however, the employee suffered no loss of wage or benefits prior to his termination, nor was there any evidence that he had been offered or accepted a transfer to another position. Thus, the Seventh Circuit found no basis for monetary or equitable relief, resulting in the dismissal of his claim.

An Employee May Be Held Accountable for Poor Performance, Even If Caused By Disability. The U.S. Court of Appeals for Fifth Circuit recently reminded employers that they may hold employees accountable for performance standards even if the failure to meet the standard is caused by the disability.

In *Moore v. Centralized Management Services, LLC*, the employee was terminated for poor performance. He sued, claiming that the termination was actually because of his alcoholism, which constitutes a disability under the Americans with Disabilities Act. The Fifth Circuit held, however, that "[t]erminating an employee whose performance is unsatisfactory according to management's business judgment is legitimate and nondiscriminatory as a matter of law." Moreover, "[t]he ADA explicitly allows an employer to hold an employee who . . . is an alcoholic to the same . . . standards for . . . job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee."

Thus, this case offers support for employers' ability to hold employees accountable for legitimate performance standards. While employers must, of course, provide reasonable accommodations to enable disabled employees to meet those standards, they do not need to excuse employees from such standards.

Paid Military Leave May Be Required Under USERRA. For the first time, a federal appellate court has ruled that the Uniformed Services Employment and Reemployment Rights Act requires employers to provide paid military leave to the extent it provides other, comparable types of paid leave, like jury duty or sick leave.

Under USERRA, employees on military leave must be accorded the same "rights and benefits" as those on comparable non-military leave. In *White v. United Airlines, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that such rights and benefits include paid leave. Thus, employers must

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provide paid military leave to the same extent that it provides paid leave for other reasons that are comparable. The Department of Labor has identified three factors to be considered in the comparability analysis: most significantly, duration, but also the purpose of the leave and the ability of the employee to choose when to take the leave. Thus, the paid leave requirement under USERRA may apply, for example, to reservists taking leave for short-term, annual military training, as was the situation in this case.

Reasonable Accommodation Obligation Extends to Workplace Access. A recent case reminds employers that, under the Americans with Disabilities Act, they must provide reasonable accommodations to allow employees with disabilities to obtain the same workplace opportunities as those without disabilities – including access to the workplace.

In *Burnett v. Ocean Properties, Ltd.*, an employee in a wheelchair struggled with the doors to his workplace, which were heavy, opened outward, closed automatically, and positioned at the top of a slope. In fact, he was injured at one point. He repeatedly requested push-button, automatic doors, to no avail. The employer, in fact, stated that the doors were compliant with the ADA public accommodations standards when constructed. Ultimately, the employee resigned and sued for failure to accommodate. The employer argued that he did not need an accommodation in order to perform his job – in fact, he excelled at it – and further argued that the requested accommodation was not reasonable.

As the U.S. Court of Appeals for the First Circuit noted, the fact that the employee was able to enter the workplace (at risk of bodily injury) and perform his job once inside did not mean that he did not need an accommodation or that the requested accommodation was unreasonable. Rather, "[a] 'reasonable accommodation' may include … making existing facilities used by employees readily accessible to and usable by individuals with disabilities." The First Circuit cited Supreme Court precedent that employers must provide reasonable accommodations to enable disabled employees "to obtain the same workplace opportunities that those without disabilities automatically enjoy." (Emphasis in original). In this case, the existing doors were not readily accessible to and usable by the employee, and he was entitled to a reasonable accommodation.

Many times employers focus on the reasonable accommodation obligation only with regard to the employee's ability to perform their essential job functions. But, as this case warns, that obligation extends further, and may include things such as access to the workplace.

Is Denial of a Lateral Transfer an Adverse Employment Action? Although the current answer is a clear "no," the future is somewhat less certain in light of a recent decision from the U.S. Court of Appeals for the D.C. Circuit.

In *Chambers v. District of Columbia*, the employee claimed that denial of her multiple requests for a lateral transfer was sex discrimination and retaliation for her filing of charges with the Equal Employment Opportunity Commission. In order to sustain a discrimination or retaliation claim under federal antidiscrimination laws, a plaintiff must establish that she suffered an adverse employment action. As the D.C. Circuit noted, under its own precedent, a lateral transfer – or denial thereof – with no diminution in pay or benefits does not constitute an adverse employment action for purposes of a discrimination or retaliation claim "unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment

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opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm."

Although that seems like a definitive answer, and the other three circuits (Fourth, Sixth and Seventh, according to the D.C. Circuit) to address the issue agree, the opinion contains language of concern. The D.C. Circuit panel specifically noted that it did not have the ability to overrule the precedent issued by another 3-member panel of the court. And two of the three judges on the panel expressed their view that the full *en banc* D.C. Circuit Court should review this case with an eye towards overturning the existing precedent and finding that all discriminatory job transfers, or discriminatory denials of transfers, to be actionable adverse employment actions. Whether the full court will take up the suggestion remains to be seen.

NEWS AND EVENTS

Webinar – Darryl G. McCallum is presenting a complimentary webinar, "The COVID-19 Vaccine: Practical Guidance for Employers During the Pandemic," on behalf of the Better Business Bureau of Greater Maryland. The webinar will take place on April 1, 2021, at 8:30 am Eastern. Darryl will review practical steps employers can take to ensure workers can return to the workplace safely, advantages and disadvantages of implementing mandatory versus voluntary vaccination programs, and safety and other concerns that may be raised by employees regarding the vaccine. You may register here.

Victory – Teresa D. Teare and Parker E. Thoeni won summary judgment on a former employee's claims against an insurance company. The court found that her failure to accommodate claims under the Americans with Disabilities Act were time-barred, and her constructive discharge claim was without merit because providing an accommodation of work from home at a lower grade and rate did not make the working conditions so intolerable that a reasonable employee would quit.

Victory – J. Michael McGuire won an arbitration for an energy company. The arbitrator rejected the union's argument that an annual bonus paid under a prior collective bargaining agreement carried over to the new agreement because it had not been specifically deleted in the course of the negotiations. The arbitrator found that had the company agreed to the bonus, it would have been spelled out in the Memorandum of Agreement.

Victory – Eric Hemmendinger won a breach of contract case for Photo Communications, Inc, following an October 2020 trial that, in a first for our firm, was held virtually. The court ruled that the former employee had breached the non-solicitation provisions contained in his employment agreement.

Victory – Lindsey A. White and Courtney B. Amelung won a motion to dismiss in federal court on behalf of a medical center. The court found that it lacked the jurisdiction to hear the former employee's claims of discrimination, wrongful termination and retaliation.

Victory – Mark J. Swerdlin successfully defended a floor covering distributor against an appeal of a trial verdict in its favor. The estate of a deceased long-term employee sued for vacation and other PTO that was unused as of the employee's termination due to his death. After a trial on the merits the trial court ruled in the Company's favor and dismissed the case because the Company acted in

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accordance with its published policies that provide that unused vacation and personal days are not paid at termination. The appellate court upheld the trial court's verdict.

Honor - Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q4 2020. 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" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the seventh consecutive quarter and eighth time overall that Fiona has received this honor.

Article – J. Michael McGuire was quoted in an article by Judy Greenwald for BusinessInsurance.com, "Employers should expect NLRB to become strongly pro-labor." (Subscription, which may be free, is required to access article).

TOP TIP: Employers - Make Sure Those Timekeeping Records Are Accurate and Detailed!

An employer that fails to maintain adequate records may face a nightmare scenario where the testimony of a few employees may support a finding of liability as to a larger group, according to the U.S. Court of Appeals for the Fifth Circuit, relying upon longstanding Supreme Court precedent.

Seventy-five years ago, in *Anderson v. Mt. Clemens Pottery Company,* the U.S. Supreme Court set forth a burden-shifting framework for wage claims under the Fair Labor Standards Act where an employer fails to maintain proper records. According to the Supreme Court, typically an employee has the burden of showing that they performed work for which they were not compensated. But if "the employer's records are inaccurate or inadequate," a plaintiff need only show by "just and reasonable inference" that they were an employee, worked the hours, and were not paid. The burden then shifts to the employer to come forward with evidence to negate the inference. The Supreme Court also held that in an action involving a group of employees, a reliable "representative sample" of those employees can shift the burden to the employer. The representative proof is reliable "if the sample could have sustained a reasonable jury finding … in each employee's individual action."

In *U.S. Department of Labor v. Five Star Automatic Fire Protection*, the Fifth Circuit looked to this framework, which it described as a "lenient standard rooted in the view that an employer shouldn't benefit from its failure to keep required payroll records, thereby making the best evidence of damages unavailable." Because the employer kept only "bare-bones timesheets," the Fifth Circuit found that the DOL filled evidentiary gaps in those timesheets with consistent testimony from six employees that the company urged employees not to record otherwise compensable pre- and post-shift activities, despite a written policy directing them to record all time. This testimony was sufficient to support damages for all 53 employees.

This case provides several warnings for employers. It is critically important for employers to maintain accurate and detailed timekeeping records. And the existence of a compliant written policy is no defense if managers are verbally directing employees to disregard the policy.

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- Hey Employers: Vaccinated ≠ Back to Normal! by Fiona W. Ong, February 10, 2021 (Selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- Are Your Account Managers Properly Classified as Exempt Under the FLSA? by Courtney B. Amelung, February 3, 2021

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