SHAWE ROSENTHAL LLP

E-UPDATE

September 30, 2021

RECENT DEVELOPMENTS

New NLRB GC Intends to Seek Case Law Reversals That Will Benefit Unions

On August 12, 2021, the recently confirmed General Counsel (GC) of the National Labor Relations Board (NLRB), Jennifer Abruzzo, issued her first official memo. Per an NLRB press release, GC Memo 21-04 "lays out a clear agenda…on some priorities of the Office of the General Counsel." The memo directs NLRB field offices to submit cases addressing issues identified in the memo to the Regional Advice Branch of the Office of the General Counsel. Often, such submissions are the first step on the path to overturning existing case law that a sitting GC seeks to change.

As a reminder, Section 7 of the NLRA grants employees the right to engage in concerted activities (not just unionization) for their mutual aid or protection, while Section 8 prohibits employers from interfering with the exercise of that right.

Last month, we issued an E-lert on the "priorities" that generally apply to all employers, whether unionized or not. This month, we focus on the issues of interest to employers who are unionized or face organizing activity and how GC Abruzzo may seek to change existing law related to those subjects:

Union Organizing

- ***Joy Silk* Bargaining Orders:** In what could be cause for significant employer alarm depending on her intent, GC Abruzzo will re-examine whether to seek the reincarnation of *Joy Silk* bargaining orders. Prior to the adoption of the *Gissel* bargaining order standard, unions could obtain bargaining orders where an employer refused to recognize and bargain with a union that presented evidence that a majority of unit employees signed authorization cards unless the employer could establish a good faith doubt as to the union's majority status. The GC will focus on cases where an employer has engaged in unfair labor practices *or* where the employer "is unable to explain its reason for doubting majority status in rejecting the union's demand." While concerns that *Joy Silk* bargaining orders could serve as a stand-in for card check may be overstated (or not), employers should be rightly concerned with what the GC may require of employers when arguing its "good-faith doubt" of a union's majority status.

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

- **Union/Contractor Access to Employer Property:** GC Abruzzo cited three Trump Board decisions that expanded employer property rights and permitted employers to exclude union organizers and off-duty contractor employees more easily – the latter issue has been remanded to the Board since this GC memo issued. Employers can expect the GC to seek to overturn those decisions and, at minimum, return to the standards that existed prior to the Trump Board's decisions, which will afford union organizers and off-duty contractors greater access to employer property than currently required.

Bargaining

- **Unilateral Changes During Term of CBA:** In the Board's 2019 *MV Transportation* decision, the Board adopted the "contract coverage" standard for analyzing employer unilateral changes (i.e., changes to employee terms and conditions without first notifying and bargaining with the employees' union). Under the *MV Transportation* standard, employer unilateral action is permitted provided that the change is within the "compass or scope" of existing language in the parties' CBA. This standard replaced the "clear and unmistakable waiver" standard, which was a more onerous standard for employers that has been consistently rejected by the D.C. Circuit (the court with jurisdiction to hear all appeals of Board decisions). Despite this, it appears that GC Abruzzo is seeking a vehicle to overturn *MV Transportation* and reinstate the prior standard.

- **Remittance of Union Dues Post-Contract Expiration:** In *Valley Hospital Medical Center*, the Board held that an employer may cease deducting and remitting union dues following the expiration of a CBA. That decision provided employers with additional leverage during bargaining: without employer deduction and remittance of dues, unions would have to seek the dues directly from employees (or not at all), something unions are loath to do if it can be avoided. That decision appears to be in GC Abruzzo's sights.

- **Requests for Information:** Unions may obtain increased access to employer documents and information. GC Abruzzo has signaled her intention to re-examine cases concerning when an employer must turn over its financial records to a union during bargaining, whether an employer must provide the union with documents and information concerning plant relocation decisions, and whether an employer must furnish information concerning customer complaints related to employees.

Withdrawing Recognition. Put simply, the GC seeks to overturn recent decisions making it easier for employers to withdraw recognition from a union that may no longer be supported by a majority of the bargaining unit employees:

- **Anticipatory Withdrawals of Recognition:** Currently, if within 90 days from CBA expiration an employer receives evidence that a majority of unit employees no longer wish to be represented, it may notify the union of its intention to withdraw recognition at the expiration of the CBA. To reacquire majority status, the union must file a petition with the NLRB, which will administer an election to determine employees' wishes concerning

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

continued union representation. GC Abruzzo presumably seeks to return to the previous "last in time" rule, which permits a union to surreptitiously reacquire majority support, thereby setting up the employer to commit unfair labor practices when it withdraws recognition and makes unilateral changes to employee working conditions following the withdrawal of recognition.

- **Withdrawing Recognition During Term of CBA:** GC Abruzzo would like to "assess" whether the Board's 2007 decision in *Shaw's Supermarkets* should be overruled. That decision allowed for employers to withdraw recognition from a union at any point after the third year of a contract of a longer duration – three years is also the length of the "contract bar," which prevents rival and decertification petitions outside of the 30-day "window period" just prior to the contract's expiration. While it is too early to speculate what position the GC may stake out, whatever that position may be would likely make it more difficult for an employer to withdraw recognition during the term of a lengthy CBA.

Conclusion. It is customary for new GCs to state their policy priorities upon taking office. And it is of no surprise that GC Abruzzo would push for the overturning of decisions that she perceives to be employer-friendly or, more importantly, union-unfriendly. This memo typically foreshadows upcoming changes in the law. If that is the case, employers can expect the GC to push for reversal of precedent that will make it easier for unions to organize, strengthen unions' bargaining position, and making it more difficult for employers to withdraw recognition from a union even where the union is no longer supported by a majority of employees. As always, we will keep you updated on these important issues.

What the Federal Guidance on President Biden's Vaccine Mandate Means for Government Contractors

The Safer Federal Workforce Task Force released mandatory guidelines for federal contractors, implementing President Biden's Executive Order requiring contractor employees to be vaccinated against COVID-19 (as discussed in our September 10, 2021 E-lert).

Who Must Comply? Not all contractors are covered by the Guidance. First, the Guidance applies to certain contracts that are renewed or extended on or after October 15, 2021 and to new contracts awarded on or after November 14, 2021. Note that the agency should notify the contractor if it is subject to this Guidance. Federal agencies are also encouraged to incorporate the Guidance's requirements into other contracts – so contractors should pay attention to any changed requirements from their contracting agencies, particularly with regard to contracts that are entered into, renewed or extended before the October 15 date. This is also true with regard to those contracts that are not otherwise covered by the EO.

Those with existing federal contracts are not subject to this Guidance but will continue to be subject to the vaccination-or-test protocol previously established.

The Guidance also applies to all lower-tier subcontractors, except for those who are only providing products. The contractors must ensure that it incorporates a clause requiring compliance with the

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

Guidance in its contracts with its direct subcontractors, who are then required to incorporate the same clause in lower level subcontracts.

Which Employees Are Covered by the Guidance? All employees working on or in connection with (this includes those whose services are indirectly necessary to the performance of a contract – such as human resources, billing, and legal review) a covered contract and all employees working at the contractor's workplace.

The workplace is any location where the employee(s) working on or in connection with a contract are likely to be present, including outdoor locations, but does not include employees' homes.

The Guidance specifically provides that if a covered employee works only in one area of a building, or one building in a series of buildings, the entire building, facility or site is still covered unless the contractor can establish that none of their other employees will come into contact with the covered employee during the contract period in any common area, including lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

What's the Vaccination Requirement? All covered employees must be fully-vaccinated by December 8, 2021. That means they must have received the second/only shot by November 24. And if it is a two-shot regimen, that means the first Moderna shot must be no later than October 27, while the first Pfizer shot must be no later than November 3. Those who previously had COVID-19 are still required to be fully-vaccinated. The requirement also applies to employees working remotely on a covered contract (although the rest of the Guidance's requirements for workplaces, such as masking and distancing, do not apply to them). After December 8, employees must be fully-vaccinated by the first day of performance on the covered contract.

"Fully-vaccinated" means two weeks after the second dose of Pfizer-BioNTech or Moderna, or two weeks after the single dose of Johnson & Johnson/Jannsen. The Task Force also states that certain clinical trial participants may also be considered fully-vaccinated (as discussed in our blog post, Foreign COVID Vaccinations and Clinical Trials? What Employers Need to Know).

Contractor employers must provide exemptions as reasonable accommodations for employees with disabilities or religious needs, to the extent that such exemptions do not pose an undue hardship. If the agency is a joint employer with the contractor of the employee in question, both will be responsible for reviewing and assessing the request for accommodation. (This also applies to any request for a medical or religious exemption to the masking requirement, discussed below).

The Guidance states that, based on "urgent, mission-critical need," agency heads may approve exceptions to the fully-vaccinated requirement for contractor employees, but that the contractor must ensure that such employees are fully-vaccinated within 60 days of commencing work on the contract or at a covered workplace, and that they comply with masking and distancing requirements.

Employers do not need to provide onsite vaccinations, but should inform their employees of convenient vaccination options.

What Is Acceptable Proof of Vaccination? The Guidance lists the following, which may be provided in digital format (e.g. digital photograph, scanned image, or pdf):

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

- a copy of the record of immunization from a health care provider or pharmacy,
- a copy of the CDC's COVID-19 Vaccination Record Card
- a copy of medical records documenting the vaccination,
- a copy of immunization records from a public health or State immunization information system, or
- a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine

An employee's attestation of vaccine status or an antibody test is not acceptable. If an employee loses their vaccination record, they should contact their vaccination provider site for a copy. They may also contact their State or local health department's immunization information system (IIS) for assistance and their State or local health department for further questions.

What Are the Masking/Distancing Requirements? Fully-vaccinated employees need not physically distance. In areas of low or moderate community transmission, they need not mask. In areas of substantial or high transmission, however, they must mask while indoors. Any increase in the transmission level requires an immediate change in protocol, while reduction in the community transmission level must be in place for two weeks before a change may be implemented.

Those who are not fully-vaccinated must mask while indoors. They must also mask outdoors in crowded settings or where they will be in sustained close contact with other unvaccinated individuals. At all times, they must physically distance from others to the extent possible.

Exceptions to the masking requirement are permitted consistent with CDC guidance, which includes:

- when an individual is alone in an office with floor to ceiling walls and a closed door
- for a limited time when eating or drinking and maintaining appropriate distancing
- when engaging in activities in which a mask may get wet
- when unable to wear a mask during high intensity activities because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a workplace risk assessment

The exceptions must be approved in writing by an authorized employer representative. In addition, contractor employers may need to provide an exemption to the masking requirement as a reasonable accommodation for medical or religious needs, unless that poses an undue hardship.

Employees may briefly lower their masks for identification purposes.

What Is the COVID Workplace Safety Coordinator Requirement? Contractors must designate one or more persons to coordinate implementation of and compliance with the Guidance, including the vaccination documentation requirement. The coordinator must also ensure that the protocols are communicated in a readily understandable manner to contractor employees and others present in the workplace. This can be done by email, websites, memoranda, flyers, or posting signage.

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

What If There Are Conflicting State or Local Requirements? The Guidance specifically states that it "supersede[s] any contrary State or local law or ordinance," including those that seek to prohibit compliance with any of the protocols in the Guidance.

How Does This Interact With Other Workplace Safety Standards? Contractors must comply with these requirements regardless of whether others (like the forthcoming OSHA Emergency Temporary Standard) also apply.

Will the Guidance Be Updated? Yes, if circumstances change. Covered contractors will be required to comply with any revised guidance immediately. We will keep you posted on any developments.

NLRB General Counsel Directs Regions to Pursue Full Remedies Against Employers

This month, National Labor Relations Board (NLRB) General Counsel (GC) Jennifer Abruzzo issued two GC memos providing guidance to Regional Offices concerning what remedies should be sought when an employer has violated the National Labor Relations Act (NLRA). Specifically, GC Abruzzo directs Regions to seek the "full panoply of remedies available" to ensure that victims of unlawful conduct are made whole. GC Memo 21-06 discusses remedies that Regions should request that Board include in any order finding an employer has violated the NLRA. GC Memo 21-07 addresses the remedies that Regions should include in settlement agreements.

21-06 (Seeking Full Remedies in Litigation Before the Board)

Additional Remedies for Unlawful Terminations

- **Consequential Damages:** In addition to back pay and loss of benefits, Regions are directed to seek consequential damages "suffered as a direct and foreseeable result" of an employer's unfair labor practices (the memo does not specify whether this principle applies to union unfair labor practices). Such damages include compensation for health care expenses, late-payment fees, or loss of a home or car suffered due to an unlawful termination.
- **Front Pay:** In cases where reinstatement may not be appropriate, the Region may request that the Board seek front pay.

Distribution and Reading of Notice to Employees

When the Board concludes that a charged party has violated the NLRA, it will order that the charged party post and/or distribute a Notice to Employees. Generally, the Notice states that the charged party will comply with its legal obligations and will refrain from specific conduct that violates the NLRA. GC Abruzzo directs the Regions to seek the following remedies that will broaden the dissemination of the Notice:

- **Wider Distribution of Notice to Employees:** The memo directs Regions to seek distribution of the notice through public forums, including social media and traditional media such as newspapers. Thus, Regions may seek remedies whereby employers are required to post the Notice to Employees on their Facebook page, Instagram feeds, Twitter accounts – or all of the above. Finally, GC Abruzzo directs Regions to seek company-wide postings or mailings

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

(i.e., posting at every facility or mailing to all employees regardless of work location) in certain cases.

- **Public Reading and Video Recording of Notice Reading:** Regions will also request that employers be required to publicly read the Notice – or, alternatively, a Board agent read the Notice in the presence of supervisors. Where appropriate, union representatives may be permitted to attend the reading. Additionally, in certain cases, the Region may request that the Board order the employer to make a video recording of the Notice reading, and then distribute the reading to employees through electronic means.
- **Extension of Notice Posting Period:** GC Abruzzo further directs Regions to request extensions of the customary 60-day Notice-posting period where unfair labor practices have been "pervasive and occurred over a significant period of time."

Unlawful Conduct During a Union Organizing Drive

- **Increased Union Access to Employer Property:** The GC notes several remedies where Regions can seek additional union access to employer property. First, an employer may be required to provide the union with "equal time" to address employees during so-called "captive audience" meetings regarding union representation that employees are required to attend during working time. Second, Regions could seek employee contact information from an employer to be provided to the union – such information is invaluable to union organizers, who will use such information to phone and visit employees the union seeks to represent. Finally, Regions may seek union access to employer bulletin boards.
- **Union Organizing Costs:** The GC states that Regions may require employers to reimburse unions for organizing costs incurred as a result of a re-run election, where an employer's "sufficiently egregious" unlawful conduct required a previous election's results to be set aside.
- **Hiring an Employee of the Union's Choice:** If a discharged employee is unable (or unwilling?) to return to work, the Region will seek to require the employer to hire an employee *of the union's choice*. Presumably, this could include a union salt whose primary purpose will be to advocate for unionization of the workplace.

Unlawful Conduct During Bargaining

GC Memo 21-06 sets forth remedies Regions should seek where it finds that an employer has failed to bargain in good faith, including:

- **Bargaining Schedules:** Employers would be required to bargain at least two times per week and for at least six hours per session until the parties reach an agreement or good-faith impasse.
- **Bargaining Expenses:** A charged party (i.e., the employer) would be required to reimburse the opposing party for expenses incurred for the entire period which the charged party failed to bargain in good faith.
- **Protection Against Decertification:** Regions will seek a 12-month "insulated period" from the date the employer begins complying with its bargaining obligations. During that period, a

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

union's status as bargaining representative may not be challenged (e.g., by a decertification petition).

- **Training of Supervisors and Managers:** Regions will seek orders requiring company supervisors and managers to undergo training regarding an employer's obligations under the NLRA. For instance, an employer's persistent failure to produce relevant requested information could result in such a remedy.

GC Memo 21-07 (Full Remedies in Settlement Agreements)

Just one week after issuing GC 21-06, GC Abruzzo issued a second memo providing guidance to Regional Offices regarding remedies to seek in settlement agreements. In addition to the remedies discussed in the earlier memo, GC Abruzzo recommended numerous remedies that Regions should include in any settlement agreement:

- **More Consequential Damages:** These would include compensation for a fired employee's early withdrawals from investment or retirement accounts, for damages caused to the employee's credit rating following an unlawful termination, and expenses related to coursework or training to obtain certifications, clearances, or professional licenses that were lost as a result of an employer's unfair labor practice. In addition, Regions will likely see moving expenses for fired employees who had to relocate, as well as medical expenses for employees who lost access to health insurance.
- **Letters of Apology:** You read that correctly. Where a settlement requires an employer to make an offer of reinstatement, Regions are being directed to seek letters of apology from the employer to the fired employee. GC Abruzzo posits that such a letter may serve to "de-escalat[e] lingering tensions" between the parties. It may also serve to undermine settlement discussions entirely.
- **"No Less than 100% of Back Pay and Benefits Owed":** It is not unusual for a Regional Office to accept 80% of the back pay owed to the employee – and, in some cases, even less. No more, says GC Abruzzo. Regions are directed to demand 100% of the back pay and benefits owed. If that was not enough, in cases where an employee does not wish to return to work, Regions will seek front pay.
- **Sponsorship of Work Authorizations for Immigrant Workers:** Where a Region concludes an employer's unfair labor practice has resulted in an immigrant worker to lose their work authorizations, Regions will seek that the employer, at its own expense, sponsor the employee's work authorization, including payment of any fees associated with the employee's non-immigrant visa, and reimbursement for application and legal fees.
- **Other Non-Economic Relief:** Such relief would include permitting an employee who is not reinstated to use the employer's outplacement services. Other examples include neutral references and agreements not to contest a former employee's unemployment benefits claim.
- **(Non) Admissions Clauses:** Most employers will insist on the inclusion of a non-admission clause in any settlement agreement. In effect, such a clause states that the employer is not admitting to violating the NLRA. GC Abruzzo reminds Regions that such clauses should be used sparingly and only where "special circumstances" warrant its inclusion. Where an employer is a "repeat violator," the GC directs Regions to include admission clauses where

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

the employer specifically admits its unlawful conduct (in addition to doing so in the Notice to Employees).

- **Default Language:** In 2011, the GC's office began a push to include language in all settlement agreements stating that if the charged party defaults on its obligations under the settlement agreement, all complaint allegations will be deemed admitted. Such language appeared in settlements less frequently following former GC Peter Robb's directive that the language was no longer mandatory in settlement agreements. GC Abruzzo seemingly will renew the push to require default language in all settlement agreements.

Takeaways

The NLRB is often derided as a forum with ineffective remedies for employees. It is clear that GC Abruzzo wants the agency to shed that reputation, and she will seek stiff remedies against employers that Regions have concluded violated the Act. It remains to be seen which of these remedies will be incorporated by the Board in its orders. But employers that wish to avoid the costs of litigation by entering into a settlement agreement can expect Regional Offices to seek many of these remedies in connection with settlement.

TAKE NOTE

DOL Issues Final Rule Increasing Protections for Tipped Workers. In the ongoing saga of the tipped worker regulations, the U.S. Department of Labor released a Final Rule that expanded its ability to seek civil money penalties against employers, among other things.

In 2020, the Trump DOL issued an employer-friendly tipped worker Final Rule. After the Biden Administration took office, the DOL took a number of actions to withdraw and revise portions of the Rule. In this latest step, the new Final Rule reinstates the ability of the DOL to seek a civil money penalty of up to $1,100 when employers unlawfully keep employees' tips, regardless of whether the violation was repeated or willful. It also reinstates a broader definition of "willful" violations.

The Final Rule also modifies provisions applicable to managers and supervisors. One revision clarifies that, while they cannot receive tips from mandatory tip pools or tip sharing arrangements, they may contribute tips to employees in those pools and arrangements. Another revision applies to the provision that managers and supervisors may keep tips for services they directly provide to customers, to add that such service must also be "solely" provided by them.

DOL Announces "Enhanced, Expanded Measures" on Worker Protections from Heat-Related Hazards. Following a September 20, 2021 "Statement by President Joe Biden on Mobilizing the Administration to Address Extreme Heat," the U.S. Department of Labor has taken several actions intended to combat the hazards associated with workplace exposure to extreme heat, both indoors and out. These include the following:

- An Occupational Safety and Health Administration enforcement initiative on heat related hazards that sets forth inspection guidance for OSHA inspectors. (Enforcement initiatives may be set forth in interpretation letters that explain OSHA's interpretation of certain requirements under the Occupational Safety and Health Act). The initiative "prioritizes heat-

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

related interventions and inspections of work activities on days when the heat index exceeds 80 degrees Fahrenheit."

- Developing a National Emphasis Program on heat inspections. (NEPs are temporary programs that focus OSHA's resources on particular hazards and high-hazard industries).
- Rulemaking on a workplace heat standard for prevention of heat-related injury and illness. (Standards are regulatory requirements established by OSHA to serve as criteria for measuring employer compliance with the OSH Act).
- Forming a National Advisory Committee on Occupational Safety and Health Heat Injury and Illness Prevention Work Group to better understand challenges and to identify and share best practices on worker protection.

More Updates for Government Contractors. Many things of interest to government contractors happened this month, beyond the vaccination guidance vaccination guidance discussed elsewhere in this E-Update. These include the following:

- **Affirmative Action Program Verification**: The Office of Federal Contract Compliance Programs' proposed Affirmative Action Program Verification Initiative has been approved by the Office of Management and Budget, meaning that the OFCCP can move forward with its plan to implement a portal through which contractors will make annual certifications of compliance with its AAP obligations. Contractors under audit will also be able to submit their AAPs through the portal.
- **Minimum Wage Increase:** Executive Order 13658 established a minimum wage rate, increased annually, for all covered workers performing work on construction contracts covered by the Davis-Bacon Act (DBA); service contracts covered by the Service Contract Act (SCA); contracts to provide concessions (*g.* food, lodging, fuel, etc.) on federal property; and contracts to provide services (*e.g.* child care, dry cleaning, etc.) in federal buildings. The DOL has announced the applicable minimum wage increase effective January 1, 2022: $11.25 per hour, with a tipped wage rate of $7.90 per hour. In addition, covered contractors must update the required minimum wage poster as of that same date, which can be found on the DOL website (only the current poster is available now; check again on January 1, 2022 for the updated poster). Note, however, that any contracts that are entered into, renewed or extended on or after January 30, 2022 will be subject to a $15.00 per hour minimum wage rate, as discussed in our April 2021 E-Update.
- **Updated Census Information for AAPs:** The OFCCP has issued a notice to contractors that updated census information must be used for written affirmative action programs commencing on or after January 1, 2022.
- **Pay Data Collection:** As contractors may recall, the EEO-1 form was revised to temporarily require the submission of pay data (Component 2) in addition to the usual workforce demographic data (Component 1). The (Trump) OFCCP had previously announced that it would not use this data because it was of limited utility. However, the OFCCP has now announced that its previous declaration was premature, and that it will now analyze the data for possible insights into pay disparity issues across industries and occupations and strengthen its efforts to combat pay discrimination.

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

- **New Construction Guide:** The DOL's Wage and Hour Division published the Davis-Bacon Wage Determination Conformance Request Guide, of relevance to construction contractors. This Guide explains the information and construction types contained in wage determination, as well as when new classes of laborer or mechanics may be requested to be added to a published wage determination for a specific contract.

Telework and Modified Schedules Are Not Reasonable Accommodations If the Employee Cannot Perform Their Essential Functions. In the context of the increase in telework during the pandemic and burgeoning requests from employees to continue telework as a reasonable accommodation, the U.S. Court of Appeals for the Tenth Circuit issued a case confirming the point that an accommodation, including telework or a modified schedule, is not reasonable if the employee is unable to perform the essential functions of their job.

In *Brown v. Austin*, an employee sought accommodations of increased telework (two days a week instead of just one) and weekend work, among other things, for certain mental health disorders. These requests were denied and, following a series of other events, the employee brought a lawsuit asserting multiple claims, including failure to accommodate under the Rehabilitation Act. (The Rehabilitation Act prohibits disability discrimination against federal employees, and incorporates standards from the Americans with Disabilities Act.)

The Tenth Circuit rejected the employee's claims. The employer established that the essential function of the employee's position was fraud investigations, which required him to work with paper case files that were only available in the office and to collaborate with law enforcement partners.

With regard to the telework, the employee was required to be physically present in the office to work with the paper files (although the Tenth Circuit noted that if the files were digitized, there likely would have been a different analysis). While he, and others, were able to telework once a week (or every two weeks, for the others), the type and amount of work that could be performed remotely was very limited.

As for the weekend work, because the law enforcement partners were only available during the weekdays, the Tenth Circuit concluded that his proposal meant that he would not be able to provide timely support to those partners. Moreover, because no managers or supervisors worked weekends, they were unavailable to monitor his work.

Because both of these accommodations would have required the employer to eliminate an essential function of his job, the Tenth Circuit found them to be unreasonable. This case is a good reminder to employers that they do not have to excuse essential functions as an accommodation – but that it is important to ensure that the function truly cannot be performed. With the increase in teleworking technologies, what may not have been possible even a year or two ago may now be possible.

Title VII Does Not Protect Need for Childcare or Requesting Time Off for Childbirth. As the U.S. Court of Appeals for the Tenth Circuit explained, Title VII prohibits discrimination on the basis of sex, which includes pregnancy, childbirth, and related medical conditions, but not childcare per se. And protected activities under Title VII are limited to opposing unlawful activity under Title VII or participating in an investigation, proceeding or hearing regarding the same.

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

In *Battino v. Redi-Carpet Sales of Utah, LLC*, an office manager who was working from home following the birth of her child was terminated after the employer determined that "significant operational issues" in the office required her immediate return, but she could not do so because she did not have any immediately available childcare. She then sued, alleging discrimination and retaliation in violation of Title VII, among other things.

As the Tenth Circuit noted, the primary basis for the manager's discrimination claim was the sudden revocation of her work-from-home arrangement and unwillingness to allow her to find childcare. However, according to the Tenth Circuit, childcare is not encompassed within Title VII's protection of pregnancy, childbirth or related medical conditions – which are all physiological conditions.

As for her retaliation claim, the manager asserted that the employer retaliated against her protected activity of becoming pregnant and requiring leave, in violation of Title VII. However, as the Tenth Circuit explained, "protected activity" under Title VII is limited to opposing discrimination or participating in such opposition. (Of course, if the employee had experienced pregnancy- or childbirth-related disabilities, she might have been entitled to reasonable accommodations, including leave, under the Americans with Disabilities Act, and been protected from retaliation on the basis of such need for accommodation).

While this case offers some interesting clarification on the boundaries of Title VII's protections for women with regard to pregnancy, childbirth and related medical conditions, employers should still be mindful that the EEOC has issued an Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, which explains that there are circumstances in which adverse treatment of caregivers can constitute discrimination in violation of Title VII.

Only "Extreme Hostility" Defeats the "Strong Preference for Reinstatement" as a Remedy. Although most employers would prefer not to reinstate an employee who has engaged in successful litigation against them, they may be required to do so in circumstances short of "extreme hostility," explained the U.S. Court of Appeals for the Tenth Circuit.

In *Tudor v. Southeastern Oklahoma State Univ.*, a professor won a jury trial on her claims of discrimination and retaliation. The trial court denied her reinstatement as "simply not feasible in this case." However, the Tenth Circuit disagreed, noting that reinstatement fulfills Title VII's purpose of making victims whole, and thus there is a "strong preference" for this remedy.

The Tenth Circuit acknowledged that "some hostility will inevitably be present in every case," but that reinstatement will be denied only "when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." (Emphasis by the court). The Tenth Circuit clarified that this test does not require "complete harmony" in the workplace. It also identified possible workarounds to animosity, "such as a remote office, a new supervisor, or a clear set of workplace guidelines."

As the Tenth Circuit summarized, "Courts must look beyond ill feeling and instead address simply whether a productive working relationship would still be possible, and they must do so through the lens of a strong preference for reinstatement."

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

The Employee Is Not Entitled to Their Preferred Accommodation – Only a Reasonable One. A recent case is a good reminder to employers that, while the Americans with Disabilities Act requires employers to provide disabled employees with reasonable accommodations to enable them to perform their essential job functions or enjoy the privileges and benefits of employment, the choice of accommodation is the employer's – not the employee's.

In *Jennings v. Towers Watson*, the newly-hired employee sustained an ankle injury that prevented her from climbing the stairs to the second-floor, where her training was taking place. Although she requested that a trainer come to the first floor to continue her training, the employer delayed her training until she had recovered. After she was later fired, she sued, alleging, among other things, a failure to accommodate under the ADA.

The U.S. Court of Appeals for the Fifth Circuit, however, rejected her claim. As it stated, "The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation." In this case, the delay in training was deemed akin to leave, and leave – whether paid or not – can be a reasonable accommodation. Because the accommodation was effective, the employer had the right to select it regardless of the employee's preference.

NEWS AND EVENTS

Publications – Chambers' Employment 2021 Global Practice Guide, for which Shawe Rosenthal authored the USA Trends and Developments chapter, has been released. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients. It also publishes global practice guides providing clients with expert legal commentary on the main practice areas in key jurisdictions around the world.

Victory – On behalf of an energy company, J. Michael McGuire and Alex I. Castelli won dismissal of a lawsuit that sought to compel arbitration over a change in retiree benefits, as reported in Law360 and the Labor & Employment Law Daily (subscriptions required). The court found that the current and previous collective bargaining agreements covered only current employees, not retirees, and thus the union could not compel arbitration over the company's conversion of its retirees' life insurance benefits into a $10,000 lump sum.

Media – Fiona W. Ong was the featured guest in the September 2, 2021 episode of "This Week in Legal Blogging with Bob Ambrogi," a weekly podcast with "the best bloggers in the legal community." You can listen to Fiona's interview here.

Media – Paul D. Burgin was quoted in a September 22, 2021 *Baltimore Business Journal* article by Amanda Yeager, "Hospitality union calls for boycott of rebranded Columbia hotel," (subscription required). As the attorney for the Merriweather Lakehouse Hotel, Paul explained that recall rights for previously laid-off employees had expired earlier this year, but that former employees were welcome to apply for open positions and would be considered on a non-discriminatory basis based on their qualifications.

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

Victory – J. Michael McGuire won an arbitration on behalf of a residential treatment program. The arbitrator agreed that the employer had cause to terminate an employee for sleeping on the job.

TOP TIP: Employers Beware! Private Arbitration Agreements Won't Stop DOL Lawsuits

The U.S. Department of Labor recently highlighted a federal court ruling that private arbitration agreements will not prevent the federal Secretary of Labor from bringing suit against an employer for violation of the Fair Labor Standards Act (and presumably other federal laws within the DOL's jurisdiction, like the Family and Medical Leave Act).

Many employers require employees and independent contractors to enter into arbitration agreements, requiring all employment disputes to be arbitrated rather than litigated in court. This less formal, but still binding, process may allow for disputes to be heard and decided more quickly and less expensively than in court. It may also avoid the publicity that may come with filing a lawsuit, which is a matter of public record. The U.S. Supreme Court has affirmed that arbitration agreements in the employment context fall within the jurisdiction of, and are permitted by, the Federal Arbitration Act, which "embodies the national policy favoring arbitration."

In *Scalia v. CE Security LLC*, there was a DOL investigation into the employer's alleged misclassification of employees as independent contractors, with the resulting failure to pay overtime in violation of the FLSA. The Secretary of Labor then filed suit against the employer seeking damages on behalf of 292 individuals. The employer moved to compel arbitration based on arbitration agreements that each of these individuals had signed.

The federal court, however, rejected the employer's argument that the DOL simply "acts on behalf" of employees in bringing suit. Rather, the court found that the DOL is not bound by individual agreements to which it is not a party. Moreover, the court cited a federal appellate court decision finding the Equal Employment Opportunity Commission's ability to bring suit unhampered by a private employer-employee arbitration agreement for the principle that "agreements of private parties cannot frustrate the power of a federal agency to pursue the public's interests in litigation."

In this case, the court recognized that the DOL may have interests other than providing make-whole relief to the individuals – such as deterring other employers from violating the FLSA and protecting complying employers from unfair competition by noncomplying ones.

Emphasizing this point, the Regional Solicitor of Labor Jeffrey Rogoff is quoted in the DOL's press release as stating, "This is a significant and favorable decision regarding the U.S. Department of Labor's ability to pursue legal actions and relief for employees in the name of the public interest…. The Office of the Solicitor of Labor prioritizes its pursuit of cases where employees do not have other avenues of relief when they are forced to arbitrate claims against their employers out of court. This decision affirms the Secretary of Labor's independent authority to bring claims as the Secretary deems appropriate, even where employees may not because of forced arbitration agreements."

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

RECENT BLOG POSTS

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

- Extraordinary Employee Misconduct: No Pics of Your Privates at Work! by Fiona W. Ong, September 23, 2021

- Do Employers Have to Pay for COVID-19 Testing Time? by Fiona W. Ong and Eric Hemmendinger, September 16, 2021

- A Few More Answers from OSHA on the Impending Vaccination ETS by Fiona W. Ong, September 10, 2021

- Foreign COVID Vaccines and Clinical Trials? What Employers Need to Know by Fiona W. Ong, September 8, 2021 (Recognized as one of LexBlog's weekly "The Best of Law Blogging" and selected as a "noteworthy" blog post by Wolter Kluwer's *Labor & Employment Law Daily*)

- D.C. Circuit Opens Door to Biden Board to Expand Property Access for Off-Duty Contractor Employees by Chad M. Horton, September 3, 2021

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