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E-UPDATE

February 28, 2022

RECENT DEVELOPMENTS

Federal Task Force Recommendations Support White House's Pro-Union Agenda

The White House Task Force on Worker Organizing and Empowerment, which was created by President Biden's April 26, 2021 Executive Order, released a report this month with nearly 70 recommendations that promote worker organizing and collective bargaining in both the public and private sector. Notably, some of these recommendations go beyond union organizing issues.

The U.S. Department of Labor will work across the 20 participant agencies to implement the recommendations, which include the following (according to the DOL's press release, with our commentary in parentheses):

- Ensuring workers know their organizing and bargaining rights. (This would include a "Know Your Rights" initiative).
- Protecting workers who face illegal retaliation when they organize and stand up for workplace rights.
- Establishing a resource center on unions and collective bargaining.
- Shedding light on employer's use of anti-union consultants (e.g. a renewed focus on the "persuader rule").
- Collecting and reporting more information on unions and their role in the U.S. economy.
- Advancing equity across underserved communities by supporting worker organizing and collective bargaining.

We note some additional recommendations of interest generally, the first of which is equally applicable to non-union employers who are not facing organizing activity:

- Preventing and addressing misclassification of employees as independent contractors.
- Reducing administrative and tax burdens on workers joining unions.
- Working with the Union Veterans Council to help service members, their spouses, and veterans transition into (specifically) "good" union jobs.
- Ensuring union representation on federal advisory committees (which gives unions a greater voice on policy issues).

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In addition, federal contractors and subcontractors may be impacted by the following recommendations:

- Ensuring union access to contractor employees on federal property.
- Strengthening Service Act compliance and enforcement efforts.
- Requiring compensation plans for blue collar workers on service contracts.
- Revisiting Davis-Bacon Act regulations (to ensure unionized construction contractors are not disadvantaged in the contract bidding process).
- Increasing the number of agency labor advisors (to ensure compliance with labor standards).

The bottom line is that these recommendations are unashamedly intended to promote the current Administration's policy of support for worker power, worker organizing and collective bargaining, which is also evidenced by the National Labor Relations Board General Counsel's recent memo on her actions to increase interagency cooperation, as discussed elsewhere in this E-Update.

NLRB GC Outlines Push for Interagency Cooperation to Protect Workers (and Their Right to Unionize)

This month, the National Labor Relations Board's General Counsel, Jennifer Abruzzo, released a memo that outlined the steps she is taking to promote better interagency collaboration and coordination in order to ensure the full protection of workers and, ostensibly, to minimize employers' compliance burdens. Realistically, these steps effectuate the White House's pro-union agenda, which impacts both unionized and non-union employers. The steps set forth include the following:

- Executing a Memorandum of Understanding (MOUs) with the Department of Labor (DOL) (as discussed in our January 2022 E-Update) to establish ground rules for information-sharing, investigation, enforcement, training, and outreach.
- Partnering with the DOL and Equal Employment Opportunity Commission on a series of webinars to combat retaliation.
- Seeking to enhance partnerships with additional agencies beyond the traditional worker protection agencies to provide workers with additional opportunities to thrive at work: the Federal Mediation and Conciliation Service, National Mediation Board, and the Department of Justice's (DOJ) Civil Rights Division.
- Establishing partnerships with the Internal Revenue Service, the DOJ's Antitrust Division, and the Federal Trade Commission to address unfair methods of competition that undermine workers' rights, such as: the misclassification of employees as independent contractors; sharing data about mergers and acquisitions that may impact unionization rights; increasing whistleblower and anti-retaliation protections; focusing on non-disclosure, non-solicitation and non-compete agreements.
- Strengthening the MOU with the Department of Homeland Security and working with the DOJ's Employee Immigrant Rights Section to better protect immigrant workers.
- Promoting education of workers, advocates, businesses and the public, and welcoming engagement with the Small Business Administration to assist them with a resource guide for employers.

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What this really means is that employers should be prepared for more aggressive enforcement by the NLRB, as well as the involvement of other agencies in matters that traditionally were handled by a single agency.

When Is an Employee a "Direct Threat" in the Workplace Under the ADA?

A recent case offers a good reminder that there are limits on the protections offered by the Americans with Disabilities Act to employees with disabilities. Among those – employees cannot pose a direct threat to themselves or others. And it further provides an overview of how to determine whether such a direct threat exists.

Background of the Case. In *Pontinen v. U.S. Steel Corp*., the company extended a contingent offer of employment, but subsequently discovered that the applicant had an "uncontrolled" seizure disorder based on the fact that, having been seizure free for some years, he had chosen to stop anti-seizure medication against his doctor's recommendation, and was therefore at risk for a recurrence. After extensive investigation into the applicant's medical history, including consultation with the applicant's doctor and review of his treatment notes, and in reviewing the job requirements, the company determined that the applicant would need work restrictions that made him unable to perform the job in question. The job offer was rescinded on the grounds that the applicant posed a direct threat to himself and others in the workplace, and the applicant sued.

Direct Threat Under the ADA. Under the ADA, an employer may use a qualification standard that screens out an individual with a disability if they pose a "direct threat" to themselves or others in the workplace. That term "means a significant risk of substantial harm ... that cannot be eliminated or reduced by reasonable accommodation." Whether an employee poses a direct threat requires an individualized assessment that is based on a reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence. The assessment must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

The Court's Opinion. The U.S. Court of Appeals for the Seventh Circuit first found that the employer's decision was based on adequate medical evidence, including the applicable regulatory requirements for the (DOT-covered) position, the health form completed by the employee, a physical examination, the response of the employee's doctor to a medical referral form, and the doctor's treatment notes.

Contrary to the applicant's contention that the employer's decision was based on preconceived notions of seizures generally, the Seventh Circuit also found that the employer had performed an individualized assessment that specifically examined the applicant's seizure and treatment history.

The Seventh Circuit then turned to the direct threat analysis itself. It found the duration of the risk was indefinite, given the doctor's warning that going off the medication would increase the risk of seizure. It found that the nature and severity of the harm weighed in favor of a direct threat finding, given the potentially catastrophic consequences of his loss of consciousness in a job involving the use of torches, power tools and equipment, vehicles, and hazardous chemicals, among other dangerous things. Given the uncontrolled nature of the condition, the Seventh Circuit found that harm was likely to occur. While it was unclear how imminent the harm would be, given the long

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periods between seizures, it was nonetheless possible that it could happen at any time. In sum, the Seventh Circuit found all the factors weighed in favor of a direct threat finding.

Lessons for Employers. The employer in this case did an excellent job in making a direct threat assessment. This included:

- A medical examination regarding the applicant's ability to do the job. Under the ADA, an employer may require applicants to undergo post-offer, pre-employment testing if all employees in the same job category are required to undergo such testing. This may be a wise requirement for positions involving strenuous physical duties or working with potentially dangerous tools and items.
- A thorough exploration of the applicant's medical history. Rather than just proceeding on the basis of the applicant's answer on a medical history form, the employer sought additional information from the applicant's doctor.
- A detailed articulation of the requirements of the job that would be impacted by the applicant's condition – including the tasks performed and equipment used specifically in the position.
- Having experienced Company personnel evaluate the information. In this case, Company representatives involved in the assessment had medical training – a nurse and a medical officer.

TAKE NOTE

Not Every Complaint Is a Request for Accommodation. Employees need to provide sufficient information to the employer that a health issue could be a disability that is interfering with their ability to work, as the U.S. Court of Appeals for the Eighth Circuit recently found.

In *Powley v. Rail Crew Xpress, LLC*, the employee driver had back pain that interfered with her ability to work. In accordance with the Americans with Disabilities Act, she provided medical documentation and received reasonable accommodations for her back pain, including limits on her hours of work. After she was transferred to a dispatcher position, she complained that the noise in the office was giving her headaches and asked to be transferred back to a driver position. She continued to submit medical notes that limited her work hours. Following her resignation from the dispatcher position, she sued the company for failure to accommodate her disabilities by refusing to transfer her back to the driver position.

The Eighth Circuit rejected her claim, finding that the employee had sought and received many accommodations for her back pain, so she was clearly aware of the process for requesting and obtaining reasonable accommodations. She never submitted a doctor's note or indicated that her request to return to a driving position was connected to her known disability – back pain. And although she complained that the noise in the office gave her headaches, the Eighth Circuit noted that "she did not identify these headaches as migraines, did not inform [the employer] that headaches or migraines interfered with her work, and did not suggest that her request was based on medical needs—as she had in past accommodation requests."

This case supports the common-sense proposition that employees have a responsibility to give their employers enough information to indicate that they have a disability and need an accommodation.

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The ADA is not necessarily triggered simply because an employee complains of "headaches" or some other minor ailment.

NLRB GC Supports Aggressive Use of Injunctions Against Employers in Organizing Campaigns. On February 1, 2022, the National Labor Relations Board's General Counsel, Jennifer Abruzzo, announced an initiative to seek injunctive relief where workers have been subject to threats or other coercive conduct during an organizing campaign. According to the GC, "threats or other coercive conduct needs to be enjoined promptly, not only to erase the chilling impact they have on employees, but to prevent escalation of the words into action."

Section 10(j) of the National Labor Relations Act allows the Board to go to federal court to obtain an injunction against employers or unions to stop unfair labor practices where normal Board processes would not be timely or adequate to effectively remedy the alleged violations. GC Abruzzo had previously issued memos that prioritized such relief against employers (without mention of unions) both generally and with regard to immigration-related matters. The current memo is further evidence of the Biden administration's aggressive support for unions.

Excusing Unpredictable Attendance Is Not a Reasonable Accommodation. Although some employers may feel like they have to tolerate a lot as a reasonable accommodation under the Americans with Disabilities Act, one thing that they may not have to allow is unpredictable attendance, as the U.S. Court of Appeals for the Tenth Circuit recently reaffirmed.

In *Lamm v. Devaughn James, LLC*, the employee, who had mental health conditions and who had attendance issues, requested an accommodation to be allowed to work half-days on the days that she experienced intense anxiety. Her request was denied and she was subsequently terminated for attendance violations unrelated to her anxiety. She sued, alleging failure to accommodate under the ADA, among other things.

In order to be protected under the ADA, the employee must be a "qualified individual," meaning that they can perform the essential functions of the job, with or without a reasonable accommodation. In evaluating failure to accommodate claims, courts may apply a two part analysis – first, whether the employee is able to perform the essential functions of the job and, if not, then whether any reasonable accommodation would enable them to do so.

The Tenth Circuit found that, because she was away from work excessively and often without warning, the employee was unable to perform the essential function of regular and predictable job attendance, as required for her position as a paralegal who was required to timely perform administrative and client-facing tasks. The Tenth Circuit further found that there was no reasonable accommodation that would enable her to perform that essential job function; her requested accommodation of sporadic absences without warning would not enable her to meet that requirement and was therefore not reasonable.

Now, regular and predictable attendance is not necessarily an essential job function for all jobs. In order to meet the showing that it is, an employer must be able to demonstrate that the requirement is job related, uniformly enforced, and consistent with business necessity. But if they can establish this, then they do not have to provide unpredictable leave as an accommodation.

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"Title VII Requires a Prompt Corrective Response, Not a Perfect Response." So says the U.S. Court of Appeals for the Sixth Circuit in rejecting an employee's claim that the employer failed to respond appropriately to his complaint of racial harassment.

In *Burns v. Berry Global, Inc.*, the employee reported multiple incidents of racial harassment (notes and nooses). After each incident, the employer took various actions, which in total included the following: reviews of security footage; employee interviews; warning employees against engaging in harassment; directing supervisors to monitor for offensive displays; adjusting the surveillance cameras and moving the lockers to enable better surveillance; an unsuccessful attempt to set up an employee group to address morale issues; and conducting refresher "Code of Respect and Nonharassment" training. The employee was also provided access to the Employee Assistance Program for counseling services, given time off, and offered a transfer to another shift. Unfortunately, the employer was unable to identify the harasser and the harassment continued. The employee resigned following the last incident.

An employer will be liable under Title VII for co-worker harassment if its response shows indifference or is unreasonable. A response is considered adequate if it is reasonably calculated to end the harassment. The Sixth Circuit has identified steps that may establish reasonably appropriate corrective action: promptly initiating an investigation to determine the factual basis for the complaint, speaking with the specific individuals identified by the complainant, following up with the complainant regarding whether the harassment was continuing, and reporting the harassment to others in management. The Sixth Circuit found that all of those things had happened here.

More specifically, the Sixth Circuit rejected the employee's argument that additional training should have been done, noting that nothing legally requires the employer to conduct such training, particularly where the employer had already conducted training during the onboarding process and required employees to acknowledge the non-harassment policy in writing. Similarly, the use of the company HR generalist to conduct the investigation was not unreasonable, as there is no legal requirement to use an outside investigator. The Sixth Circuit concluded that, even if not perfect, the employer took prompt action that was reasonably directed at determining the source of the harassment.

While employers may be reassured that they will not be required to provide a "perfect" – as dictated by the complainant – response to a harassment complaint, they should keep in mind that their goal should not be to do the bare minimum, but rather their response must be prompt, thoughtful and appropriately calculated to stop any harassment.

Context Matters for Sexual Harassment Claims. Whether sexually-based conduct constitutes sexual harassment in violation of Title VII may depend on the situation in which it occurs, the U.S. Court of Appeals for the Fifth Circuit recently explained.

In *Landry v. Leesville Rehabilitation Hospital*, a patient inappropriately touched a nurse and made a sexual comment about her. Following her termination for aggressive personal interactions with that patient and others, the nurse sued, alleging among other things, that she had been subjected to a sexually hostile work environment based on the patient's conduct.

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In rejecting the nurse's claim, the Fifth Circuit focused on the context of the conduct, noting that the "unique nature" of care facilities is relevant in weighing whether such conduct is sufficiently severe or pervasive to constitute sexual harassment. The Fifth Circuit recognized that, as stated in the employee handbook, inappropriate sexual conduct is, unfortunately, not uncommon with patients suffering from illness and diminished capacity. And in that context, the patient's conduct towards the nurse, while offensive, was not severe enough and, given that it involved only two incidents, was not pervasive enough to be considered illegal sexual harassment.

Employers should be warned, however, that this case does not mean that they can simply ignore complaints of sexual conduct from patients or in other circumstances where sexual conduct might be expected (for example, see our blog post on sex shop workers who sought to unionize in part because they were subjected to sexual harassment by customers). Employers must still take reasonable steps to protect their employees from third-party harassment.

NEWS AND EVENTS

Corporate Counsel Program – The Maryland State Bar Association is presenting the Corporate Counsel Institute on March 15, 2022, in which top practitioners will give in-depth and practical reviews of various topics of interest to in-house counsel. Darryl G. McCallum will present a session on "What's Keeping Corporate Counsel Up at Night." 5.5. hours of CLE (including 1.0 ethics) credit will be offered by the surrounding MCLE states. You may obtain more information about the program and register here.

Victory – J. Michael McGuire successfully defended a company against the union's challenge to a change in health care premium rates for employees on long-term disability. Previously, those employees were permitted to participate in the company medical plan at the active employee rate. The arbitrator upheld the company's position that it had negotiated an agreement subjecting such employees to the same two-year cap on active employee rates as non-represented and management employees.

Victory – J. Michael McGuire won a COVID-related arbitration for a company. The employee, who was aware of COVID-like symptoms, nonetheless came to work in violation of the company's requirement to remain at home or risk disciplinary action, including termination. Thus, the arbitrator found the company had good cause for terminating employment.

Testimony – This month, Fiona W. Ong testified before both the Senate Finance Committee and House Economic Matters Committee of the Maryland General Assembly on the proposed Paid Family Leave Program bill. On behalf of the Maryland Chamber of Commerce, Fiona expressed concerns about the impact on employers of a program that provides up to 24 weeks of paid leave, with guaranteed reinstatement and no ability by the employer to control or challenge the State-granted leave.

Media – Lindsey A. White was quoted in a February 21, 2022 Daily Record article by Pete Pichaske, "Confusion over vaccine mandates bedevils employers." (Subscription required) Lindsey discussed the choices employers can make, and ways to incentivize employees to become vaccinated.

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Media – Fiona W. Ong's testimony before the House Economic Matters Committee in opposition to the proposed Paid Family Leave Program bill was quoted in a February 16, 2022 article for the Washington Informer by William J. Ford, "Maryland Lawmakers Revisit Push for Family, Medical Leave."

Media – Fiona W. Ong was quoted in a February 16, 2022 article for the Society on Human Resource Management (SHRM)'s HR Week by Allen Smith, "IBM Defends Itself from Allegations of Age Bias." (membership required to access article)

TOP TIP: Employers – State Safety and Health Departments Can Find COVID Violations Too!

In last month's Top Tip, we noted that, even though the Vax-or-Test Emergency Temporary Standard is no more, the federal Occupational Safety and Health Administration can still hold employers liable for failing to protect workers from COVID-19 under existing safety standards. And now we remind you that state OSH agencies may also get involved, as the State of Washington's Department of Labor & Industries (WDL&I) demonstrated this month when it imposed more than $285,000 in fines in connection with a COVID-19 outbreak at a multi-employer warehouse.

As the WDL&I announced in a February 8, 2022 press release, 253 workers in the warehouse (approximately 1 in 4) tested positive for COVID-19 over a three month period. The county health department informed the WDL&I, which opened several inspections at the warehouse. Among the violations that it found were the following:

- Allowing/Insisting COVID-positive employees report to work
- Failure to reduce staffing during the outbreak
- Failure to enforce mask use in company vehicles and in the workplace
- Failure to verify worker vaccination status (the state required mask use for unvaccinated workers)
- Failure to conduct screening and comply with social distancing measures in transport vans
- Failure to report hospitalizations
- Failure to provide contact information for those who tested positive
- Failure to notify workers of close contact with COVID-positive co-workers
- Failure to have COVID-19 plans

Realistically, not all state OSH agencies will be as engaged in COVID-19 enforcement activity as that in Washington. Nonetheless, some will certainly be – in addition to federal OSHA's expressly asserted focus on such activity. Employers must continue to be thoughtful about taking appropriate measures to protect their workers from COVID-19.

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RECENT BLOG POSTS

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

- Who are you and what did you do with my job candidate? by Evan Conder, February 23, 2022
- Employers, Don't Ignore COVID Just Because the Vax-or-Test ETS is Gone by Fiona W. Ong, February 17, 2022
- New Law Lets Sexual Harassment Claimants Get Out of Arbitration Agreements by Eric Hemmendinger, February 10, 2022
- Extraordinary Workplace Misconduct: No Pokémon Go While Policing! by Fiona W. Ong, February 9, 2022
- Extraordinary Workplace Misconduct: Petty Pennies by Elizabeth Torphy-Donzella and Garrick Ross, February 2, 2022

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