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MANAGEMENT'S WORKPLACE LAWYERS

E-UPDATE

March 31, 2022

RECENT DEVELOPMENTS

Do You Care? The EEOC Offers Guidance on Caregiver Discrimination and COVID-19

"Caregivers" (e.g. individuals who care for other family members) are not technically a protected class under current federal antidiscrimination law, but the Equal Employment Opportunity Commission has issued new guidance and updated its "What You Should Know About COVID-19" resource on when it believes that discrimination against caregivers may implicate Title VII and the Americans with Disabilities Act. This supplements previously-existing general guidance, a fact sheet, and best practices on caregiver discrimination.

When Does Caregiver Discrimination Violate the Law? According to the EEOC:

> Caregiver discrimination violates federal employment discrimination laws when it is based on an applicant's or employee's sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age (40 or older), disability, or genetic information (such as family medical history). Caregiver discrimination also is unlawful if it is based on an applicant's or employee's association with an individual with a disability, within the meaning of the ADA, or on the race, ethnicity, or other protected characteristic of the individual for whom care is provided. Finally, caregiver discrimination violates these laws if it is based on intersections among these characteristics (for example, discrimination against Black female caregivers based on racial and gender stereotypes, or discrimination against Christian female caregivers based on religious and gender stereotypes).

Examples of Discrimination. The EEOC gives examples of illegal discrimination against caregivers, including the following:

- **Sex discrimination.**
  - Refusing to hire or promote a female based on a belief that she would/should focus primarily on the care of children or parents.
  - Making assignments, particularly about demanding or high-profile projects, based on assumptions about a female caregiver's ability to juggle work and personal obligations or to work extra hours.
  - Stereotyping men as breadwinners and women as caretakers, such that men are denied flexible schedules to handle caregiving duties or are refused requests for exceptions from return-to-work or attendance policies.

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- Demanding that LGBTQ+ employees, but not others, who make caregiver-related requests to provide proof of family relationship.

- Denying caregiving leave based on the sexual orientation or gender identity of the employee or their partner.

- **Pregnancy Discrimination.**
  - Refusing to hire or promote or demoting pregnant employees based on assumption that they should be focused on their pregnancies, or allowing harassment of pregnant employees for taking precautions to avoid COVID-19 (e.g. physical distancing, schedule changes, teleworking).
  - Unilaterally making schedule changes or requiring telework of pregnant employees to protect them from COVID.
- **Disability Discrimination.**
  - Discriminating against employees based upon their association with the care recipient, such as by denying leave to care for a family member with a disability arising from long COVID while granting unpaid leave for other personal responsibilities, or refusing to promote an employee whose mental health disability worsened during the pandemic based on the assumption they would not be fully available to work, or refusing to hire an individual out of fear of increased insurance costs for a spouse who is at higher risk of severe illness from COVID.
- **Race/National Origin Discrimination.**
  - Applying different standards to employees (with caregiving responsibilities) of one race but not another, such as by requiring proof of vaccination, or denying leave based on the fact that the care recipient is from a country with a recently-identified variant.
- **Age Discrimination.**
  - Basing employment decisions, or imposing different terms and conditions of employment, based on age or age-related stereotypes, such as assuming that an older worker who must care for a grandchild whose parent has COVID lacks the stamina to balance the job and caregiving.
- **Intersectional Discrimination.**
  - This is discrimination based on the intersection of two or more protected characteristics, such as denying caregiving leave to male Native American employees while granting it to female Native American employees or those of other races/national origins.

Harassment. The EEOC provides examples of harassing conduct related to caregiving responsibilities, including:

- Disparaging female employees for focusing on their careers rather than their families.
- Accusing female employees of being preoccupied with their families and distracted from their jobs.
- Criticizing male employees for caregiving activities.

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- Asking intrusive questions about an employee's sexual orientation in connection with a leave request to care for a partner.
- Insulting Asian employees caring for family members with COVID because COVID was first identified in an Asian country.
- Assigning unreasonable amounts of work or imposing unrealistic deadlines on employees of color because they requested caregiving leave.
- Questioning the professional dedication of employees caring for individuals with disabilities or mocking them for taking pandemic precautionary measures.
- Stating that older employees should be receiving care, not providing it.

The EEOC suggests preventive measures such as periodically distributing harassment policies and complaint procedures to all employees, posting such documents on-site and online, training employees on these policies and procedures, and demonstrating leadership's commitment to a harassment-free workplace. Employers should also apply their harassment policies consistently and in a non-discriminatory fashion, respond promptly to harassment-related questions/concerns/complaints, and take prompt and effective corrective and preventive action.

No Reasonable Accommodations Required. The EEOC notes that there is no right to reasonable accommodations (e.g. telework, flexible schedules, reduced travel or overtime) under federal antidiscrimination laws based strictly on caregiver status. But they may be entitled to leave under the Family and Medical Leave Act and similar state/local laws.

Also, those who are unable to perform their job duties because of pregnancy and childbirth must be treated the same as other employees who are temporarily unable to perform their job duties. And they may be entitled to accommodations under the ADA or state law if they have pregnancy-related disabilities.

Performance Standards May Be Enforced. Employers are not required to excuse poor performance associated with caregiving duties, as long as the standards are applied consistently.

No Retaliation. The EEOC emphasizes that employers are prohibited from retaliating against employees for exercising their rights under the anti-discrimination laws, such as by making complaints, participating in investigations, or reasonably opposing conduct they believe to be discriminatory. Examples of retaliation include the following:

- Refusing to recall an employee from furlough because they made a pregnancy discrimination complaint.
- Changing an employee's schedule to conflict with school drop-off and pick-up times because she participated in a discrimination investigation.
- Transferring a manager who cares for a family member in a local assisted living facility to a distant office because they refused to obey a discriminatory order.

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The EEOC offers suggestions to prevent retaliation, such as by training managers on their obligations under federal anti-discrimination laws (including non-retaliation), notifying complainants/participants of their right to non-retaliation and what to do if they experience retaliation, and taking appropriate preventive and corrective action if retaliation occurs.

The EEOC Provides Guidance on Religious Objections to the COVID-19 Vaccine

On March 1, 2022, the Equal Employment Opportunity Commission revised its What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws resource to add new Q&As about requests for religious exemptions to COVID-19 vaccine mandates. Of significance are the following points:

Employees Must Request an Accommodation. The EEOC emphasizes that employees must tell their employer if they are requesting an exception to a vaccination requirement because of their religious belief. Although they do not need to use any "magic words" like "reasonable accommodation" or "Title VII," they must explain the conflict and the religious basis for it. The EEOC states that a best practice is for employers to provide employees and applicants with contact information and the procedure for requesting an accommodation. It has also provided its own internal accommodations form as a sample for employers.

No Social, Political or Economic Views or Personal Preferences. These are not protected by Title VII, and the EEOC specifically asserts that objections based on the possible effects of the vaccine are nonreligious. However, the EEOC notes that there may be overlap between a sincere religious view and a political view; the religious aspect of the belief is covered by Title VII. In addition, the EEOC cautions employers not to assume a request is invalid because it is based on unfamiliar religious beliefs, practices or observances.

The Belief Must Be Sincere. As the EEOC notes, this is "largely a matter of individual credibility." The EEOC identifies factors that may undermine an employee's credibility:

- whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance);
- whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons;
- whether the timing of the request renders it suspect (for example, it follows an earlier request by the employee for the same benefit for secular reasons); and
- whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

The EEOC cautions employers not to assume that a belief is insincere because the employee deviates from the commonly followed tenets of their religion, or because they adhere to some of the common practices but not others. Beliefs may change over time, thus an employee's past behavior, although relevant, may not necessarily be determinative.

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Employers May Ask for Supporting Information. While employers are generally supposed to assume the sincerity of the employee's stated religious belief, they may seek additional supporting information where there is an objective basis for questioning the religious nature or the sincerity of the belief. The employee is required to cooperate with such a reasonable request.

The Accommodation Must Not Pose an Undue Hardship. Under Title VII, an accommodation that requires the employer to bear more than a de minimis (i.e. minimal) cost is considered an undue hardship. Costs include direct monetary costs, but also the burden of the conduct on the employer's business – such as the risk of the spread of COVID-19 to other employees or to the public. The EEOC notes that courts have also found hardship where the accommodation would violate federal law, impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work.

Employers must assess undue hardship on a case-by-case basis, and must rely on objective information, not speculative or hypothetical hardship. Employers may grant some requests and not all. The EEOC notes "common and relevant considerations during the COVID-19 pandemic" to include:

- whether the employee works outdoors or indoors
- whether the employee works in a solitary or group work setting
- whether the employee has close contact with other employees or members of the public (especially medically vulnerable individuals)
- the number of employees who are seeking a similar accommodation, i.e., the cumulative cost or burden on the employer

Other workplace safety considerations include the type of workplace, the nature of the employees' duties, the location in which the employees must or can perform their duties, the number of employees who are fully vaccinated, and how many employees and nonemployees physically enter the workplace.

The Employer May Choose the Accommodation – Sort of. The EEOC states that if there is more than one reasonable accommodation available, the employer may choose the accommodation regardless of the employee's preference. But the EEOC also warns that "an employer's proposed accommodation will not be 'reasonable' if the accommodation requires the employee to accept a reduction in pay or some other loss of a benefit or privilege of employment (for example, if unpaid leave is the employer's proposed accommodation) and there is a reasonable alternative accommodation that does not require that and would not impose undue hardship on the employer's business." (We believe that the EEOC's position on this last point is aggressive, and potentially unsupported by the law, which does not contemplate comparative reasonableness). The employer should explain why a preferred accommodation is being denied.

The EEOC also reminds employers to consider all possible alternatives, such as actions recommended by the CDC.

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Employers May Reconsider Religious Accommodations. The EEOC notes that an accommodation may be discontinued if it is no longer being utilized for a religious purpose or if circumstances change such that the accommodation now poses an undue hardship. However, employers should consider if there are alternative accommodations that do not pose an undue hardship. The EEOC suggests a best practice would be to discuss concerns about continuing a reasonable accommodation with the employee before revoking it.

The U.S. Department of Labor Provides More Anti-Retaliation Resources

Following the U.S. Department of Labor's prior announcement of its joint anti-retaliation initiative with the Equal Employment Opportunity Commission and the National Labor Relations Board (as discussed in our November 2021 E-Update), the DOL has now released additional resources that it asserts are "to help combat retaliation against employees who assert their workplace rights or cooperate with investigations by the Wage and Hour Division." These resources include:

- A Field Assistance Bulletin to provide information on protection against retaliation under the laws enforced by the DOL's WHD (i.e. the Fair Labor Standards Act, the Family and Medical Leave Act, the Employee Polygraph Protection Act, and the Migrant and Seasonal Agricultural Worker Protection Act). Some of the points made in the FAB include:
    - Retaliation is prohibited for exercising rights under these laws.
    - Complaints can be written or oral, internal or external.
    - An employee may be wrong about whether a violation of the laws has occurred, but they are still protected from retaliation.
    - Retaliation can be subtle (e.g. excluded from meetings) or overt (e.g. threats, termination).
    - Retaliation can occur by the employer's agent, such as outside counsel. Also former employers can retaliate.
- An Essential Workers Essential Protections presentation on "Unlawful Retaliation Under the Laws Enforced by the Wage and Hour Division."
- A new Retaliation website that defines "retaliation," provides examples, identifies the applicable laws, collects resources on the topic, and informs employees how to file a complaint.

The Trump Independent Contractor Rule Is Back In Effect – For Now

Continuing the chaos over the appropriate standard for determining independent contractor status, a federal judge has overturned the Biden administration's attempt to withdraw the employer-friendly independent contractor rule issued in the waning days of the Trump administration. This means that the Trump Department of Labor's rule is back in effect pending the undoubtedly forthcoming action from the Biden DOL.

Independent Contractor Status. A worker who is an independent contractor is generally not protected by employment laws, and companies are not required to provide them with employment benefits (including health insurance, leave, or retirement benefits) or pay employment taxes and contributions (including workers' compensation and unemployment insurance). The

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misclassification of employees as independent contractors – enabling companies to avoid these obligations – has become a particularly hot area of employment litigation in recent years.

The Trump Rule. Adding to the confusion, the standard for the determination of independent contractor varies across laws, agencies, and courts at both the federal and state level. As discussed in our January 6, 2021 E-lert, just prior to the change in administration, the Trump DOL joined this fray by issuing a Final Rule that adopted an "economic realities" test. This test, which newly set forth two "core" factors and three additional factors for the analysis, made it easier to achieve independent contractor status under the FLSA. It was scheduled to take effect in March 2021.

The Biden Administration's Attempt to Withdraw the Rule. Upon assuming office on January 20, 2021, President Biden issued an Executive Order that, in part, directed agencies to consider a 60-day or longer postponement of the effective date of regulations that had been published in the Federal Register but not yet taken effect. The DOL promptly announced a proposed rule to delay the effective date of the Final Rule to May 7, with a comment period of only 19 days (rather than the typical 30 or 60 days). It then announced a proposed rule to withdraw the Final Rule, with a 31-day comment period, asserting that the statutory language of the FLSA and longstanding case law do not support the new test set forth in the Final Rule. The Final Rule was formally withdrawn on May 6, 2021, as we discussed in our May 2021 E-Update.

The Court's Ruling. The federal district court found that the 19-day comment period for the proposed delay of the Final Rule was too short, and the content of the proposal was too restricted, to provide the public with a meaningful opportunity for notice and comment. Nor was there any good cause to bypass the typical 30-day period. With regard to the actual withdrawal of the Final Rule, the court found that the reason for the withdrawal was arbitrary and capricious, as the Biden DOL had failed to consider potential alternatives to rescission of the Final Rule, as it was required to do by law. The court vacated both the delay and withdrawal rules, meaning that the Final Rule is in effect.

What Now? We expect the Biden DOL to appeal the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit, although that is typically a conservative court that will likely agree with the district court. In the alternative, and quite likely, the Biden DOL may engage in a new round of rulemaking. But for the time being, employers may rely on the Trump Final Rule (although keeping in mind that courts are not bound by the rule, and some have rejected it in favor of stricter standards). We will continue to monitor and update you on this situation.

TAKE NOTE

Proposed Changes to OSHA's Electronic Reporting Requirements for Occupational Injuries and Illnesses. The U.S. Department of Labor has announced some proposed changes to its current electronic reporting requirements for workplace injuries and illnesses. According to the DOL's press release, while establishments with 20 or more employees in certain high-hazard industries would continue to be required to electronically submit information from their OSHA Form 300A annual summary, the proposed rule would:

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- Require establishments with 100 or more employees in other certain high-hazard industries to electronically submit information from their OSHA Forms 300, 301 and 300A to OSHA once a year.
- Update the classification system used to determine the list of industries covered by the electronic submission requirement.
- Remove the current requirement for establishments with 250 or more employees not in a designated industry to electronically submit information from their Form 300A to OSHA annually.
- Require establishments to include their company name when making electronic submissions to OSHA.

The DOL is accepting comments from the public on the rule here, through May 31, 2022. The DOL will then consider the comments and may make changes to the proposed rule before issuing a final rule.

A Supervisor's Single Use of the N-Word Can Create a Hostile Work Environment. A supervisor's sporadic use of offensive words normally is alone not sufficient to create a hostile work environment under Title VII – except for the N-word, as a recent case from the U.S. Court of Appeals for the Fifth Circuit makes clear. (This is different than co-worker conduct, as discussed in the next article).

In order to create a hostile work environment under Title VII, the conduct at issue must be sufficiently severe or pervasive. As a general matter, courts have found that the single use of a racial epithet does not meet that standard – with the sole exception of the N-word. In *Woods v. Cantrell*, the Fifth Circuit found that the employee's allegation that his supervisor called him a "Lazy Monkey A** N*****" in front of his coworkers was enough to support a hostile work environment claim. In arriving at that determination, the Fifth Circuit quoted an opinion from Justice Kavanagh (prior to his appointment to the Supreme Court) that described it as "a term that sums up . . . all the bitter years of insult and struggle in America, [a] pure anathema to African-Americans, [and] probably the most offensive word in English."

The Fifth Circuit's decision is not an outlier - a number of its sister circuits (i.e. the First, Second, Fourth, Seventh, Eighth, Ninth, and D.C.) have come to the same conclusion that the use of the N-word by a supervisor in the presence of subordinates is sufficient to alter the conditions of employment and create an abusive working environment for which the employer will be liable.

As a general reminder, however, although employers must be particularly sensitive to the use of the N-word in the workplace, they must always be vigilant about the use of any racially-offensive terms in the workplace.

But an Employer's Prompt Response to Coworker Use of the N-Word Is a Defense to Liability. In contrast to the last article regarding supervisory misconduct, an employer can avoid liability under Title VII for a hostile work environment created by coworkers – even involving the N-word – by a prompt and effective response to a harassment complaint.

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In *Paschall v. Tube Processing Corp.*, two African-American employees asserted hostile work environment claims based on two coworkers' use of the N-word. The U.S. Court of Appeals for the Seventh Circuit distinguished between the use of the term by supervisors and coworkers, observing that the supervisor's use impacts the work environment far more severely than a coworker's use. Moreover, in this case, the Seventh Circuit found that the employees' hostile work environment claims failed because the employer took prompt and effective remedial action to address the coworker misconduct. Upon receiving the complaint, the employer considered terminating the employee, but decided to suspend the offending coworker for three days and warned her that she would be terminated if she ever used racially inappropriate language again. The employees never heard her use the word again.

This case emphasizes the need for employers to react promptly to complaints of coworker harassment, and to take appropriate steps to stop any harassment and prevent it from continuing. While terminating an offending employee may be an option, it is not necessarily the only one, as was the case here – the critical point is that the harassment must be stopped.

Employees May Be Terminated for Performance Issues Discovered During FMLA Leave. An employee is protected from termination for taking leave under the Family and Medical Leave Act, but not for performance issues that warrant termination, even if they are discovered while the employee is on FMLA leave, as the U.S. Court of Appeals for the Seventh Circuit recently reiterated.

In *Anderson v. National Lending Corp.*, an employee with a history of performance deficiencies went on FMLA leave. While she was on leave, the company's audit system flagged a number of errors in her work that caused a government agency to cite the employer. Her supervisor recommended her termination, and Human Resources conducted an investigation into the employee's performance. She returned to work while the investigation was still ongoing. Upon its completion three days later, the decision was made to terminate her employment. She sued, claiming violation of her FMLA rights to reinstatement and retaliation for taking FMLA leave.

The Seventh Circuit noted, however, that "an employee is not entitled to return to her former position if she would have been fired regardless of whether she took the leave." In this case, the Seventh Circuit found that the employer had evidence of her poor performance, which warranted discharge in the company's honest opinion, and the company's Standards of Conduct permitted termination for substandard performance without prior disciplinary action.

While this case supports the ability of employers to take appropriate disciplinary action, regardless of an employee's FMLA leave, we caution employers to ensure that they are treating such employees consistently with how other employees with similar performance or conduct issues have been treated.

Although Regular Attendance May Be an Essential Function, Leave May Still Be Required. The U.S. Court of Appeals for the Sixth Circuit rejected an employer's argument that the employee was unable to perform any of her essential job functions, including attendance, as of the date of her termination, and was therefore not entitled to the protections of the Americans with Disabilities Act.

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As the Sixth Circuit noted, "To accept [the employer]'s supposed rule, an employee requesting medical leave could always be terminated if she were unable to work at the time of her request. But that cannot be the case because … medical leave can constitute a reasonable accommodation under the ADA."

In *Blanchet v. Charter Communications, LLC*, the employee suffered from post-partum depression. Upon exhausting her FMLA leave, she requested an additional 60 days of leave, but was instead terminated because she was unable to perform her job duties, including attendance. As the Sixth Circuit noted, however, the employee was not requesting an accommodation that would permanently remove attendance as an essential function of her position (such as telework or part-time work). Rather, her request for leave was a temporary accommodation that would hopefully enable her to fulfill the attendance requirement once the leave was over. Thus, by denying the request for leave and terminating the employee, the employer had failed to provide a reasonable accommodation.

So while employers can certainly establish regular and predictable attendance as an essential job function of certain jobs, as we recently discussed in our February 2022 E-Update, they must recognize that a temporary leave of absence may be a reasonable accommodation.

Be Careful Not to Assume That an Inquiry About Severance Is a Resignation. This was the lesson from a recent case, in which the U.S. Court of Appeals for the First Circuit found that the employer's mistaken assumption resulted in a wrongful termination.

In *Forsythe v. Wayfair, Inc.*, the employee complained of sexual harassment by a coworker and retaliation by her manager, which a human resources representative investigated and deemed to be unsubstantiated. She then told the HR representative that she was interested in having the company put together a "compelling severance package." The company responded that it accepted her resignation and provided a severance agreement. The employee sued, alleging in part that she had been involuntarily terminated.

The First Circuit found that a request for a severance package is not necessarily a voluntary offer to resign. The employee stated that she intended to evaluate any proposed package with her attorney, and certainly never stated that she was resigning. The employer's decision to treat her inquiry as a resignation was therefore a termination against her wishes.

So, while it might seem logical to an employer that an employee would only ask about severance if they did not wish to continue working for the company, it is important not to assume that such a request is necessarily a resignation.

OSHA Is Taking Additional Comments on a Proposed COVID Healthcare Standard. Back in June 2021, OSHA issued a COVID-19 Emergency Temporary Standard for healthcare employers that was then withdrawn in December (as we discussed in our December 2021 E-Update), with its six-month duration acting as a comment period for a possible final rule. In the aftermath of its unsuccessful attempt to implement a general COVID-19 ETS (the Vax-or-Test rule for larger employers), OSHA asserted that it was focusing on a permanent COVID-19 healthcare standard. It

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has now announced that it is scheduling an informal hearing and reopening the comment period on its ETS to solicit additional information on the following issues:

- Alignment with the Centers for Disease Control and Prevention's recommendations for healthcare infection control procedures.
- Additional flexibility for employers.
- Removal of scope exemptions.
- Tailoring controls to address interactions with people with suspected or confirmed COVID-19.
- Employer support for employees who wish to be vaccinated.
- Limited coverage of construction activities in healthcare settings.
- COVID-19 recordkeeping and reporting provisions.
- Triggering requirements based on community transmission levels.
- The potential evolution of SARS-CoV-2 into a second novel strain.
- The health effects and risk of COVID-19 since the ETS was issued.

The public may submit through April 22, 2022 written comments here, referencing Docket No. OSHA-2020-0004. They may also submit a notice of intention to appear and provide verbal testimony at the hearing that begins on April 27, 2022 and, if necessary, will continue on subsequent days. OSHA reminds employers that, until a final rule is issued, they must comply with existing standards including the General Duty Clause.

Federal Contractor Update. The U.S. Department of Labor and its Office of Federal Contract Compliance Programs was busy in March 2022 with various announcements of interest to federal contractors, including the following:

- A proposed modification to a final rule that sets forth procedures to identify and remedy discrimination in federal contracting. The effect of the proposed amendments is to provide less transparency from the OFCCP in audits and to establish different evidentiary standards, yet to be defined, but which we can assume will not favor contractors.
- A new Directive on pay equity audits, intended to provide guidance on how OFCCP will evaluate contractor compliance with pay equity audit obligations. The OFCCP is taking an aggressive approach with regard to what information it can obtain from employers, even that which may be subject to the attorney-client privilege.
- A proposal to overhaul the long-standing Davis-Bacon Act regulations (applicable to construction contractors). The public may submit comments on the proposed revisions to the rule here until May 17, 2022.

D.C.'s Noncompete Ban Is Delayed Until October 1, 2022. As we discussed in our January 2021 E-Update, the District of Columbia passed arguably one of the most sweeping non-compete bans in the country. In order to consider some amendments to address serious concerns from the business community, however, the effective date of this law was previously delayed until April 1, 2022 (as we reported in our August 2021 E-Update) and, as the amendments are still pending, now has been further delayed until October 1, 2022.

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With a few limited exceptions, the Ban on Non-Compete Agreements Amendment Act of 2020 ("the Act") would prohibit the use of non-competition agreements across all income levels both during and after employment. Notably, however, D.C. Council members, including the Act's sponsor, have questioned the impact of this law, and are considering amendments, including adding an exception for "bona fide conflict of interest provisions" and clarifying that employees may be banned from using, as well as disclosing, the employer's confidential, proprietary or sensitive information (e.g. client or customer lists, trade secrets). Another proposal would permit certain targeted non-competes.

NEWS AND EVENTS

Resource Guide – We are pleased to announce that the 2022 edition of The Legal 500: Employment & Labour Law Country Comparative Guide, for which we authored the U.S. chapter, is now available. A copy of the pdf of our chapter is available here. The Legal 500 is a preeminent international rating organization for law firms and lawyers.

Conference – The Maryland Manufacturing Extension Partnership (MEP) is presenting Manufacturing Workforce Innovation 2022, its first-ever conference focused on providing manufacturing leaders and HR professionals with insights, best practices, and industry trends to solve current and future workforce challenges. Parker E. Thoeni will be presenting a session on "Top 5 Issues for Employers: A Discussion Around Legal Challenges, Questions and Concerns." This one-day conference will take place on June 8, 2022 at the Hilton Baltimore BWI Airport. You may obtain more information and register for the conference here.

Victory – Teresa D. Teare and Paul D. Burgin won a motion to dismiss a former employee's claims of race and age discrimination, as well as retaliation, on behalf of a health system. The court found that she had failed to allege any adverse employment action or that any difference in treatment was based on race or age. Moreover, her claim of retaliation fails because even if there had been adverse action, it occurred prior to any complaint.

Victory - Mark J. Swerdlin assisted a major food manufacturer in a union organizing campaign, which resulted in the workers rejecting unionization by an overwhelming majority.

Victory – Gary L. Simpler and Chad M. Horton successfully assisted a marijuana dispensary in defeating a union organizing drive.

Leadership – Parker E. Thoeni was approved to serve as a Hearing Committee Member by the District of Columbia Board on Professional Responsibility. The Hearing Committee reviews and decides disciplinary cases brought by the D.C. Bar Association against attorneys.

Presentation – Darryl G. McCallum presented a session on "What's Keeping Corporate Counsel Up at Night" for the Maryland State Bar Association's Corporate Counsel Institute on March 15, 2022.

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TOP TIP: The Actions of a Single Employee Can Be Protected Concerted Activity

The National Labor Relations Act protects the rights of employees, whether unionized or not, to engage in "concerted" (i.e. group) activity for their mutual aid or protection. It does not protect an employee's actions on their own behalf. But, as a recent case makes clear, employers should be aware that if that employee asserts that they are acting on behalf of coworkers – even if they are acting alone – that activity may be considered protected concerted activity under the NLRA if it arises in relation to prior concerted activity.

In *Moreno v. UtiliQuest, LLC*, the employee alleged that company management asked him to collect signatures from all other employees to release their union rights in exchange for a ten percent raise. However, of all those who signed, the employee was the only one to receive a raise. On multiple occasions, he complained to his managers about his coworkers not receiving the promised raises. He was subsequently terminated, and sued, claiming among other things that he had been terminated for advocating on behalf of his fellow employees.

As the U.S. Court of Appeals for the Ninth Circuit explained, "[t]he NLRA does not protect an employee acting alone to complain about an issue, even if the issue concerns mutual aid or protection." But if those actions take place against a backdrop of other group activity, they may "stem from" or be considered a "logical outgrowth" of such activity – and may then be found to be concerted and subject to the NLRA's protection.

In this case, the Ninth Circuit found that, although the employee acted alone, his actions were not personal in nature. Rather they were a logical outgrowth of prior concerted activity, as the employee had convinced other employees to relinquish their union rights in exchange for a raise. Thus his advocacy on their behalf could be considered "concerted activity."

This case emphasizes the need for employers to consider the circumstances carefully before terminating an employee who contends that they are acting on behalf of other employees. Such conduct may be protected by the NLRA.

RECENT BLOG POSTS

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

- TOP TIP: Employers – State Safety and Health Departments Can Find COVID Violations Too! by Fiona W. Ong, March 28, 2021

- An (Updated) Employer's Guide to March Madness by Evan Conder, Fiona W. Ong and Garrick Ross, March 17, 2022 (Selected by Lexblog as one of the best blogs for the week)

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