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E-UPDATE

April 29, 2022

RECENT DEVELOPMENTS

US Department of Justice Provides Guidance to Employers on Opioid Addiction and the ADA

In the context of the opioid crisis, the US DOJ has issued a Q&A guidance on how the Americans with Disabilities Act may apply to those in treatment for or recovery from opioid use disorder (OUD). The DOJ makes several points of significance to employers.

In the guidance, the DOJ asserts that drug addiction is a disability under the ADA, as long as the individual is not currently using illegal drugs. The ADA regulations define "current illegal use of drugs" as the "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

What this actually means has been unclear, with some courts in the past taking the position that the employee must have completed treatment and been "clean" for some significant period of time. However, the DOJ, as well as the Equal Employment Opportunity Commission, are taking a more aggressive approach to the definition. Thus, the DOJ states that, although those engaged in the current illegal use of drugs are not protected by the ADA, those in treatment or recovery from OUD are. More specifically:

- The ADA protects individuals who are taking legally prescribed medications for opioid use disorder ("MOUD," i.e. methadone, buprenorphine, or naltrexone) under the supervision of a licensed health care professional to treat OUD.
- The ADA also protects individuals currently participating in a drug treatment program.
- Those with a history of past OUD are also protected by the ADA, since the ADA protects individuals with a "record of" disability.
- In addition, those who are "regarded as" having OUD are also protected by the ADA. The DOJ offers the example of an employer believing an employee has OUD because the employee uses opioids legally prescribed by her physician for pain. If the employer fired that employee, it would be a violation of the ADA.
- Employers may have a drug policy and conduct drug testing for opioids. However, an employee who tests positive because they are taking legally prescribed opioids may not be fired or denied employment based on their drug use, unless they cannot do the job safely and effectively or they are disqualified under another federal law (such as Department of Transportation regulations).

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Notably, on this last point, although the DOJ guidance does not address it, the EEOC guidance on this topic for employees (there is no guidance for employers) makes clear that employees taking legally prescribed opioids may be entitled to a reasonable accommodation, if the medical condition causing the pain requiring the use of such medication constitutes a disability. Such accommodation could include allowing the use of opioid medications, although as noted above, such use cannot prevent the safe and effective performance of the job or violate some other law. But even in that case, employers may need to consider transferring the employee to an open position that would permit such use, if no other reasonable accommodation is available. Employees may also be entitled to a reasonable accommodation to avoid relapse, such as scheduling changes to allow the employee to attend a support group meeting or therapy session.

Thus, it is important that if an employee is taking MOUD or in other treatment, or if they are taking legally prescribed opioids, that the employer engage in the interactive discussion to ascertain if a reasonable accommodation is available. Additionally, as the EEOC notes, employees may also be entitled to take leave under the Family and Medical Leave Act for treatment or recovery.

What the EEOC's "Equity Action Plan" May Mean for Employers

Only days after being sworn into office, President Biden signed Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government." On April 14, 2022, the Equal Employment Opportunity Commission released its Equity Action Plan in accordance with that E.O., containing several items of interest or significance for employers.

The plan sets forth four general categories of action, but buried within the discussion of each are some interesting details:

- *"Improving worker access to the EEOC's charge filing process so that individuals in rural areas, with inflexible schedules or with limited digital resources can use EEOC services with greater ease."*

  The EEOC will make it easier for workers to file charges, which may result in an increase in charge activity faced by employers. The EEOC will do this by, among other things: streamlining the process to shorten wait times for intake appointments; increasing staffing, including multilingual staffing, at its national call center; making its online intake forms and public portal available in Spanish and potentially other languages; and increasing the number of outreach events in rural areas.

- *"Engaging with a broad range of employers, researchers, and worker and civil rights organizations to support diversity, equity, inclusion and accessibility."*

  After gathering information from employers, employees and employee organizations, the EEOC will initially focus on highlighting efforts to increase equity in recruitment and hiring, with a later expansion to promoting DEIA in retention and representation in management. The EEOC's initiative on the use of artificial intelligence and algorithms in making employment decisions will be a part of this, so employers should keep an eye on these new technologies.

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- *"Further developing the EEOC's data collection and analysis to support effective enforcement and to empower individuals to exercise their civil rights."*

  The EEOC will update its charge-related forms related to gender self-identification beyond the traditional male/female categories (which it also separately announced on March 31, 2022). It will also consider updating categories on the EEO-1 form, including further breakdowns on ethnicity, as well as potentially adding sexual orientation, gender identity, and disability status.

  Of particular interest, employers may recall that, in September 2016, the EEOC issued a revised EEO-1 survey form that added the requirement for employers with 100 or more employees to provide aggregated data for the prior year on pay and hours worked, broken down into 12 pay bands across the 10 job categories, by racial, ethnic, and sex groups (Component 2). This latter requirement, which was subject to legal challenge, was in effect only for two years, and EEOC officials under the Trump administration questioned the utility of this data. However, the EEOC under the Biden administration announced that it was conducting an analysis of this data and, in the Equity Action Plan, states that it will formulate additional goals with respect to pay data after the analysis is completed. We further note that EEOC Commissioner Keith Sonderling has publicly stated that this Component 2 requirement will be resurrected. Any such effort will likely be met with a fresh round of litigation, however.

- *"Continuing to improve access to EEOC's resources for people whose primary language is not English as well as those who have limited digital or reading proficiency*."

  This step will make the EEOC's materials and services available to more people, which may also increase charge-filing activity. The EEOC intends to update its website to make the most important and popular materials available in other languages beyond just English and Spanish. It will also make its materials more accessible to low-literacy and disabled individuals through the use of alternative formats, including print and radio.

NLRB General Counsel Seeks to Do Away with "Captive Audience" Meetings

National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo is targeting so-called "captive audience" meetings and has asked the Board to find such meetings unlawful. Employers often hold these meetings during union organizing campaigns to present their views to assembled employees regarding unionization and other issues relating to employee working conditions. If the Board ultimately sides with the GC, employers will be found to have violated the National Labor Relations Act (NLRA) even if such meetings do not involve unlawful statements or activities.

On April 7, Ms. Abruzzo issued GC Memo 22-04 and announced that she would urge the Board to reconsider (read: overrule) precedent and ban mandatory meetings where employers discuss union activity or other protected activities with employees. In her memo titled "The Right to Refrain from Captive Audience and Other Mandatory Meetings," Ms. Abruzzo argues that such meetings "inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if

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they exercise their protected right not to listen to such [employer] speech." Further, she would ask the Board to hold that in two circumstances employees will understand – even if they are not told as much – that their presence at an employer meeting is mandated: where employees are (1) forced to convene on paid time, or (2) cornered by management while performing job duties. Ms. Abruzzo posits that in both cases employees are a "captive audience" deprived of their right to refrain from listening to employer speech and are compelled to listen by a threat of discipline or other reprisals.

If the Board eventually sides with the GC, it will overturn 75 years' worth of precedent holding that such meetings are not inherently unlawful. In 1948, the Board held in *Babcock & Wilcox Co*. that an employer does not violate the NLRA by requiring employees to attend speeches in which it urges them to reject union representation. The state of the law on this subject has been undisturbed through numerous administrations of both major political parties.

It did not take long for Ms. Abruzzo's office to find a case to use as a vehicle to ask the Board to ban these mandatory meetings. Just four days after issuing GC Memo 22-04, the GC's office filed its brief in *Cemex Construction Materials Pacific, LLC*, urging the Board to overturn *Babcock & Wilcox* and hold that "captive-audience meetings regarding the exercise of Section 7 rights are per se unlawful." The GC's argument reasons that employees "will reasonably perceive a threat of reprisal for failure to attend, whether or not a threat is openly stated" or the employer does not state that the meeting is mandatory. Further, the GC asks the Board to find that an employee has been unlawfully "cornered" into a "captive-audience meeting" when a supervisor approaches them while they are performing job duties, because employees will supposedly perceive they cannot abandon their work and refrain from listening to the employer without risking reprisal. According to the GC's brief, an employer would escape liability only if it states that:

- Attendance is entirely voluntary;
- Employees are free to leave at any time if they choose to attend;
- Non-attendance will not result in reprisals, including loss of pay for choosing not to attend if the meeting occurs during the employee's regular working hours;
- Attendance will not result in rewards or benefits.

Even if such assurances are provided in advance, the GC has asked that the Board require them to be repeated at the start of the meeting. As for "cornered employees," an employer will have to state that participation in the discussion is voluntary, that non-participation will not result in reprisals, and that participation in the discussion will not result in rewards or benefits.

Takeaway: If the Biden Board accepts the GC's invitation to reverse nearly 75 years of precedent and find such mandatory meetings unlawful, it will significantly impact the way employers respond to union organizing campaigns. Employers would now be required to repeatedly recite a list of assurances to assembled employees, as well as employees it merely stops to speak with about issues related to unionization or working conditions. Failure to recite these assurances will result in violation of the NLRA, even where the employer does not state attendance is mandatory or where the employer's speech does not otherwise violate the NLRA. Moreover, such a Board decision may affect employers' ability to persuade employees who have heard only one side of the unionization

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argument and have either determined they do not wish to hear the employer's position or do not wish to be perceived by union-supporting colleagues as interested in hearing the employer's position.

As always, we will keep you updated regarding this important issue.

TAKE NOTE

Do Not Include Arbitration Agreements in Your Employee Handbook. This was the lesson that a company recently and sadly learned, when the U.S. Court of Appeals for the Fourth Circuit found its arbitration agreement to be invalid because of the handbook disclaimer.

In *Coady v. Nationwide Motor Sales Corp.*, the employer's Employee Handbook contained an arbitration agreement, which provided that the employee's signature on the handbook receipt confirmed the employee's understanding of the agreement. The handbook receipt itself stated that the handbook was a reference source for policies, procedures and benefits, and that the employer reserved the right to "enforce, change, abolish or modify" existing policies, procedures and benefits "as it may deem necessary with or without notice." The Fourth Circuit found that this language rendered the arbitration agreement invalid since "Under Maryland law, a promise to arbitrate is illusory—and thus cannot constitute the consideration necessary to support a binding contract—if the employer reserves the right to alter, amend, modify, or revoke the Arbitration Policy . . . at any time with or without notice."

As a general matter, handbooks typically include disclaimers to prevent employees from claiming that the policies constitute some sort of contract. That means it is critically important for employers to keep separate from the handbook any agreements that they want to be able to enforce – such as arbitration agreements or restrictive covenants.

RIF Criteria Should Be Clear and Consistent. When conducting a reduction in force, it is important to ensure that the criteria by which employees are either retained or selected for termination are clearly identified and applied consistently, as the U.S. Court of Appeals for the Fifth Circuit recently reminded employers.

In *Gosby v. Apache Industrial Services, Inc.*, an employee was terminated as part of a RIF only days after suffering a diabetic attack at work. She sued, alleging discrimination under the Americans with Disabilities Act. The Fifth Circuit found the employer's reasons for her selection for the RIF to be questionable. The company's managers gave different rationales for inclusion in the RIF at different times. One set of criteria was "performance, the skillset of the individuals, and time on the worksite." But another explanation focused on job level, customer requirements, and attendance, along with seniority, skills, and discipline. Moreover, the Fifth Circuit noted that there was no evidence that both the terminated and retained employees were evaluated against any fixed criteria; while there was documentation of the assessments of the terminated employees, there was no similar documentation for the retained employees. The Fifth Circuit found "[t]he inconsistent explanations and the absence of clear criteria" could demonstrate that the company's stated reasons for the RIF were actually pretext for disability discrimination.

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This case highlights some of the many legal landmines that can be triggered in a RIF. In addition to establishing clear and consistent criteria, and documenting the application of the same, there are also potential issues with the possible discriminatory impact of those criteria on a particular protected group (e.g. age, minority, gender, use of protected leave, etc.). In addition, if the employer is seeking a release of claims in exchange for a severance package, there are technical requirements that must be met under certain federal and some states' laws. Wise employers should work closely with employment counsel in conducting a RIF.

Severity of Discipline May Be Based on the Employee's Reaction to A Charge of Misconduct. The U.S. Court of Appeals for the Seventh Circuit rejected a race discrimination claim based on different levels of discipline received by two employees for the same misconduct, finding that more serious discipline was imposed not based on race but the employee's conduct following the charge of misconduct.

In *Reives v. Illinois State Police*, a special agent and his partner both submitted falsified timecards in connection with a particular assignment. Based on concerns about one of their reports, their superiors directed them to prepare honest and accurate memoranda that detailed their activities on the assignment. The special agent falsified his activities on his memorandum (as proven by available security footage), while his partner submitted a truthful memorandum. The special agent received more serious discipline than his partner. He sued, claiming that the difference in discipline was based on race.

The Seventh Circuit disagreed. Although both agents had falsified their timecards, the special agent had also falsified the information in his memorandum as well as throughout the department's investigation, while his partner had not. While the partner accepted responsibility for his wrongdoing, the special agent did not. Thus, the Seventh Circuit found that the special agent could not properly compare his situation to that of his partner for purposes of establishing a discrimination claim.

There will certainly be times when employees should be subject to the same level of discipline for the same type of misconduct. But this case reminds employers that an employee's reaction to a charge of wrongdoing can be taken into account in determining the appropriate discipline. An employee who is genuinely contrite may be entitled to more consideration than one who digs themselves a deeper hole.

Closely-Related Small Companies May Be Integrated Under the ADA. Although companies with fewer than 15 employees are not covered by federal anti-discrimination laws, including the Americans with Disabilities Act, the U.S. Court of Appeals for the Ninth Circuit found those that are sufficiently related may be combined to trigger ADA coverage.

In *Buchanan v. Watkins & Letofsky, LLP*, the employee worked for a law firm with fewer than 15 employees. When she brought a lawsuit for violations of the ADA, her employer argued that the ADA did not apply because of its size. However, the Ninth Circuit has previously recognized the "integrated enterprise doctrine" in the context of Title VII and the Age Discrimination in Employment Act, under which an employee can bring suit if they can establish that their employer is "so interconnected with another employer that the two form an integrated enterprise" and the integrated enterprise has at least the threshold number of employees (15 for Title VII, 20 for the

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ADEA). Ruling on this question for the first time, the Ninth Circuit found that the integrated enterprise doctrine equally applies to the ADA, which shares the same 15-employee threshold and statutory enforcement scheme as Title VII. (We note, however, that the Equal Employment Opportunity Commission has long taken this approach).

In determining whether two employers are sufficiently interrelated, the court considers the following factors: interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control. In this case, the employee alleged that her employer was part of an integrated enterprise with another firm. There was evidence that both firms shared a website and toll-free number, employees of both used the same email template footer with both offices, and both offices shared operational and administrative work, an IRS taxpayer ID number, and an employee roster. Moreover the same two individuals own both firms, are the only partners of both firms and manage both offices, including all significant employment matters. Based on this evidence, the Ninth Circuit held that a jury could find an integrated enterprise that could be held liable for violations of the ADA.

Thus, owners of multiple small companies should be aware of the possibility that their companies could be combined for purposes of triggering coverage under federal anti-discrimination laws. If they wish to keep the companies truly separate, they will need to take appropriate steps to establish each company's independence from the other(s).

"I'm Working From Home" ≠ Request for FMLA Leave. An employee must actually request leave (for a covered reason) in order to trigger the protections of the Family and Medical Leave Act – and saying that they are working from home is not a request for leave, as the U.S. Court of Appeals for the Third Circuit recently noted.

In *Conway v. ConnectOne Bank*, the employee was a Senior Vice President for Commercial Lending, whose job required him to travel and allowed him to work frequently from home. After each of his wife's two surgeries, the employee told his managers that he would be out for a significant amount of time and working from home. The employee was subsequently terminated for lack of performance, and he sued for violations of the FMLA and analogous state law.

The Third Circuit rejected the employee's claim that he was protected by the FMLA because he told his employer that his wife had surgery and he needed to work from home to care for her. As the Third Circuit noted, "[t]o give proper notice, an employee must request or relay an intention to take leave." The Third Circuit made the reasonable observation that, "An employee who says that he intends to work while out of the office has not conveyed to his employer that he is unable to work or that he seeks time off."

Although, this case offers good news to employers that employees must actually request leave in order for the FMLA to apply, they should be aware that, as the Third Circuit noted, there is "considerable leeway" in how leave may be requested. The employee does not need to reference the FMLA. As long as they provide enough information to the employer that they need time off or are unable to work for a reason that is potentially covered by the FMLA, they will be entitled to the protections of the law.

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OFCCP Compliance Evaluations Will Be More Challenging. The Office of Federal Contract Compliance Programs released a new directive that "will strengthen OFCCP compliance evaluations and reduce delay by promoting the timely exchange of information." But what this really means for contractors is a less transparent and less cooperative process. Among the things the directive does:

- Rescinds four Trump era directives that were intended to provide transparency, efficiency and certainty to contractors in their dealings with the OFCCP.
- Eliminates the automatic 30-day extension for the submission of certain data that was available under the transparency directive. The OFCCP will grant extensions on a case-by-case basis, and only in "extraordinary circumstances."
- Provides that reviews may be scheduled immediately following the release of the Corporate Scheduling Announcement List (CSAL), rather than 45 days later.
- States that the neutral scheduling procedures for compliance evaluations will be enhanced to reach a broader universe of contractors and subcontractors.
- Reiterates the OFCCP's ability to require supplemental information and data and to expand its investigation.
- Emphasizes the OFCCP's access to employees, applicants and other witnesses. In addition, the directive notes that, while the contractor's attorneys may be present for OFCCP interviews of management personnel, they will not be permitted to attend the interviews of non-management employees, except as requested by the employee. The contractor's attorneys will also generally not be able to participate in the interviews of former employees.
- Highlights the required use of the new Contractor Portal to increase contractor and subcontractor accountability for compliance with their obligations under applicable Executive Orders, laws, and regulations.

OFCCP Updates Hiring Benchmark for Protected Veterans. The Office of Federal Contract Compliance Programs released its annual update of the hiring benchmark for protected veterans to 5.5%, effective March 31, 2022, based on recently-released data from the Bureau of Labor Statistics. Under revised Vietnam Era Veterans' Readjustment Assistance Act regulations issued in 2014, covered government (sub)contractors must set a veterans' hiring benchmark for each of their establishments, either by using the OFCCP's annual benchmark as set forth in its VEVRAA Benchmark Database, or by developing their own individualized benchmarks. While the original 2014 hiring benchmark was set at 7.2%, we have seen a steady decrease in the percentage each year since. The current 5.5% figure represents a slight decrease from last year's 5.6% benchmark.

NEWS AND EVENTS

Webinar – The Employment Law Alliance, of which we are the Maryland member, is presenting a complimentary webinar on May 3, 2022 at 3:00 p.m. Eastern, "DC Briefing: Review of recent developments in the legal landscape that impact US employers." Top attorneys who specialize in various areas of the US government will provide an update on key topics from the OFCCP, EEOC, NLRB and DOL's Wage & Hour agencies. You may register for this webinar here.

Honor – Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q1 2022. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted

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its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the twelfth consecutive quarter and thirteenth time overall that Fiona has received this honor.

Presentation – Parker E. Thoeni was a presenter for the Employment Law Alliance's April 27, 2022 webinar on "Protecting the Company: Non-competes, Non-disclosures and Non-solicitation." The ELA is a comprehensive global network of leading local labor, employment and immigration attorneys, of which our firm is the Maryland member. A recording of the presentation may be accessed here.

Presentation – Lindsey A. White moderated an April 28, 2022 presentation with the Chair of the Equal Employment Opportunity Commission, Charlotte Burrows, for the American Bar Association Section of Labor and Employment Law's National Symposium. In conversation with Lindsey, Chair Burrows discussed the EEOC Initiative on Artificial Intelligence and Algorithmic Fairness.

Presentation - Fiona W. Ong and Parker E. Thoeni, along with Maddy Voytek of the Maryland Chamber of Commerce, presented a webinar on Complying with Maryland's New Employment Laws on April 28, 2022. A recording of the presentation, conducted in partnership with the Maryland Chamber, may be accessed here.

Leadership – Fiona W. Ong was re-appointed to the Board of Directors for the Maryland Chamber Foundation, which focuses on the research and educational objectives of the Maryland Chamber of Commerce. Fiona also serves as General Counsel for both the Chamber and the Foundation, and is a member of the Chamber's Executive Committee. She is the first minority and second woman to serve in these positions, following Elizabeth Torphy-Donzella. The Chamber is the leading voice for businesses in Maryland.

TOP TIP: Employers - Make Sure the Evidence Supports the Story

When taking disciplinary action against an employee, it is important for employers to ensure that the underlying evidence clearly supports the reason for such action. Sometimes, decisionmakers get caught up in the emotion of the moment and do not necessarily maintain objectivity, or they do not take the time to fully investigate and confirm the situation. This kind of tunnel vision can cause problems in defending such decisions, as the U.S. Court of Appeals for the Sixth Circuit recently found.

In *Courtney v. Wright Medical Technology*, an employee who had received generally good performance reviews was fired by his new supervisor, not for performance, but for "style, approach and behavior" issues for which he had not received progressive discipline. The company cited three specific incidents to justify the termination decision: an email exchange in which the employee failed to provide his supervisor with an adequate response as to why the warehouse sprinkler system was set up a particular way, the employee's disparagement of the supervisor to a governmental agency, and an incident in which he threatened another employee. The company also asserted that there had been ongoing issues with leadership that predated the new supervisor. The employee was replaced by a younger individual, and he sued for age discrimination.

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The Sixth Circuit found that the employer's stated reasons for the termination were not factually supported. With regard to the email exchange, although the company characterized the employee's communications as non-responsive, the Sixth Circuit found that a jury could determine that the employee had provided both an answer to the supervisor's question as well as a narrative explanation (i.e. "The sprinklers are a code requirement and we cannot remove them," along with the actual code provisions). The Sixth Circuit also rejected the company's characterization of the employee's responses as "evasive," "coy," and "short," noting that the supervisor initiated the discussion with "stern and accusatory language" (i.e. "In 25 years, I have never seen this .... This is ridiculous and was a terrible waste of money.").

As to the alleged disparagement, the agency had sent several letters to the company noting that several company representatives had recently reached out about the sprinkler system requirement because current (unspecified) management was "upset." Although the supervisor believed the employee had inappropriately communicated the supervisor's feelings about the sprinkler system to the agency, the employee denied doing so, asserting that he only stated that management wanted to know if they could change the system. The Sixth Circuit noted that the letters themselves did not support the company's conclusions – the letters referenced inquiries from "various" company employees and did not clearly disparage the supervisor.

Next, although the company characterized the interaction between the employee and a co-worker as "workplace violence," both of them disagreed with the company's view of the event. Importantly, the alleged victim denied that the employee raised his voice or threatened him.

And finally, the Sixth Circuit noted that the company's assertion that the employee had ongoing issues with leadership was not supported by any documentation – in fact, all of his reviews reflected that he exceeded expectations or was outstanding in his role.

What this case emphasizes is that employers must be thoughtful and objective in assessing the evidence that will support a disciplinary or other adverse employment action. It is important to step back and consider how a jury, judge or fair employment agency might view relevant documents, and to confirm that the testimony of witnesses will actually support the company's position.

RECENT BLOG POSTS

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

- Extraordinary Workplace Misconduct: Celebrating You Is a Piece of Cake… by Garrick Ross and Fiona W. Ong, April 21, 2022
- New Employment Laws in Maryland – Paid Family and Medical Leave, Expanded Definition of Harassment, Disability Accommodations and More by Fiona W. Ong, April 12, 2022 (Selected by Lexblog as one of its best blog posts of the week)
- The Maryland General Assembly Just Passed Paid Family and Medical Leave – What's Next for Employers? by Fiona W. Ong, April 6, 2022

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