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E-UPDATE

May 31, 2022

RECENT DEVELOPMENTS

The DOL Issues Guidance on Mental Health and the FMLA

Marking National Mental Health Awareness Month, the U.S. Department of Labor issued several resources addressing employee use of leave under the Family and Medical Leave Act for mental health conditions, including a fact sheet, FAQs, and a blog post.

- **Fact Sheet - "Mental Health Conditions and the FMLA."** Noting that mental health conditions may constitute an FMLA serious health condition, the DOL makes the following points of significance.
  - Mental health conditions are considered serious health conditions if they require either inpatient care or continuing treatment by a health care provider.
    - Inpatient care includes an overnight stay in a hospital or other treatment facility, such as a treatment center for addiction or eating disorders.
    - Continuing treatment by a health care provider means either:
      - Conditions that incapacitate an individual for more than three consecutive days and require multiple appointments with a health care provider, including a psychiatrist, clinical psychologist or clinical social worker, OR a single treatment by such a provider with follow-up care, such as prescription medication, outpatient rehabilitation counseling, or behavioral therapy.
      - Chronic conditions, including anxiety, depression or dissociative disorders, causing occasional incapacity and requiring treatment by a health care provider at least twice a year.
  - Leave may be taken for the following reasons (with the DOL's examples)
    - The employee's own mental health condition. For example, an employee with severe anxiety may take FMLA when she is unexpectedly unable to work due to her condition and for regularly scheduled appointments with her doctor.
    - To care for a family member with a mental health condition, including providing psychological comfort and reassurance that would be beneficial to that family member. For example, an employee may use FMLA leave to travel to an inpatient facility and attend an after-care meeting for an under-18 child completing an inpatient drug rehabilitation treatment program.
    - Although an employee's child typically must be under age 18, FMLA leave is available to care for an adult child where they are incapable of self-care because of am ADA-covered mental disability, including conditions such as major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, and schizophrenia. Such conditions may be active only

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periodically (rather than constantly), and may have started at any age (not just under 18). For example, an employee may use FMLA to care for an adult daughter who was recently released from inpatient care for a mental health condition that prevents her from working or going to school, and who requires help with cooking, cleaning, shopping and other daily activities.

  - To care for a military servicemember (spouse, adult child, parent, or next of kin) with a mental health condition that was incurred or aggravated in the line of duty, including PTSD, a traumatic brain injury (TBI), or depression. For example, an employee whose spouse developed PTSD after being discharged from military service may use FMLA to take them to outpatient treatment at a VA hospital and to assist with day-to-day needs when incapacitated.

- **FAQs – Mental Health and the FMLA**. Through a series of questions and answers, the DOL states that FMLA leave is available for the following mental-health-related situations (reiterating, in large part, information from the Fact Sheet):
  - When an employee is unable to work due to a chronic mental health condition (like severe anxiety) that causes occasional periods of incapacity and for which the employee is receiving treatment from a health care provider at least twice a year.
  - For treatment visits and therapy sessions for the employee's mental health condition that constitutes a serious health condition.
  - To care for an adult child if the child is incapable of self-care and needs care because of an ADA-covered disability that is also an FMLA-covered serious health condition.
  - To care for a family member undergoing inpatient treatment for a mental health condition, including participating in their treatment program or attending a care conference with the family member's health care providers.
  - To provide physical (e.g. helping with basic medical, hygienic, nutritional or safety needs) and psychological care to a family member with a mental health condition, like depression. The employee need not be the only person available to provide care.
  - To care for a family member who is a veteran suffering from a mental health condition that was incurred or aggravated during military duty, although it may not manifest itself until after discharge – such as PTSD, TBI, or depression.

  The DOL further makes the following points:

  - Employers must keep mental health records confidential and separate from the employee's regular personnel file. Managers and supervisors may be informed of an employee's medical leave, work restrictions, or need for reasonable accommodations under the ADA.
  - Employers may not discriminate or retaliate against employees for exercising or attempting to exercise their FMLA rights – including by considering FMLA leave for employment actions like hiring, promotions or discipline or counting FMLA leave in points-based attendance policies.

- **Blog Post – "The Family and Medical Leave Act: Essential for Mental Health-Friendly Workplaces."** In the DOL's blog post, it emphasizes the availability of FMLA leave for employees due to their own mental health disorders or to care for family members with such

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conditions. It references the new fact sheet and FAQs, and notes that "all have a role to play in promoting mental-health friendly workplaces." The DOL asserts that it will focus on FMLA outreach and enforcement, while identifying the following for employers and employees:

- Organizational leadership can set the tone for a supportive, inclusive workplace.
- Managers and supervisors can provide accommodations and promote assistance programs.
- Co-workers can listen and be a source of support to colleagues.
- Workers with mental health conditions can ask for what they need to perform their best.

The EEOC and DOJ Offer Suggestions to Employers on Avoiding Disability Discrimination When Using AI Technologies

The Equal Employment Opportunity Commission and the U.S. Department of Justice each issued guidance about possible discrimination in violation of the Americans with Disabilities Act when employers make employment decisions based on their use of artificial intelligence and other software tools. They further suggested "promising practices" to help avoid such discrimination.

- **EEOC – The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees**. In this technical assistance document, the EEOC identifies the most common ways that an employer's use of AI tools could violate the ADA: by failing to provide a reasonable accommodation to enable the applicant/employee to be rated fairly and accurately; by using an AI tool that intentionally or unintentionally screens out those with disabilities, even if they are able to do the job with a reasonable accommodation; or the use of the AI tool violates the ADA's restrictions on medical inquiries and examinations. Types of software that may utilize AI include resume scanners, employee monitoring software, virtual assistants or chatbots that screen applicants, video interviewing software that assesses facial expressions or speech patterns, and testing software.

  Of particular use to employers, the EEOC provides "promising practices" related to the use of AI tools, including the following:
  - Training staff to recognize and process requests for reasonable accommodation as quickly as possible.
  - Training staff to develop or obtain alternative means of rating applicants or employees where the current process disadvantages them because of a disability.
  - If the AI tool is administered by another entity, ensure that the entity either provides reasonable accommodations or promptly forwards requests for accommodation to the employer.
  - Ensure that AI tools have been designed to be as accessible to individuals with as many different kinds of disabilities as possible.
  - Describe, in plain language and accessible formats, the AI tools being used, what traits are being assessed and how, and the factors that may affect the rating.
  - Inform all applicants and employees of the availability of reasonable accommodations, and provide clear instructions for requesting accommodations.
  - Ensure that AI tools only and directly measure those abilities and qualifications that are truly necessary for the job, even for those requiring a reasonable accommodation.

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- Confirm with the software vendor that the AI tool does not improperly elicit information about a disability or seek information about an individual's physical/mental impairments or health.

- **DOJ – Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring**. The DOJ's technical assistance document does the following:
  - Provides examples of the reasons why employers may use AI:
    - to show job advertisements to targeted groups;
    - to decide if an applicant meets job qualifications;
    - to hold online video interviews of applicants;
    - to use computer-based tests to measure an applicant's skills or abilities; and
    - to score applicants' resumes.
  - Clarifies that, when designing or choosing technological tools, employers must consider how their tools could impact different disabilities.
  - Explains that employers may violate the ADA when using AI technologies, including those developed by others, if such tools screen out people with disabilities.
  - Asserts that testing technologies must evaluate job skills, not disabilities, and must not improperly elicit or request medical information.
  - States that employers must provide reasonable accommodations in connection with the use of AI. The DOJ also reiterates that employers should inform applicants about what AI technologies are being used and how and should provide clear procedures for requesting reasonable accommodations.
  - Provides information for employees on what to do if they believe they have experienced discrimination.

Supreme Court Holds that Prejudice Is Not Required to Find Waiver of Right to Arbitration

According to the U.S. Supreme Court, it is not necessary to find that an employee has been prejudiced by the employer's delay in invoking an arbitration agreement in order to determine whether the employer has waived the right to arbitration.

Background of the Case. In *Morgan v. Sundance, Inc.*, an employee filed a nationwide collective action against her employer, alleging violations of the Fair Labor Standards Act. After engaging in litigation for almost 8 months, the employer then sought to compel arbitration based on an arbitration agreement signed by the employee when she applied for employment. The employee opposed, arguing that the employer had waived its right to arbitrate.

The U.S. Court of Appeals for the Eighth Circuit applied its prior case precedent under which a party waives its right to arbitration where it knew of the right, acted inconsistently with that right, and prejudiced the other party by its actions. Here, the Eighth Circuit found no prejudice to the employee and therefore no waiver. Although the prejudice requirement is not part of general federal waiver law, the Eighth Circuit, along with eight other Circuit Courts, had adopted it based on the "federal policy favoring arbitration." Other federal Circuit Courts, however, have rejected such a requirement.

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The Supreme Court's Ruling. The Supreme Court rejected the prejudice requirement, finding that federal courts may not create arbitration-specific variants of federal procedural rules, like waiver rules based on the Federal Arbitration Act's "policy favoring arbitration." The policy is simply an acknowledgement that agreements to arbitrate, which were previously disfavored by courts, should be placed "upon the same footing as other contracts." A party may be held to an arbitration contract just as any other contract, but courts may not create "novel" rules to favor arbitration over litigation.

What This Means for Employers. Arbitration agreements will be treated as standard contracts, and general contract law will apply to determine whether a contract may be enforced. However, the specific framework for determining whether an employer has relinquished its contractual right to require arbitration of employment matters was not decided by the Supreme Court. This case involved a waiver argument, but the Supreme Court specifically declined to decide whether that was the appropriate framework, or whether some other framework, such as forfeiture, should apply – that decision was left to the lower courts to decide, which can and will likely lead to different approaches in different jurisdictions.

But the larger lesson here is that employers facing litigation from an employee should promptly determine whether the employee has signed an arbitration agreement and, if the employer wishes to invoke such an agreement, should move expeditiously to do so.

TAKE NOTE

NLRB General Counsel Announces New Protocol to Protect Immigrant Workers. Following her announcement of an initiative to ensure the rights of immigrant workers under the National Labor Relations Act (as discussed in our November 2021 E-Update), the National Labor Relations Board's General Counsel, Jennifer Abruzzo, issued a memo earlier this month that sets forth a new protocol for Board agents working with immigrant witnesses, including the use of a new Immigrant Worker fact sheet.

In her memo, General Counsel Abruzzo describes the fact sheet as explaining "that immigration status is not relevant to whether there has been a violation of the NLRA, that information obtained during NLRB investigations is protected, and that a charging party or witness can ask the NLRB to seek immigration relief for employees at a worksite if it is necessary to protect employees who are participating in NLRB processes or exercising their rights under the NLRA." She directs Board agents to distribute this fact sheet to all witnesses before taking their testimony. She further directs Information Officers assisting visitors or callers with the preparation of a charge for filing to provide a copy of the fact sheet along with any draft charge. And she reminds Board agents to verbally advise a witness before preparing their affidavits that their immigration or work authorization status is not relevant to the Board's investigation and that the Board will not ask about it.

The Scope of an EEOC Charge Defines the Scope of a Lawsuit. The U.S. Court of Appeals for the Fourth Circuit recently reminded employers (and employees) of this principle when it rejected the claims that an employee failed to include in her charge of discrimination before the Equal Employment Opportunity Commission.

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Before filing a discrimination lawsuit in federal court, employees must first file a charge of discrimination with the EEOC regarding the allegedly discriminatory acts. As the Fourth Circuit has previously noted, "Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII [or ADEA] lawsuit."

In the present case of *Walton v. Harker*, the employee filed a charge regarding her reassignment to a different position, which she termed "a demotion." During her lawsuit, however, in response to the employer's motion for summary judgment (in which the employer argued that, as a matter of law, her claims had no merit), the employee, for the first time, asserted claims that she had been excluded from a particular team and denied unspecified promotions. The Fourth Circuit noted that these new claims had not been raised in her initial charge, did not surface during the EEOC investigation, and were not reasonably related to her supposed demotion. Accordingly, she had failed to meet the administrative prerequisite of filing a charge regarding these matters, and the Fourth Circuit threw out these claims.

In defending against a federal lawsuit, therefore, it is important for employers (or, really, their counsel) to review the original charge and investigative materials in order to ensure that the employee has, in fact, satisfied the administrative charge filing requirement as to all claims. An employee's failure to do so should result in the dismissal of any claims beyond the scope of the charge.

Work Restrictions Cannot Prevent an Employee from Actually Performing a Job. While the Americans with Disabilities Act requires employers to provide reasonable accommodations to employees with health-related work restrictions, the employee must still be able to demonstrate that they can perform the essential functions of the job (including any job to which the employee might be transferred as part of the reasonable accommodation obligation).

In *Ehlers v. University of Minnesota*, the employee held a position that primarily involved answering customer questions by phone, in person, and by email, and resolving customer issues. She was diagnosed with Temporomandibular Joint Syndrome, which affected her jaw and therefore her ability to speak. She was granted leave, a reduced schedule, and time off for medical appointments. Over the next several months, she subsequently requested numerous and extensive additional accommodations, most of which could not be accommodated. She further informed her employer that she had been diagnosed with overuse injuries resulting from constant typing that impacted her neck, back, hand, elbow, forearm, head and face, as well as anxiety and PTSD. The employer noted that her job could not be restructured to a nonspeaking or reduced speaking role, and repeatedly offered to assist her in finding a new position. The employee identified a number of positions of interest, some of which were filled and others inconsistent with her work restrictions, while the employer sought additional information regarding the rest. She then requested another leave, which was granted. She was subsequently terminated and sued, alleging failure to accommodate by providing her with an alternative position.

As the U.S. Court of Appeals for the Eighth Circuit noted, reassignment "is an accommodation of last resort when the employee cannot be accommodated in his existing position." The employee must show that there is an available position for which they are qualified. In this case, although the employee identified eight positions, she did not provide evidence about the duties and requirements

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of the positions or whether she could perform them given her severe and extensive work restrictions. Thus the Eighth Circuit found that she was unable to show that she was qualified for any of the positions, with or without reasonable accommodations.

In this case, it was important that the employer repeatedly offered to help the employee find another position, and worked to determine whether those positions fit within her restrictions – not an easy or quick task given her extensive limitations. This reminds employers of the need to explore possible reassignment as an accommodation when an employee cannot do their original job because of their medical condition and to provide assistance to the employee in reviewing available positions in order to meet their obligations under the ADA.

Just Because an Employer's Termination Reason Is False Doesn't Necessarily Mean It's Discrimination. Highlighting an interesting point in the analysis of a discrimination claim, the U.S. Court of Appeals for the Fifth Circuit stated that an employee must do more than prove the employer's asserted justification for termination is false in order to sustain a discrimination claim – there must be evidence that the actual reason was discriminatory.

In a discrimination case without direct evidence of discrimination (such as racist or sexist comments), the *McDonnell Douglas* burden-shifting framework applies. Under this Supreme Court-established framework, the employee must first establish a *prima facie* case of discrimination by showing that (1) they belong to a protected group; (3) they were qualified for their position; (3) they suffered an adverse employment action; and (4) a similarly-situated employee outside of their protected group was treated more favorably or, as in this case, replaced them. The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the action. And then the burden shifts back to the employee to establish that the employer's asserted reason is pretext for discrimination.

In *Owens v. Circassia Pharmaceuticals, Inc.*, the employee was terminated and she sued, alleging race and sex discrimination. The Fifth Circuit found she had established a *prima facie* case, and the employer articulated a legitimate, non-discriminatory reason – poor performance. The Fifth Circuit notes that, while "[m]ere disputes over an employer's assessment of performance," including conclusory statements or the employee's own assessment of her performance, are not sufficient to meet the plaintiff's burden of showing pretext, in this case, the employee offered objective evidence that the employer's actions did not "logically comport" with its stated assessment of her performance – i.e. that it was false. "But that alone is not enough. The evidence must permit a reasonable inference that [the employer's] false reason was pretext for the true, discriminatory reason." And this showing the employee could not make. The Fifth Circuit quoted the Supreme Court that "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."

Although this was a win for the employer, by no means should employers seek to rely on this argument as a primary defense to a claim of discrimination. Providing a false or illogical reason for an employment action is never a good idea – and with slightly different facts, can easily lead to a viable claim of discrimination. In this case, the employer may well have avoided the significant cost and inconvenience of litigation had it been more thoughtful and logical in its actions and explanations.

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Is "Tenure" a Euphemism for Age? Although acknowledging the possibility, the U.S. Court of Appeals for the Fifth Circuit nonetheless found that a manager's stated refusal to hire "tenured employees" was not direct evidence of age discrimination in this particular case.

As the Fifth Circuit explained, comments will constitute direct evidence of discrimination when they are 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the complained-of adverse employment decision; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue. If these criteria are not met, such comments are considered "stray remarks" that will not, by themselves, support a claim of discrimination.

In *Smith v. AT&T Mobility Services, LLC*, an employee sued for failure to promote. In support of his claim, he cited a comment to him from his manager that she was "not going to hire any tenured employees" into a manager role because the new facility is "state of the art . . . with the highest technology and equipment," and she needs managers who are "innovative" and capable of leading the facility "in the right direction."

The Fifth Circuit found that "'tenured employees' logically appears to be a euphemism for age'" since the promotion in question requires experience or "tenure," while the comments about technology and innovation have "nothing to do with seniority and everything to do with stereotypes about age." However, the Fifth Circuit went on to note that direct evidence "proves the fact without interference or presumption," while "tenured" is not a term that is synonymous with age or generally recognized as ageist. Thus, the plaintiff had to present evidence that his manager intended "tenure" to mean age – such as testimony from other employees that "tenure" "is commonly understood to be code for 'age' within the company."

Thus, whether terms like "tenure" can constitute direct evidence of discrimination may very well depend on the circumstances at a particular company. What is code at one company may not be at the next. But regardless, such language may still be considered indirect evidence of discrimination – and managers should be careful to avoid using terms and phrases that could be construed in a discriminatory fashion.

OFCCP Update for Government Contractors – Impending Contractor Evaluations, Upcoming Contractor Portal Deadline. On May 20, 2022, the Office of Federal Contract Compliance Programs published its latest Corporate Scheduling Announcement List (CSAL), identifying those supply and service contractors who have been selected for a Compliance Review (Establishment Review), Corporate Management Compliance Evaluation, or Functional Affirmative Action Program Review.

The CSAL functions as a courtesy notification of a contractor's selection for an evaluation; the contractor will receive a formal letter that will commence the actual review process. In the past, the OFCCP provided a 45-day grace period between issuance of the CSAL and transmittal of any letters; however, as discussed in our April 2022 E-Update, the OFCCP recently released a new compliance evaluation directive that, among many other things, eliminated this grace period. This means that letters may start arriving promptly.

This is also a good time to remind supply and service contractors and subcontractors of their obligation to register with the OFCCP's new Contractor Portal by June 30, 2022. As discussed in our

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December 2021 E-Update, those contractors and subcontractors must use this new portal: (1) to annually certify whether they have developed and maintained an affirmative action program for each establishment and/or functional unit; and (2) to submit their AAPs during compliance evaluations by the OFCCP. The OFCCP has provided resources to assist covered contractors and subcontractors in complying with this new requirement, including FAQs, a webinar, how-to videos, and a user guide.

NEWS AND EVENTS

Conference – Parker Thoeni will be a speaker at the Maryland Manufacturing Extension Partnership's Manufacturing Workforce Innovation Conference, taking place on June 8, 2022 at the Hilton Baltimore BWI. This one-day conference is focused on providing manufacturing leaders and HR professionals with insights, best practices, and industry trends to solve current and future workforce challenges. Parker will be presenting a session on "Top 5 Issues for Employers: A Discussion Around Legal Challenges, Questions and Concerns." For more information and to register, click here.

Victory - Eric Hemmendinger, Teresa Teare, and Lindsey White, with the assistance of Paul Burgin and Evan Conder, successfully opposed a motion by the plaintiff in a significant class and collective action seeking individualized classwide discovery, including production of a list with contact information for all putative class members, even though the Court had not granted conditional certification. If a Court grants conditional certification, it is tasked with supervising the process of providing judicial notice to absent class members. Production of contact lists prior to conditional certification, as sought by plaintiff in this matter, provides plaintiffs the ability to improperly solicit additional claimants to join the case and provide widespread notice to potential claimants without judicial supervision.

Presentation – On May 19, 2022, Darryl McCallum presented a webinar, "A Path Out of The Pandemic: Adapting to a Post-Pandemic Workplace," on behalf of the Better Business Bureau of Greater Maryland.

TOP TIP: Non-Competes in the Context of the Sale of a Business

Many employers require certain of their employees to execute non-competition agreements as a condition of employment at the time of hire. Similarly, in many business acquisitions, there is an agreement by the seller of a company not to compete with the purchasing business for a period of time. While courts closely scrutinize non-competition agreements in the context of employment, they offer much greater latitude in the context of the sale of a business. Which standard applies is not always clear, however.

Background of the Case. In the recent case of *Progressive Technologies v. Chaffin Holdings, Inc.*, the U.S. Court of Appeals for the Eighth Circuit analyzed whether to apply the employment standard or the sale of business standard to a non-competition agreement. The case involved an asset purchase agreement, an employment agreement, and a non-competition agreement.

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In the asset purchase agreement, the plaintiff, Progressive, agreed to pay almost $2 million over three years to purchase the individual defendant, Chaffin's, business. The court did not elaborate as to whether the asset purchase agreement contained any restrictive covenants. The employment agreement, which provided for employment for one year followed by at-will employment for an indefinite period, required Chaffin to assist with new sales and to transition relationships to Progressive. Following the one-year term, Chaffin remained employed for five and a half years at which time Progressive terminated his employment.

The non-competition agreement prohibited Chaffin from being involved in the "Video Security Business" throughout Arkansas for five years, the restrictive period beginning on the later of the date of the execution of the non-competition agreement or the termination of Chaffin's employment.

Following the termination of his employment, Chaffin allegedly breached the non-competition agreement and Progressive sued him for, among other things, breach of contract. The U.S. District Court granted a broad preliminary injunction, but the Eighth Circuit reversed.

The Eighth Circuit's Ruling. In its analysis, applying Arkansas law, the Eighth Circuit reiterated the general principle that courts apply "stricter scrutiny to noncompete agreements in employment contracts…than those connected with a sale of a business." (internal quotations omitted). In determining that the non-competition restriction should be analyzed in the context of employment rather than sale of business, the Eighth Circuit focused on the following factors: (1) The termination of Chaffin's employment triggered the non-competition obligations; (2) Progressive characterized the obligations as "post-employment" and "post-termination" restrictions; and (3) The lack of close temporal proximity between the sale of the business and the enforcement action (six and a half years and more than three years after Progressive finished paying for the business).

In applying the stricter employment standard, the Eighth Circuit deemed the restriction overbroad both because the temporal scope of five years extended longer than necessary to protect Progressive's legitimate business interests and because the scope of the activity restricted, which included any activity engaged in by Chaffin from the time of the sale to the time of his termination, was similarly overbroad.

In its discussion, the majority opinion noted the absence of binding case law in Arkansas to provide guidance on this analysis. Our state of Maryland similarly lacks binding case law on this point, but at least one Maryland court, in *Allegis Group, Inc. v. Jordan*, has analyzed a hybrid non-competition agreement in the same manner, citing as persuasive authority the Virginia case of *Capital One Financial Corp. v. Kanas*.

Lessons for Employers. It is not unusual to see the seller of a business hired as an employee subject to restrictive covenants. Purchasers should be mindful to structure their agreements with the understanding that restrictions connected to the post-sale employment are likely to be more closely scrutinized than those that are related solely to the sale of the business and such restrictions will run from the date of the transaction rather than the termination of employment.

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