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E-UPDATE

July 29, 2022

RECENT DEVELOPMENTS

The Novavax Vaccine May Mean Fewer Religious and Medical COVID Vaccine Exemptions

The FDA's approval of the Novavax vaccine may be a game changer in the tumultuous COVID vaccine mandate situation. Unless limited by state law, employers may require employees to become fully vaccinated against COVID – subject to exemptions as reasonable accommodations for disability or religious needs. Many employees have invoked such exemptions – but the Novavax vaccine may reduce the number of employees who would be entitled to them.

In the context of the COVID pandemic, the EEOC, OSHA and President Biden have all issued guidance, statements, or orders that support the employer's right – or even require an employer – to mandate vaccination for its employees (although President Biden's orders are subject to legal challenge or have been overturned). However, Title VII requires employers to provide reasonable accommodations to such vaccine mandates for an employee's religious belief, while the Americans with Disabilities Act requires such accommodations for an employee's disability. Thus, employees with legitimate medical issues or conflicting religious beliefs are entitled to an exemption from the mandate as a reasonable accommodation, to the extent that such accommodation does not pose an undue hardship – such as where an unvaccinated employee poses a direct threat to workplace safety. (We discuss the EEOC's recent updates to the direct threat analysis for vaccine mandates in our July 15, 2022 blog post, The EEOC Updates Its COVID Guidance for Employers – Testing, Accommodations, Direct Threat and More).

Religious Exemptions. One of the major religious objections to the Moderna, J&J/Janssen and Pfizer vaccines is that fetal cell lines from aborted fetuses were used in the development of these vaccines. According to Novavax, in a February 2022 statement to Religion News Service, however, "No human fetal-derived cell lines or tissue … are used to develop, manufacture, or produce" its vaccine. Thus, employees with such religious objections may be required to receive the Novavax vaccine (absent valid bases for other religious or medical exemptions). This would include those employees who previously received religious exemptions on this basis.

Medical Exemptions. Among the common and valid reasons for medical exemption requests are a documented history of a severe allergic reaction to any component of a COVID-19 vaccine or to a substance that is cross-reactive with a component, and a severe allergic reaction after a previous dose of the COVID-19 vaccine. Because the Novavax vaccine is a traditional protein-based vaccine, rather than a mRNA vaccine like the other existing options, it contains different components. Thus the allergy concerns related to the other vaccines may not apply, depending, of course, on the individual's specific allergies. Again, employees who previously received medical exemptions on this basis might now be required to obtain the Novavax vaccine.

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But Remember Those State Laws! Many states have enacted or are considering restrictions on a company's right to require proof of vaccination (e.g. bans on so-called "vaccine passports"). These bans come in many different forms. Some are limited to governmental or public entities. Others prohibit private entities from requiring vaccine passports in providing goods, services, or access to the public, but do not govern employers' ability to impose a vaccine mandate on their employees. Some states prohibit employers from requiring proof of vaccination, and many other states have similar legislation pending before their state legislatures.

Another type of relevant state law or order requires employers to provide exemptions to any vaccine mandates beyond religious and medical exemptions. Such exemptions may need to be provided for personal or philosophical objections, as well as "natural immunity."

It is critically important for employers seeking to impose vaccine mandates to stay on top of any changes in state law on this issue.

Monkeypox in the Workplace: A Practical Guide for Employers

The World Health Organization has declared monkeypox to be a global health emergency – a designation currently held only by COVID-19 and polio. In the U.S., cases are rapidly rising, and the federal Centers for Disease Control and Prevention (CDC) has created a monkeypox website.. Although the total number of U.S. cases is currently less than 3000, our recent experience with COVID-19 is a lesson for employers to be proactive in preparing for yet another infectious outbreak. Many of the workplace considerations learned from COVID-19 are equally helpful in helping employers protect the workplace from monkeypox.

Just as with COVID, there is no one size fits all answer. The right choices will depend on the type of workplace, the job the employee performs, and the employer's tolerance for legal risks (to name a few of the considerations an employer would take into account).

What is Monkeypox and How Does it Spread? Monkeypox is a viral infection that is related to smallpox, although typically less severe and rarely fatal. The symptoms of monkeypox can include fever, headache, muscle aches and backache, swollen lymph nodes, chills, exhaustion, and a rash that can look like pimples or blisters on the face, inside the mouth or elsewhere on the body, including the hands, feet, chest, genitals, or anus. It typically lasts 2-4 weeks. The incubation period lasts between 6-13 days.

Monkeypox spreads person-to-person, from the time symptoms start until the rash has fully healed, through:

- direct contact with the infection rash, scabs or body fluids
- respiratory secretions during prolonged face-to-face contact or intimate physical contact
- touching contaminated items.

Cases have been reported among household members, as well as sexual partners. It seems that monkeypox is less transmissible than COVID-19, however, meaning that precautions need not be as stringent.

What U.S. Government Agencies Are Saying. In the U.S., the Center for Disease Control is simply monitoring the situation, asserting that the risk to general public is low. It has issued a Level

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2 travel alert, recommending enhanced precautions during travel, given that monkeypox has been found in countries all around the world – and not just in those central or west African countries where it normally occurs.

It does not appear that OSHA has yet issued any guidance on monkeypox. Nonetheless, the general OSHA standards would apply, including the General Duty Clause that requires employers to provide a safe and healthy working environment. Employers must furnish a place of employment free from recognized hazards that may cause death or serious physical harm.

Employer Actions. If the monkeypox outbreak becomes more widespread within the community or if there is a case in the workplace, employers should then conduct a workplace hazard assessment and take control measures similar to that set forth in OSHA's COVID-19 guidance. Of note, OSHA offers a free and confidential on-site consultation program to small and medium businesses, with priority given to workplaces at high risk for infection (e.g. healthcare or congregate settings). To locate the OSHA On-site Consultation Program nearest you, call 1-800-321-OSHA (6742) or visit https://www.osha.gov/consultation.

The following suggestions are generally based on the CDC's and OSHA's COVID-19 guidance:

- **Employee Education**. Just as with past outbreaks, there will likely be some misunderstanding of how monkeypox is transmitted, and where the outbreaks are occurring. Employees should be educated as to the facts, which should calm some of the fears in the workplace.

- **Reiterate Non-discrimination Policies**. In the context of the COVID pandemic, there was significant and widespread anti-Asian discrimination. Given that the monkeypox is typically found in central and west Africa, and is commonly spread during male-male sex, there is the possibility of discrimination on the basis of race and national origin, as well as sexual orientation. Employers must be vigilant to ensure this does not occur in the workplace, by emphasizing non-discrimination policies and responding promptly to complaints of discrimination.

- **Prevent Infection in the Workplace**. Employees should be trained or reminded to take preventive steps in the workplace to avoid spreading monkeypox as well as other infections, like COVID-19, the flu or a cold. These steps include: encouraging frequent handwashing/sanitizing, providing or allowing employees to use protective gear such as masks/face coverings and gloves, perform regular cleaning and disinfection of the workplace, and instructing employees to seek medical treatment immediately if symptoms appear following exposure to monkeypox. The CDC suggests calling ahead to the medical center or doctor's office before arriving, to allow them to prepare to minimize contact with other patients.

  Healthcare employers need to ensure that their workers are complying with OSHA requirements on personal protective equipment, as well as the CDC's Infection Prevention and Control of Monkeypox in Healthcare Settings.

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- **Business Travel**. Certainly, employers should continue to monitor the CDC's travel advisories, but no restrictions are currently recommended.

- **Exposures and Quarantine.** It would seem that the exposure to monkeypox must be more significant than under COVID – involving more direct and prolonged contact with an infected individual or materials. Employers may require employees who have that level of exposure to monkeypox to remain out of work for the incubation period, either with or without pay. They could also permit employees to return to work, subject to self-monitoring, and with appropriate protective measures – such as wearing a mask and enhanced sanitary/cleaning precautions.

  Another approach, in keeping with past CDC guidelines, is to require employees who have been exposed to monkeypox to be assessed by their doctor, in consultation with public health authorities, in order to determine their risk level and what actions are appropriate. Whether the employee would be permitted to return to work, with self-monitoring, would depend on the doctor's assessment.

- **Confidentiality**. Any information received from employees with regard to monkeypox exposure, symptoms, and medical examinations should be treated as a confidential medical record (meaning that it is kept in a secure file separate from the employee's personnel file). It is not appropriate for the employer to discuss the individual employee's exposure, symptoms or results of medical examinations with the co-workers, or even managers who do not have a business need to know. Employers may and should communicate that they have implemented monkeypox policies and that the policies are being followed with regard to all employees to ensure a safe workplace.

- **Review and Remind Employees About Sick Leave Policies**. Given the increasing proliferation of sick leave laws at the state and local level, employers should ensure that their sick leave policies are compliant with any applicable law. In addition, employees should be kept informed of such policies and any employee assistance policies. In addition, employers may wish to identify a company representative to assist employees who are exposed or become ill. And employers may require employees who have contracted monkeypox (and other infectious illnesses) to be cleared by a doctor before returning to work.

- **Telecommuting**. If an employee is required to remain home for the incubation period or if they are out because of actual illness, telecommuting may or may not be an option, depending on the type of work performed by the employee. Because of COVID, many of the logistical issues regarding remote work have already been addressed.

- **Consult with Your Attorney**. In developing a written policy or protocol, we suggest that you consult with counsel to ensure that, before the proposed policy/protocol is implemented, legal risks have been identified and assessed, and that the policy/protocol is appropriate for your specific workplace. In addition, what the policy/protocol actually contains may need to be modified as the monkeypox situation further develops.

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Federal Court Blocks Enforcement of EEOC Sexual Orientation and Gender Identity Guidance

In June 2021, the federal Equal Employment Opportunity Commission issued resources on workplace protections for LGBTQ+ employees, including a technical assistance document entitled "Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity," which we discussed in a June 16, 2021 E-lert. A federal district court has now enjoined enforcement of that guidance – but not in all states.

What the Guidance Says: Among other things, the guidance takes the following rather aggressive positions:

- Employers cannot require a transgender employee to dress in accordance with the employee's sex assigned at birth.
- Employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity.
- Use of pronouns or names that are inconsistent with an individual's gender identity could be considered harassment.

In issuing the guidance, the EEOC asserted that it was explaining the Supreme Court's decision in *Bostock v. Clayton County*, which held that Title VII's protections against sex discrimination encompass sexual orientation and transgender status, and was reiterating "the EEOC's established legal positions on sexual-orientation- and gender-identity-related workplace discrimination issues." The EEOC contended that the document did "not have the force and effect of law" but was only intended to provide clarity on already-existing requirements.

Challenge to the Guidance: The EEOC's guidance was met with immediate controversy, including from the Republican EEOC Commissioners, as EEOC Chair Charlotte Burrows had unilaterally issued the document without a Commission vote. The Attorneys General of twenty states filed suit challenging the EEOC guidance, as well as other guidance issued by the Department of Education, on the grounds that the issuance of the guidance did not comply with applicable legal requirements.

Under the federal Administrative Procedures Act, when issuing final agency actions that determine certain rights and obligations, an agency must publish notice of the proposed rule and allow public comments that it must consider before publishing a Final Rule. Non-binding agency interpretations do not have the same legal force and effect, and are therefore not subject to the notice and comment process. In this case, the agencies argued that their guidance were merely interpretive, while the challengers contended that they were final agency actions, for which the agencies failed to engage in the notice and comment process.

The Court's Decision: A federal district court in Tennessee agreed with the challengers, calling the EEOC's above-described labels "self-serving." The court found that the EEOC guidance determined the "rights or obligations" of those subject to Title VII, and thus constituted final agency action. The court stated that, "The Technical Assistance Document purports to speak authoritatively on specific conduct that constitutes discrimination based on sexual orientation and gender identity," specifically as to the dress, locker room/bathroom, and pronoun issues referenced above. The guidance also invites employees to contact the EEOC if they believe their rights have been violated in this manner.

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The court also found that the guidance extends far beyond the limited reach of the *Bostock* decision, in which the Supreme Court specifically "refused to decide whether 'sex-segregated bathrooms, locker rooms, and dress codes' violate Title VII." The guidance "advance new interpretations of Titles VII … and impose new legal obligations on regulated entities." Thus, the guidance constitutes a legislative rule that is, by definition, a final agency action. Because the EEOC failed to comply with the required notice and comment process, the court then issued a preliminary injunction precluding enforcement of the guidance by the EEOC against the plaintiff states in order to protect those states from harm pending a determination of the merits of the case.

What This Means for Employers: Technically, the court's order applies only to those states that challenged the guidance: Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia. The injunction will remain in effect in those states until and unless the court comes to a different decision, or the matter is appealed to the U.S. Court of Appeals for the Sixth Circuit, and further to the U.S. Supreme Court. In the remaining 30 states and the District of Columbia, however, the guidance remains in effect, although it is questionable how aggressive the EEOC will be pending resolution of the current case. This ruling is a significant blow against the Biden administration's anti-discrimination efforts on behalf of LGBTQ+ individuals.

TAKE NOTE

US DOL Seeks Public Input on Long COVID. The U.S. Department of Labor is inviting the public to participate in an online dialogue about the workplace challenges related to long COVID – a condition where those infected by COVID experience new or lingering symptoms over weeks or months. Such symptoms can include shortness of breath, fatigue, brain fog, heart palpitations, headaches, anxiety, depression, and more.

As we previously discussed in our July 2021 E-Update, the Biden administration has asserted that long COVID may be a disability under the Americans with Disabilities Act. This means that employers must not discriminate against employees with that condition and may need to provide reasonable accommodations to enable them to perform their essential job functions or to enjoy equal privileges and benefits of employment, absent an undue hardship.

The DOL is asking the public – which includes employers – to share their experiences and insights on long COVID, in order to determine how to better support both workers and employers in the context of the laws that it enforces, including the Fair Labor Standards Act and the Family and Medical Leave Act. Those who are interested in participating may visit https://longcovidatwork.ideascale.com/.

EEOC Prohibits Employers from Requesting COVID Test Results for Family Members. The Equal Employment Opportunity Commission has engaged in a rather troubling expansion of the Genetic Information Nondiscrimination Act, as reflected in its July 6, 2022 announcement of agreement to resolve certain GINA claims against a private employer.

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According to the EEOC, the employer had been collecting the COVID-19 test results of employees' family members. The EEOC asserts that this violates GINA, which generally prohibits employers from requesting or requiring genetic information about employees and their family members. The law defines "genetic information" to include "the manifestation of a disease or disorder in family members of such individual." The employer agreed to stop collecting such information, and to provide leave time and back pay to impacted employees.

Although it is not clear from the news release, we suspect the employer was requiring the employees to submit such test results in order to determine whether the employee had been exposed to COVID at home, and thereby required to quarantine (implicating the use of paid or unpaid leave). This, of course, is a reasonable concern during the ongoing pandemic. The designation of "family members," however, may not have been sufficiently thoughtful, since the concern is really more appropriately regarding contact with "household members." We also think it seems reasonable to require test results in order to confirm whether the individual did, in fact, have COVID. But apparently, the EEOC does not agree.

Of more significant concern, however, is the EEOC's assertion that the test results violate GINA. As reflected in the preamble to GINA, the purpose of the law was to address concerns arising out of developments in the field of genetics and to prohibit discrimination on the basis of genetic information. COVID certainly is not a genetic disease, and to read the definition to include any illness – including non-genetic, contagious diseases - in a family member is, in our view, well beyond the intended scope of the law. We believe that, if the EEOC's position were challenged in court, it would likely be overturned. Nonetheless, unless and until some brave employer is willing to be the test case, employers should be careful to avoid asking for family member COVID test results.

D.C. Enacts Employment Protections for Marijuana Users. The Mayor of the District of Columbia has signed a bill that protects marijuana/cannabis users from adverse employment actions for off-duty use, with certain exceptions. Following a typical period of Congressional review, the law will take effect upon the date of inclusion of its fiscal effect in an approved budget and financial plan or 365 days after the Mayor approves this Act, whichever is later (i.e. at least a year from now). Beyond the general prohibition, the Act specifically provides:

- Employees, which includes unpaid interns, may not use or otherwise handle marijuana at the workplace, while performing work, or during work hours.
- Employers may prohibit employees from being impaired at work and may take adverse action if the employee manifests specific articulable symptoms of impairment during work hours that substantially and negatively impacts the employee's performance or interferes with the employer's legal obligation to provide a safe and healthy workplace.
- There is an exception for those in "safety sensitive positions," defined as positions designated by the employer in which it is reasonably foreseeable that if the employee performs the position's routine duties or tasks while under the influence of drugs or alcohol, the person would likely cause actual, immediate, and serious bodily injury or loss of life to self or others. Examples of such positions include security services, construction, vehicle or heavy/dangerous equipment operators, hazardous materials handlers, certain medical caregivers, and caregivers to vulnerable adults.

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- Another exception is where the employer must prohibit employees' marijuana use under federal statute, federal regulations, or a federal contract or funding agreement.
- Employers may have a reasonable drug-free workplace policy that provides for post-accident or reasonable suspicion testing of employees in safety-sensitive positions.
- Employers must provide employees with notice of their rights under this Act, whether they are designated safety-sensitive, and any testing protocols. This notice must be provided to all employees within 60 days after the law takes effect and then annually, and to all new hires. The DC Office of Human Rights (OHR) will develop a template for the required notice.
- Employees may file complaints with the DC OHR up to one year after an alleged violation. The Act sets forth a mediation and fact-finding process, including judicial review, for such complaints.
- The Act also provides that employees may file suit against the employer, under certain circumstances.
- The Mayor will issue rules implementing this Act, but enforcement will not be delayed pending issuance of the rules.

D.C. Eases Off Its Proposed Non-Compete Ban. This month, the D.C. Council passed the Non-Compete Conflict of Interest Clarification Amendment Act of 2021, which narrowed the scope of the very broad ban on non-competition agreements pursuant to the Ban on Non-Compete Agreements Amendment Act of 2020 (which we previously discussed here and here). In an apparent recognition of the overbreadth of the law, the D.C. Council meaningfully narrowed the ban on non-competes in the following ways:

Definition of Covered Employee Narrowed. The definition of "Employee" has been narrowed in several respects. First, the definition now applies only to employees who perform 50% or more of their work in D.C. or who have D.C. as a base, perform substantial work in D.C., and do not perform 50% or more of their duties in another jurisdiction.

Second, the new law creates a definition for "highly compensated employees" who are excluded from coverage unless they fall into the category of "broadcast employees." Non-competition agreements are generally permitted for highly compensated employees, employees earning $150,000 or more ($250,000 for medical professionals), an amount that will be adjusted annually based on the Consumer Pricing Index. For highly compensated employees, a non-competition agreement must be provided at least 14 days prior to the commencement of employment and must set forth the scope of activity restricted, the geographic scope, and the temporal scope must be limited to 365 days (except that a 730-day restriction is permitted for medical professionals).

Scope of Prohibition Narrowed. The definition of non-compete agreement, which was particularly problematic under the original law, and seemed to abrogate the common law duty of loyalty, has been appropriately narrowed. Under the Clarification Amendment Act, the definition no longer includes agreements that prohibit employees from accepting work that would reasonably require the employee to (i) disclose or use an employer's confidential information; (ii) create a conflict of interest; (iii) interfere with the duties of an employee of a higher education institution; or (iv) impair the employer's ability to comply with D.C. or federal law, a contract, or a grant agreement.

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Also carved out are agreements that contain long term incentives, a term that is broadly defined.

Effective Date and Applicability Date. The bill has been transmitted to the Mayor with a response deadline of August 4, 2022. Assuming the Mayor signs the bill into law, it will become effective following a 30-day Congressional review period and publication in the District of Columbia Register. The bill further states that it shall become applicable on October 1, 2022, meaning that it does not resolve the confusion that existed in the original law between the effective date and the applicability date.

Be Accurate With Those Performance Reviews! A recent case reminds employers that performance reviews are compelling evidence – both positively and negatively – in employment discrimination cases.

In *Cowgill v. First Data Tech., Inc.*, the call center employee had back issues for which she required leave under the Family and Medical Leave Act and the Americans with Disabilities Act. During her nine years of employment, she routinely received above-average performance reviews. However, she was terminated following two customer call issues. She then filed suit, alleging disability discrimination, among other things.

In order to bring a claim of disability discrimination, an employee must establish that (1) she was disabled; (2) she was discharged; (3) she was fulfilling the employer's legitimate expectations when discharged; and (4) the circumstances of the discharge suggests unlawful discrimination. The trial court threw out her lawsuit, finding among other things that she had not met the employer's legitimate expectations.

On appeal, however, the U.S. Court of Appeals for the Fourth Circuit reversed the trial court's ruling, stating, "If an employer genuinely believed that one of its employees was performing poorly on metrics the employer perceives as important (as First Data claims here), it seems unlikely that it would rate the employee's performance highly." Based on these evaluations, as well as some other factual disputes, the Fourth Circuit found that a reasonable factfinder could conclude that the employee had been subjected to disability discrimination.

So the lesson here is that managers need to ensure that performance reviews accurately reflect the employee's actual performance. Many times managers don't take the time to complete these carefully, or prefer to avoid the hard task of dealing with an employee's performance concerns. Those evaluations can certain come back to bite the employer, as was the case here. Conversely, a well-considered and thoughtful series of performance evaluations that note continuing performance issues can be powerful evidence to counteract an employee's assertions of excellent – or even adequate – performance.

Federal Agencies Partner to Combat "Anticompetitive and Unfair Labor Practices." In furtherance of the strong pro-worker stance of the Biden administration, various federal agencies have entered into agreements that allow them to share information and partner on initiatives that promote workers' rights. We had previously written about the commitment of the General Counsel of the National Labor Relations Board to better interagency cooperation, as well as the agreement between the NLRB and the Department of Labor. This month brings two more agreements.

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The NLRB has entered into Memoranda of Understanding with the Department of Justice and the Federal Trade Commission to facilitate (1) information-sharing and cross-agency consultations for law-enforcement purposes, (2) cross-agency training to provide education about the laws and regulations each enforces, and (3) coordinated outreach and education of the public. The MOU with the DOJ identifies areas of shared interest in protecting workers who have been harmed or may be at risk of being harmed as a result of interference with the rights of workers to obtain fair market compensation and to freely exercise their legal rights under the labor laws. The MOU with the FTC asserts that the agencies share interests in "gig economy" concerns such as misclassification of workers and algorithmic decision-making, one-sided noncompete and nondisclosure provisions, and the ability of workers to act collectively.

As we previously noted, these agreements mean that employers should be prepared for more aggressive enforcement by the NLRB, as well as the involvement of other agencies in matters that traditionally were handled by a single agency.

A Job Coach Might Be a Reasonable Accommodation. The U.S. Court of Appeals for the Seventh Circuit rejected an employer's request to find that a permanent, full-time job coach is never a reasonable accommodation under the Americans with Disabilities Act.

The ADA requires employers to provide reasonable accommodations to employees with disabilities to enable them to perform their essential job functions or to enjoy equal benefits and privileges of employment, absent an undue hardship. Courts and the Equal Employment Opportunity Commission have acknowledged that there are some accommodations that are unreasonable as a matter of law – such as indefinite leave or reassignment in violation of a seniority system.

In *EEOC v. Walmart*, the employer argued that a permanent full-time coach fell into that category. The Seventh Circuit, however, rejected the employer's argument. It clarified that the accommodation must itself create "an inability to do the job's essential tasks" in order to be *per se* unreasonable. Otherwise, courts must apply the ADA's "default fact-based case-by-case approach" to assess the reasonableness of the requested accommodation. The Seventh Circuit acknowledged that, "To be sure, employers need not pay twice for the same work" if another employee is performing the essential functions of the job for the disabled employee; however, that was not at issue in this case as the employee's job coach was paid for by Medicaid, not the employer.

Thus, employers should take note that a full-time job coach – even one who may be assisting the employee to do the essential functions of the job (but not performing it for them) – may be a reasonable accommodation. It is necessary to engage in a case-by-case assessment.

Protected Activity Need Not Involve the Same Employer for Purposes of Retaliation Claim. A recent case highlights the fact that an employer may be found liable for retaliation under federal anti-discrimination laws even when the employee's protected activity is against another employer.

In *Patterson v. Georgia Pacific, LLC*, an HR manager testified in a pregnancy discrimination case against her former employer. Her current employer fired her a week later, and the employee brought a retaliation claim. In addition to prohibiting discrimination on the basis of race, sex, religion, national origin, and color, Title VII also prohibits retaliation against an employee who has opposed discrimination, or who has made a charge, testified, assisted, or participated in any manner in a discrimination proceeding, such as an investigation or lawsuit (i.e. Title VII's opposition clause).

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The trial court dismissed the employee's case because she had not engaged in protected activity against her current employer. The U.S. Court of Appeals for the Eleventh Circuit, however, reversed the trial court's ruling, noting that nothing in the law limits the protected activity to the current employer. Thus, the Eleventh Circuit held that "a current employer may not retaliate for opposition clause conduct even if it is directed at or involves only a former employer."

It is important for employers to recognize that an employee's actions in opposing discrimination will be protected – even if it is directed at another entity.

NEWS AND EVENTS

Honor – Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q2 2022. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted 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 thirteenth consecutive quarter and fourteenth time overall that Fiona has received this honor.

Presentation – Teresa D. Teare recently served as a panel member for the Associated Builders and Contractors of Metro Washington's Wage Theft Compliance Series.

TOP TIP: Employers, You Don't Always Have to Call Your Attorney First… Take a Look at the US DOL's elaws Advisors

As attorneys, of course we are delighted to answer questions from our clients – even basic ones. But the U.S. Department of Labor has provided many free resources for employers to educate them about and help them comply with their obligations under a multitude of workplace laws. A particularly useful tool that many employers may not know about is the elaws Advisors. Although the elaws Advisors are directed at workers and small employers, they provide an excellent overview of numerous federal employment laws for employers of all sizes.

The elaws Advisors are a set of interactive, online tools on specific topics covered by particular laws. They are not simply an extended narrative of every aspect of these laws, much of which may not be relevant to an employer's specific question or issue. Rather, they take a "Choose Your Adventure" approach (for those of us who remember these books, popular in the '80s) that provides more targeted information for a particular situation.

For example, the FMLA elaws Advisor:

- Starts with an overview of the Family and Medical Leave Act.
- The reader then clicks on a link that takes them to the "Coverage and Eligibility" page, which sets forth options to "Determine Employer Coverage" or "Determine Employee Eligibility."

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- If the reader clicks on the first link, they jump to a page that asks them to select a type of employer: "Private employer," "School," or "Government" (which are the three categories of employers covered under the FMLA).
- If the reader clicks on the "Private Employer" link, they jump to a page that asks whether the employer has employed 50 or more employees during 20 or more calendar workweeks in either the current or preceding calendar year, with options for responding "Yes," "No" or "Unsure." There is also explanation of what it means to be employed (with a link for further detail), and clarification that employment must be within the US or a US territory/possession.
- Further answers take the reader to other pages with relevant information beyond these basics.

The DOL has created many different elaws Advisors, which are sorted into seven different categories (and a master list). Those of general relevance include the following:

- Pay & Benefits (which includes Advisors on Fair Labor Standards Act (FLSA) coverage, overtime calculations, determining FLSA-exempt status, hours worked under the FLSA, ERISA fiduciaries, FMLA, health benefits, small business retirement savings, and the Worker Adjustment and Retraining Notification (WARN) Act)
- Posters & Recordkeeping (including Advisors on a legal overview of the applicable laws, recordkeeping/reporting/notices, and required posters under DOL-enforced laws)
- Veterans' Issues (which includes Advisors on Uniformed Services Employment and Reemployment Rights Act (USERRA), and VETS-4212 reporting (required of federal contractors and subcontractors), among other things)

- Safety & Health (including hazard awareness and recordkeeping, in addition to various other OSHA standards. There is also an OSHA Software Expert Advisors link to a range of interactive off-line training tools explaining how OSHA regulations apply to unique work sites)
- Youth Employment (including a Child Labor Rules Advisor)
- Federal Contractor (including Advisors on federal contractor compliance and disability nondiscrimination)

So, employers, if you don't want to pay your attorney to answer some basic (and perhaps even no-so-basic) questions about how these workplace laws apply to you, these elaws Advisors may be quite useful. The DOL is engaging in outreach to inform employers of these resources (including by contacting us to help them get the word out!). And if these resources don't answer your questions – then call your attorney!

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