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E-UPDATE

February 28, 2023

RECENT DEVELOPMENTS

NLRB Prohibits General Non-Disparagement and Confidentiality Clauses in Severance Agreements

In a disturbing case applicable to all employers – union and non-union alike – the National Labor Relations Board asserts that severance agreements may not contain general non-disparagement or confidentiality clauses. According to the Board, such clauses violate the rights of employees under Section 7 of the National Labor Relations Act to engage in concerted activity for their mutual aid or protection (i.e. "protected concerted activity).

Historically, the Board has disfavored such provisions in severance agreements. However, in several 2020 cases, *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, the Trump Board found such provisions to be permissible. According to the Trump Board, the agreements containing such provisions were not mandatory, pertained exclusively to post-employment activities and therefore had no impact on terms and conditions of employment, and were not proffered coercively. But now, in *McLaren Macomb*, the Biden Board has overruled those cases.

Background of the case. The employer offered severance agreements to furloughed employees. The agreements provided severance pay in exchange for a release of claims, as well as standard provisions broadly prohibiting disparagement of the employer and requiring confidentiality of the terms of the agreement, as follows:

> **Confidentiality Agreement**. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> **Non-Disclosure**. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

The agreement further provided for monetary and injunctive sanctions for violations of these provisions.

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The Board's Decision. The Board admittedly takes a "broad" approach to the protection of Section 7 rights. According to the Board, it now "return[s] to the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful." The acceptance or nonacceptance of the agreement by the employee is "immaterial," as the "mere proffer of the [unlawful] agreement itself violates the Act." The Board will look to the language of the provisions themselves, and will consider such language unlawful if, read broadly, it could potentially impact employees' Section 7 rights.

Specifically as to the provisions in question, the Board found the rather typical non-disparagement provision "on its face substantially interferes with employees' Section 7 rights." The Act protects employees' right to make public statements about the workplace, including critiques of employer policies or statements that the employer has violated the Act (as long as the communications are not so "disloyal, reckless or maliciously untrue as to lose the Act's protections"). In the Board's view, this "comprehensive ban would encompass employee conduct regarding any labor issue, dispute, or term and condition of employment." The Board also found problematic that the ban applied also to statements about the employer's parent and affiliated companies, and officers, directors, employees, agents and representatives. Moreover, there was no time limit on the ban. According to the Board, "The end result is a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee."

With regard to the also rather typical confidentiality provision, the Board found it broadly prohibited the disclosure of the agreement – and any illegal provision contained therein – to any third person. The Board stated that, "This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the [employer's] use of the severance agreement, including the nondisparagement provision." The Board also stated that it would prevent employees from discussing the terms of the agreement with other co-workers (which may assist employees to decide whether to accept similar agreements) or the union.

Takeaways for Employers. It is clear that very standard provisions, like those in this case, will be deemed unlawful by the Board. This Board decision places significant limitations on employers' abilities to ensure that departing employees will not disparage the employer or share the terms of any severance agreement – including the amount of severance pay – with others. These matters are often a significant factor in the decision of whether and how much severance pay to offer employees, and some employers may now determine that the utility of severance agreements without such provisions is much diminished. It may be possible to include targeted disclaimers or carefully craft a narrowly tailored provision that respects the protected rights, but employers should consult with counsel.

We note that the Board's decision here is part of a larger trend, arising out of the #MeToo movement, to prohibit non-disclosure and confidentiality provisions in severance or settlement agreements. A number of states have enacted laws that prohibit such provisions – some only with regard to sexual harassment claims, but others more broadly. At the federal level, President Biden recently signed the Speak Out Act, which prohibits nondisclosure and non-disparagement provisions in pre-dispute employment agreements, as discussed in our November 2022 E-Update. In addition, the federal Tax Cuts and Jobs Act of 2018 contained a provision prohibiting the deduction, as an ordinary and necessary business expense, of any settlements of payments related to sexual harassment or sexual abuse, or associated attorneys' fees, if the settlement or payment is subject to a nondisclosure agreement, as we discussed in our December 2017 E-Update.

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Of additional interest, the Board also found that the employer had violated the Act by failing to notify the union of the furlough decision or of the severance agreement, resulting in the union's exclusion from the discussions about these significant workplace events. Thus, this case also reminds unionized employers that they should provide notice to the union and an opportunity to bargain over reductions in force and the terms of severance agreements.

Department of Labor Says FMLA Leave May Be Used to Reduce Work Schedule Indefinitely

In a troubling opinion letter for employers, the Wage and Hour Division of the U.S. Department of Labor has asserted that employees may use leave under the Family and Medical Leave Act to reduce their work hours for an indefinite period, as long as they do not exhaust their FMLA leave. It also offers some insight into the interaction of the FMLA with the Americans with Disabilities Act.

Background. Opinion letters respond to an FMLA inquiry to the DOL's WHD from an employer or other entity, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters for guidance. This opinion letter describes a 24-hour coverage requirement, where employees are scheduled for a workday lasting longer than 8 hours. However, multiple employees provided medical certifications for FMLA leave after 8 hours of work, resulting in a limited work schedule.

As the WHD notes, the FMLA provides eligible employees of covered employers (generally, those with 50 or more employees) with up to 12 workweeks of leave in a 12-month period due to the employee's serious health condition that makes the employee unable to perform their job functions. Such serious health conditions can include chronic conditions. A health care provider must certify the existence of the condition, as well as the leave medically required, which may include intermittent or reduced schedule leave. The FMLA regulations provide that employees may use intermittent or reduced schedule FMLA leave when they are unable to work required overtime hours because of an FMLA-qualifying reason.

The WHD's Opinion and Its Practical Effect. In the opinion letter, the WHD asserts that "[a]n eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement." And even more specifically, "if the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely."

As many employers know, some employees use just enough intermittent or reduced schedule leave to ensure that they never run out of leave. For example, a full-time employee scheduled to work 40 hours a week would be entitled to 480 hours (12 weeks x 40 hours) of FMLA leave in a 12-month period. If the employee took FMLA leave for 1 day a week, they would use only 416 hours of FMLA in a 12-month period. As a practical matter, they could establish a permanent 32-hour schedule using FMLA leave, while still retaining full-time status and benefits.

The WHD also takes the opportunity to remind employers that the employee's entitlement is to 12 workweeks of leave – and the workweek may differ from employee to employee. Thus, employers should not assume that all full-time employees will get 480 hours of FMLA leave. For example, if an employee regularly works 50 hours a week, they would be entitled to 600 hours of FMLA leave (12 weeks x 50 hours) in the 12-month period.

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What About the ADA? The opinion letter notes that "'disability' under the ADA and 'serious health condition' under the FMLA are different concepts and must be analyzed separately." It goes on to note, however, that "leave provided as an accommodation under the ADA may also be FMLA-protected leave."

Employees are entitled to protections under both laws, whichever is greater. One specific example provided in the opinion letter is health insurance coverage – under the ADA, a reasonable accommodation might be a transfer to a part-time job with no health benefits, but under the FMLA, the employee would be able to use FMLA leave to reduce their work schedule until they use the equivalent of 12 workweeks of leave while still maintaining their group health benefits. (Now, if the reduced schedule FMLA leave is on a regular schedule, the FMLA would allow the employer to transfer the employee to another position that better accommodates the scheduled leave – but at the same salary and benefits. Note that this transfer option, however, is not available for unscheduled intermittent leave.)

Another area in which the FMLA trumps the ADA is with regard to the impact of the leave. While the ADA provides that a reasonable accommodation cannot impose an undue hardship on the employer, the FMLA ignores the impact of protected leave on the employer. Thus an employee is entitled to take FMLA leave – apparently even on an indefinite, intermittent or reduced schedule basis – even if such leave imposes an undue hardship on the employer.

And, of course, if an employee exhausts their FMLA leave, they may still be entitled to reasonable accommodations under the ADA – which can include additional leave, to the extent such leave does not impose an undue hardship. Thus, employers must not automatically terminate employees at the end of FMLA leave, but must be careful to engage in the ADA's required interactive process to evaluate potential accommodations prior to any termination decision.

What Has Happened and What Can Employers Still Expect from the NLRB?

On February 15, 2023, Sean Marshall, Regional Director of Region 5 of the National Labor Relations Board (NLRB or Board) met with a group of labor and management practitioners at an event hosted by the Maryland State Bar Association. At the meeting, Mr. Marshall discussed case handling within the Region, summarized significant recent Board decisions, previewed several issues that may be addressed by cases pending before the Board, and addressed initiatives announced by General Counsel Jennifer Abruzzo.

An Increase in Region 5 Cases

Unions may filed Petitions with the NLRB seeking to represent a group of employees (i.e. Representation Cases), and may bring charges before the NLRB, alleging that employers have engaged in Unfair Labor Practices ("ULP") in violation of the National Labor Relations Act. In the past twelve months, Region 5 has seen 994 cases, consisting of 828 ULP Charges and 166 Representation Cases. This is an increase of 4.2% in ULP Charges and an increase of 9.2% in Representation Cases. The significant increase in Representation Cases is attributable to the wave of unionization at Starbucks stores, which led to an increase of Representation Cases stemming from other retail establishments. This seemingly reflects a heightened interest in unionization, which is being encouraged by the current Presidential administration and Board.

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"Pendulum Swings" In NLRB Case Law

Mr. Marshall highlighted some of the most significant precedent changes under the Biden administration:

- Micro-units: Noted as one of the biggest "swings" of importance, and as we discussed in a blog post, the return to the *Specialty Healthcare* standard of evaluating bargaining units, which changes how petitioned-for bargaining units are identified. With the reversion to the Specialty Healthcare standard, if a bargaining unit is readily identifiable and has a shared community of interest, the employer must show an "overwhelming community of interest" in order for the employer to add excluded members to the petitioned-for unit.

- Restricting access to third party contractors: Also as we discussed in a blog post, the return to the *New York New York Hotel & Casino* standard requires property owners to demonstrate that contractor employees' protected activity significantly interferes with the property owner's use of the property or that the exclusion is justified by another legitimate business reason.

- Dress Codes: Again, as we discussed in a blog post, the Board ruled in *Tesla, Inc*. that an employer's interference with an employee's display of union insignia on their apparel is presumed to be unlawful, unless the employer can demonstrate "special circumstances" to justify the interference. Special circumstances are found when the display jeopardizes employee safety, equipment or product safety, or unreasonably interferes with a public image which the employer has established as part of its business plan.

- Union Dues: As further discussed in another of our blog posts, the *Valley Hospital Medical Center* ("*Valley Hospital II*") decision stated that dues checkoff provisions should be treated as a part of the status quo that cannot be changed unilaterally after expiration of a collective bargaining agreement. Thus unionized employers cannot unilaterally cease deducting and remitting union dues upon expiration of a collective bargaining agreement.

- Expansion of Board Remedies for ULPs: The *Thryv, Inc*. decision, discussed further in yet another one of our blog posts, provides compensation "for all direct or foreseeable pecuniary harms" to its customary "make-whole" remedy, which typically consisted of back pay along with reinstatement in any case that calls for relief to make employees whole for unfair labor practices, and not just egregious violations.

Where Will the Pendulum Swing Next?

As Mr. Marshall noted, General Counsel Memos set forth issues which the NLRB's General Counsel intends to pursue and tend to indicate the direction in which the Board will move in the near future.

- Memo 21-08 – Students or Employees?: In our October 2021 E-Update, we discussed the General Counsel's reinstatement of a 2017 memo that asserts that college "Players" (rather than student-athletes), are employees since they perform services for compensation (whether for scholarships or, for graduate teaching assistants, pay), and their services are controlled by colleges. The General Counsel also indicated that referring to "Players" as "student-athletes" is a denial of their NLRA rights by not recognizing them as employees.

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- Memo 22-04 – Mandatory Meetings: As discussed in our April 2022 E-Update, the General Counsel signaled that situations where a supervisor advances an anti-union message in a one-on-one setting likely rise to the level of an unfair labor practice. The GC stated she would urge the Board to reconsider a ban on mandatory meetings where employers discuss union activity or other protected activities with employees, suggesting that such meetings "inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such [employer] speech."

- Memo 23:02 – AI and Electronic Monitoring: The General Counsel announced her interest in reining in employers' increased use of automated technologies and electronic management systems, stating that these technologies can violate the NLRA, as we discussed in our November 2022 E-Update. The GC urged the Board to adopt a new framework to protect employees "from intrusive or abusive forms of electronic monitoring and automated management that interfere with" employees' rights under the NLRA.

We will keep you posted as to these developments.

TAKE NOTE

US DOL Provides Resources on Protections for Nursing Mothers. The federal Department of Labor has launched an effort to educate workers about the new Providing Urgent Maternal Protections for Nursing Mothers ("PUMP") Act.

As we discussed in our December 2022 E-Update, the PUMP Act expands the existing lactation accommodations for nursing mothers under the Fair Labor Standards Act (FLSA) to include exempt, as well as non-exempt, employees. Employers must provide reasonable break time as needed and a private place, other than a bathroom, for nursing mothers to express breast milk for one year following a child's birth. The new law exempts small employers for whom compliance would impose an undue hardship. There are also exceptions for certain employees of air and rail carriers, as well as motorcoach services operators.

The DOL has a webpage with resources, including fact sheets and guidance, for employees who are nursing and their employers. It will also engage in national outreach to inform workers and employers on the expansion of breastfeeding protections in the workplace.

US DOL Issues New and Updated Resources on the Family and Medical Leave Act. In celebration of the 30th anniversary of the Family and Medical Leave Act, the federal Department of Labor has launched an FMLA webpage with new and updated resources.

The webpage contains the following categories: General Guidance, Fact Sheets, Forms, Other Resources, Interpretive Guidance (which further links to the new Opinion Letter discussed elsewhere in this E-Update), and Laws and Regulations. Each of these link to webpages with specific materials. These include the following resources of particular interest or usefulness to employers:

- FMLA Frequently Asked Questions
- FMLA Employer Guide
- Questions and Answers concerning the use of FMLA leave to care for a son or daughter age 18 or older
- COVID-19 or Other Public Health Emergencies and the FMLA

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- A multitude of Fact Sheets on various FMLA topics, including "in loco parentis" relationships for parents and children, employer and employee notice requirements, adult children, joint employment, and mental health conditions. Fact sheets that were added recently include "Taking Leave from Work When You or Your Family Member Has a Serious Health Condition under the FMLA" and "Taking Leave from Work for Birth, Placement, and Bonding with a Child under the FMLA." Some of the Fact Sheets contain examples of situations that may be helpful.
- The DOL's model FMLA poster and forms.
- elaws Employee/Employer Advisor, an interactive tool

"Anticipated Length of Service" May Be a Risky Selection Factor. The U.S. Court of Appeals for the Fifth Circuit found that the employee's overwhelming qualifications supported her race discrimination claim and undercut the school district's asserted primary reason for selecting another candidate: that the employee would not remain in the principalship position for long.

In *Watson v. School Board of Franklin Parish*, the African American female employee had 20 years of experience as a teacher, 7 years as a school principal, and an additional 7 years as a supervisor. She also had multiple certifications, including to serve as a superintendent and principal, as well as a Master of Education degree. She retired for a month before returning to serve as an assistant principal for the next nine or so years. When the principal at her school resigned, she applied for the position. However, a white male with 8 years of teaching experience, a couple of certifications, and no administrative experience was selected. According to the school board, it considered a variety of factors, including educational credentials, certifications, interview scores, work history, and "most importantly, anticipated length of service" in making the decision. As to this last factor, the School Board noted that the employee was a retiree who returned to work and that she did not live in the parish for the school.

Although the federal trial court sided with the school board's explanation, the Fifth Circuit disagreed. As it noted, a plaintiff employee may show that an employer's stated reason for the challenged employment decision is a pretext for discrimination by presenting evidence that she was "clearly better qualified (as opposed to merely better or as qualified)" than the selected employee. In this case, the Fifth Circuit found that the plaintiff met this standard – she had significantly more relevant work experience (particularly in the parish school in question), as well as significantly more educational certifications, and had scored higher on the interview, than the selected employee. Thus, the Fifth Circuit determined that a jury could find that no reasonable person could have selected the other employee over the plaintiff in the absence of racial discrimination.

This case does not mean that anticipated length of service is never an appropriate factor. But employers must be careful not to make assumptions about an employee's future work plans and circumstances. And they should not rely on speculative assumptions over documented, objective qualifications in making decisions.

Allegedly Discriminatory Incidents Should Not Be Considered in Isolation. The U.S. Court of Appeals for the Second Circuit recently reiterated that multiple incidents – including those that may be "facially neutral" – must be considered as a whole in support of an employee's race discrimination claim.

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In *Williams v. New York City Housing Authority*, an African-American housing manager (who spoke no Spanish) claimed that, for several years preceding her retirement, she had been subjected to a racially hostile work environment in violation of federal, state and local law. In support of her claim, she cited five incidents – a meeting at which a co-worker requested a "Spanish" manager, directions to transfer the housing manager to another location, a meeting regarding the housing manager's exchanges with Spanish-speaking residents, the employer's failure to fill certain job vacancies at the location, and the transfer of a Spanish-speaking superintendent away from the location.

To establish a hostile work environment claim, a plaintiff must produce evidence that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." The federal trial court considered the incidents in isolation and found that each was insufficient to establish a hostile environment claim as a matter of law. It then also considered the first three incidents (which potentially referenced race) together, but declined to include the last two (which were not overtly racial), in finding that the "totality of circumstances" did not support the hostile environment claim.

On appeal, the Second Circuit reversed. It found that there were questions of fact as to the first three incidents that could support the housing manager's claims (including whether management knew of the co-worker's potentially race-based statement, as well as the import of a transfer based on "cultural" reasons and not performance). But more importantly, the Second Circuit found that the district court improperly failed to include the 4th and 5th incidents in its totality analysis. As the Second Circuit noted, "This analysis is intended to provide courts with "a realistic view of the work environment." These incidents are a "substantial part" of the housing manager's argument that she was subjected to "an orchestrated effort to remove her from her position." Whether or not these incidents, taken together, created a hostile work environment was, therefore, an issue for a jury to decide.

Employers should understand that, when an employee is asserting a hostile work environment claim based on multiple incidents, it is important to look at all of the incidents together – even those that do not appear to be based on the protected characteristic in question.

A Flawed Investigation Does Not Necessarily Equal Discrimination. Although the U.S. Court of Appeals for the Tenth Circuit asserted that a flawed investigation is not enough, on its own, to support a claim of discrimination, we caution employers to be thorough and impartial in investigations in order to avoid such arguments.

In *Markley v. U.S. Bank National Association*, a bank VP sued his employer, alleging that the stated reason for his termination – improperly giving commission credits to a subordinate – was pretext for age discrimination in violation of the Age Discrimination in Employment Act. In support of his claim, he contended that the employer conducted a "sham" investigation. Among other things, he argued that the investigator failed to conduct additional bank research and to review sales records and account histories. He questioned the choice of witnesses to interview as well as an allegedly inappropriate internet search for the VP's social media history and review of personal emails. And he contended that he did not have the opportunity to respond to the allegations against him.

The Tenth Circuit, however, held that an employer's failure to follow its own policies or an imperfect investigation alone does not establish pretext. As the Tenth Circuit explained, there could be many factors for flaws in an investigation, including a "less than diligent investigator." Thus, "there must be some other indicator of protected-class-based discrimination for investigatory flaws to be capable of establishing pretext." The Tenth Circuit further addressed the supposed flaws in

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question and determined that the investigator made logical choices about his investigatory activities. Moreover, while the VP identified additional steps the investigator could have taken, he did not provide any evidence that such steps would have produced valuable evidence to rebut the finding of misconduct. The Tenth Circuit further found that the VP had, in fact, been given an opportunity to respond to the allegations.

As we noted in our October 2022 E-Update, employees may not dictate how an employer's investigation should be conducted. Although the present case reiterates this point, it is still important for employers to ensure that any investigation is thorough, reasonable, and appropriate for the situation. Ideally, this would include interviews of key witnesses, review of appropriate documents (including ones that establish motive for the wrongdoing), and an opportunity for the employee to explain their side of the story prior to any disciplinary decision being made.

USERRA May Require Short-Term Paid Military Leave. The U.S. Court of Appeals for the Ninth Circuit found that employers who provide paid leave for short-term absences may be required to provide similar paid leave for short-term military purposes under the Uniformed Services Employment and Reemployment Rights Act.

USERRA requires employers to provide employees on military leave with the same rights and benefits that are provided to employees on other, similar leaves. If the benefits vary, the employee must be given "the most favorable treatment according to any comparable form of leave." In assessing comparability, courts will consider the duration and purpose of the leave, as well as the ability of the employee to choose when to take the leave.

In *Clarkson v. Alaska Airlines, Inc.*, the employer provided short-term paid leave for non-military reasons, including jury duty, bereavement and sick leave. The Ninth Circuit explained that paid non-military leaves should not be compared to *all* military leaves, which can last from a few days up to years. Rather, a USERRA claim for leave may be defined by the particular length of the military leave at issue. Thus, the Ninth Circuit held that a jury could find the identified non-military paid leaves to be comparable to a short-term military leave.

The amount – duration and frequency – of paid military leave would be determined by the amount of paid non-military leave available. The Ninth Circuit used the example that "if the employer only provides three days of paid bereavement leave per year or only offers the difference in pay between the employee's salary and the compensation for jury duty…, that is all the employer would be required to provide to the servicemember."

The Ninth Circuit is not alone in finding that USERRA may require paid leave co-extensive with other paid leaves. The Seventh Circuit also came to this conclusion, as we discussed in our February 2021 E-Update. Thus, employers who voluntarily provide paid bereavement leave or jury duty leave to employees should carefully consider whether they should also be providing paid leave of similar duration and frequency for military purposes, including short-term annual training.

OFCCP Extends Deadline for Federal Contractor Objections to Release of EEO-1 Information. As we previously discussed in our August 2022 and September 2022 E-Updates, the OFCCP is planning to release certain demographic data from contractor EEO-1 Reports from 2016-2020 in response to a specific Freedom of Information Act request (Component 2 pay data has not been sought), but has extended the deadline by which contractors could object to the release of their information to March 3, 2023.

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Contractors were given the opportunity to object to the release of such data by arguing an exception to FOIA, including that their EEO-1 information constitutes "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." There are FAQs for contractors wishing to object to the release of their EEO-1 data, as well as a portal for submission of objections.

On February 2, 2023, the OFCCP listed all contractors who had not yet filed an objection. It updated the list on February 10, and extended the deadline for contractors to object to their inclusion on the list to March 3. Another list will be published on March 10, and contractors will be given a "final" opportunity to inform OFCCP that their company was improperly listed by March 17, 2023. Contractors filing objections for the first time must explain why they did not object in response to prior notices.

NEWS AND EVENTS

Victory – On behalf of a healthcare employer, Teresa Teare and Courtney Amelung won a partial motion to dismiss an employee's claims of retaliation, ostensibly for opposing race discrimination. As the federal district court found, the employee did not allege any discriminatory employment practices by the employer.

Webinar – Lindsey White and Veronica Yu Welsh presented a one-hour webinar for HRSimple, "Handling EEOC Investigations and Litigation" on February 9, 2023. The session provided insight into the Equal Employment Opportunity Commission's investigative and litigation tactics by examining the EEOC's hot button issues. Lindsey and Veronica provided guidance on how to tell if your company is being eyed for possible litigation, the advantages of mediation, how to approach investigations, and more. You may view the presentation here.

Article – Fiona Ong and Lindsey White authored "New Rulings Show Job Duties Crucial To Equal Pay Act Claims," which was published as Expert Analysis by Law360.com on February 17, 2023.

Presentation – Fiona Ong and Parker Thoeni, along with Alex Gordon of the Johns Hopkins Health System, presented "Conducting Legal RIFs: What Employers Should Consider" to the Baltimore chapter of the Association of Corporate Council on February 7, 2023.

TOP TIP: There Are No ADA Protections for Unknown Disabilities

A recent case reiterates the point that, under the Americans with Disabilities Act, it is not possible for an employer to discriminate against an employee for a disability of which it did not know, and that it need not provide accommodations for the unknown disability. Moreover, an employer need not rescind discipline if it later discovers the misconduct was caused by a disability.

Background of the Case. In *Hrdlicka v. General Motors, LLC*, the employee was unhappy with her assigned department and supervisor, and sought a transfer to another department. She also had significant attendance issues, for which she was counseled, disciplined, and warned of possible termination. The employee asserted that, in a final meeting with Human Resources before her termination for attendance issues, she mentioned that she had been experiencing severe depression due to her work environment, which caused her tardiness. The employee appealed her termination through the employer's open door policy. While her termination was pending, she was diagnosed with Persistent Depressive Disorder and a brain tumor. After her appeal was denied, she sued her

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employer for disability discrimination and failure to accommodate under the ADA and the analogous state law.

The Employer Had No Notice of a Disability. The U.S. Court of Appeals for the Sixth Circuit rejected the employee's claims. It noted that neither she nor her employer was aware of any purported disability until well after her termination. Moreover, she never sought any medical help while employed. The Sixth Circuit noted that a medical diagnosis is not necessary for an ADA claim to succeed; however, there must be enough relevant information to put the employer on notice of a disability.

The employee pointed to text messages to her supervisor, which variously referred to headaches, fevers, being "sick," "having a tough time," and dealing with "a mental thing." However, the Sixth Circuit found the messages to be insufficient to put the supervisor and employer on notice of any disability. As the Sixth Circuit noted, "A general awareness of some symptoms is not enough to show that the defendant knew of the plaintiff's disability."

The Sixth Circuit also rejected the argument that the employee's reference to her depression in an HR meeting put the employer on notice. As the Sixth Circuit observed, the employee attributed her depression to personality conflicts with her supervisor and her work environment. However, "personality conflicts, workplace stress, and being unable to work with a particular person or persons do not rise to the level of a 'disability' or inability to work for purposes of the ADA." Moreover, depression does not always render an employee "disabled."

There Was No Request for Accommodation. The employee contended that her request for a transfer was a request for accommodation. The Sixth Circuit, however, determined that the request was linked only to her dislike of her department and co-workers, and that it was never linked to a disability – thus, she did not make a request for reasonable accommodation.

But even if she had connected it to a disability, her request was not reasonable. The Sixth Circuit asserted that, "a transfer request is not reasonable if it was made to avoid working with certain people." This is in line with the well-established principle that reassignment to a different supervisor is never a reasonable accommodation.

Moreover, the Sixth Circuit found the request to be untimely. "When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.'"

Lessons for Employers. This case reiterates the point that employees, as well as employers, have obligations under the ADA.

- They are required to put their employers on notice of any disability, and while there are no "magic words" that must be used (such as "disability" or "ADA"), there must be enough information to enable the employer to recognize that the employee has a mental or physical condition that is substantially limiting their ability to meet work standards. Vague references to feeling sick or unwell, or to generic symptoms, will not be enough.

- Similarly, if the employee is requesting an accommodation, they must make it clear that it is because of a disability, in order to trigger the reasonable accommodations interactive process under the ADA.

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- Additionally, the accommodation request must be reasonable – and a change in supervisor is not reasonable.

- Moreover, any accommodation request must come in advance of an imminent or actual disciplinary action.

This case also reminds employers that they may make employment decisions based on the information that they have at the time. And if it later turns out that the misconduct on which the decision was based arose from a disability, the employer need not reverse its decision.

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