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E-UPDATE

March 31, 2023

RECENT DEVELOPMENTS

Baby Steps – The EEOC Offers a Little Guidance on the New Pregnant Workers Fairness Act

As discussed in our December 2022 E-Update, Congress enacted the Pregnant Workers Fairness Act as part of the most recent federal omnibus funding bill. The Equal Employment Opportunity Commission has now issued rather limited guidance on that new law.

In What You Should Know About the Pregnant Workers Fairness Act, the EEOC explains that the new law requires covered employers to provide reasonable accommodations to a worker's known limitation related to pregnancy, childbirth or related conditions, unless it would cause the employer an undue hardship. It further makes the following points:

- The PWFA goes into effect on June 27, 2023. The EEOC will begin accepting charges of discrimination under the PWFA beginning on that date. However, until then and as well as after, pregnant employees may file charges of discrimination based on Title VII and the ADA.

- Federal, state and local laws may provide additional protections beyond the PWFA. Federal laws include:
    - Title VII, which prohibits discrimination based on pregnancy, childbirth and other medical conditions, and requires employers to treat such employees the same as other employees who are similar in their ability or inability to work.
    - The American with Disabilities Act, which prohibits discrimination based on disability, which may include some related to pregnancy, childbirth and other medical conditions, and requires employers to provide reasonable accommodations as long as there is no undue hardship.
    - The Family and Medical Leave Act, which provides up to twelve weeks of unpaid, job-protected leave for serious health conditions including those arising from pregnancy and childbirth, as well as to care for a child following its birth.
    - The Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act, which provides lactation accommodations and protections in the workplace, as discussed further in this E-Update here.

- The EEOC will be issuing regulations to implement the law. Proposed regulations will be subject to public comment, before the EEOC issues final regulations.

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- "Covered employers" include private and public sector employers with at least 15 employees.

- Of particular usefulness, the EEOC offers examples of possible reasonable accommodations:
  - the ability to sit or drink water;
  - receive closer parking;
  - have flexible hours;
  - receive appropriately sized uniforms and safety apparel;
  - receive additional break time to use the bathroom, eat, and rest;
  - take leave or time off to recover from childbirth; and
  - be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

We caution employers, however, not to assume that any particular accommodation is needed by an employee. Employers who have paternalistically prohibited pregnant employees from certain tasks or exposures to certain chemicals have been found liable for discrimination. It is important to engage in the interactive process, as set forth under the ADA, with the employee to identify appropriate accommodations.

The DOL Provides Guidance on Lactation Accommodations Under the New PUMP for Nursing Mothers Act

Congress recently enacted the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act), which expands existing lactation protections for nursing mothers under the Fair Labor Standards Act, as discussed in our December 2022 E-Update. Under the new law, employers are required to provide to nursing mothers a reasonable amount of break time and private space to express milk for up to one year after the child's birth. The U.S. Department of Labor has now issued Frequently Asked Questions and updated its Fact Sheet on "pump" or lactation breaks.

The FAQs and the Fact Sheet make the following points:

- The PUMP Act takes effect on April 28, 2023. (Before that date, available remedies for violations of existing pump break protections may be limited).

- All employers covered by the FLSA are also subject to the new law. Businesses with fewer than 50 employees, however, may be exempt if they can show that compliance will impose an undue hardship. Undue hardship is determined by looking at the difficulty or expense of compliance in comparison to the employer's size, financial resources, nature, or structure of its business.

- Most FLSA-covered employees are entitled to pump breaks as needed, regardless of exempt or non-exempt status (the current law applies only to non-exempt employees). There are exceptions for certain employees of airlines, railroads, and motorcoach carriers – but those employees may be protected under state or local laws.

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- State and local laws may provide greater protections to breastfeeding employees. Some of these laws impose very specific location and notice requirements, for example.

- The private space may not be a bathroom, and it must be shielded from view and free from intrusion by coworkers or the public. The space can – but need not – be permanent, but it must be available when needed.

- The break time need not be paid, but if the employer provides paid break time generally, the nursing employee may use such breaks to pump. Any additional time required need not be paid. If the break is unpaid, the employee must be completely relieved from duty.

- Factors such as the location of the space and necessary actions, like pump setup, may affect the amount of break time needed.

- Teleworking employees are eligible for pump breaks. During such breaks, they must be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform.

- Employees are protected from retaliation for exercising rights under the law. An example of illegal retaliation offered by the DOL is a delivery driver employee who is transferred to a lower-paying job because her supervisor complains that her pump breaks are interfering with the delivery schedule.

- If there is a violation, the employee may file a complaint with the DOL's Wage and Hour Division or file their own lawsuit in federal court.

- Remedies for violations may include employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.

NLRB GC Identifies Aggressive, Pro-Union Priorities and Desired Changes to Existing Law

On March 20, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued GC Memo 23-04, providing an update concerning her prosecutorial priorities. The memo follows up on GC Memo 21-04 – which was the GC's first memo (we wrote about it here)– setting forth issues to be submitted to the NLRB's Division of Advice concerning Board decisions that the GC believed should be overturned.

The GC first noted that many of the issues addressed by GC Memo 21-04 have already been addressed by the Board or are currently pending before the Board. But GC Memo 23-04 identifies 15 issues that remain from GC 21-04 that must be submitted to the Division of Advice.

Issues Relevant to Both Non-Union and Unionized Employers. Regardless of an employer's union or non-union status, Section 7 of the National Labor Relations Act protects employees' rights to engage in concerted activity for their mutual aid or protection (i.e. "protected concerted activity"

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or PCA), while Section 8 makes it unlawful for an employer to interfere with those rights. Many of the issues identified by GC Abruzzo impact all employers:

- Expansion of PCA: The Board has long held that discussion of issues that are "vital elements of employment," such as wages, are "inherently concerted" even if group action has not yet been contemplated. The GC seeks to expand this doctrine to issues like health and safety, sexual harassment, and diversity, equity, and inclusion (DEI) subjects. (Our Top Tip this month involves a Board Advice Memo that finds workplace discussions of racism to be inherent PCA).

- Offers of Back Pay: Employers may, in some cases, offer a terminated employee more compensation than what would be owed in back pay. The purpose of such an offer is to obtain a waiver of any right to reinstatement that the employee could seek through an administrative charge or lawsuit. The GC is seeking a case in which to argue that such offers are unlawful.

- Arbitration Agreements: In 2019, the Board held that an employer does not violate the National Labor Relations Act (NLRA) by promulgating a mandatory arbitration agreement in response to employees engaging in collective action (e.g., a class or collective action lawsuit). The GC is seeking to overturn that 2019 decision and make such agreements unlawful.

- Electronic Monitoring and Algorithmic Management: The GC reiterated that issues concerning electronic surveillance and AI-related management of employees – which was the subject of GC Memo 23-02, as discussed in our November 2022 E-Update – should be submitted to the Division of Advice.

- Jurisdictional Issues: Currently, individuals with disabilities working in a rehabilitative setting are not "employees" within the meaning of the NLRA. The GC wishes to overturn the 2004 decision in which that holding was established. In addition, the GC directs Regional Offices to submit cases where the National Mediation Board – the agency that oversees labor relations in the airline and railway industries pursuant to the Railway Labor Act – has asserted jurisdiction over an employer in an advisory opinion.

- Intermittent Strikes: Non-union employees have the right to strike. But "intermittent strikes" – where employees repeatedly stop working, typically for short durations – are not protected by the NLRA. The GC seeks to overturn a Trump Board decision broadly defining what activity constitutes an intermittent strike.

Issues for Unionized Employers to Watch. Additional issues raised by GC Abruzzo are specific to unionized employers:

- Withdrawal of Recognition: The GC seeks to overturn the Board's 2019 decision in *Johnson Controls* establishing the process for an employer to anticipatorily withdraw recognition from a union. The GC seeks to return to the "last in time" rule that spawns more, not less, confusion and litigation among parties. In addition, the GC will seek to overturn a 2007 case

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in which the Board held that an employer may withdraw recognition from a union during the term of a collective-bargaining agreement provided that the withdrawal occurs after the third year of the contract (i.e. the "contract bar"). Such a decision could effectively extend the current three-year period of the Board's "contract bar."

- Expanding the Scope of Information to be Provided to Unions: The GC appears ready to assert that a unionized employer must provide a union with the questions to be asked to an employee during a pre-disciplinary interview. In addition, the GC seeks cases involving an employer's refusal to provide information related to plant relocations.

- Issues Related to Successor Employers: Generally, successor employers may set initial terms and conditions of employment even if they differ from those established by its unionized predecessor. The GC seeks a case to argue that an employer found to have discriminated in hiring a certain number of its predecessor's workforce to altogether avoid a bargaining obligation will forfeit its right to set initial terms and conditions of employment.

- Easing Union Obligations Related to Union Dues: In 2019, the Board held that unions must provide non-member objectors with verification that the financial information provided to them has been independently audited and lobbying costs are not to be charged to such objectors. The GC will seek the reversal of that decision and ask the Board to eliminate the auditing and verification requirements.

- Bargaining Obligations: The GC is seeking cases in which to argue that the post-CBA status quo requires increases to employee benefits. On the remedial side, the GC intends to overturn a 33-year-old case and seek make-whole compensatory remedies where it is found that an employer has unlawfully failed or refused to bargain.

Given how quickly the GC has moved on many of her priorities discussed in her first memo, employers should expect the GC to continue issuing complaints and litigating the above issues to and through the Board. As always, we will keep you updated concerning important developments in these areas.

TAKE NOTE

PTO ≠ Salary Under the FLSA. Addressing the question for the first time, the U.S. Court of Appeals for the Third Circuit held that paid time off is not part of an employee's salary under the Fair Labor Standards Act and, thus, deductions from an exempt employee's PTO bank are not improper reductions in salary.

The FLSA provides for exemptions from its minimum wage and overtime requirements. In order to qualify for the exemption, among other things an employee must be paid a weekly salary that is not reduced because of variations in the quality or quantity of work. There is a limited and specific list of deductions that are permitted; however, deductions from salary for things such as lower productivity or lost/damaged equipment are not allowed.

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In *Higgins v. Bayada Home Health Care Inc.*, the exempt employees were paid extra for exceeding weekly productivity minimums, but if they failed to meet those minimums, the employer would deduct from their accrued PTO – but not their base salary – to supplement the difference between what they were paid and what they actually earned. The employees sued, arguing that this constituted an improper deduction from their salary in violation of the FLSA.

The Third Circuit, however, found that, under the FLSA, PTO is not part of an employee's salary, but is a fringe benefit. Therefore, the employer's actions with regard to PTO were not governed by the FLSA, even if the employee might be able at some point to convert the PTO to cash.

This decision opens up some interesting possibilities for employers who have felt constrained by the inability to deduct from an exempt employee's pay for things such as damaged or lost equipment, missing funds, fines, etc. Under the Third Circuit's reasoning (which has not yet been adopted by sister Circuits), it may be possible to deduct for such items from PTO, as long as the employee's weekly salary remains intact. Any employer interested in doing this should consult with counsel, however, and should also keep in mind that state wage-hour and wage payment laws may differ from the FLSA.

Is Employee Entitled to a Transfer as a Reasonable Accommodation Regardless of a Most-Qualified-Applicant Policy? The Equal Employment Opportunity Commission says "yes," but a number of federal appellate courts disagree, including most recently the U.S. Court of Appeals for the Fifth Circuit, which asserted that "the EEOC's proposed course of action turns the shield of the ADA into a sword, casting the equally reasonable expectation of other workers to the side."

Under the Americans with Disabilities Act, employers must provide reasonable accommodations to enable employees with disabilities to perform their essential job functions or to enjoy the privileges and benefits of employment, unless the accommodation imposes an undue hardship on the employer. If an employee is unable to perform the essential functions of their original job, a possible accommodation is transfer to another position that they can perform, with or without additional reasonable accommodations. But are they entitled to the transfer, as long as they are minimally qualified, even if there are more qualified applicants for the role?

In *EEOC v. Methodist Hospitals of Dallas*, the hospital had a policy to hire "the most qualified applicant available" for every vacancy, and if an employee required reassignment because of a disability, they would compete for available job openings. The EEOC challenged the policy, arguing that the ADA required the hospital to make exceptions to its most-qualified-applicant policy as a reasonable accommodation.

The Fifth Circuit rejected the EEOC's position, finding that mandatory reassignment in violation of the hospital's most-qualified-applicant policy is not reasonable as a general proposition, although it may be reasonable in a specific case, depending on the circumstances. Quoting its sister Eighth Circuit, the Fifth Circuit stated that "the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." Also quoting the Fourth Circuit, the Fifth Circuit went on to assert that, "Preferential reassignment improperly recasts the ADA—a shield meant to guard disabled employees from unjust discrimination—into a sword that may be used to upend entirely reasonable,

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disability-neutral hiring policies and the equally reasonable expectations of other workers." Specifically as to the hospital, the Fifth Circuit also found that the EEOC's position "imposes substantial costs on the hospital and potentially on patients," whose lives "are on the line."

This case is an interesting one for employers. If defending an EEOC charge on this issue, they should recognize that the EEOC will almost certainly require mandatory reassignment regardless of relative qualifications. But if the matter is escalated to a federal lawsuit, the Tenth and likely the Seventh Circuits would agree with the EEOC, while the Fourth, Fifth, Eighth, and Eleventh Circuits would not. But, to further complicate matters, there may be additional requirements under state law. For example, although Maryland sits in the Fourth Circuit, the state Supreme Court has held that the state disability law requires mandatory reassignment.

The NLRB Is Providing More Resources to Workers – But What Are Employers' Rights?
Employers should be aware that the National Labor Relations Act is actively working to inform employees about their rights under that law, and not always in a neutral way. A recent initiative is a new "Know Your Rights" card series. These tri-fold cards, in English and Spanish, are available to employees to share with others in the workplace. But, unsurprisingly, they overlook employers' rights.

Of the first two cards, one card provides information on protections for immigrant workers. It notes that employees are protected by the Act regardless of immigration status, and that the NLRB will not ask about immigration status. It also explains that employees have the right to talk about pay and unfair treatment in the workplace, vote in a union election, join a union, or strike (although it fails to note that employees also have the right to refuse to do any of those things). It further suggests that the NLRB may be able to assist workers with immigration issues related to the need for protection at a worksite.

The other card talks about *Weingarten* rights, which allow union members to request a representative to be present and assist the employee at any interview that the employee reasonably believes could lead to discipline. It notes that employers violate the law if they threaten or retaliate against an employee because of a request for a representative or if it proceeds with the interview without allowing the representative. More troubling, while the card notes that, at the current time, non-union employees do not have *Weingarten* rights, it also makes clear that the NLRB is looking for a case in which to change that.

As a refresher, and because it was entirely omitted from the card, employers should recall what *their* rights are under *Weingarten*. First, employers are not obligated to advise an employee concerning their *Weingarten* rights. Second, unless otherwise provided for in a collective-bargaining agreement, employees do not have an automatic right to a union representative in meetings that could lead to discipline – the employee must request the representative. Third, an employee has no right to a *Weingarten* representative where the purpose of the meeting is to merely convey a disciplinary decision already reached. Fourth, an employee has no right to a *Weingarten* representative where their belief that the meeting could result in discipline is not "objectively reasonable" – for example, where the employee was a mere witness to a physical altercation involving other employees and the purpose of the interview is merely to ascertain what the employee witnessed. Fifth, as for the degree of the *Weingarten* representative's involvement, an employer may request that the representative save their questions until the end of the supervisor's questioning. If a *Weingarten* representative

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directs an employee not to answer a question, the supervisor may remind the employee that their failure to answer the question may amount to insubordination and the lack of an answer will be considered in the employer's investigative conclusions.

If an employee has the right to a *Weingarten* representative and has requested such a representative, here are the employer's options. First, the employer may grant the request. Second, the employer may deny the request and end the interview (and make a decision based on the information it has without the interview) – the employer may not, however, discipline the employee solely because they requested a *Weingarten* representative. Third, the employer may give the employee the choice of continuing the interview without a union representative or ending the interview. If the employee chooses the former option, the employer may continue the interview without the presence of a *Weingarten* representative.

Unsurprisingly, this card omits employers' rights related to *Weingarten*. In addition, the Board has nuanced rules in situations where employees request a *Weingarten* representative in the context of drug and alcohol testing. If faced with such a request, we advise that you reach out to counsel immediately.

"Failing to report is not a protected activity under Title VII." A manager who chose to conduct her own investigation into a harassment complaint, rather than following her employer's reporting protocol, did not have a valid retaliation claim, according to the U.S. Court of Appeals for the Seventh Circuit.

In *Alley v. Penguin Random House*, the employer established a harassment reporting procedure that, among other things, required managers and supervisors to report any employee complaint of harassment to Human Resources, and they could be disciplined for failing to do so. The managers were given a copy of the procedure and trained on it. Nonetheless, a manager who received a harassment complaint chose to investigate the complaint on her own, and failed to notify HR or upper management. The employer discovered the manager's own investigation when other employees complained to HR about the same harasser. The manager then reported that she, too, had been harassed by the same harasser. The harasser was terminated, and the manager was demoted for failing to report harassment. She sued, alleging retaliation in violation of Title VII.

In order to sustain a claim of retaliation under Title VII, an employee must show that: (1) they engaged in protected conduct; (2) they suffered an adverse employment activity; and (3) there is a causal connection between the two. A protected activity involves either: (1) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Title VII or other employment statutes; or (2) opposing an unlawful employment practice. Here, as the Seventh Circuit found, the manager "did not actually report harassment; she failed to report harassment." And such inaction is not a protected activity, regardless of the manager's motivation.

This case emphasizes that employers should implement clear reporting procedures for harassment and discrimination complaints and should train managers on the procedures. Then, they can and should hold those managers accountable for complying with the reporting procedures.

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Can You Relate? The "Relational" Test for the FLSA Administrative Exemption. The U.S. Court of Appeals for the 1st Circuit recently held that a "relational" analysis test must be used to determine if an employee meets the administrative exemption to the Fair Labor Standards Act's minimum wage and overtime requirements, and clarified its application.

The FLSA requires the payment of an overtime premium at 1½ times the employee's regular rate for all hours worked over 40 in a workweek. There are several white collar exemptions to this requirement, including the administrative exemption. In order to meet this exemption, the employee must meet the following tests: (1) they must be paid on a salary basis at a rate of at least $684 per week; (2) their primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Specifically as to the second factor of whether work is "directly related," the DOL regulations make clear that the phrase refers to "assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." The Department of Labor's regulations further list functional areas of the business that are so "directly related," including things such as tax, finance, quality control, marketing, human resources, and much more.

In *DOL v. Until Service Corp.*, the First Circuit asserts that the analysis of the second factor is a "relational" one, under which it is "necessary to clearly identify the primary duty of the employee(s) in question, and to determine whether that duty is directly related to 'running or servicing of the business.'" The First Circuit asserted that, in conducting the analysis, "it is often useful to identify and articulate the business purpose of the employer and (if necessary) the employer's customers," meaning the actual product or service being provided to the public. The analysis then considers whether the employee's primary duties are directly related to the business purpose (non-exempt) as opposed to general business operations (exempt).

The federal district court below had found the dispatchers and controllers in question to meet the second prong of the administrative exemption by analogizing their duties to the functional areas listed in the regulation. The First Circuit, however, asserted that, while such analogy "may be useful in some cases," they might not encompass the full "relational" analysis. Thus, the First Circuit sent the case back to the federal district court to apply this newly-articulated "relational" analysis to the dispatchers and controllers.

While not every federal appellate court has adopted the "relational" analysis for purposes of determining whether the administrative exemption applies, it is worth noting that the US DOL applies this approach. Thus, employers facing a DOL investigation in which the administrative exemption is at issue should be aware of this analysis and how it is applied.

Federal Contractor Update –Religious Exemption Developments, Certification Portal, Mega Construction Project Program. The US Department of Labor and its Office of Federal Contract Compliance Programs announced several matters of significance to federal contractors and subcontractors this month. These include the following:

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- **Rescission of Religious Exemption Rule.** The OFCCP has rescinded a controversial rule, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," which went into effect in the waning days of the Trump administration. According to OFCCP Director Jenny Yang, the rule adopted new standards for applying the religious exemption under Executive Order 11246 (which established non-discrimination requirements based on race, color, religion, sex and national origin for federal contractors) that were at odds with existing legal authority and weakened protections for employees. With the rule's rescission, the OFCCP returns to longstanding policy of determining the applicability of the religious exemption (for qualifying religious organizations to hire individual of a particular religion) under established caselaw as applied to the particular case.

- **Contractor Certification Portal**. The OFCCP announced that the portal will be open from March 31-June 29, 2023. Through this portal, supply and service contractors and subcontractors must certify their current compliance with the OFCCP's affirmative action and non-discrimination requirements, including the preparation of affirmative action plans (AAPs) or functional affirmative action plans (FAAPs). (New contractors have 120 days from the date of the contract to develop their AAPs and then 90 days to certify compliance through the portal). We discussed this annual certification requirement, which began in 2022, in our December 2021 E-Update. It is important to note that those who fail to certify are more likely to be selected for a compliance review.

- **Mega Construction Project Program.** The OFCCP has launched a new initiative focused on construction contractors. The agency will designate certain Bipartisan Infrastructure Law-funded contracts, valued at $35 million or more and lasting at least one year, as Megaprojects. These projects will receive compliance assistance from the OFCCP with regard to recruitment, hiring, and employment practices and, of more concern, be subject to compliance reviews of the contractors' anti-discrimination and EEO practices.

NEWS AND EVENTS

Webinar: Key HR Legal Issues Impacting Non-Profit Organizations. Non-profits face unique HR legal challenges. This complimentary 90-minute webinar, presented by the Employment Law Alliance at 12 noon Eastern on April 12, 2023, will focus exclusively on what these entities must do to ensure legal compliance and minimize costly litigation:

- Why unions are focusing so much attention on non-profits and what you can do right now to avoid becoming a target
- Special federal and state wage-hour issues
- Unique issues that arise when negotiating CEO employment and compensation agreements
- Managing a remote workforce to ensure legal compliance
- How to effectively incorporate DEI initiatives
- Establishing proper roles/responsibilities between your Board and executive team
- Challenges when implementing reductions in force/layoffs

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Hirschfeld Kraemer Partner Steve Hirschfeld will moderate a discussion with Shawe Rosenthal Partner Fiona W. Ong and featured speakers Natalie Margolis, Chief Operating Officer of Catalight Foundation, Chris Bedford, Executive Director of the San Francisco Museum of Modern Art, and Neil Duke, Labor & Employment Practice Group Leader of Johns Hopkins Health System Corporation. You may register for the webinar here.

Podcast – Parker Thoeni was the featured guest speaker for the March 28, 2023 episode of the Employment Law Alliance's Travel Tuesdays: Doing Business in Maryland podcast. This series explores the "need to know" items for doing business in various jurisdictions around the world.

Victory – Stephen Shawe won an arbitration for a distribution company, in which the arbitrator rejected a grievance protesting that the employer violated the collective bargaining agreement by paying some drivers rates of pay that were higher than the rates provided for in the wage schedule. The employer successfully argued that the union had the opportunity during recent CBA negotiations to rectify the issue but failed to do so.

Victory – J. Michael McGuire won an arbitration in which the union argued that the employer's decision to contract out work constituted either a constructive layoff or an impermissible permanent filling of bargaining unit vacancies in violation of the collective bargaining agreement. The arbitrator found that, because the employer went to great lengths to maximize the use of its own employees but could not meet its overtime needs, it could reasonably exercise its right under the CBA to hire contractors.

Leadership – Parker Thoeni was elected to join the Board of the Conflict Resolution Center of Baltimore County. The organization supports the resolution of interpersonal and community conflict through the use of Community Mediation, Community Conferencing, and other restorative justice services and education.

Presentation – Maya Foster was a panel speaker for "The Law School Admission Game," a presentation held as part of the National Black Students Association's annual convention, which took place on March 11, 2023 in Washington D.C.

Media – Parker Thoeni, who represents the Walters Art Museum, was quoted in a March 29, 2023 Baltimore Sun article about the Museum's agreement to proceed with a union election in connection with the withdrawal of problematic legislation that sought to force union recognition.

TOP TIP: The National Labor Relations Act Protects (Union and Non-Union) Workplace Discussions of Racism

In a recently issued Advice Memorandum, the National Labor Relations Board's (NLRB) Office of the General Counsel (OGC) offered guidance to employers – both union and non-union – regarding the protection of workplace discussions of racism. NLRB Advice Memoranda contain the recommendations of the OGC to Regional Offices on novel or complex issues. These memos may be publicly released years after issuance, but often contain helpful guidance for employers.

Protected Concerted Activity Under the Act. Regardless of an employer's union or non-union status, Section 7 of the National Labor Relations Act protects employees' rights to engage in concerted activity for their mutual aid or protection (i.e. "protected concerted activity" or PCA),

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while Section 8 makes it unlawful for an employer to interfere with those rights. An employee's lone statements may be PCA where they are addressed to coworkers and seek to initiate, induce or prepare for group action – even if the coworkers do not agree or join. They may also be PCA where they communicate a complaint to management on behalf of a group of coworkers. Moreover, communications may be protected even where there is no express call for group action if they involve "inherently concerted discussions about vital categories of workplace life."

Background of the Case. In *Kaiser Permanente Bernard J. Tyson School of Medicine*, a medical school professor alleged that her teaching privileges were suspended following a classroom discussion with students and another employee of racism against Black faculty and students as well as systemic racism in medicine, and that she was subsequently terminated after tweeting about the incident and asking others to share her story and use their voices to "augment the marginalized" and "end racism in medicine."

The OGC's Memo. In its 2021 memo, the OGC found that the classroom discussion about racism, which, critically, involved another employee and not just students, "was inherently concerted and was for mutual aid or protection." It further found that the professor's individual tweets, which it designated a "logical outgrowth" of the classroom discussion, were also PCA because she "discussed terms and conditions of employment regarding racial disparities in medicine faced by medical professionals, sought the assistance of others to improve working conditions in medicine, and encouraged others to fight for racial equality and justice in the workplace." Notably, the OGC asserted that it was immaterial that none of the professor's co-workers engaged with her tweet because the Act protects the concerted activity of "any employee, and shall not be limited to the employees of a particular employer."

The Act does not protect individual gripes. But even though the professor discussed her own suspension, she did so in the context of calling for future group action against racism. Thus, according to the OGC, the tweets were more than mere griping and constituted PCA.

Takeaways for Employers. It is well-understood by most employers that Title VII prohibits discrimination based on race, among other characteristics, and protects employees who opposed such discrimination – which can involve raising concerns about racism in the workplace. What this memo makes clear is that the National Labor Relations Act will also protect employees who discuss racism in the workplace with their co-workers, and may also protect social media activity that can be deemed to call for group action – even among those beyond the individual workplace.

RECENT BLOG POSTS

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

- NLRB General Counsel Provides (Some) Clarification on Severance Agreement Non-Disparagement and Confidentiality Provisions by Fiona Ong and Eric Hemmendinger, March 22, 2023

- A Revised Updated Employer's Guide to March Madness by Evan Conder and Fiona Ong, March 15, 2023

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- Say What? NLRB Rules Employees May Tape Record Others in Violation of State Law by Elizabeth Torphy-Donzella, March 10, 2023

- No, You May Not Pay Your Workers in Chicken Sandwiches by Fiona Ong, March 2, 2023

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