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E-UPDATE

April 28, 2023

RECENT DEVELOPMENTS

What the End of the COVID-19 National Emergency Means for Employers

President Biden has signed legislation that ends the COVID-19 national emergency. Separately, the public health emergency that was declared by the U.S. Department of Health and Human Services will end on May 11, 2023. The end of these two emergency declarations have impacts on certain employee benefits (which is outside the scope of this article) – but what does it mean for employers beyond that?

For the past three years, employers have struggled with changing, inconsistent, and confusing mandates and guidance regarding leave, vaccinations, masking, and other workplace actions. At this time, we have emerged into a "new normal," with COVID-19 becoming an endemic (but still deadly) illness, like the flu. And much like the flu, there are certain precautions that employers may still take. In addition, there may also be legislative or regulatory mandates that linger beyond the end of the national and public health emergencies.

OSHA COVID-19 Guidance – "Update Coming Soon." As employers may recall, the Occupational Safety and Health Administration issued guidance for the workplace in January 2021, which was updated several times. The guidance is not mandatory, but compliance with such guidance would certainly establish an employer's compliance with OSHA's General Duty Clause, which requires employers to protect workers from any serious hazards in the workplace.

The last iteration of the guidance, which we discussed in detail in an August 16, 2021 E-lert, supported employer vaccine mandates, paid vaccination leave, sanitation/cleaning, improved ventilation, and supplying/encouraging face coverings in the workplace, particularly in areas of substantial or high transmission. It adopted the Center for Disease Control and Prevention's (CDC) then-current guidance on masking and testing for symptomatic employees and those who had close contact with infected individuals, with different recommendations based on vaccination status. The CDC's guidance on isolation of infected individuals was also adopted. The Guidance also provided that other workplace protections, such as barriers and distancing, were not required for vaccinated employees.

At this time, the CDC has modified its guidance on testing, masking, and isolation. Although the OSHA guidance is still technically in effect, the OSHA website states that an update to its guidance is "coming soon." In the interim, employers should assess their workplace and take reasonable steps to protect workers not only against COVID-19, but other respiratory diseases like the flu. We discuss some of these steps below.

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CDC's Testing Guidance. In its current testing guidance, the CDC recommends testing immediately if there are symptoms of COVID-19. If the individual was exposed to COVID-19 and does not have symptoms, the CDC suggests waiting at least 5 full days after exposure before testing. It also recommends that individuals test before coming into contact with someone at high risk for severe COVID-19.

Employers may require employees who are symptomatic or who were exposed to COVID-19 to test and isolate in accordance with the CDC's guidance.

CDC's Isolation Guidance. At this time, the CDC's guidance on when to isolate has been significantly streamlined from earlier guidance. Employers can and should follow the CDC's isolation guidelines for those testing positive.

Those testing positive should stay at home for at least 5 days and isolate from others in the home, wear a high-quality mask if they need to be around others and in public through day 10 (unless they test negative twice, 48 hours apart, with an antigen test), and refrain from travel through day 10.

- If there were no symptoms, isolation may end after day 5.
- If there were symptoms, isolation may end if the symptoms are improving and the individual has been fever-free for 24 hours without medication, as early as day 5.
- If the individual had moderate illness (meaning shortness of breath or trouble breathing), they should isolate through day 10.
- If the individual had severe illness (requiring hospitalization) or a weakened immune system, they should isolate through day 10 and consult their doctor.

CDC's Exposure Guidance. According to the CDC's guidance for those who were exposed to COVID-19, isolation is no longer required for exposures without symptoms – only for those who actually have COVID-19 (apparently as confirmed by testing). Those who were exposed without symptoms should test at least 5 days after exposure. The CDC recommends that they wear a mask for 10 days when around others or in public, even if they test negative after 5 days.

Obviously if the person develops symptoms, they should test immediately and, if positive, follow the isolation protocol.

Some employers may wish to require those who were exposed to stay out of the workplace for the 5-10 day period. While employers may choose to impose greater restrictions than the CDC recommends, they should be thoughtful about the impact of such a requirement on employees. If the employer does not provide paid leave for such circumstances, this may be economically harmful to the employee. In addition, it is important to ensure that any such restriction is applied consistently, in order to avoid discrimination claims.

If there is an outbreak of COVID-19 at the workplace (yes, it's still happening), we recommend that the local Board of Health be contacted for further guidance. In all likelihood, the Board of Health may refer the employer back to the CDC guidance, but that will give the employer additional grounds for requiring testing and masking, since some employees may be resistant to such requirements.

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CDC's Masking Guidance. The multitude of mask mandates at the federal and state level have not been in effect for quite some time. The CDC's mask guidance notes that "People may choose to mask at any time," and employers should support those employees who choose to continue to mask. According to the CDC, those who are in medium or high community levels of COVID-19 should mask if they are at high risk for severe illness.

As noted above, those who have COVID-19 should wear a mask for 10 days following the onset of illness, unless they test negative twice, 48 hours apart with an antigen test. Those were exposed to COVID-19 should wear a mask for 10 days following the onset of illness or exposure, regardless of any negative test result.

As we previously discussed in a blog post, employers may implement and maintain protocols that exceed what the CDC recommends. Thus, employers may require masks in the workplace, but should provide reasonable accommodations as necessary for medical or religious needs. They also should be prepared for pushback from employees. At this time, however, we suggest that employers only impose mask mandates if they can articulate a legitimate business reason for doing so.

Paid Leave. At this time, there are no federal laws that require private employers to provide leave specifically to obtain a COVID-19 vaccine or to recover from COVID-19. The Families First Coronavirus Response Act's COVID-19 leave mandates expired at the end of December 2020, and the voluntary leave benefits expired in September 2021. However, a number of states passed laws that required employers to provide vaccine leave, COVID-19 leave, or public health emergency leave. While many of the COVID-specific leave mandates have now expired, several are still in effect – at least for now. In addition, more general public health emergency leaves will continue to apply going forward. Thus, it is important that employers check their jurisdiction for any continuing COVID-19-related leave laws.

We remind employers that an increasing number of states and local jurisdictions have other leave laws that will cover COVID-19, such as sick and safe leave or general leave. Additionally, the employee's or family member's COVID-19 illness may meet the eligibility requirements for leave under the federal Family and Medical Leave Act, analogous state family and medical leave laws, or state paid family and medical leave benefits programs.

Absent legal leave mandates, employers may choose whether to provide paid leave for COVID-19 specifically – and, we suggest, other illnesses like the flu – for their employees. Many employers have implemented paid sick leave or PTO policies that may be used for illnesses like COVID-19, and employees should be encouraged to use such leave when they are sick in order to prevent the spread of the illness in the workplace.

Vaccine Mandates. At this time, most private employers are not subject to vaccine mandates. Courts continue to battle over the federal government's mandate for government contractors, but this mandate is not currently being enforced. On the other hand, the Center for Medicare and Medicaid Services' regulation requiring Medicaid and Medicare-certified healthcare providers to mandate COVID-19 vaccination for all applicable staff (as discussed in our November 8, 2021 E-lert) is still in effect and is currently not scheduled to end until November 2024, absent any action from CMS.

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(Other mandates – vaccine and otherwise – may be coming in the forthcoming OSHA COVID-19 standard specific to healthcare employers).

State laws may complicate the situation. A number of states have passed laws that prohibit employers from taking any employment action based on COVID-19 vaccination status, which effectively prevents vaccine mandates. We also note that many states require flu vaccinations for healthcare employees. But absent such laws, employers may choose whether to mandate COVID-19 (and flu) vaccinations or not.

If an employer chooses or is required to mandate vaccines, it is important that they provide reasonable accommodations for medical or religious reasons, unless the accommodation results in an undue hardship for the employer. This has been a fertile area of litigation over the past several years. The argument that the unvaccinated status of an employee poses a direct threat in the workplace has less weight now than in the height of the pandemic, and it is likely that the use of masks or face coverings in lieu of vaccination may be deemed an appropriate accommodation (as it has been for the flu).

Reporting Illness. There are two different reporting requirements at issue here – what employees should report to the employer, and what the employer needs to record and/or report to OSHA.

Employers can and should require employees who are working in-person to report when they have symptoms of COVID-19 (or flu, for that matter) or if they test positive. This is a health and safety issue, since co-workers may have been exposed to the disease. Employers could also require employees to report exposures, and require those employees to follow the CDC's guidance on masking and testing during the 10-day post-exposure period.

As for OSHA recording, OSHA mandates covered employer record certain work-related injuries and illness on their OSHA 300 log. COVID-19 may be a recordable illness if the employee is infected as a result of performing their work-related duties. It is recordable if there is a confirmed COVID-19 case, the case is work-related, and it meets the general recording criteria (e.g. medical treatment beyond first aid, days away from work).

With regard to OSHA reporting, employers must report work-related hospitalizations and deaths within a certain timeframe. For COVID-19, the reporting requirement applies if an employee is hospitalized within 24 hours of exposure to COVID-19 at work, and the report must be made within 24 hour of knowing both that the employee has been hospitalized and that the reason was a work-related case of COVID-19. If an employee dies from a work-related confirmed case of COVID-19 within 30 days after exposure, the employer must report the death within 8 hours of knowing both that the employee dies and the cause was a work-related case of COVID-19.

As we have said since the beginning of the COVID-19 pandemic, the workplace guidance has been constantly changing. We will keep you updated on any developments, including the forthcoming OSHA update.

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NLRB Will Target Repeat Offenders With Stronger Sanctions

An April 20, 2023 decision by the National Labor Relations Board ("NLRB" or the "Board") detailed potential remedies the Board will consider in cases involving employers or unions that have demonstrated repeated or egregious disregard for employee rights under the National Labor Relations Act ("NLRA"). Specifically, where the Board finds unfair labor practices would justify a "broad" cease-and-desist order – rather than a standard cease-and-desist order – it will consider a non-exhaustive list of potential remedies. A broad cease-and-desist order is often ordered where a respondent (who can be either an employer or union, but more likely the first) (1) has shown a proclivity to violate the NLRA, or (2) has engaged in "egregious or widespread" misconduct.

In *Noah's Ark Processors d/b/a WR Reserve*, the Board discussed this list of potential remedies where a broad cease-and-desist order is required:

- Explanation of Rights: The explanation will be added to the remedial order and informs employees of their rights in a more detailed manner than set forth in the customary Notice to Employees.

- Reading the Notice to Employees and Explanation of Rights: Employees are gathered and the Notice to Employees and Explanation of Rights is read to them. Additionally, the Board may require supervisors or high-ranking officials involved in the unlawful conduct to perform the reading or, alternatively, be present for the reading by a NLRB agent. Lastly, in cases where a union is the charging party or represents the employees at the facility, the Board will consider a remedial provision permitting a union agent to attend this read.

- Mailing the Notice and Explanation of Rights to Employees: This potential remedy allows the Board to order a respondent to mail the Notice and/or Explanation of Rights to current and former employees who may have been exposed to the respondent's unlawful actions.

- Notice Signing: In broad order cases, the Board may order the Notice to Employees to be signed by a representative who bears significant responsibility in the respondent's organization. The Board reasoned that such a remedy will be appropriate where the individual ordered to sign either committed the unfair labor practices at issue or is viewed by the employees as the face of the conduct underlying the violations.

- Publication of Notice and/or Explanation of Rights: Where many employees – current and former – are impacted by the unfair labor practices at issue, the Board will consider requiring the respondent to publish the Notice and/or Explanation of Rights in a "local publication of broad circulation and local appeal." The Board stated that such a remedy may be appropriate where the unfair labor practices occurred over a lengthy period and the respondent no longer has current mailing information for employees impacted by the unlawful conduct.

- Extended Notice Posting Period: The standard Notice posting period is 60 days. Where a broad cease-and-desist order is issued, however, the Board has issued posting periods as long

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as three years. The Board noted that the length of time for the extended posting will be determined on a case-by-case basis.

- Board Agent Visitation to Facility: The Board will consider a narrow visitation order allowing a Board agent to visit a respondent's facility to ensure the Notice and/or Explanation of Rights is posted in accordance with a Board order, allow the Board to inspect documents, and to take statements from respondent officers and employees regarding compliance with the Board order. The period of such visitation orders will likely track the length of any extending Notice posting period.

In this case, the employer had previously been subjected to a federal court injunction, contempt findings, sanctions, and unfair labor practices related to findings that it had bargained in bad faith with the union representing its employees and prematurely declared an impasse in bargaining. A third round of bargaining ended in January 2020 when the employer again declared an impasse and implemented its last, best and final offer.

The Board agreed with the administrative law judge that the employer bargained in bad faith and prematurely declared an impasse, in violation of Section 8(a)(5) of the NLRA. The Board issued a broad cease-and-desist order, which included making whole employees for any loss of earnings or benefits caused by the employer's unilateral changes following its declaration of impasse, and reimbursing the union for its bargaining expenses. The Board also determined that most of the additional remedies discussed above were appropriate in light of the employer's misconduct.

The lone Republican Board member, Marvin Kaplan, dissented in part. While he agreed that the employer had violated the NLRA and that some of the remedies were required, Member Kaplan characterized the decision as an "advisory opinion." Member Kaplan expressed his belief that the decision was an attempt by the Board majority to nudge the NLRB General Counsel to "implicitly but unmistakably…encourag[e] her to seek [extraordinary remedies]."

Employer Takeaways. This decision further demonstrates this Board and General Counsel's desire to provide for additional and stronger remedies against employers that are found to have violated the NLRA. The decision comes just months after the Board's decision in *Thryv, Inc.* (which we wrote about here) finding that employees will be entitled to consequential damages stemming from unlawful conduct as part of any make-whole order.

It remains to be seen whether such extraordinary remedies will be reserved for those employers – like the one in this case – that commit widespread unfair labor practices over extended periods of time, or is extended to less pervasive misconduct. As always, we will keep employers updated concerning the development of the Board's growing use of enhanced remedies.

EEOC Identifies "Promising Practices for Preventing Harassment"

The Equal Employment Opportunity Commission has issued guidance to assist federal agencies in preventing and remedying harassment in the workplace – but specifically observed that "many of the practices identified may also be helpful to practitioners outside of the federal government." Thus,

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private employers may find the following suggestions useful in terms of both preventing harassment and in defending against claims of harassment before the EEOC.

The EEOC organized its recommendations into four categories. We have selected some of the more useful or interesting recommendations as follows:

- **Leadership and Accountability.** To demonstrate commitment and accountability, top management may undertake the following:
    - Periodically meet with those in charge of anti-harassment programs to discuss the state of the program
    - Periodically assess harassment risk factors and take appropriate preemptive steps to address and eliminate those factors
    - Conduct climate and exit surveys and review EEO complaint data to gauge the prevalence of harassment, retaliation and other unwelcome work-related conduct
    - Ensure that the response to harassment allegations is regularly evaluated and documented through an electronic tracking system
    - Acknowledge and reward employees, supervisors and managers for creating and maintaining a culture in which harassment is not tolerated
    - Incorporate performance measures on harassment prevention and response for supervisors and managers

- **Comprehensive and Effective Anti-Harassment Policy.** In addition to the typical recommendations regarding a comprehensive and clear anti-harassment policy (e.g. using clear language, identifying the protected bases, providing multiple channels of complaint, prohibiting retaliation for reporting harassment, assuring a prompt and thorough investigation and appropriate corrective action, ensuring confidentiality to the extent possible), the EEOC suggests the following:
    - Explicitly assure that the policy applies to employees at all levels, as well as applicants
    - Discuss how the anti-harassment policy may be violated through work-related conduct on virtual platforms, including social media
    - Explain the employer's duty to investigate and correct harassment even where the alleged victims wish otherwise
    - Require managers and supervisors to report harassment to the appropriate officials, and encourage employees to report harassment that they witness or of which they otherwise become aware
    - Make the policy available onsite and online in accessible formats (as needed)
    - Periodically review and update the policy

- **Effective and Accessible Anti-Harassment Program.** The EEOC notes that policies should not exist in a vacuum, but must be part of a comprehensive program that ensures that all employees understand the anti-harassment procedures. In addition to setting up investigative and remedial procedures, such programs should include the following:
    - Allow for anonymous reporting through platforms like hotlines and websites

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- Ensure that the program has the necessary resources to respond promptly, thoroughly and effectively to complaints
- Utilize a complaint tracking system to document reports of harassment
- Educate employees and managers about the program
- Consider interim actions to prevent the recurrence of harassing conduct during an investigation
- Convey the outcome of the investigation to the alleged victim and harasser, where appropriate and consistent with relevant legal requirements
- Use tailored training, letters of warning, and counseling to address unwelcome conduct before it becomes unlawful or serious enough for more significant discipline

- **Effective Anti-Harassment Training.** As the EEOC notes, employees and management must be aware of what conduct is prohibited and how to prevent and correct it. The EEOC requires federal agency training, among other things, to: be provided periodically and be accessible to all employees; include plain language definitions of harassment and unwelcome conduct; provide examples of harassment based on specific protected bases; encourage employees to report unwelcome conduct before it rises to the level of unlawful harassment; and include details on how to report harassment. In addition, employers could also do the following:
  - Have senior leaders champion the training
  - Regularly revise and update it
  - Use trainers who are experts in the topic of harassment
  - Solicit feedback to improve effectiveness
  - Conduct training in smaller groups to foster more employee engagement and participation
  - Specifically direct content at non-supervisory employees, including by: having live, interactive discussions; providing real-world examples and scenarios tailored to the specific workplace; discussing harassment in remote environments; providing contact information for those responsible for addressing harassment questions, concerns, and complaints; providing informal training during team meetings, in advance of social gatherings, or in response to high-profile current events; and providing bystander training.
  - Provide separate training for managers and supervisors, in order to avoid chilling discussion among employees and to communicate additional responsibilities. Such training could include: reminding them that they must report harassment even if the employee does not wish to do so; reminding them that they should report inappropriate conduct before it becomes illegal harassment; reminding them to keep information about harassment allegations confidential; providing information on how to monitor for online harassment, including in a virtual work environment; and providing "trauma-informed training" for those who may receive or respond to allegations of harassment.

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TAKE NOTE

Federal Agencies Issue Joint Statement on AI Bias in the Workplace. The heads of the Equal Employment Opportunity Commission, the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Justice Department's Civil Rights Division joined together to issue a statement on their enforcement efforts against discrimination and bias in the use of automated systems or artificial intelligence (AI) in the workplace. The statement identifies the roles each agency plays, as well as the specific concerns raised by the workplace use of AI.

According to the joint statement, the EEOC enforces anti-discrimination employment laws, while the DOJ enforces constitutional provisions and federal statutes prohibiting discrimination across many areas, including employment. Although both the FTC and CFPB protect consumers from unfair business practices, they have both expanded their reach to include employees within the definition of consumer.

The statement identifies the following issues with potential discrimination in the use of AI:

- **Data and Datasets:** Outcomes can be skewed by unrepresentative or imbalanced datasets, as well as datasets that incorporate historical bias or contain other types of errors. In addition, data may be correlated with protected classes.
- **Model Opacity and Access:** Most people do not understand how AI works, meaning that users do not know if the system is fair.
- **Design and Use:** Developers may make flawed assumptions about the users, relevant context, or the underlying practices or procedures the AI may replace.

The agencies commit to monitoring the development and use of AI "to promote responsible innovation," as well as to protecting individuals' rights that may be violated through new technologies.

Notably, while these agencies are focused on the possible discriminatory impact of AI in the workplace, other federal workplace agencies are also concerned about other problematic issues arising from the use of AI. As we discussed in our November 2022 E-Update, the National Labor Relations Board General Counsel has announced that she is targeting employers' increasing use of automated technologies and electronic management systems. Employers should expect all federal workforce agencies to scrutinize their use of AI, perhaps even where an initial complaint to the agency is apparently unrelated to that issue.

An Accommodation, Unlike a Diamond, Need Not Be Forever. A recent case illustrates the point that employers can "test drive" a religious (or medical) accommodation to see if it is, in fact, feasible or whether it poses an undue hardship.

In *Kluge v. Brownsburg Community School Corp.*, a teacher objected on religious grounds to calling transgendered students by their registered first names in accordance with school policy, rather than those consistent with their sex at birth (an issue that may be arising more frequently in the workplace now). The teacher proposed, as a reasonable accommodation under Title VII, that he be allowed to call all students by their last name, "like a gym coach." The school initially allowed this

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accommodation. However, students soon complained that they found this practice insulting and disrespectful, and that they thought it was due to the transgendered students, who were then targeted and isolated by their peers. Teachers also reported that they believed the use of last names was harmful to the students and disrupted learning because the students brought their concerns into other classrooms. The school informed the teacher that the accommodation was not working, and he subsequently resigned and sued for failure to provide a reasonable accommodation under Title VII.

The U.S. Court of Appeals for the Seventh Circuit noted that, under current Supreme Court precedent, an employer need not provide a religious accommodation that imposes more than a *de minimis* cost or impact, as it would constitute an undue hardship on the employer. (Note that this *de minimis* standard for undue hardship under Title VII does not apply under the Americans with Disabilities Act, which has a significantly higher standard for establishing an undue hardship. We further note that the Supreme Court is currently reviewing whether to revise the *de minimis* standard for religious accommodations.)

In the current case, the Seventh Circuit found that the "emotional harm to students and disruptions to the learning environment are objectively more than *de minimis* or slight burdens to schools." Thus, the accommodation imposed an undue hardship. Of particular interest, the Seventh Circuit stated, "Title VII does not require the school to adopt an accommodation that, although facially neutral, does not work that way in practice." As shown here, the proposed accommodation, though reasonable on its face, ended up imposing an undue hardship on the school because it harmed students and the educational environment. Thus, it was lawful for the employer to withdraw the accommodation.

This case reminds employers that an accommodation, once granted, does not need to continue regardless. The actual impact of the accommodation, if it proves to impose an undue hardship on the employer, can be taken into account, and the accommodation may be discontinued. This gives employers and employees the flexibility to explore accommodations to see if they are, in fact, effective and the employer is not forced to tolerate them if it turns out that they are an undue hardship. This is also the case if the accommodation is initially workable, but circumstances change such that it later becomes an undue hardship.

"Fractioning" a Job May Still Result in Liability Under Federal Anti-Discrimination Laws. An employer cannot automatically escape liability under federal anti-discrimination laws, including Title VII or the Age Discrimination in Employment Act, by dividing up an employee's duties among others, according to the U.S. Court of Appeals for the Fifth Circuit.

In order to assert a claim of discrimination under the ADEA or Title VII, an employee must show, among other things, that they were replaced by someone outside the protected class (e.g. a younger employee or one of a different race/sex/religion/etc.). In *Spears v. Louisiana College*, a professor was terminated and sued for age discrimination. The federal district court found that, because the professor's courses had initially been spread out over other teachers, she had not been "replaced." The Fifth Circuit disagreed, stating, "Employers may not circumvent Title VII protections by 'fractioning' an employee's job," and then extending that principle to the ADEA. Of additional significance, after initially dividing up the professor's duties, the school subsequently hired a

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younger couple and that the professor's teaching duties were ultimately performed by one and her faculty duties by the other.

This case provides an important lesson for employers that they may still face liability even if an employee is not technically "replaced" and their duties are divided among other employees. While in most job eliminations, the employee's duties are legitimately redistributed, employers should not assume that this will automatically relieve them of any liability for discrimination – particularly if the position is eventually replaced, even in pieces, by others outside the protected class.

Another Federal Appellate Court Broadly Defines "Adverse Action" Under Title VII. In order to assert a discrimination claim under Title VII, an employee must show, among other things, that they suffered some "adverse employment action." Courts have traditionally interpreted that to mean some "ultimate employment decision" (such as a lack of promotion or a termination), but several recent decisions from various U.S. Courts of Appeals have taken a broader approach, including most recently the Second Circuit.

In *Buon v. Spindler*, a school principal sued the school district, alleging, among other things, that she was subjected to an adverse action when she was denied an opportunity to participate in several additional programs, which were paid, because of her race, color and national origin. Although the federal district court found that the denial of these extra employment opportunities did not constitute an adverse employment action, the Second Circuit disagreed. The Second Circuit "define[d] an adverse employment action as a 'materially adverse change' in the terms and conditions of employment," and provided examples, including "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." With respect to this case, the Second Circuit noted that "the denial of a lateral transfer or an additional assignment can qualify as an adverse employment action if that transfer or additional assignment would have materially changed the terms and condition of employment, such as by materially increasing the employee's pay or materially increasing the employee's opportunity for advancement."

As we discussed previously, actions that apparently fall short of "ultimate employment actions" may still be considered adverse actions sufficient to support a discrimination claim.

"Not a Good Fit" Might Be Grounds for Termination – But You Must Be Able to Back It Up. Employers sometimes assert that an employee is "not a good fit" for the company. Such vague terminology may be problematic when the employee claims that their termination was actually because of illegal discrimination or harassment. But the U.S. Court of Appeals for the Fourth Circuit upheld an employer's "not a good fit" determination because the employer was able to provide concrete examples of the employee's poor interactions with others.

In *Lashley v. Spartanburg Methodist College*, a professor sued for discrimination and retaliation under the Americans with Disabilities Act, among other things, when the school decided not to renew her contract and then terminated her shortly thereafter. The Fourth Circuit found that, with regard to the non-renewal of her contract for being a poor fit, the school offered several reports that the professor was often at the center of conflicts with students and faculty, that there were multiple

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complaints that she had unprofessional relationships with students, and that there were conflicts with multiple faculty members. There were also emails in which the professor expressed her dissatisfaction with the school, sometime profanely. As to her termination, that was the result of her making threatening statements to students and colleagues following the non-renewal of her contract.

To further illustrate this point, a federal district court came to the opposite conclusion in *Glenn v. P1 Group, Inc.* Similarly, the employee there was told he was "not a good fit" when he was terminated. After the lawsuit was filed, however, the employer explained that it meant that he lacked the experience for the job. The problem was that the employer's explanation was not consistent with its actions – for example, on the termination form, the employer did not check the box that stated "Failure to satisfactorily perform job duties." Based on the shifting explanations for the termination, the court found that a jury could find that the employer's reason was a pretext for discrimination.

The lesson here is that "not a good fit" can be a legitimate reason for terminating an employee, but it is important that the employer be able to demonstrate exactly why the employee is a poor fit. And frankly, it is better to identify the specific grounds – truthfully and accurately – for why the employee is not a good fit when informing the employee of the reasons for a termination.

Don't Forget to Provide Another WARN Notice If the Employees' Separation Date is Delayed. The federal Worker Adjustment and Retraining Notification Act requires certain employers to give 60 days' written notice of mass layoffs and plant closings to impacted employees. A recent case reminds employers that if the original separation date is delayed, an updated WARN notice must be provided.

The WARN Act requires employers with 100 or more full-time employees to provide at least 60 calendar days' advance written notice of a worksite closing affecting 50 or more employees, or a mass layoff affecting at least 50 employees and 1/3 of the worksite's total workforce or 500 or more employees at a single site of employment during any 90-day period. Notice is provided to the impacted employees as well as designated government officials and union representatives, and there are technical requirements as to what the notice must contain.

The WARN regulations further provide that once an employer has provided initial notice, "[a]dditional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice." If the postponement is for 60 days or more, the notice is treated as a new notice. If less than 60 days, the updated notice must be given as soon as possible, with reference to the earlier notice, the revised date/14-day period, and the reasons for the postponement.

In *Messe v. Bristol Compressors Int'l, LLC*, employees were provided the WARN notice; however, some employees were retained for several months beyond the specified termination date. The U.S. Court of Appeals for the Fourth Circuit found that the employer failed to provide those employees with notice to which they were entitled under WARN, and had no statutory or regulatory basis for excusing such failure. The Fourth Circuit further found that it was not necessary for the employees to show that they were harmed by the failure of notice in order to sustain a WARN Act claim (which conflicts with a decision from the Fifth Circuit).

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To avoid any chance of liability, regardless in which Circuit the employer is located, employers should take "warning" from this case and provide updated WARN notices if the original separation date is delayed for any employee.

OFCCP Updates Hiring Benchmark for Protected Veterans. The Office of Federal Contract Compliance Programs released its annual update of the hiring benchmark for protected veterans – 5.4%, effective March 31, 2023, based on recently-released data from the Bureau of Labor Statistics.

Under revised Vietnam Era Veterans' Readjustment Assistance Act regulations issued in 2014, covered government (sub)contractors must set a veterans' hiring benchmark for each of their establishments, either by using the OFCCP's annual benchmark as set forth in its VEVRAA Benchmark Database, or by developing their own individualized benchmarks. While the original 2014 hiring benchmark was set at 7.2%, we have seen a steady decrease in the percentage each year since. The current 5.4% figure represents a slight decrease from last year's 5.5% benchmark.

NEWS AND EVENTS

Resource Guide – We are pleased to announce that the 2023 edition of The Legal 500: Employment & Labour Law Country Comparative Guide, for which we authored the U.S. chapter, is now available. A copy of the pdf of our chapter is available here. The Legal 500 is a preeminent international rating organization for law firms and lawyers.

Webinar: Key HR Legal Issues Impacting Non-Profit Organizations. Fiona W. Ong, along with Hirschfeld Kraemer Partner Steve Hirschfeld, Chief Operating Officer of Catalight Foundation Natalie Margolis, Executive Director of the San Francisco Museum of Modern Art Chris Bedford, and Labor & Employment Practice Group Leader of Johns Hopkins Health System Corporation Neil Duke, presented a complimentary 90-minute webinar, presented by the Employment Law Alliance on what non-profit entities must do to ensure legal compliance and minimize costly litigation. You may access the webinar here.

Victory – Veronica Yu Welsh successfully obtained dismissal of a discrimination lawsuit for a large public school system. The federal court agreed that the plaintiff had failed to file a timely charge of discrimination with the Equal Employment Opportunity Commission or the Maryland Commission on Civil Rights, as required before filing a federal lawsuit.

Honor – Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q1 2023. 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 16th consecutive quarter and 17th time overall that Fiona has received this honor.

Media – Lindsey White was quoted in a April 7, 2023 article by Allen Smith for the Society for Human Resource Management (SHRM.org), "When Fitness-for-Duty Examinations Are Allowed." (Subscription may be required for access). Lindsey offered comments on the appropriateness of requiring a fitness-for-duty exam for a suicidal employee, as well as fraudulent paperwork.

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Presentation – On April 20, 2023, Lindsey White moderated a panel for American Bar Association Section of Labor & Employment Law National Symposium on Technology in Labor and Employment Law on the inclusion of cryptocurrency in 401(k) plans.

Media – Fiona Ong was quoted in an April 20, 2023 Law.com article by Trudy Knockless, "Businesses Are Paying Big Bucks in Response to Gender Stereotype Lawsuits." (Subscription required for access).

TOP TIP: Background Checks? Updated Summary of Rights Notice and FCRA Refresher for Employers

Under the Fair Credit Reporting Act, employers that use a third-party provider to conduct a consumer report or investigative consumer report (i.e. background check) are required to provide notices and communications to the applicant/employee. This includes a notice published by the Consumer Financial Protection Bureau (CFPB), "A Summary of Your Rights Under the Fair Credit Reporting Act," which was updated with non-substantive changes to contact information on March 17, 2023. In connection with informing employers about the updated mandatory notice, we thought this would be a good time to remind employers of the very technical requirements of the FCRA.

Over the years, there have been numerous lawsuits against employers for failure to comply with FCRA's strict notice and/or disclosure requirements. In many instances, employees challenged technical violations – some on behalf of a class. Thus, technical compliance is important in order to avoid liability under FCRA, as well as to avoid the time, inconvenience and cost of defending against a claim.

General Notice Requirements. Under FCRA, a "consumer report" is any communication containing information about an individual's credit history, character, general reputation, personal characteristics, or mode of living. An "investigative consumer report" is a consumer report in which information is obtained, at least in part, through personal interviews with neighbors, friends, or associates. These reports include credit checks, criminal background checks, reference checks, educational checks, driving records checks, and social media checks.

When any consumer report or investigative consumer report is being procured for employment purposes, the employer must do the following:

- Provide the applicant/employee with a clear and conspicuous written advance disclosure in a stand-alone document, stating that a consumer report or investigative consumer report may be obtained for employment purposes.
- Obtain the applicant's/employee's written authorization for the procurement of the consumer report or investigative consumer report, which may be combined with the stand-alone document referred to in the prior paragraph.
- Certify, to the entity providing the report, that the company has complied with the above notice requirements and that the information from the report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.
- If the report is going to be used as the basis, in whole or in part, for any adverse employment action (such as a refusal to hire or a decision to terminate), provide the applicant/employee

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with a pre-adverse action notice letter, along with a copy of both the report and a copy of the updated CFPB's "A Summary of Your Rights Under the Fair Credit Reporting Act" before taking the action.

- After waiting a "reasonable" amount of time (not specified by the statute or the CFPB), advise the applicant/employee of the adverse employment action. We recommend at least 5 business days. The letter must explain the adverse action, provide the name and contact information for the consumer reporting agency, state that the consumer reporting agency did not make the decision to take the adverse action and will not be able to provide an explanation for the action, state that the individual has the right to request a free copy of the report from the agency within 60 days, and state that the individual has the right to dispute with the agency the accuracy or completeness of the information in the report.

Additional Requirements for Investigative Consumer Reports. Employers that use third party providers to prepare investigative consumer reports have further obligations, as follows:

- Sometime before but not later than three days after requesting a report, provide the applicant/employee with written disclosure that an investigative consumer report may be obtained. Note that this requirement is satisfied by the initial disclosure/authorization form referenced above, which is provided to the applicant/employee before requesting the report.
- The disclosure must include a statement that the investigative consumer report may include information about the individual's character, general reputation, personal characteristics, or mode of living.
- The disclosure must inform the applicant/employee of their right to request a complete and accurate disclosure of the nature and scope of the investigation.
- The disclosure must also inform the individual that the employer is required to make a written disclosure of the nature and scope of the investigation within five days after receiving the individual's request for disclosure or the date the employer requests the investigative consumer report, whichever is later.
- With the disclosure, provide the CFPB's updated "A Summary of Your Rights Under the Fair Credit Reporting Act."
- Certify to the third-party reporting company that the Company has and will comply with all notice and disclosure requirements for investigative consumer reports, and further certify that the Company will disclose the nature and scope of the investigation to the individual upon request and within the required five-day period.
- Upon written request by the applicant/employee made within a "reasonable time," provide complete written disclosure of the nature and scope of the investigation that was requested, within the five-day period noted above.

Special Rules for Employee Investigations. If an employer uses a third-party consumer reporting agency (such as a human resources consulting firm that regularly does investigations) to conduct an investigation into suspected employee misconduct, or compliance with laws, regulations or the employer's policies, the employer does not need to provide the notices and disclosures or obtain the authorization described above. However, the employer must provide a summary describing the nature and scope of the investigation to the employee if adverse action is taken based on the investigation.

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