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E-UPDATE

July 31, 2023

RECENT DEVELOPMENTS

EEOC Updates Its Guidance on Visual Disabilities in the Workplace

The Equal Employment Opportunity Commission has issued an updated version of its Visual Disabilities in the Workplace and the Americans with Disabilities Act technical assistance document. This document provides guidance to employers on when they may ask employees and applicants questions about a vision impairment, possible accommodations, safety concerns, and harassment prevention.

The resource begins with general information about the wide range of vision impairments that may cause blindness or low vision. It also emphasizes that many individuals with vision impairments can perform their essential job functions, with or without reasonable accommodation, and that employers should not rely on stereotypes or incorrect assumptions to deny them employment opportunities. Of particular interest, the resource makes the following points:

- Wearing ordinary glasses or contact lenses does not constitute a disability under the ADA.
- Vision tests are medical examinations, and employees can be required to take such a test or meet an uncorrected vision standard only when it is job-related and consistent with business necessity.

Applicants – Medical Inquiries

- Employers may not ask about vision impairments (including history, medications, or current conditions) prior to making a job offer. They can ask whether the applicant can perform the essential functions of a job (which could include reading, working in low light, or inspecting small components, for example), with or without reasonable accommodation.
- Applicants need not disclose visual disabilities unless they are seeking reasonable accommodation for some part of the application process (e.g. application materials in larger font or in braille).
- If an applicant has an obvious impairment or voluntarily discloses a visual impairment, and the employer reasonably believes they would need an accommodation to perform the job, the employer may ask whether one is required and what type. Employers must provide an accommodation during the application process, even if it believes that it will be unable to provide an on-the-job reasonable accommodation.
- After making an offer, an employer may ask questions about the applicant's health, including visual disabilities, as long as it is asking the same questions of all those entering the same type of job. The employer may also request additional medical information to

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follow up on particular responses, as appropriate – but they can only disqualify those individuals from employment if it is job-related and consistent with business necessity.

Employees – Medical Inquiries

- For employees, employers may ask questions about a visual disability only when they have a reasonable belief that the employee's ability to perform the essential job functions is impaired or that they will pose a direct threat in the workplace. This can arise where employers observe performance issues that reasonably may be related to a known vision impairment, or where the employer observes symptoms that could indicate a vision impairment (difficulty visually focusing, reliable reports from others). Employers should keep in mind, however, that poor performance may be unrelated to a disability, and should not make assumptions.
- Employers may also ask employees about vision impairments: to support a related request for reasonable accommodation, to enable employees to participate in voluntary wellness programs, to comply with federal safety statutes or regulations, and to verify the use of sick leave related to a vision impairment as long as all employees are required to provide such information.
- Information must be kept confidential. Employers may not tell co-workers that an employee is receiving an ADA reasonable accommodation, or even that the ADA applies. (Instead, they should say that the information is personal, and company policy is to respect employee privacy, just as the co-worker's privacy would be respected). The EEOC suggests that employers could avoid these issues by educating employees on reasonable accommodation, including through written procedures, handbooks, staff meetings, and training.

Reasonable Accommodations

- Possible accommodations related to the performance of essential functions of the job include (but are not limited to):
    - Assistive technology (such as text-to-speech software, optical character recognition technology, systems with audible/tactile/vibrating feedback, or website modifications, low-vision optical devices, digital apps or recorders, smartphone and tablet apps with built-in accessibility features, magnifiers or closed-circuit televisions systems, larger and high-contrast monitors, adjustable computer operating system settings, prescription safety goggles, anti-glare shields and filters, large-print or high contrast keyboards, wayfinding tools and tracking devices, talking products like calculators, color identification technology, accessible maps)
    - Accessible materials (such as braille, large print, or recordings)
    - Modification of workplace/employer policies or procedures (such as verbal introduction protocols, use of personal assistive items, dress code modifications like sunglasses and filters, allowing the use of guide dogs in the work area, work schedule modification to facilitate transportation, telework, leave, alteration of marginal functions, reassignment to a vacant position), testing (such as allowing alternative testing, accessible format, additional time), or training
    - Ambient adjustments (such as brighter office lights, audible or tactile signs and warnings); sighted assistance or services (such as a qualified reader)

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    - Sighted assistance or services (such as screen-sharing technology, qualified readers, sighted guides and assistance, input from orientation/mobility/assistive technology professionals, noise-canceling headsets, braille labeler and labels)

  The EEOC also suggests the Job Accommodation Network for additional resources and ideas.
- Employers must also provide reasonable accommodations related to the terms, conditions and privileges of employment, including: accommodations for access to work or the workplace itself, services, facilities, or portions of facilities to which all employees are granted access (for example, employee break rooms, gyms, and cafeterias, and employee assistance programs); access to information communicated in the workplace; and the opportunity to participate in employer-sponsored training and social events.
- In keeping with the federal agencies' recent focus on artificial intelligence in the workplace, the EEOC specifically notes that employers must provide accommodations in connection with the use of software that uses algorithms or AI as decision-making tools. Employers should take steps to ensure that these tools do not screen out or disadvantage those with disabilities.
- No "magic words" are required to request an accommodation. The employee simply needs to make it known that they need an adjustment or change at work because of an impairment.
- Employers must engage in the interactive process in response to an accommodation request. This can involve medical documentation under certain circumstances to establish the existence of a disability and why reasonable accommodation is needed.
- Employers do not have to provide accommodations that are an undue hardship (meaning significant difficulty or expense). They do not have to provide personal use items that will be used both on and off the job. They do not have to eliminate essential functions, lower performance standards, or excuse conduct violations. If more than one reasonable accommodation would be effective, the employer may choose the accommodation, even if it is not the one preferred by the employee.

Safety and Legal Concerns

- If the employee's ability to perform the job safely is a concern, the employer must conduct an individualized assessment to determine whether the individual poses a direct threat in the workplace (meaning a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced through reasonable accommodation). This principle also applies in the post-offer, pre-employment situation. As part of this assessment, employers may send employees for a medical examination.
- Employers need not hire/retain an individual with a visual disability where prohibited by federal law.

Harassment and Retaliation

- Employers should make clear that they will not tolerate harassment based on disability or any other protected basis. They can do this through a written policy, staff meetings and training. They must also respond promptly and effectively to any reports of harassment.

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- The EEOC also emphasizes that the ADA prohibits retaliation against someone for requesting a reasonable accommodation and prohibits employers from interfering with the exercise of rights under the ADA.

New Mandatory Form I-9 and Remote Verification Procedures

The U.S. Citizenship and Immigration Services (USCIS) has announced a new, streamlined Form I-9 that employers should use beginning August 1, 2023 to verify the employment eligibility of new hires. In conjunction with this announcement, the Department of Homeland Security issued a rule that continues to allow for remote verification of I-9 documentation (which started during the COVID-19 pandemic) in certain instances.

New Form I-9. The new Form I-9 will be available on August 1, 2023 on uscis.gov. Employers may continue to use the current Form I-9 (edition date 10/21/19) until October 31, 2021; after that date, they are required to use the new form or risk monetary penalties. As the USCIS notes, the revised Form I-9:

- Reduces Sections 1 and 2 to a single-sided sheet;
- Is designed to be a fillable form on tablets and mobile devices;
- Moves the Section 1 Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary;
- Moves Section 3, Reverification and Rehire, to a standalone supplement that employers can print if or when rehire occurs or reverification is required;
- Revises the Lists of Acceptable Documents page to include some acceptable receipts as well as guidance and links to information on automatic extensions of employment authorization documentation;
- Reduces Form instructions from 15 pages to 8 pages; and
- Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHS-authorized alternative procedure rather than via physical examination.

Remote Verification Process. As for the verification process itself, employers may recall that, prior to the pandemic, they were required to examine Form I-9 documents in person, even for employees working remotely. During the pandemic, however, employers who were operating remotely were permitted to inspect the verification documents remotely (by video link, fax or email), while obtaining and retaining copies of the documents within three business days. They were also supposed to conduct in-person re-verification of the documents following the end of the COVID-19 National Emergency – the in-person review deadline has been announced as August 30, 2023.

The new DHS rule allows certain employers to remotely examine Form I-9 documents if they meet the following criteria: be enrolled in E-Verify, examine and retain copies of all documents, conduct a live video interaction with the employee, and create an E-Verify case if the employee is a new hire.

As to employees who were remotely verified during the pandemic, DHS will permit certain employers – those who were participating in E-Verify and created a case for those employees – to use this new verification process to satisfy the physical document examination requirement by

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August 30. Those employers who were not enrolled in E-Verify during the pandemic, however, must comply with the physical examination requirement.

TAKE NOTE

EEOC Postpones EEO-1 Deadline. The Equal Employment Opportunity Commission has announced that the filing period for the annual submission of EEO-1 workforce demographic information (Component 1), which typically occurs in the summer, will be postponed until the fall.

Employers who are required to file an EEO-1 form are those with 100 or more employees and federal contractors and first-tier subcontractors with 50 or more employees. The original EEO-1 form sought demographic information regarding the race, ethnicity, and sex of the workforce in 10 job categories (Component 1). In September 2016, the EEOC issued a revised EEO-1 survey form that added the requirement for employers with 100 or more employees (but not federal contractors and subcontractors with fewer than 100 employees) to provide aggregated data for the prior year on pay and hours worked, broken down into 12 pay bands across the 10 job categories, by the same racial, ethnic, and sex groups (Component 2). This latter requirement, which was subject to legal challenge, was in effect for only two years. Under the Biden administration, the EEOC has announced a focus on pay equity issues, and it is possible that some version of Component 2 may be resurrected in the future.

Employers may file their EEO-1 data electronically, and obtain more information and assistance about the filing requirements, here.

Can Employers Still Use the FMLA Forms that Expired on June 30, 2023? Particularly observant employers may notice (and worry) that the U.S. Department of Labor's model Family and Medical Leave Act forms and notices that they have been using have an expiration date of June 30, 2023, and that the forms now available on the DOL's website have a new expiration date of June 30, 2026. But there is no need to panic – the old forms are just fine.

As FMLA-covered private employers (those with 50 or more employees) know, the FMLA imposes very specific notice and other informational requirements on employers (and employees). In order to assist employers with compliance, the DOL has prepared model notices and forms that employers may use. Employers may also develop their own notices and forms, but given the very technical requirements that these documents must meet, we strongly suggest that employers use the DOL's models. These notices and forms are:

- **Eligibility Notice, form WH-381** – informs the employee of their eligibility for FMLA leave or at least one reason why the employee is not eligible.
- **Rights and Responsibilities Notice, form WH-381** (combined with the Eligibility Notice) – informs the employee of the specific expectations and obligations associated with the FMLA leave request and the consequences of failure to meet those obligations.
- **Designation Notice, form WH-382** – informs the employee whether the FMLA leave request is approved; also informs the employee of the amount of leave that is designated and counted against the employee's FMLA entitlement. An employer may also use this form to

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inform the employee that the certification is incomplete or insufficient and additional information is needed.

- **Employee's serious health condition, form WH-380-E** – to be completed by a health care provider when a leave request is due to the medical condition of the employee.
- **Family member's serious health condition, form WH-380-F** – to be completed by a health care provider when a leave request is due to the medical condition of the employee's family member.
- **Qualifying Exigency, form WH-384** – to be completed by the appropriate authority when the leave request arises out of the foreign deployment of the employee's spouse, son, daughter, or parent.
- **Military Caregiver Leave of a Current Servicemember, form WH-385** – to be completed by a health care provider when requesting leave to care for a family member who is a current service member with a serious injury or illness.
- **Military Caregiver Leave of a Veteran, form WH-385-V** – to be completed by a health care provider when requesting leave to care for a family member is who a covered veteran with a serious injury or illness.

As the DOL explains on its FMLA forms webpage, the expiration date is related to the collection of certain information required by the Office of Management and Budget. Other than extending the expiration date to 2026, there was no change in the forms and notices. So, employers – it's a sell-by date, not a use-by date.

Employers – Don't Get Too Cute In Interpreting Those Non-Disparagement Clauses. This was the lesson for employers from the U.S. Court of Appeals for the D.C. Circuit, which found the employer to have violated a mutual non-disparagement clause in an employee's severance agreement in *Wright v. Eugene & Agnes E. Meyer Foundation*.

The non-disparagement clause in question contained rather typical language that prohibited the Foundation employee from making "false, disparaging or derogatory statements to any person or entity." It also provided that, "Likewise, the Foundation will direct those officers, directors, and employees with direct knowledge of this revised letter agreement not to make any false, disparaging or derogatory statements to any person or entity regarding you." There was also an appropriate carve-out for "truthful disclosures to any governmental entity or in any litigation or arbitration."

Following execution of the agreement, the Foundation's CEO made negative statements about the employee to another non-profit leader. The employee sued for breach of the agreement, among other things. The Foundation argued, and the federal trial court agreed, that the disparagement clause obligated the Foundation only to direct its employees not to disparage the employee, but that the Foundation and its employees were actually free to disparage her. The trial court dismissed the claim.

On appeal, although the D.C. Circuit acknowledged that the Foundation's interpretation was "tenable," it held that, under D.C. law, the issue turned on what a reasonable person in the parties' position would have thought the words meant. The D.C. Circuit found the following language to be compelling: (1) the title of the clause was "Mutual Non-Disparagement," (2) the use of the word

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"likewise" as to the employer suggests that the employee's non-disparagement obligation is equally applicable to the employer, and (3) unless the Foundation was, in fact, prohibited from disparaging the employee, the carve-out for testimony to agencies or in litigation would have no real effect (contrary to the principle that all parts of a contract should be given effect). The D.C. Circuit also found it would make "little sense" if the clause permitted the Foundation, through the very person who fired the employee and signed the agreement to freely disparage the employee. Accordingly, the D.C. Circuit found that the trial court should not have dismissed the claim, and that the employee should have the opportunity to prove that her interpretation is the best reading of the contract.

Frankly, the employer's argument in this case – although perhaps technically "tenable" – feels rather disingenuous. And certainly it would seem to be contrary to what the employee reasonably believes. It does not place the employer in a good light and puts their good faith in question.

General Complaints By Other Employees Do Not Necessarily Provide Constructive Notice of Harassment. Although the employee argued that the employer should have known that she was being sexually harassed based on complaints by other employees, the U.S. Court of Appeals for the Tenth Circuit found that such complaints were not sufficiently similar or close in time to trigger liability for the employer. Moreover, the employer had no duty to monitor the behavior of the offending employee under the circumstances.

In *Frank v. Heartland Rehabilitation Hospital, LLC*, the employee reported that a co-worker made a number of sexually inappropriate comments to her. The following day, management met with the co-worker and he resigned. The employee subsequently sued her employer, alleging, among other things, that she had been subjected to a hostile work environment, and that the employer had notice of the harassment based on the prior complaints of other employees.

The Tenth Circuit noted that, in order to sustain a hostile work environment claim based on co-worker harassment, the employee must show that the employer had actual or constructive (should have known by exercising reasonable care) of the harassment and responded negligently. Such notice could exist when other employees report harassment that is sufficiently related in similarity and nearness in time to the harassment that the employee experienced.

In this case, the employee relied on complaints by multiple other employees; however, the Tenth Circuit found that the one similar incident was too removed in time (well over a year earlier), while other incidents were dissimilar – racially insensitive, not offensive, too vague, not confirmed, and/or simply rude. The Tenth Circuit found that the employer could not have known that the co-worker posed a risk of sexual harassment to the employee.

The Tenth Circuit also rejected the employee's argument that the first complaint by another employee imposed a duty on the employer to check in with female employees even after it had been addressed. The Tenth Circuit flatly stated, "We have never imposed an affirmative duty on employers to monitor their employees to make sure they are behaving appropriately unless the employer knows or should have known that the employee poses a risk to others."

Although this case is good news for employers, it still reminds them of the need to address harassment complaints promptly. And frankly, if an employee is behaving improperly – even if the

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conduct is not based on a protected characteristic – it would be wise for the employer to address the poor behaviors, both to minimize any risk of claims and to ensure a pleasant workplace.

OSHA Reinstates the Electronic Illness and Injury Reporting Requirements for High-Hazard Employers. The Occupational Safety and Health Administration has issued a final rule requiring certain employers to electronically submit injury and illness information (that they are already required to keep) to OSHA. This obligation is similar to one that was imposed under the Obama Administration but then largely rescinded under the Trump Administration.

OSHA's recordkeeping regulation requires employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses: OSHA Form 300 (the log of work-related injuries and illnesses); OSHA Form 301 (the injury and illness report); and OSHA Form 300A (the annual summary of work-related injuries and illnesses). Employers with 250 or more employees in industries that must routinely keep OSHA injury and illness records, as well as employers with 20-249 employees in certain high-hazard industries, are currently required to electronically submit their Form 300A information to OSHA annually.

The final rule will now require employers with 100 or more employees in certain designated high-hazard industries to electronically submit information from their OSHA Forms 300 and 301 each year. Notably, some of the establishment-specific data will be published online (without worker-specific information), for the stated purpose of allowing the public to make more informed decisions about workplace safety and health at a given establishment. Ultimately, OSHA believes, this will lead to the reduction of occupational injuries and illnesses.

No Employer Liability for Take-Home COVID? Well, not in California, at least, but also potentially in other states. The Supreme Court of California and now the U.S. Court of Appeals for the Ninth Circuit have found that an employer owes no duty of care under state law to prevent the spread of COVID-19 to the members of an employee's household.

In *Kuciemba v. Victory Woodworks, Inc.*, an employee and his wife sued the employer, alleging that the wife contracted a severe case of COVID-19 because the employer had negligently failed to protect its employees from the virus. Because this involved questions of state law, the Ninth Circuit asked the Supreme Court of California to address, among other things, whether employers have a duty of care to protect employees' household members.

The Supreme Court of California noted that, while state law imposes a general duty of care, there are exceptions to that general duty based on "compelling policy exceptions." In this case, the Supreme Court found "the significant and unpredictable burden that recognizing a duty of care would impose on California businesses, the court system, and the community at large counsels in favor of an exemption." The Ninth Circuit, relying on the state Supreme Court's ruling, then dismissed the take-home COVID claim.

Although this case specifically arose under California law and in the context of COVID, it could prove instructive for courts (and employers) in other jurisdictions and with regard to future outbreaks of other communicable diseases.

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An Employee's Verbal Testimony May Be Enough to Support an Overtime Claim. A recent decision from the U.S. Court of Appeals for the Fifth Circuit emphasizes the need for employers to ensure that they are maintaining good records of the hours worked by employees, as the lack of such records means that an employee's own assertions may be enough to create liability under the Fair Labor Standards Act.

Under the *Mt. Clement* standard established long ago by the U.S. Supreme Court, where an employer has failed to keep record of hours worked, or where the records are "inaccurate or inadequate," an employee needs to show only "that he has in fact performed work for which he was improperly compensated" and "the amount and extent" of such uncompensated work. Under this standard, the employee need not prove "the precise extent of uncompensated work," although they must present more than "unsubstantiated assertions." It is then the employer's burden to provide evidence to rebut the employee's claims.

In *Flores v. FS Blinds, L.L.C.*, the Fifth Circuit noted that an employee's testimony alone is sufficient to sustain an overtime claim under the *Mt. Clemens* standard, even where the employee offers only an estimated average of the hours worked. But here, the employees were also able to point to work orders and some corroborating testimony from the employer itself. Meanwhile, because the employer did not have records of the time worked, it could not negate the employees' testimony – at most, it could only challenge the amount of overtime worked.

This case is an important reminder of the critical need for employers to maintain accurate records of hours worked for its non-exempt employees. It may even be wise for them to keep such records for exempt employees and independent contractors (e.g. invoices that reflect the number of hours worked), given the focus on misclassification issues by plaintiffs' attorneys and the U.S. Department of Labor.

Well, The DOL's 80/20 Tipped Employee Rule Won't Be Enjoined After All. As we reported in our May 2023 E-Update, the U.S. Court of Appeals for the Fifth Circuit reversed a district court's decision denying a restaurant association's request to enjoin a Department of Labor final rule that reinstated the 80/20 rule applicable to tipped employees and further limited the amount of an employee's non-tipped work time for which the employer may take a tip credit. The Fifth Circuit sent the case back to the district court for further proceedings in accordance with its analysis – but the district court has once again refused to enjoin the rule.

Under the Fair Labor Standards Act and analogous state laws, an employer of tipped employees can satisfy its obligation to pay those employees the applicable minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour under federal law) and counting a limited amount of its employees' tips as a partial credit (i.e. the "tip credit") to satisfy the difference between the direct cash wage and the applicable minimum wage. The 80/20 rule, which has swung in and out of favor with the change in Presidential administrations, provides that if an employee performs work that directly supports tip-producing work either exceeding 20 percent of all of the hours worked during the employee's workweek or exceeding 30 continuous minutes, the employee is not performing labor that is part of the tipped occupation, and the employer may not take a tip credit for that time.

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In the current case, *Restaurant Law Center v. DOL*, the district court found that the DOL had the authority to interpret the FLSA's provisions as to tipped employees, and that its interpretation was not impermissibly arbitrary, capricious, or manifestly contrary to the FLSA's statutory language. The court further found that the DOL rule did not violate the "major questions" doctrine, which requires Congress to explicitly authorize agencies to decide issues of major national significance. The amounts of money at issue in the present case do not rise to that level, and the rule simply restores prior long-standing guidance, according to the court.

This ruling means that, at least for now, employers of tipped employees must continue to comply with the rule, which we further explained in our October 2021 E-Update.

NEWS AND EVENTS

Victory – Teresa Teare and Courtney Amelung won a complete defense verdict for SavaSeniorCare Administrative Services, LLC and one of its prior long-term care facilities, Patuxent River Center, following a four-day jury trial in federal court. The lawsuit was brought by a former employee of the Center who asserted claims of race discrimination and retaliation under federal and state law, as well as retaliation and interference under the Family and Medical Leave Act.

Victory – Chad Horton won an arbitration on behalf of a hospital. The arbitrator agreed that the employer had just cause to terminate an employee whose falsified time records were disproven by video showing her actual time of arrival at the hospital.

Victory – In a case before the Superior Court of the District of Columbia, Lindsey White, Veronica Yu Welsh, and Jamie Salazer received a favorable ruling partially granting a media company's Motion for Summary Judgment, which resulted in dismissal of the former employee's race, national origin, sex, religion, and disability discrimination claims and retaliation claim under the D.C. Human Rights Act. The Court held that the media company had a legitimate non-discriminatory reason for the employment actions taken against the former employee, and the former employee failed to establish that the employment actions taken by the media company were causally related to any alleged protected activity.

Podcast – Parker Thoeni was a guest speaker for the July 26, 2023 installment of the Employment Law Alliance's podcast series, Episode 512: SCOTUS Addresses Workplace Religious Accommodations: Title VII Compliance in the US. The podcast can be accessed on the ELA website or on your favorite podcast streaming service.

Presentation – On July 11, 2023, Parker Thoeni and Paul Burgin presented "Understanding Wage and Hour Laws" for the National Creditors Bar Association's (NCBA) "Three-Part Legal Learning Series with Shawe Rosenthal," which has been focused on employment laws and regulations.

Article – Elizabeth Torphy-Donzella's March 10, 2023 blog post, "Say What? NLRB Rules Employees May Tape Record Others in Violation of State Law" was reprinted in the Illinois State Bar Association's monthly newsletter for July 2023.

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Media – Fiona W. Ong was quoted in a July 12, 2023 Law360 article by Anne Cullen, "What Employers Should Know When Customers Harass." (Subscription required for access). Fiona offered comments on an employer's obligation to protect employees from third-party harassment.

Presentation – On July 26, 2023, Courtney Amelung and Jamie Salazer presented "An Overview of Employment Discrimination and Harassment Laws" for the National Creditors Bar Association's (NCBA) "Three-Part Legal Learning Series with Shawe Rosenthal," which has been focused on employment laws and regulations.

Media – Fiona W. Ong was quoted in a July 6, 2023 Bloomberg Law article by Annelise Gilbert, "After the Addiction, Opioid Users Struggle to Get Back to Work." Fiona provided insights on employers' obligations to engage in the reasonable accommodations process for applicants and employees in methadone treatment for opioid use disorder.

TOP TIP: Employers, Be Aware of the Risk With Electronic Signatures

For those of us who defend employers, some of the best weapons we have are an employee's actual signature on a critically-important agreement, policy acknowledgement, or form. There is something powerful about a physical signature, which is very hard for an employee to deny. In our increasingly digital world, however, the physical signature is giving way to electronic ones – but employers need to be aware of potential issues that can arise, as highlighted by a recent case from the U.S. Court of Appeals for the Sixth Circuit.

There are federal and state laws that provide for the validity of electronic signatures, such as the federal Uniform Electronic Transactions Act ("UETA") and the state laws that adopt the UETA, as well as the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"). Under these laws, an electronic signature is deemed to be the act of the person from whom the transmission is received, so long as this can be verified in some manner. And where effective computer security procedures can verify that the record is attributable to that person, this showing is presumptively made. But what happens when the employee challenges those procedures?

In *Bazemore v. Papa John's U.S.A., Inc.*, an employee sued his employer under the Fair Labor Standards Act. The employer tried to compel arbitration, pointing to an arbitration agreement that it requires all new employees to sign. The agreement was electronically signed through a computer program that requires the employee to sign in using a user ID and password, after which the employee must scroll through the entire document and check a box at the end as their signature. In this case, however, the employee swore under penalty of perjury that he had never seen or heard about the document, that his login credentials were made up of demographic information available from his application that others could have accessed, and that his manager had logged in for him and other employees to complete training materials for them.

The Sixth Circuit noted that whether an enforceable agreement exists is a matter of state law – and Kentucky law requires each party to assent to an agreement by "an intentional manifestation of such assent." (This is substantially the standard in many, although not all, other states). While an electronic signature can show assent, an issue – as raised here – is whether the person in fact executed the electronic signature. And the burden of showing that an agreement actually exists lies

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with the party seeking to enforce the agreement. Here, despite the employer's sign-in security measures, the employee offered testimony that created a question of fact around whether he actually executed the electronic signature.

Realistically, so much of the human resources process has moved to an electronic platform. Many employers are utilizing electronic signatures on personnel documents – and it can certainly be easier and much more efficient to obtain and retain electronic signatures than to chase down and obtain handwritten ones on a physical document. But it is critically important for employers to ensure that the electronic signature process is, in fact, truly secure such that only the employee can execute the signature. If there are ways to bypass the signature process – such as a manager's ability to create the employee's login and sign in for the employee – there is a risk that a court could find no enforceable agreement to exist.

RECENT BLOG POSTS

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

- Hey CEOs – Be Careful with Those Diversity Initiatives! by Fiona Ong, July 13, 2023
- The Supreme Court Redefines the Religious Accommodation Obligation for Employers by Elizabeth Torphy-Donzella and Fiona Ong, June 29, 2023
- What the Supreme Court's Affirmative Action Ruling Means for Employers by Fiona Ong and Elizabeth Torphy-Donzella, June 29, 2023
- Are Employers Supposed to Protect Striking Employees by Gary Simpler and Fiona Ong, July 28, 2023

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