SHAWE ROSENTHAL LLP

E-UPDATE

November 30, 2023

RECENT DEVELOPMENTS

Court Rejects NLRB's Decision that Company Uniforms Are Presumptively Unlawful

Employers have watched with dismay as the National Labor Relations Board, under an admittedly pro-union President, issued opinions and rules that significantly promote the interests of unions over those of employers. The Board's actions, however, may be challenged in court, and the U.S. Court of Appeals for the Fifth Circuit has now rejected a Board opinion that found company uniforms presumptively unlawful.

Background of the Case. In *Tesla v. NLRB*, Tesla's team-wear policy required production associates to wear black Company-issued clothes or, with supervisory approval, all-black clothing, while supervisors and inspectors wore red and white shirts. This was to allow "visual management" to distinguish among different types of employees, to ensure that workers were in their proper work area, and to verify that only employees were present in the production area. The policy also specified that clothing must be "mutilation free," meaning that it could not possibly cause damage (e.g. scratches, dings, chips, etc.) to a vehicle during the manufacturing process.

During the UAW's unionization drive in 2017, production associates began wearing black UAW shirts. A few months later, following the discovery of several mutilations, Tesla began to enforce its dress code by informing employees that the UAW shirt violated policy and employees would be sent home if they wore non-conforming shirts again. Tesla did permit employees to wear union stickers on their work apparel. The union charged Tesla with unfair labor practices, arguing that the policy violated employees' rights to engage in union-related activity under the National Labor Relations Act.

The NLRB's Position on the Display of Union Insignia. As we discussed in our September 1, 2022 E-lert, in *Tesla, Inc.* (the first precedent-shifting decision under the Biden Administration), the Board held that an employer's interference with an employee's display of union insignia on their apparel is presumed to be unlawful unless the employer can demonstrate "special circumstances" to justify the interference. Special circumstances are found when the display jeopardizes employee safety, equipment or product safety, or unreasonably interferes with a public image that the employer has established as part of its business plan.

Under the Board's 2019 ruling in *Wal-Mart Stores, Inc.*, the "special circumstances" test applied only when an employer completely prohibited union insignia, and that certain size-and-appearance restrictions on union insignia could be lawful based on less compelling employer interests. However, the Biden Board in *Tesla, Inc.* asserted that the special circumstances test applied to any restriction, and not just total bans. This effectively meant that company uniform requirements were presumptively unlawful. Tesla then appealed the Board's ruling to the Fifth Circuit.

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One South Street, Suite 1800, Baltimore, MD 21202
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The Fifth Circuit's Decision. In rejecting the Board's "extremely broad" apparel rule, the Fifth Circuit found that "the Board has exceeded its statutory authority in crafting the rule." Instead, the Fifth Circuit endorsed the *Wal-Mart* approach as to when the "special circumstances" test should apply (i.e., only where there has been a complete ban on the display of union insignia).

The Fifth Circuit primarily based its ruling on its finding that 'the Board failed to balance properly the competing interests 'of self-organization' and the 'right of employers to maintain discipline in their establishments.'" Instead, the Board "elevated employee interests at the expense of legitimate employer interests." The Fifth Circuit found that, in order to invalidate a dress ban, the Board must show that the policy "truly diminished the ability of the labor organizations involved to carry their message to the employees," which the Board did not do here.

In particular, the Fifth Circuit noted the policy justifications for company uniforms, which it adopted from the Ninth Circuit: "that a 'uniform requirement fosters discipline, promotes uniformity, encourages esprit de corps, and increases readiness' and [that] having 'standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission.'" These justifications were ignored by the Board.

Lessons for Employers. This decision is good news in that it upholds the ability of employers to enforce reasonable dress code requirements, including company uniforms, as long as the dress code does not totally prohibit the display of union insignia – absent special circumstances. But more generally, it also reinforces the fact that the power of the NLRB is not without bounds, and that federal courts, which are less subject to the whims of changing administrations, may provide a check on government agencies.

"Unlimited Sick Time, Without Penalty, Is Not a Reasonable Accommodation"

At least, not when in-person attendance is an essential function of the job, according to the U.S. Court of Appeals for the Seventh Circuit (which further noted that it is generally an essential function of many jobs). Accordingly, requiring an employee to use her existing sick time to cover disability-related absences did not violate the law.

Background of the Case. In *Smithson v. Austin*, a teacher for a school system for military families had a multitude of mental and physical health issues. She requested initial accommodations that included arriving up to 15 minutes late on an occasional basis, which were granted. Over the next several years, her accommodations requests increased in scope and variety, including the assignment of the first period of the day as her planning period. Although the principal told her that this could not be guaranteed, it appears that this was mostly granted.

After several more years, under a new principal, the teacher, whose condition had worsened, submitted revised accommodations requests, including reporting up to two hours late every day. The new principal's response was to allow her to use sick leave in half-day increments (which was school policy based on the need to call a substitute for teacher absences) whenever she came in late.

When COVID struck, the teacher's scheduling issue was resolved due to the fact that classroom instruction became fully remote. Nonetheless, the teacher sued, alleging that requiring her to use a half-day of sick leave whenever she arrived late was a violation of the Rehabilitation Act (the federal employee analog to the Americans with Disabilities Act).

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One South Street, Suite 1800, Baltimore, MD 21202
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What the Law Requires. Under both the Rehab Act and the ADA, a plaintiff must demonstrate that they are a qualified individual with a disability, meaning that they are capable of performing the essential functions of the job with or without reasonable accommodation. In determining whether a particular function is essential, courts will consider the employer's judgment, the written job description (if any), the amount of time spent performing the function, the consequences of not performing the function, and the experiences of past and current workers. Notably, courts – including the Seventh Circuit – have held that in-person attendance can be an essential function of many jobs.

The Court's Decision. In this case, the trial court held, and the Seventh Circuit agreed, that in-person attendance was an essential function of the job of a teacher. The early periods of the day were used for training, teacher collaboration, interactions with parents, *ad hoc* instruction, and other necessary activities. The fact that the teacher needed to miss up to two hours each and every morning meant that she was unable to perform this essential function – and thus was not a qualified individual under the law.

The teacher argued that early morning attendance was not essential because the school had allowed her to arrive late for a number of years. The Seventh Circuit noted, however, that her initial accommodation request was to arrive fifteen minutes late on an occasional basis, but this grew over the years to consume 25% of the workday on a regular basis – which the Seventh Circuit found was "not a reasonable accommodation as a matter of law."

In addition, according to the Seventh Circuit, the fact that the school accommodated her late arrival for years did not mean that physical attendance was not essential. The Seventh Circuit specifically noted that, "if an employer goes further than the law requires in accommodating a disabled person, it must not be punished for its generosity by being deemed to have conceded the reasonableness of a far-reaching accommodation."

Here, the school granted her "significantly more expansive request to regularly arrive two hours late," but required her to use sick leave in half-day increments to cover her absence, in accordance with school policy. The teacher argued that this was no accommodation at all because every employee receives sick leave, and forcing her to use it penalized her for her disabilities. Yet, as the Seventh Circuit observed, "the very purpose of sick leave is to accommodate employees who are unable to work due to illness." The teacher's desire to use unlimited sick time without penalty was not reasonable as a matter of law, in the Seventh Circuit's view, when in-person attendance was an essential function of her job.

Of additional interest, the Seventh Circuit reviewed the impact of COVID in – and out of – the workplace. The rapid and recent development of work-from-home technologies means that many jobs may no longer require in-person attendance. But this assessment must be made on a context-specific basis. Notably, these technologies were not available when the teacher made her request to miss up to two hours a day. Under those circumstances, allowing the use of sick leave was a reasonable accommodation, in the Seventh Circuit's view.

Lessons for Employers. This case provides several insights for employers. First, in-person attendance can be an essential function of the job in question, but new technologies may mean that certain jobs that were traditionally performed in person might be able to be performed virtually. This determination must be made on a case-by-case basis, and employers must be open to thinking beyond the traditional

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

methods of accomplishing job functions. But employers never need to excuse the performance of truly essential job functions as an accommodation for an employee's disability.

Moreover, if an employer does excuse the performance of essential functions or provides more expansive accommodations than required under the law, this will not necessarily mean that the employer has conceded that the accommodation is reasonable. However, it will be easier for the employer to defend that position if it has clearly documented that it is going beyond what is necessary and is providing the accommodation only on a temporary basis.

And last, but not least, employers can utilize existing policies and benefits – like existing sick leave – to provide reasonable accommodations under the law. If the use of such policies and benefits enables the employee to perform their essential functions, it is reasonable and the employer may choose that accommodation, even if it is not the one the employee prefers.

TAKE NOTE

And Unlimited Unpaid Leave May Not Be Reasonable Either. Elsewhere, in this E-Update, we discussed how unlimited paid sick leave was not a reasonable accommodation under the Americans with Disabilities Act where in-person attendance is an essential function of the job. In another case emphasizing the essential nature of in-person attendance for certain jobs, the U.S. Court of Appeals for the First Circuit rejected as not reasonable a teacher's request for a third extension of her unpaid leave, lasting an additional three-to-six months.

In *Der Sarkisian v. Austin Preparatory School*, at the beginning of the school year, the teacher was given a four-week leave for hip surgery. Due to complications, she required another surgery and leave of an additional three months, which the school granted. However, her request for yet another three-to-six months of leave was denied and her employment terminated, with the offer to reapply when she was cleared to work. The teacher sued for disability discrimination under the ADA and state law, among other things.

Under the ADA, a plaintiff must demonstrate that they are a qualified individual with a disability, meaning that they are capable of performing the essential functions of the job with or without reasonable accommodation. The First Circuit found that the teacher was not qualified because she was unable to meet the essential function of in-person attendance for classroom teaching, despite her argument that an accommodation of the additional leave would eventually enable her to do so. Given the need to provide consistency to the students and to retain the teacher's replacement, an open-ended leave was not a reasonable accommodation.

Moreover, although the First Circuit acknowledged that leave extensions may be reasonable under very specific circumstances, the teacher's request for yet another extension was not "facially reasonable" given the school's needs. The First Circuit also rejected the argument that the school's prior policy of offering 110 days of sick leave and a year-long absence meant that the teacher's request was reasonable, since the school had deliberately removed those policies.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

This case is helpful in reinforcing the principle that open-ended leaves typically are not reasonable under the ADA. Moreover, repeated leave extensions – particularly those without a specified end date – may also be unreasonable.

"Service Animals Need Not Be Accommodated Under Every Circumstance." Although federal law offers strong protections for the use of service dogs (and miniature horses!), such use is not entirely without limitations, as the U.S. Court of Appeals for the Sixth Circuit recently found.

In *Bennett v. Hurley Medical Center*, a nursing student had a service dog that could recognize the onset of a panic attack and enable the student to take medication to minimize the attack. She requested that the dog be allowed to accompany her while working on her clinical rotation at the hospital. Although the hospital initially agreed to her request, a staff member and a patient experienced severe allergic reactions to the dog, with other individuals reporting allergies as well.

The hospital revoked the student's ability to have the dog with her at all times because the dog posed a direct threat to these staff and patients. Nor would it be reasonable to relocate the affected staff members and patients – in particular, the nurses are unionized with negotiated terms governing reassignments, the hospital was already short-staffed, and certain nurses have specialized skills that cannot be transferred to other units (which would also impact patient care). There was also concern about not knowing which patients might have dog allergies, and safety issues regarding having a dog around immunocompromised or unconscious patients in the unit. The hospital instead proposed an accommodation of crating the dog on a separate floor and providing the student with the ability to take necessary breaks to be with her dog. The student refused the proposed accommodation as insufficient, and sued for violations of the Americans with Disabilities Act.

The Sixth Circuit found that the hospital did not discriminate against the student based on her disability of panic disorder; rather, the decision to prevent the dog from accompanying her on her rounds was due to staff and patient allergies to the dog. As for her claim that she was denied the reasonable accommodation of having her service dog with her, the Sixth Circuit looked to the ADA's service animal regulations, noting that "Service animals need not be accommodated under every circumstance." Among the reasons that a service animal may be excluded from the premises of a public entity is where it poses a direct threat to the health or safety of others.

In assessing whether a service animal poses a direct threat, the regulations set forth three factors: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk. In this case, the Sixth Circuit found that there was actual risk of harm, in that several individuals experienced severe allergic reactions, and there was no reasonable way to mitigate that risk, since moving patients and staff was not feasible under the specific circumstances. Consequently, the dog posed a direct threat to the patients and staff, and the hospital could legally prohibit it from accompanying the student.

The lesson for employers here is that there is no absolute right to bring service animals into the workplace. The regulations do provide for excluding service animals in limited circumstances, such as when the service animal poses a direct threat to others (but the threat must be significant and real, not speculative), as well as when the animal is out of control, not housebroken, or would fundamentally

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

alter the activities of the public entity. We further note that therapy or comfort animals are not service animals, and a very different analysis applies to their use.

When Do an Employer and Union Reach Impasse? The answer to this question is important because, under the National Labor Relations Act, an employer and union must bargain in good faith with regard to matters to be covered by a collective bargaining agreement, and the employer can change the conditions of employment only when agreement is reached or when the parties reach impasse. A recent case from the U.S. Court of Appeals for the D.C. Circuit offers some enlightenment on when impasse has been reached.

In *Thrifty Payless, Inc. d/b/a Rite-Aid v. NLRB*, the employer and union were engaged in negotiations over healthcare benefits for the employees, which were provided through a Trust Fund funded by employer contributions. Because the Fund was not financially stable (according to an independent consultant), the parties negotiated over proposed changes to the contributions and the impact on other benefits. The employer also suggested an alternative – switching to an employer-sponsored healthcare plan. There were several extensions to the existing agreement while the parties negotiated but were unable to come to agreement. The employer then declared the parties at impasse, and moved the employees to an employer-sponsored healthcare plan. The union filed unfair labor practice charges, arguing that the parties were not, in fact, at impasse and thus the employer should not have taken unilateral action. The National Labor Relations Board agreed, and the employer then appealed the Board's ruling to the D.C. Circuit.

Under Board precedent, an impasse occurs only when both sides have exhausted the prospects of reaching a deal and are "at the end of their rope" leaving no "realistic prospect" that further discussions will be fruitful. The Board determines the existence of an impasse by considering, among other things, the parties' bargaining history, their good faith in negotiations, the length of the negotiations, the importance of the points of contention, and the "contemporaneous understanding of the parties as to the state of negotiations."

In this case, the D.C. Circuit found sufficient evidence to support the Board's ruling that impasse had not been reached. Noting that impasse has been reached when neither party is open to compromise, the D.C. Circuit pointed to the fact that the union stated that it was open to further discussion, proposed additional bargaining dates and, just before the employer declared impasse, made a proposal with significant movement – involving hard numbers and proposed changes to benefits – towards the employer's position. Significantly, the employer did not evaluate the union's proposal by taking it back to its own experts for analysis, or conferring with the union's experts to understand how they had developed the plan, or seek input from the original consultant on the Fund's viability. The D.C. Circuit further noted that this was not a situation where the employer issued an ultimatum and the union fell short of fully-agreeing with the demand – the employer did not indicate that the employer-sponsored plan was the only option, and the union never rejected that proposal outright.

The D.C. Circuit also remarked on the brief duration of the negotiations as supporting the lack of impasse – at their last meeting, the parties discussed the employer's proposal in the morning and spent 44 minutes discussing the union's proposal in the afternoon. Given the complexity and importance of the issues, the Board found, and the D.C. Circuit agreed, that the employer was unjustified in walking away from the negotiations after less than an hour of negotiations on the union's proposal, following

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

only a handful of meetings in the prior months. The process was not exhausted, and the employer was wrong to declare impasse.

This case illustrates the importance of following through on the process of negotiations, and firmly establishing no possibility of compromise, before an employer may declare the parties to be at an impasse that would then allow it to take unilateral action. The failure to do so can have significant economic consequences – in this case, the employer was ordered to rescind the unilateral changes, to make current employees whole for any loss of benefits, to make the withheld contributions to the Fund, and to reimburse employees for any resulting expenses they incurred, as well as additional monetary damages to employees who had retired after the employer switched out of the Fund.

The NLRB Postpones the Effective Date of Its Expanded Joint Employer Rule. As we discussed in our October 26, 2023 E-lert, the National Labor Relations Board recently issued a final rule that will result in more findings that two entities are joint employers. Originally scheduled to take effect on December 26, 2023, the Board has now announced that the effective date will be extended to February 26, 2024.

As we previously reported, under the new rule, two companies will be joint employers of workers if they "possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment." And a joint employer must bargain collectively with employees' representative with respect to any term or condition of employment that it possess the authority to control or exercises the power to control – even for non-essential terms or conditions of employment.

The new standard will be applied only prospectively, meaning that the old standard will continue to apply to cases filed before February 26, 2024. As we warned previously, however, any arrangements that rely on the old standard may fall afoul of the new standard – and be subject to an unfair labor practice charge – once it takes effect.

DOL Issues Sample Employment Agreements for Domestic Workers. The Women's Bureau of the U.S. Department of Labor has created sample employment agreements for cleaners, home care workers, and nannies to assist both the workers and employers in understanding their rights and obligations, and to clarify the terms and conditions of employment. Although specific to these workers, these agreements also provide some insight into what the DOL thinks should be clearly articulated in any employment relationship.

The agreements include the following sections:

- Basic information about the employer and employee: names, contact details, work location, start date and length of employment (if applicable. We note that at-will employment is presumed, and to the extent an agreement is used, employers should reiterate the at-will nature of any employment relationship).
- Job responsibilities (including the fact that additional unspecified responsibilities may be required).
- Pay and benefits: rate of pay (including overtime rate), paydays and means of payment (e.g. cash, check, direct deposit, etc. Note that many states prohibit employers from mandating direct deposit or the use of pay cards), additional benefits (e.g. health/dental insurance, retirement plan contributions, transportation allowance, etc.), pay statements.

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(410) 752-1040 www.shawe.com

- Taxes and paycheck deductions: legally required withholdings, additional voluntary deductions.
- Schedule and work hours: how hours are tracked and recorded, the employee's work schedule, meal and rest breaks (with the notation that breaks of under 20 minutes must be paid), a schedule for regular feedback, notice of the employee's rights under the PUMP Act to lactation breaks and a private place to express breast milk.
- Cancellations, schedule changes, and emergencies: what notice employers should provide of schedule changes and cancellations and any pay requirements (notably, this is not required by federal law, although some states have started implementing such requirements for retail and food service employees), and what notice must be given in emergencies.
- Supplies, tools and personal protective equipment: designating who is to provide such equipment, and reimbursement.
- Leave benefits: holidays, and details around amount/accrual, payment, use, and required notice for sick leave, vacation, caregiving and medical leave, safe leave (for domestic violence reasons), bereavement leave, or other types of leave. Some of these leaves may be required under state or local laws.
- Workplace health and safety: infectious diseases protocols (including vaccinations), workers compensation, risk factors specific to the work being performed, risk of workplace violence, training for use of chemicals/tools/PPE.
- Disability accommodations: if required by the employee for a temporary or permanent disability. Note that the ADA and state laws apply to when and what accommodations are required.
- Workplace dignity and respect: protections for the employee's personal documents and belongings, prohibitions on discrimination/harassment/violence/retaliation.
- Termination or severance or employment: notice requirements, severance or termination pay (which is not required under law), reasons for termination (again, not required under law – particularly for at-will employees).

The DOL specifically notes that these agreements are not required by law. Moreover, there may be state and local laws that provide additional protections and requirements.

More Federal Agency Cooperation – the NLRB and OSHA. As we have noted over the past several months, including in our September 2023 E-Update, the federal workplace agencies have been entering into Memoranda of Understanding that will allow them to cooperate on workplace investigations, resulting in an expansion of possible liability for employers. The latest agreement is between the National Labor Relations Board and the Department of Labor's Occupational Safety and Health Administration.

In the past, these agencies did not work together, meaning that an agency's investigation was limited to the laws it enforced without regard to potential violations of other laws enforced by other agencies. The various MOUs now enable these agencies to partner on investigation and enforcement. In particular, the NLRB has been aggressive in piggybacking on worker complaints about violations of pay or discrimination laws to find violations of workers' rights to engage in concerted activity under the National Labor Relations Act. And now that has been expressly expanded to issues about workplace health and safety.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

NEWS AND EVENTS

Honor. Teresa Teare was named to the Daily Record's 2023 Employment Law Power List, which recognizes 25 of the most influential and respected employment attorneys in Maryland, as selected by the publication's editorial leadership team. (Subscription may be required for access).

Media. J. Michael McGuire was quoted in a November 9, 2023 Baltimore Business Journal article by Joe Ilardi, "'Something's Got to Give.' Baltimore unions often face long waits – and tough fights – to get their first contracts." (Subscription may be required for access). Mike offered comments on how the size of the bargaining unit may impact employee unionization efforts.

Leadership. Lindsey White was invited to serve as Co-Chair for the Technology Track programs at the American Bar Association's 18th Annual Section of Labor and Employment Law Conference, which will be held in New York City from November 13-16, 2024.

Honor. Fiona Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q3 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 18th consecutive quarter and 19th time overall that Fiona has received this honor.

Presentation. Fiona Ong and Chad Horton conducted a webinar, "2023 NLRB Update: Recent Board Decisions Alter Landscape for Union and Non-Union Employers," for the Maryland Automobile Dealers Association on November 7, 2023.

TOP TIP: Employers - Be Careful with Those Mandatory EAP Referrals!

As part of the corrective action process, some employers require employees to go to a company-provided Employee Assistance Program (EAP). Such programs are intended to offer resources and support to employees for their personal issues on a confidential basis, at no cost to the employee. The scope of services is wide, including health, financial and social issues. And to the extent that a mandatory EAP referral is related to an employee's health, that that can trip up employers, as a recent announcement from the Equal Employment Opportunity Commission highlighted.

The EEOC is suing Weis Markets for "unlawful use" of the Company's EAP. According to the announcement, after an employee complained of sexual harassment by her supervisor, the Company told the complaining employee that her coworkers had complained about her and that, as a result, she would be required to participate in its EAP. The EEOC asserts that the mandatory EAP referral would have required the employee to undergo a medical examination and disability-related inquiries, as well as release medical information to the Company. In addition, a Company official told the employee that the referral was to determine whether she should be placed on disability leave. When the employee refused to comply with the mandatory EAP referral, she was suspended without pay and then discharged.

Under the Americans with Disabilities Act, employers cannot require employees to undergo medical examinations or answer questions that may reveal a disability unless the employer can show that the

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

examinations/inquiries are job-related and consistent with business necessity. Another issue that arises under the ADA with regard to requiring a medical evaluation through EAP is the argument that the employer might be regarding the (non-disabled) employee as disabled, in violation of the law.

But mandatory referrals to EAP do not necessarily violate the ADA. As to the first issue, if the referral does not involve a medical examination or medical questions, the ADA would not be implicated. As to the second issue of "regarded-as" disability, in an informal discussion letter from 2000 (which was withdrawn in 2019, but is nonetheless illuminating and still publicly available), the EEOC addressed the question of whether an employer's suggested or required referral of an employee to an EAP creates the perception of disability covered by the ADA. The EEOC stated, on the one hand, that,

> It is unlikely that a mere referral to an EAP, by itself, would be sufficient to establish that an employer treated an individual as having a substantially limiting impairment. Simply referring someone to an EAP probably would not constitute regarding the person as having a substantially limiting impairment if the employer routinely referred people to EAP for reasons unrelated to impairments (such as grief or marriage counseling).

The EEOC goes on to observe, however:

> On the other hand, a referral to an EAP in combination with other relevant evidence could raise an inference that the employer regarded the person as having a substantially limiting impairment.

Of course, employers may legally make mandatory EAP referrals for a health-related evaluation where there is uncertainty as to an employee's health condition and fitness for duty. As the U.S. Court of Appeals for the Eighth Circuit stated in a 1998 case:

> An employer's request for a mental evaluation is not inappropriate if it is not obvious that an employee suffers from a disability. A request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired. Employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims [under the "regarded as" prong] . . .

However, where an employer connects an employee's work issues with a health condition for which it then requires the employee to obtain EAP counseling, the employer will likely be found to have regarded the employee as disabled in violation of the ADA.

So where does this leave employers with regard to mandatory EAP referrals? Well, the type of EAP services that the employee is required to obtain will determine whether such referral could raise issues under the ADA:

- If the referral is for non-health related counseling (e.g. dispute or conflict resolution, anger or stress management) and there has been no prior discussion with the employee regarding any health-related issues (such as mental health concerns) that could underlie the behavior warranting the referral, there is no problem with a mandatory referral.

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

- If the referral is for a health-related evaluation (such as a psychiatric evaluation), based on an employee's behavior in the workplace, and the employer is trying to obtain information about whether there may be a health-related component to the employee's behavior, without having previously discussed such concerns with the employee, there is likely no issue with a mandatory referral, as long as it is both job-related and consistent with business necessity.
- If an employer assumes and states to the employee, without any medical basis, that the employee has a health condition that is causing performance concerns and then refers the employee for a health-related evaluation, a mandatory referral could possibly be viewed as regarding the employee as disabled in violation of the ADA.

To the extent that there is any health-related aspect of a mandatory referral to EAP, either on the employer's side or EAP's side, employers should certainly consult with their employment counsel before taking such a step.

RECENT BLOG POSTS

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

- At-Will Employment Is a Fairy Tale… by Fiona W. Ong, November 24, 2023
- NLRB GC Issues Guidance Regarding Board Decision Impacting Employer Responses to Demands for Voluntary Recognition by Chad M. Horton, November 6, 2023

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One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com