RECENT DEVELOPMENTS

The COVID-19 Isolation Guidelines Have Changed Again…

It's been a long pandemic (and for those of you who are interested, the World Health Organization says that the pandemic is still ongoing, although it no longer constitutes a global public health emergency). As the virus has morphed, we've come a long way from the early, all-too-deadly days of the disease. And in recognition of the current state of COVID-19 and new preventative tools, the Centers for Disease Control and Prevention (CDC) has updated its guidance to take a unified approach to common respiratory viral illnesses, to include COVID-19, flu and RSV.

Prevention. The CDC identifies "Core Prevention Strategies" to protect individuals and those around them:

- Immunizations. Employers can encourage employees to become vaccinated against COVID-19 and the flu, as well as RSV for older employees. In many states, they can mandate vaccination, subject to reasonable medical or religious accommodations. But certain states prohibit employers from such mandates.
- Good hygiene practices (e.g. covering mouth and nose with a tissue when coughing or sneezing, proper handwashing, cleaning frequently touched surfaces). The CDC suggests that organizations, which includes employers, can also display (free) hygiene posters, make sure facilities are equipped with soap/water/hand-drying, provide hand sanitizer dispensers near frequently touched surfaces or where soap and water are not easily accessible, and clean frequently touched surfaces.
- Cleaner air. Employers can bring in fresh air, purify indoor air through the HVAC system or by using portable HEPA cleaners, or allow gathering outdoors. Employers should ensure compliance with at least the minimum outdoor air ventilation requirement in accordance with ventilation design codes (which are based on the year of building construction or latest renovation, and intended building occupancy).

Isolation. From the earliest recommendations of two weeks, the CDC has gradually reduced the isolation periods for those with COVID-19 infections. And now, the CDC is recommending that those with respiratory symptoms (including but not limited to fever, chills, fatigue, cough, runny nose, and headache) can return to normal activities when, for at least 24 hours, symptoms have improved and there has been no fever.

The CDC still recommends that those individuals who had symptoms, as well as those testing positive without symptoms, should still take additional precautions over the next five (5) days, including masking, physical distancing, and testing when they will be around other people indoors.

The CDC suggests that organizations can advise employees to stay home when sick, provide employees with paid time off, and develop flexible leave and telework policies.

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Special Considerations. The CDC notes that certain groups have a higher risk of severe illness from respiratory diseases, including older individuals, those with disabilities, those with weakened immune systems, and pregnant individuals. Employers should keep in mind that the Americans with Disabilities Act and the Pregnant Workers Fairness Act may require them to provide reasonable accommodations for such employees.

The Pregnant Workers Fairness Act Has Been Blocked – But Only as to the State of Texas!

What happened, and what does that mean for employers elsewhere? Following passage of the Pregnant Workers Fairness Act (as part of the Consolidated Appropriations Act of 2023), Texas sued to enjoin the law. On February 27, 2024, in *State of Texas v. Garland*, a federal district court in Texas ruled that the passage of the PWFA violated the Constitution. However, because Texas requested an injunction of the law only as applied to itself, the court's ruling was limited to the State and its agencies, meaning that the law still is in effect for private employers in Texas as well as all covered employers (meaning those with at least 15 employees) in all other states.

Background of the PWFA. As we reported in our December 2022 E-Update, the PFWA protects individuals with "known limitations," meaning a physical or mental health condition arising from pregnancy, childbirth, or a related medical condition, whether or not the condition constitutes an disability under the Americans with Disabilities Act. The law requires employers to provide reasonable accommodations for pregnancy/childbirth-related limitations, absent an undue hardship.

The law went into effect on June 27, 2023, and the Equal Employment Opportunity Commission began enforcement of the PWFA at that time. On August 7, 2023, the EEOC issued proposed regulations that explained how it plans to interpret employers' obligations under the law. Of concern to employers, these proposed regulations contemplate extremely broad and onerous obligations for employers, as we discussed in our August 9, 2023 E-lert. Unsurprisingly, the law was subject to immediate legal challenge.

The Court's Decision. The court's decision turned on the Constitution's Quorum Clause, which requires a majority of members of the House or Senate to be physically present in order to constitute the necessary quorum (or majority percentage) to pass legislation. In the context of the COVID-19 pandemic, the House implemented a rule that allowed its non-present members to vote by proxy. And it was pursuant to this rule that the PWFA was passed.

The court agreed with Texas that Congress violated the Constitution when it included absent members in the quorum count for passage of the PWFA. However, because Texas requested an injunction only on its own behalf, the court prohibited enforcement of the law by the EEOC only as to the State of Texas, leaving it in effect as to all other covered employers.

What This Means for Employers. This case provides a game plan for other plaintiffs to challenge the law and seek a broader or even nationwide injunction. Of course, the decision may (and, we venture to say, will likely) be appealed by the federal government to the U.S. Court of Appeals for the Fifth Circuit. Consequently, the long-term prospects of this law are uncertain, particularly if there is a change in Presidential administration with the next election.

For the time being, however, covered employers are required to comply with the PWFA, even though the EEOC has not yet issued final regulations. Pending those regulations, the EEOC has published general guidance on the law, as discussed in our March 2023 E-Update.

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D.C. Circuit Provides Guidance on Unlawful Surveillance Under the NLRA

This month, the U.S. Court of Appeals for the D.C. Circuit issued several opinions that provide some guidance to employers on the issue of unlawful surveillance of union members or supporters under the National Labor Relations Act.

The Rule on Surveillance. The Act prohibits employers from engaging in or creating the impression of surveillance of union-related activity because such conduct may interfere with, restrain or coerce employees who are attempting to exercise their protected right to self-organization. Unlawful surveillance may be found where the employer's conduct is "out of the ordinary" such that it has a "reasonable tendency in the totality of the circumstances to intimidate the employees." Routine employer observation of employees, however, is legal.

NCRNC, LLC v. NLRB. In the first case, there was a unionization drive at a health care facility. During the drive, managers distributed informational "fact of the day" flyers that included quotes from a guide to the NLRA and got employee feedback, which, along with their observations of employee reactions, they reported to the employer's labor relations consultant. The facility also implemented a "Manager on Duty" program, whereby managers would rotate around different floors and purportedly assist staff – but were also directed to observe whether employees gathered in groups and to monitor "suspicious activities." The Board found these activities to constitute unlawful surveillance.

On appeal, the D.C. Circuit first found that distributing employee flyers, observing employee reactions, and one-on-one persuasion efforts do not constitute unlawful surveillance. Rather it is protected speech under the First Amendment, as recognized by the Act, which provides that, "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice" unless it contains a "threat of reprisal or force or promise of benefit." More specifically, the D.C. Circuit reiterated that employers have the explicit right to influence their employees through verbal appeals and to communicate their general views on unionism. They also "may investigate employees' views on unionization so long as employers use non-coercive means to discover those views."

More problematic, however, was the Manager on Duty program. In determining whether conduct is so out of the ordinary as to constitute unlawful surveillance, the following factors are considered: the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. Here, the D.C. Circuit found that the increased presence of managers during the union drive, at abnormal times and locations, was atypical monitoring that deviated from the company's usual practices and was enacted for the purpose of inhibiting employees from participating in protected union activity.

***Stern Produce Co. v. NLRB*.** In the second case, the employer, a wholesale produce distributor, had cameras installed in company trucks to prevent unsafe driving and protect drivers from liability for accidents for which they were not at fault. The employer also had policies directing drivers that all vehicle cameras must remain on "at all times" unless specifically authorized to turn them off, as well as providing notice that drivers should have no expectation of privacy with regard to in-vehicle recording systems.

A driver (who had testified against the employer in a 2019 unfair labor practice trial) stopped for a lunch break and covered the truck's internal camera. His supervisor sent him a text message: "Got

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the uniform guy for sizing bud, and you cant [sic] cover the camera it's against company rules." The driver responded several hours later, acknowledging the text and stating that it was his lunchtime. There was no further discussion about this subject. The Board found that the employer had created an impression of surveillance of organizing activities by making the employee aware that he was being watched.

The D.C. Circuit rejected the Board's argument that the employee had not violated the company's rules when he blocked the camera during his lunch break, calling it "nonsense" since there was nothing ambiguous about the policy's requirement to have the camera on "at all times." The D.C. Circuit found that, under typical circumstances, a reasonable driver would have no basis to believe he was being watched through the truck camera for union activities, particularly since he knew he could be monitored at any time, without warning for any reason, as set forth in the relevant policies. Moreover, there was no evidence that union activity ever took place in a truck cab. In addition, another employee had been issued discipline for covering his camera.

Of particular interest, the D.C. Circuit recognized that the driver was a known supporter of the union and had been previously subjected to unfair labor practices (against all drivers, not just him specifically). It pointedly stated, however, "But those facts cannot automatically render suspect any interaction between him and management in perpetuity." And an employer does not violate the Act with a single remark that does not directly or indirectly refer to the employee's union activity.

Lessons for Employers. Employers should be aware that the Board is taking an extremely aggressive position on employer activities that have traditionally been considered lawful under the Act. At the same time, the D.C. Circuit has not been afraid to rein it in. However, employers should be careful about changing any conduct that could be viewed as surveillance in the context of union activity.

TAKE NOTE

US DOL Announces New Resource to Support the Employment of Individuals with Disabilities. The U.S. Department of Labor has created a new Competitive Integrated Employment Transformation Hub to collect resources from various federal agencies that provide practical guidance, policy information, and best practices for those with disabilities and their employers, as well as other related entities and individuals. According to the DOL, competitive integrated employment ensures people with disabilities are paid competitive wages and can work in environments where most employees do not have disabilities.

Specifically for employers, the DOL provides links to resources in four topic areas:

- Accommodations
- Creating an Inclusive Workplace Culture
- Targeted Populations (including veterans, those with mental health disabilities, and other specific disabilities)
- Special Considerations for Federal Agencies and Federal Contractors.

These resources are drawn from various DOL agencies (like the Office of Federal Contract Compliance Programs) and DOL-funded entities (like the Job Accommodation Network (JAN) and the Employer Assistance and Resource Network on Disability Inclusion (EARN)), as well as the Equal Employment Opportunity Commission, in addition to other federal agencies and private organizations.

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Threatening to Expose Co-Workers to COVID-19 Is Really Not Acceptable. The U.S. Court of Appeals for the Fifth Circuit found that the employee's threats, as well as her stealing time, were legitimate reasons for her termination, contrary to her claims that her employer interfered with her rights and retaliated against her in violation of the Family and Medical Leave Act, among other things.

In *Cerda v. Blue Cube Operations, LLC*, following her return from an extended medical leave, the employee told her supervisor that she was going to visit her ailing father during her 30-minute lunch breaks to make sure he took his medications and ate. The supervisor subsequently suggested that she talk to Human Resources about FMLA to care for her father. Although she briefly mentioned her desire to explore getting FMLA to the HR manager in passing, she never followed up. After her co-workers complained about her prolonged lunch breaks, the employer investigated and found that the employee had been paid for at least 99 hours that she did not work. During the investigation, the employee missed work after being exposed to COVID-19. When she was required to use her sick days, she threatened to come into work and infect her co-workers the next time she was sick. She was terminated and sued, alleging that the time she missed to care for her father was FMLA-protected.

The Fifth Circuit rejected the employee's claims. As to the interference claim, it reiterated that, under the FMLA, an employee must give their employer notice of their need or intent to take leave and enough information for the employer to understand that such leave may be covered by the FMLA. In addition, an employer can require an employee to comply with usual notice and procedural requirements, absent unusual circumstances, and discipline an employee for their failure to do so. In the present case, the Fifth Circuit found that the employee never actually requested leave and, at most, inquired about her eligibility for FMLA without expressing a desire or intent to take leave. Moreover, by referring the employee to HR for further information, the supervisor met any obligation to provide the employee with information under FMLA. Thus, there was no interference with her FMLA rights.

The Fifth Circuit also found that the employer offered legitimate, non-discriminatory reasons for the employee's termination – because she received wages for time that she did not work and threatened to expose co-workers to COVID-19. The employee offered no evidence to show that the reasons were pretext for retaliation.

This case reinforces the principle that employers can and should establish protocols for requesting FMLA. While they must be thoughtful and careful about recognizing when FMLA may apply, and should inform employees of what to do in order to request FMLA, they can hold employees accountable if the employees do not then follow the required process. And the second lesson here is that employers can certainly fire employees for making threats against other employees, as well as for stealing time.

Employers Must Reimburse Actual – Not Approximate – Expenses for Minimum-Wage Employees. The Fair Labor Standards Act requires employers to pay non-exempt employees at least the minimum wage, free and clear. And if the employer requires the employee to provide their own "tools" for work, the employer must reimburse the employee for 100% of the cost. But how should that cost be calculated?

In the consolidated appeal of *Parker v. Battle Creek Pizza, Inc.*, delivery drivers were paid minimum wage and were required to use their own vehicles for work. In one case, the federal district court agreed with the drivers that they should be reimbursed using the IRS' standard-mileage rate, while in the other case, another federal district court agreed with the employer that a "reasonable

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approximation" of the drivers' costs was permissible. The U.S. Court of Appeals for the Sixth Circuit disagreed with both.

The Sixth Circuit noted that the "reasonable approximation" of expenses principle derives from regulations governing the computation of overtime, not the payment of minimum wage. Moreover, a "reasonable approximation" that amounts to an underpayment of the employee's costs "would violate" the FLSA's minimum wage mandate where the employee makes only the minimum wage. The Sixth Circuit also rejected the employers' argument that the calculation of actual costs is "impossible," noting that the employers themselves created the situation: by paying the drivers the minimum wage, by requiring them to provide their own vehicles, and by cutting it close on the reimbursement. The Sixth Circuit observed that the removal of any one of these three elements would obviate the claim, and further stated, "the risk of financial harm from borderline reimbursements – the risk, specifically, that even 'reasonably approximate' reimbursements might be inadequate ones for some employees – must fall solely on the employer."

The Sixth Circuit similarly rejected the drivers' request to use the IRS standard-mileage rate, noting that it, too, was an approximation. The IRS' rate is a nationwide average that tends to overpay drivers in states with low gas taxes and underpay drivers in states with high gas taxes. It also weights depreciation costs towards newer vehicles, and favors low-mileage drivers.

Rather, the Sixth Circuit held that minimum wage employees like the drivers must be reimbursed for their actual costs. It also acknowledged the difficulty in calculating such costs. Unfortunately for employers, the Sixth Circuit declined to provide any specific definitive guidance on how to do so. It did, however, suggest that a burden-shifting framework, similar to the one used in discrimination cases, might be appropriate – or it might not. But it left the determination of how to make such a calculation to the parties and the district courts to figure out.

Just Because It Takes Time to Respond to an EEOC Subpoena Doesn't Make It an Undue Burden. The U.S. Court of Appeals for the Sixth Circuit gave short shrift to an employer's argument that it should not have to respond to a subpoena from the Equal Employment Opportunity Commission because the time that it would take employees to find responsive documents was an undue burden.

In *EEOC v. Ferrellgas, L.P.* , an employee filed an EEOC charge of discrimination against her employer. As part of its investigation into the charge, the EEOC served several requests for information (RFI), followed by several subpoenas (although not clear from the opinion, the EEOC typically only serves subpoenas when the employer has not provided the requested documents in response to an RFI). The employer objected to the subpoena as unduly burdensome, among other things. Specifically, the employer asserted that it would take 700-1500 employee hours to review and identify responsive documents, and it refused to provide the documents. At the EEOC's request, a federal district court ordered the subpoena to be enforced. The employer then appealed the order.

The Sixth Circuit affirmed the order of enforcement. It reiterated that whether a subpoena is overly burdensome is a fact-intensive inquiry depending on what is sought and the difficulty faced by the employer, with the employer bearing the obligation of establishing the undue burden. The Sixth Circuit observed that, "Assessing whether the burden of compliance is undue is a comparative exercise; what is unduly burdensome to a small business with a handful of employees may not be unduly burdensome to a Fortune 500 company." The Sixth Circuit noted that the employer here offered no baseline against which it could compare the estimated response time to determine whether

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the burden was undue. It also stated, "Merely pointing out that compliance with the subpoena will divert employee attention from ordinary tasks is insufficient – if that were enough, then nearly every EEOC subpoena would fail." The Sixth Circuit acknowledged that compliance would require significant time and effort, but the employer was required to provide "some metric of *how significant* that time and effort is."

What this means for employers (and their attorneys) facing an EEOC investigation is to be thoughtful about responding to RFIs in the first instance. And if the EEOC serves a subpoena, be prepared to spend significant time and effort in responding to it – a court will likely not find the subpoena to be unduly burdensome unless the employer can demonstrate, relative to its size and resources, that the compliance cost and effort seriously disrupts normal operations.

Second Circuit Clarifies the Test for Disparate Treatment Discrimination. The U.S. Court of Appeals for the Second Circuit has issued a decision that seeks "to demystify" part of the well-established standard for proving disparate treatment discrimination under Title VII (i.e., that an employee has been treated less favorably than co-workers who do not share the same protected characteristic). In so doing, the Second Circuit has also made it easier for a plaintiff to establish such a claim.

In order to establish a disparate treatment claim, a plaintiff must provide either (1) direct evidence of discrimination or, (2) as is more common, circumstances giving rise to an inference of discrimination. As to the second situation, the Supreme Court articulated the applicable test for whether a plaintiff has shown sufficient evidence of discrimination to sustain a claim. The *McDonnell Douglas* framework first requires the plaintiff to establish a *prima facie* case by showing that (1) they are a member of a protected class; (2) they are qualified for the position; (3) they suffered an adverse action; and (4) there are circumstances giving rise to an inference of discrimination. If that showing is made, the burden shifts to the employer to articulate "some legitimate, nondiscriminatory reason" for the adverse action. The burden then switches back to the plaintiff to prove that the employer's stated reason is a pretext for discrimination. Also of relevance to disparate treatment claims under Title VII, the employee need only show that discrimination was a "motivating factor," meaning one of several reasons, and not the only reason for the adverse action.

Where the confusion has arisen is with regard to the third stage of the *McDonnell Douglas* framework. Traditionally, in order to establish pretext, plaintiffs were required to show that the employer's stated reason was false and that the real reason was discrimination. However, as the Second Circuit has now clarified in *Bart v. Golub Corp.*, "To satisfy the third-stage burden under McDonnell Douglas and survive summary judgment in a Title VII disparate treatment case, a plaintiff may, but need not, show that the employer's stated reason was false, and merely a pretext for discrimination; a plaintiff may also satisfy this burden by producing other evidence indicating that the employer's adverse action was motivated at least in part by the plaintiff's membership in a protected class."

Thus, the fact that the employer's stated reason is true will not necessarily mean the claim fails; if discrimination is possibly also a reason for the adverse decision, the employee's claim will not be thrown out before reaching a jury. This means that it will be easier for some plaintiffs to establish their claim of discrimination. Of course, this decision is binding only on employers in the Second Circuit (Connecticut, New York and Vermont). However, as the Second Circuit notes, it is consistent with decisions (albeit less clearly stated) in other Circuits, and may serve as persuasive guidance for the remaining Circuits going forward.

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New Resources to Support Federal Contractor Hiring and Retention of Veterans. On February 29, 2024, the Office of Federal Contract Compliance Programs announced a new Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) landing page with new resources added to existing ones to assist federal contractors and subcontractors to comply with their obligations under the law.

VEVRAA prohibits federal (sub)contractors from discrimination against certain groups of veterans ("protected veterans") and take affirmative action to provide them with equal employment opportunities. The new resources include "promising practices" for employers on the following topics: using the VEVRAA hiring benchmark; requesting applicants to self-identify as a protected veteran; employment; outreach and recruitment; and retention. The OFCCP also updated its VEVRAA FAQs.

NEWS AND EVENTS

Webinar - Shawe Rosenthal LLP and the Maryland Chamber of Commerce presented a "2024 Handbook Update" webinar on March 6, 2024. This complimentary webinar covered the latest employment law changes and how they will impact your handbooks, including:

- The National Labor Relations Board's changing rules on handbook policies, which impact all employers, whether unionized or not.
- Legislative updates at the federal and state level, such as lactation accommodations, pregnancy protections, limits on marijuana testing, and changes to leave laws.
- Major workplace developments, including the impact of the Supreme Court's affirmative action decisions on corporate DEIA initiatives and the use of generative AI like ChatGPT.

You may view the webinar here.

Victory – Parker E. Thoeni and Paul D. Burgin won a partial motion to dismiss in federal court. Parker and Paul were able to establish that the customer and employee non-solicitation provisions in an employee's restrictive covenants agreement with her former employer were overbroad and therefore unenforceable.

Victory – Parker E. Thoeni and Evan Conder won a partial motion to dismiss in federal court on behalf of a senior living facility. The court agreed that the employee had failed to file the required charge of discrimination with the Equal Employment Opportunity Commission as to her claims of discrimination on the basis of her genetic information and disability, as well as her retaliation claim. Although she had filed a charge alleging failure to provide a religious accommodation, her other claims were not sufficiently related to that claim to meet the charge prerequisite.

Presentation – Parker E. Thoeni was a guest speaker for the Maryland Manufacturing Extension Partnership's Human Resources Peer Group on March 13, 2024. Parker offered the group guidance on Family and Medical Leave Act issues.

TOP TIP: A Reminder to Employers to Be Thoughtful About DEI Initiatives – And DOCUMENT!

Following the increased interest in diversity, equity and inclusion (DEI) initiatives in the context of the murder of George Floyd and the #BlackLivesMatter movement, we warned employers to be careful about rushing into anti-discrimination initiatives, like diversity hiring quotas, that could, in fact, violate Title VII. We reiterated this warning more recently in light of the Supreme Court's

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decision rejecting the use of affirmative action in college admissions. And now a recent case from the U.S. Court of Appeals for the Fourth Circuit again emphasizes this point.

Background of the Case. In *Duvall v. Novant Health, Inc.*, a major healthcare system developed a "Diversity and Inclusion Strategic Plan" that incorporated three phases that essentially boiled down to (1) assessment of the organization's D&I culture, (2) implementation of goals, including increasing diversity in the executive and senior leadership teams, and (3) evaluation of progress with additional actions to close identified gaps.

During phase 1, it was noted that there was a substantial overrepresentation of white males in leadership. Then during phase 2, a white male senior vice president (SVP) with strong performance reviews and significant professional accomplishments was abruptly terminated. He was told that the employer was "going in a different direction." He was initially replaced by two female subordinates, one of whom was Black, and eventually by another Black woman. A potential employer was told by the SVP's manager that he was a high performer, but was let go due to a desire for "new leaders," "a different point of view," and a "different flair."

The SVP sued, alleging that his termination during a substantial D&I initiative was due to his race and/or sex. A jury agreed. The employer then appealed the jury's decision to the Fourth Circuit.

The Court's Ruling. The Fourth Circuit found there was "more than sufficient evidence" to sustain the jury's verdict. The SVP "was fired in the middle of a widescale D&I initiative" that sought to ensure that leadership reflected the community served through the three-phase plan. The employer collected data that showed a decrease in white workers and leaders and an increase in Black workers and leaders over the life of the plan. The employer also tied executive bonuses to achieving certain minority percentages.

Moreover, the Fourth Circuit noted that the employer offered "shifting, conflicting, and unsubstantiated explanations" for the SVP's termination. At trial, the SVP's manager testified for the first time that he fired the SVP because the SVP lacked engagement and support from the executive team – which was not the reason given at the time of termination. Moreover, there was a complete lack of contemporaneous documentation as to that supposed reason or any other performance deficiency. To the contrary, there was extensive evidence regarding the SVP's "superb" performance – and the manager himself told the SVP's potential employer that he was not let go for performance. Of additional relevance, during phase 2, another high-performing white male SVP was also terminated and replaced with a Black male.

Lessons for Employers. The Fourth Circuit specifically noted that employers may utilize D&I programs – but what they may not do, as we have previously explained in the blog posts linked above, is take employment actions based on an employee's race or gender. This case also offers some additional pointers for employers:

- Do not use quotas or numerical targets based on race or sex.
- Do not tie executive bonuses to the accomplishment of numerical diversity metrics, including the achievement of minority or female representation percentages.
- If there is a performance issue, make sure to address it and document it!

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RECENT BLOG POSTS

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- Federal Court Tosses NLRB's Expanded Joint Employer Rule by Fiona W. Ong, March 11, 2024
- Wiping the (Diverse Candidate) Slate Clean? by Fiona W. Ong, March 8, 2024
- Could Headphones Have Averted a Work-From-Home Tragedy? by Elizabeth Torphy-Donzella, February 29, 2024

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