SHAWE ROSENTHAL LLP

E-UPDATE

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RECENT DEVELOPMENTS

The ADA Does Not Protect an Employee Who Failed a Drug Test Because of Hemp Use

The use of products containing cannabinoids (CBD) is quite prevalent, with many assuming that it is perfectly legal. What they do not realize, however, is that they can trigger positive drug tests – and that employers may be able to discipline them based on those results. This case further offers lessons on what information is required to establish coverage under the Americans with Disabilities Act.

THC is the primary psychoactive component of marijuana, which belongs to the cannabis family. CBD products are derived from hemp, a variety of cannabis that is bred to contain little to no THC; any concentration of up to 0.3% THC is not a controlled substance and is not considered an illegal drug. However, because CBD products are not regulated, they may contain more THC than indicated on product labels, and therefore may actually cross the line to become an illegal drug.

Background of the Case: In *Anderson v. Diamondback Investment Group, LLC*, a new employee suffered from anxiety and pain, for which she took hemp-derived products and other over-the-counter painkillers. In the morning, she took a dropper-full of CBD oil, and then vaped a hemp cartridge at lunch time.

The employee's pre-employment test, which came back after she started work, showed a positive result for marijuana. The Company decided to allow her to retest, and the employee informed them that she took Midol "for female issues," Aleve-D and Benadryl "for sinus and allergy issues," and CBD "for everything else." The second test came back "invalid," and she took a third test, which again returned a positive result. The employee alleged that she provided a nurse's note that stated she took CBD for anxiety and muscle spasms. Nonetheless, the employer fired her for violation of the company's drug-testing policy. Unsurprisingly, she sued, claiming violations of the ADA. The federal district court threw out her case and she appealed.

The Court's Opinion: The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's ruling. With regard to her claim of wrongful discharge under the ADA, the Fourth Circuit noted that an essential element of the claim is that she is a qualified individual with a disability. In this case, however, she offered no expert medical evidence to support her disability. The nurse's note offered no information about limitations on major life activities, and the employee's affidavit about her health contained only conclusory assertions. The Fourth Circuit noted that an employee's affidavit alone can establish a disability, but only where it "elaborated in detail upon the plaintiff's injuries, symptoms, and treatment." That was not the case here.

Next, the Fourth Circuit found that the employer offered a legitimate, non-discriminatory reason for the termination – the fact that the employee twice tested positive for an illegal drug – marijuana – in

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violation of company policy. The employee argued that the policy itself was discriminatory, because it did not distinguish between illegal drug users and those who treat their disabilities with remedies that may contain illegal substances – or at least test as illegal. The Fourth Circuit disagreed, noting that an employer's legitimate reason can be "correlated" with conduct covered by the ADA but still be nondiscriminatory. In this case, the employer "was free to implement a drug testing policy that results in the termination of an individual taking what the unchallenged drug test results showed to be an illegal drug—marijuana—to treat a disability, if that policy doesn't have, as a goal, the intentional exclusion of any individual taking a lawfully prescribed drug to treat a disability."

The employee also claimed that her termination violated North Carolina's "lawful use of lawful products" law, which prohibits employers from taking adverse action against employees based on their off-duty use of lawful products – unless the employer's restriction on such use is "relate[d] to a bona fide occupational requirement and is reasonably related to the employment activities." Here, the Fourth Circuit found that the employee could not show that the hemp products were, in fact, legal, given the lack of any evidence regarding their THC content. Moreover, the Fourth Circuit determined that the employer had articulated a bona fide occupational requirement that was reasonably related to its employment activities – "a drug testing policy targeted to maintain workplace safety and efficiency."

Lessons for Employers: This case offers some interesting guidance for employers. What is not particularly helpful is the ruling that an employee's own (and shall we say, potentially self-serving) affidavit might be sufficient to establish a disability, but at least the court put some guardrails around it by requiring a certain level of specificity. More helpful is the point that an employer can implement and enforce a legitimate drug testing policy (although a number of states have enacted restrictions on testing for marijuana). And finally, for those employers in North Carolina, the interpretation of the lawful use of lawful products in the context of marijuana is quite helpful.

Federal Appellate Court Upholds NLRB's Decision Prohibiting Non-Disparagement and Confidentiality Clauses in Severance Agreements

In 2023, the National Labor Relations Board issued a disturbing case applicable to all employers – union and non-union alike – asserting that severance agreements may not contain general non-disparagement or confidentiality clauses. According to the Board, such clauses violate the rights of employees under Section 7 of the National Labor Relations Act to engage in concerted activity for their mutual aid or protection (i.e. "protected concerted activity). The case was appealed to the U.S. Court of Appeals for the Sixth Circuit and, unfortunately for employers, the Sixth Circuit upheld the NLRB's ruling – albeit on procedural grounds, without reaching the substantive question of whether the NLRB's ban on the aforementioned clauses was permissible.

Background of the Case: Historically, the NLRB has disfavored such provisions in severance agreements. However, in several 2020 cases, *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, the Trump Board found such provisions to be permissible. According to the Trump Board, the agreements containing such provisions were not mandatory, pertained exclusively to post-employment activities and therefore had no impact on terms and conditions of employment, and were not proffered coercively. However, in *McLaren Macomb*, the Biden Board overruled those cases, as discussed in our February 2023 E-Update.

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Specifically, the NLRB asserted that it was "return[ing] to the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful." The acceptance or nonacceptance of the agreement by the employee is "immaterial," as the "mere proffer of the [unlawful] agreement itself violates the Act." The NLRB will look to the language of the provisions themselves, and will consider such language unlawful if, read broadly, it could potentially impact employees' Section 7 rights.

With regard to typical non-disparagement language, the NLRB found that it substantially interfered with employees' ability to make statements about the workplace, including critiques of employer policies and assertions that the employer has violated the Act. As for typical confidentiality provisions, the NLRB held that such a provision illegally prohibited employees from disclosing the agreement to the NLRB, filing unfair labor practice charges with the NLRB, or discussing the terms and conditions of the agreement with other co-workers for their mutual benefit.

Following this decision, the NLRB's General Counsel issued a memo clarifying and confirming the broad impact of the ruling, as discussed in our March 22, 2023 E-lert. The case was then appealed to the Sixth Circuit.

The Sixth Circuit's Ruling: In *NLRB v. McLaren Macomb*, the Sixth Circuit upheld the NLRB's decision – but did not decide whether the NLRB was correct that the non-disparagement and confidentiality provisions violated the Act, finding that it was not necessary to resolve the case. Rather, the Sixth Circuit addressed only whether the employer had the obligation to bargain with the union over the furlough of 11 employees and whether it engaged in unlawful direct dealing by offering the severance agreement directly to the employees.

The Sixth Circuit agreed with the NLRB that layoffs or furloughs are terms and conditions of employment that are subject to mandatory bargaining for unionized employers. Although the employer raised certain arguments about whether the union had been formally recognized as the employees' bargaining representative and whether the furloughs were permissible as a past practice, among other things, the Sixth Circuit noted that the employer had failed to raise these arguments before the NLRB, and therefore had failed to preserve them for review on appeal.

There is an exception to the statutory obligation to bargain where there is a compelling business justification that would justify the failure to bargain. The employer argued that the COVID-19 constituted exigent circumstances that excused its conduct. This required a showing that it was required to take immediate action and was unable to bargain. Here, the Sixth Circuit noted that the employer had bargained with the union over other matters during the same timeframe, undermining the claim that it could not do so.

The Sixth Circuit also found that the employer violated the Act when it dealt directly with the employees over the severance agreements, rather than going through the union as the employees' exclusive representative. This constituted unlawful direct dealing.

Lessons for Employers: Unfortunately, the employer community lost this first effort to overturn the NLRB's *McLaren Macomb* decision, meaning that the Board's currently prohibitions on general non-disparagement and confidentiality provisions in severance agreements remains in effect. We may need

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to wait until there is a change to a Republican administration before receiving any relief from this ruling.

But this case also highlights the need for employers (and their counsel) to ensure that all relevant arguments are raised before the Board. In addition, if asserting a compelling business justification defense to a failure to bargain charge, it is important to ensure that the Company's actions are consistent with such a defense with regard to other interactions with the union.

TAKE NOTE

Federal Appellate Court Upholds DOL's Authority to Use Salary Test for Overtime Exemption. The U.S. Court of Appeals for the Fifth Circuit upheld the authority of the U.S. Department of Labor to define the terms of the overtime exemption under the Fair Labor Standards Act, including the salary requirement. Although the decision, *Mayfield v. U.S. Dept. of Labor*, reviewed that 2019 regulatory changes, the ruling significantly bolsters the DOL'S position that it has the authority to increase salary levels required to meet the overtime exemption. Thus, for now, the DOL's most recent increase of the salary level to meet the overtime exemption will remain in place (other than for the State of Texas, which won an injunction of the rule as to state government employees, as discussed in our July 1, 2024 E-lert).

As most employers should be aware, the FLSA requires covered employers to pay employees time-and-a-half of the employee's regular rate for hours worked over 40 hours in a week, unless the employee falls within a bona fide executive, administrative, or professional ("EAP" or "white-collar") exemption. In order to meet the exemption, a white-collar employee must meet three tests: (1) the employee's primary duties must meet requirements specific to the EAP exemption in question; (2) the employee must be paid on a salary basis; and (3) the employee's salary must be at least a certain amount per week. Most recently, the DOL issued a rule, effective July 1, 2024, that raised the required weekly salary from $684 to $844 (or $43,888 annually), with a further increase on January 1, 2025 to $1,128 per week (or $58,656 annually).

What this means for employers is that, in the context of similar challenges to the 2024 rule, a generally reliably employer-friendly federal appellate court, which has enjoined a number of other agency rules, is not likely to overturn the 2024 rule.

Remember that Temporary Conditions Can Still Be Disabilities Under the ADA. Before the Americans with Disabilities Act was amended back in 2008, the clear rule was that conditions lasting less than 6 months were not considered disabilities. That changed, however, with the ADA Amendments Act – but many employers still (incorrectly) use the 6-month cut-off. And they do so at their peril, as a recent case from the U.S. Court of Appeals for the Third Circuit makes clear.

In *Morgan v. Allison Crane & Rigging LLC dba Allison Crane & Rigging*, the employee had a lower back injury that resulted in lifting and bending limitations for several months. He was then terminated for failure to "follow the day off request process as well as other policies" when he supposedly failed to show to work one day. He sued for violation of the ADA, but the federal district court threw out his claims, finding, among other things, that the employee was not disabled because his back pain was both transitory and minor (applying prior ADA precedent).

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The Third Circuit used this case to clarify that the prior precedent was no longer good law. Rather, "temporary impairments can qualify as an actual disability under the ADA." The critical question focuses on whether the condition "substantially limits" the employee's ability "to perform a major life activity as compared to most people in the general population." While duration may be relevant, it "*is not dispositive* of whether someone is disabled." (Emphasis in original). Under the ADA Amendments Act, conditions that are both "transitory and minor" are not disabilities – but a condition may be transitory but not minor, and therefore fall under the ADA's coverage. Moreover, the "minor" requirement is intended to exclude only those impairments "at the lowest end of the spectrum of severity," like a cold or the flu. In this case, the employee's back pain caused difficulty bending, lifting, walking, and turning left or right, so it was clearly "more than minor pain."

With this case, the Third Circuit joins multiple sister Circuits that have previously held that temporary impairments may be disabilities within the meaning of the ADA. Employers should be aware even short-lived conditions may be protected disabilities, and engage in the interactive process to determine if there are reasonable accommodations available for the employee.

An Employee Is Not Entitled to Remote Work in Lieu of FMLA to Care for a Child. The Family and Medical Leave Act provides leave, and not other accommodations, to care for a child, as the U.S. Court of Appeals for the Second Circuit recently confirmed.

In *Kemp v. Regeneron Pharmaceuticals, Inc.*, following several other medical leaves for herself and for caring for her child, who had a serious medical condition, the employee spent most of a month working remotely while caring for her child. When she returned, her managers expressed concern about the amount of time the employee had spent out of the office, and she was limited to working remotely only one day per week, even though others regularly worked from home. She was also encouraged to speak to Human Resources about using paid time off or intermittent FMLA leave in place of remote work for her time away from the office. The employee subsequently retired. She then sued, alleging that the Company had violated her FMLA rights, among other things. The federal district court granted summary judgment for the employer, finding that employee's claims failed as a matter of law.

On appeal, the Second Circuit affirmed judgment for the employer. The Second Circuit held "that an employer can violate the FMLA merely by interfering with the employee's benefits under the FMLA without actually denying the employee's request for those benefits." In this case, however, the employee argued that the Company substantially limited her ability to work remotely and punished her for doing so. But, as the Second Circuit noted, the FMLA protects an employee's ability to take leave, but "does not entitle employees to work remotely or make it unlawful for an employer to punish an employee who works remotely." The Second Circuit further observed that "[r]emote work may be another form of accommodation, but it is not 'leave' within the meaning of the [FMLA]."

The good news for employers is that employees do not have a right under FMLA to work remotely. Of course, an employee may be entitled to remote work as a reasonable accommodation for their own disability under the Americans with Disabilities Act, and an employer will need to engage in the interactive discussion to determine if that is so. But the ADA does not provide reasonable accommodations to care for a family member.

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Federal Agencies Partner to "Protect Workers" in Mergers and Acquisitions. The U.S. Department of Labor, the National Labor Relations Board, the U.S. Department of Justice, and the Federal Trade Commission recently announced a joint "Memorandum of Understanding on Labor Issues in Merger Investigations" based on their shared "interest in protecting American workers and promoting fair competition in labor markets."

The MOU establishes a "Labor Information Sharing Protocol" for use during an investigation of a proposed acquisition or merger to determine if there is a negative impact on competition for labor. Under the protocol, the FTC and DOJ (the "Antitrust Agencies") may utilize data from the DOL (including worker and employer statistical data and labor standards enforcement activity) and NLRB (including enforcement and representation cases involving the entities at issue and/or others in the relevant labor markets). The Antitrust Agencies may also seek technical assistance from the NLRB and DOL (the "Labor Agencies") on labor and employment law matters. In addition, the Labor Agencies will provide training to Antitrust Agency personnel on issues under their jurisdiction.

Thus, employers engaged in mergers or acquisitions need to be aware that there may be heightened scrutiny on labor and employment matters during Antitrust Agency review. This is yet another instance of more cooperation among federal agencies, which can lead to more liability for employers.

OSHA's Proposed Heat Standard Now Open for Comment. Over a month after announcing the issuance of the proposed heat stress rule, as we discussed in our July 2024 E-Update, the U.S. Department of Labor has finally opened the period to receive public comment. The DOL will receive comments through December 31, 2024, and you may submit comments here.

As we previously reported, the proposed rule imposes extensive requirements on employers. Among other things, the proposed rule would require employers to develop an injury and illness plan to control workplace heat hazards, provide training, and implement procedures to respond to workers experiencing a heat-related illness or emergency. The required plan must include an evaluation of heat risks. If there is an increased risk, employers must implement requirements for water hydration, rest breaks, and indoor heat control. Employers must also protect new or returning workers who are unaccustomed to working in high heat.

Following the comment period, the DOL will issue a final rule. In keeping with recent rulemaking activity, we would expect challenges to that final rule, regardless of any changes that are made to the proposed version, which has already been controversial.

U.S. Department of Labor Announces New Tool for Compliant Use of AI. The DOL has partnered with the Partnership on Employment & Accessibility (PEAT) to create a new tool to assist employers in avoiding unintentional discrimination against persons with disabilities when using artificial intelligence in hiring and other decisions within the workplace. Among the tools included on PEAT's website is The AI Inclusive Hiring Framework, which is intended to make hiring with AI tools more inclusive and accessible for disabled applicants. In announcing the publication of the tool, the DOL Assistant Secretary for Disability Employment Policy Taryn Williams stated that "employers recognize that AI tools can improve recruitment and hiring but may also impact workplace culture and inclusion of disabled employees. The AI & Inclusive Hiring Framework published today charts a clear course for employers to navigate this transformation successfully."

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NEWS AND EVENTS

Collective Bargaining. J. Michael McGuire successfully settled a new 4-year collective bargaining agreement for a leading specialty chemical manufacturer with the Teamsters Union, after the agreement was initially rejected by the union members.

Victory. Teresa Teare and Paul Burgin won summary judgment this month for a healthcare employer. The federal district held that the employer carefully considered the employee's request for a religious exemption from its vaccine requirement during the height of the COVID-19 pandemic but could not accommodate that request without undue hardship.

Publication. Chambers' Employment 2024 Global Practice Guide, for which Shawe Rosenthal authored the Maryland Chapter, has been released. Our chapter provides a comprehensive overview of labor and employment law in the state. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients. It also publishes regional practice guides providing clients with expert legal commentary on the main practice areas in key jurisdictions around the world.

TOP TIP: Employers, Be Aware of Voting Leave Laws for Your Mid-Atlantic Employees!

With the upcoming election, we thought that it would be helpful to remind employers with employees in the mid-Atlantic about voting leave laws.

- **Maryland:** Under Maryland law, employees may take up to two hours of paid leave to vote on Election Day if they do not have two consecutive off-duty hours while polls are open. Employers may require proof of voting on an official State form. The law does not contain any provisions around notice by or to employees, and we believe that employers can impose a reasonable notice requirement. We also believe that employers may designate the leave schedule. Notably, with the advent of early voting, which is not addressed in the law, this leave right has become less significant.

- **District of Columbia**: Under D.C. Law, employees may take up to two hours of paid leave to vote in person (wherever they are registered to vote, including outside the District, and regardless of whether they have sufficient off-duty time in which to vote). They can be required to provide reasonable advance notice of their need for leave – and if there is no policy, the employee cannot be required to provide more than 7 days' notice. Employers may designate the time off, including during early voting or at the beginning/end of the employee's shift on Election Day. The law does not address proof of voting, but we believe that employers may require such proof. Employers must post a notice of rights in a conspicuous place at least 60 days before the election.

- **Delaware:** No voting leave law applies. Employees do not have a right to take leave to vote.

- **New Jersey:** No voting leave law applies. Employees do not have a right to take leave to vote.

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- **Pennsylvania:** No voting leave law applies. Employees do not have a right to take leave to vote.

- **Virginia:** No voting leave law applies. Employees do not have a right to take leave to vote.

- **West Virginia:** Under W.V. law, employees may take up to three hours of leave to vote, which is paid unless the employee had at least three consecutive off-duty hours in which to vote but failed to do so. Employees can be required to provide three days' written notice of their need for voting leave. The law does not address proof of voting, but we believe that employers may require such proof. As for scheduling, the law provides that employers in the following industries may schedule leave so as to avoid impairment or disruptions of essential services: essential government, health, hospital, transportation and communication services and in production, manufacturing and processing works requiring continuity in operation. This would suggest that employers in other industries may not schedule the leave, but that the employee may choose the time.

RECENT BLOG POSTS

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

- EEOC Sues FedEx Over "Fully Healed" Return-to-Work Requirement by Elizabeth Torphy-Donzella, September 25, 2024

- Maryland DOL Releases Updated FAQs on Paid Family and Medical Leave by Fiona Ong, September 16, 2024

- Maryland Department of Labor Issues Highly-Anticipated Guidance on New Wage Transparency and Paystub Notice Obligations by Fiona Ong, September 11, 2024

- No Discrimination Against… Fox Hunters? by Fiona Ong, September 6, 2024

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