BARRAN LIEBMAN LLP
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Labor & Employment Law Update

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JANUARY 29, 2016

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Statutes

NLRB Election Rules

- Employers:

1. Start campaign early
2. Examine supervisory status
3. Review and amend rules and handbook
4. Open lines of communication
5. Electronic petition filing
6. 7 day employee list with classifications, shifts and locations
7. Regional Director ruling with possible appeal
8. 7 day Excelsior List with telephone numbers and email addresses if the employer has them
9. April 14, 2015 implementation

NLRB Election Rules, Continued

1. Electronic petition filing
2. 7 day employee list with classifications, shifts and locations
   - Employer list people in and out of unit and file by noon on the 7th day – hearing on 8th
3. Regional Director ruling with possible appeal
4. 7 day Excelsior List with telephone numbers and email addresses if the employer has them
5. Old rule 42 days; new rule 10-14 but running 20-25 days

NLRB Election Rules, Continued

1. Union statement of position on 1st day while record open
2. No briefs after closing without permission; points of authorities okay
3. Individual issues must exceed 20-25% of unit/or by challenge
   - Recommend meeting with hearing offer

Marijuana & The Workplace

Basic Background

- Marijuana is Illegal Under Federal Law
- Schedule 1 Drug
- Current Federal Government will not Interfere with State Laws
- Measure 91
  - Allows the Possession, Manufacturing and Sale by/to Adults Subject to OLCC Regulation and Taxing
  - Must be 21
  - Possession in public (1 oz) and at home (8 oz or 4 plants)
- Use Not Permitted in Public (bar, restaurant, porta-potty)

OLCC Website

www.oregon.gov/olcc/marijuana

"Passage of measure 91 does not impact employment law in Oregon"

"Employers who require drug testing can continue to do so."

Employment Law Doesn't Change

But Culture and Prevalence Does

Key Issues

- OSHA / Safety (Occupational Safety and Health Act)
  - "Anyone whose ability to work safely is impaired by alcohol, drugs or medication, must not be allowed to work on the job while in that condition"
  - Practical and Potential Liability Consequences?
- Drug Free Workplace Act (federal funding)
  - Must have zero tolerance policy – don't need to drug test
- Common Law Tort Liability
- Omnibus Transportation Act (must test certain aviation, highway, rail and transit employees)
- Labor Laws – Duty to Bargain, Weingarten Rights of Union Representation

Drug Testing Procedures

- Testing – Don't DIY
  - Oregon Law Requires Certified Laboratory
- What to Test
  - Urine
    - Normal user = 4-72 hours
    - Chronic user = up to 30 days
  - Blood
    - 3-4 hours after use
    - Still Not Good Evidence of Current Impairment
  - Oral fluids
    - Within 24 Hours
    - No National Standard for Testing

Refusal to Test

- Policy:
  - Prohibited Conduct Includes Failure to Submit to a Drug Test
  - Must Test Within 2 Hours of Incident / Suspicion
  - Allow for Full Day to Test if Cause Shown
- Shy Bladder Syndrome
  - General Rule: Not a Disability, No Need to Accommodate
  - Recent Washington Ruling: May Need to Accommodate in Washington State
- Shy Lung Syndrome?
  - Recently Rejected

Ban-The-Box

- Effective Date: January 1, 2016
- Cannot ask for criminal history on job applications
  - When can you ask about criminal history?
    - At initial interview
    - After conditional offer of employment made
  - Exemptions
    - Requirement of federal, state, local laws
    - Law enforcement/criminal justice employees

Pending Legislation

- Budget Amendments:
  - Would ban EEOC regulations limiting wellness plans
  - Would ban employer disclosure of email addresses and cell phone numbers under NLRB election rules

Joint Employer Status:

- The NLRB's recent decision in *Browning-Ferris Industries* would be vitiated by an amendment to the NLRA to limit joint employer findings to situations where two or more entities share control over employees that is "actual, direct, and immediate"

EEOC Enforcement Initiatives

- *EEOC v. UPS* – Grooming standards may need to accommodate religious beliefs.
  - Hair length
  - NY complaint
  - Undue hardship to employer in the test
- Pregnancy Bias – Facially neutral standards must comply with *Young vs. UPS*.

EEOC Enforcement Initiatives, Continued

- Transgender employees – Employee choice on restroom utilization.
  - Consistent with how the employee "presents," not necessarily current physical status
  - Employees may have to adapt
  - Employer must be flexible
  - Employee will usually work with employer

FLSA Exemptions

- Along with the proposed Section 213(a) rules, the DOL also announced it would be issuing an FRI in the near future "on the use of electronic devices by overtime-protected employees outside of scheduled work hours."
  - Issues for both exempt and nonexempt

Oregon Sick Time

Basics - SB 454

- 40 hours of sick time per year
- Effective January 1, 2016
- Preempts all other local sick leave laws (Portland / Eugene)
- Provides a floor of benefits – not a limit
- Time can be taken hourly
- Can be for routine appointment

Qualifying Employers

- All Employers: Must provide sick time
- Portland employers with six or more employees: Must provide paid sick time (Population 500,000 – no one else close)
- All other employers with 10 or more employees: Must provide paid sick time
- Does not apply to federal employers

Qualifying Employees

- Most all employees qualify UNLESS:
  - They receive paid sick leave under federal law
  - Independent contractors
  - Participant in work study or work training programs
  - Certain railroad workers
  - Employees of a parent, spouse or child
  - Employees covered by a CBA or similar type labor organization

Specifics of the Law

- 40 hours a year calculated by any consecutive 12-month period
  - Calendar Year/ Tax Year / Fiscal Year/ Contract Year/ Employee Anniversary Date
- May begin using on 91st day of employment
- Accrual - 1 hour for every 30 hours worked
  - Exempt employees assumed to work 40 hours a week
  - No accrual for time off
- Accrual beings first day of work
  - Temp employee's accrual begins first day of work – regardless if before official "hire date"

Other Issues

- Employees may donate time if permitted by employer for qualified employee
- Sick time must be taken in hourly increments
  - 4 hour exception if:
    - hourly time imposes an undue hardship; and
    - 56 hours of paid leave a year
- Employer Cannot Require
  - That employee find a replacement
  - That employee make up the lost shift
    - Employee *may* willfully agree to make-up shift to avoid using sick time

Current U.S. Supreme Court Docket

- *Green v. Brennan* – Does constructive discharge date start:
  1. When employee resigns?
  2. At last allegedly discriminatory act?
- *M&G Polymers v. Tackett* – Union contract provision of lifetime health benefits.
- *DHS v. MacLean* – Whistleblower protection for federal employees.
- *Friedrichs et al. v. California Teachers Association* – The constitutionality of fair share.

Summers v. Altarum

- In enacting the ADA, Congress sought to overturn the Supreme Court's *Toyota* decision, which suggested temporary impairments could not qualify as disabilities.
- Section 1630.2(j)(1)(ix) of the EEOC's regulations provides that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" for purposes of proving an actual disability.
- In *Summers*, the Fourth Circuit upheld the EEOC's regulation.

Summers Continued

- EEOC example is 20 pound limitation for "several months" is "sufficiently severe."
- California and Washington cover most temporary disabilities.
- Consider all impairments as disabilities at pre-litigation stage.

Case Law
The Supreme Court

EEOC v. Abercrombie & Fitch

- Applicant must show need for accommodation was motivating factor.
  - Need not show that employer had actual knowledge of religious aspect of need.
    - But, explain policy and ask if there is an issue where accommodation needs to be discussed
    - Settled for $44,600

Integrity Staffing v. Busk

- Security screenings not "principal activities" employees were employed to perform.
- Screening not integral, and indispensable to principal activities.
- Focus is on "productive work," not on whether the employer required the task.

Young v. UPS

- "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*."
  - Pregnancy Discrimination Act
- Breyer:
  1. Not the same as "any other person"
  2. Act does not state "which other persons Congress had in mind"

Young v. UPS, Continued

- Employer's duty on remand:
  1. Cite legitimate nondiscriminatory reason other than cost or convenience.
  2. Cite sufficiently strong reason to overcome law's intent.
- Plaintiff may challenge that employer accommodates "a large percentage of non-pregnant workers" but fails to accommodate "a large portion of pregnant workers."

Case Law
Federal & State Courts

Miscellaneous FLSA Cases

- Health insurance cashback and merit pay increases must be included in the overtime rate. *Callahan v. City of Sanger*.
- A defective payroll system that fails to compensate employees for overtime is no defense to a FLSA action. *Souryavongv. Lackawanna County*.

EEOC Wellness Plan Rule

- 2 statutory principles:
  1. Under the ADA: An employer may not require an involuntary medical examination without business necessity and job relatedness.
  2. Under GINA, in most cases an employer may not require the disclosure of family medical history by either the employee or a family member.

EEOC Wellness Plan Rule, Continued

- 2 Questions:
  - Can the terms of a "wellness plan" created pursuant to the ADA violate the ADA and/or GINA?
    - EEOC says yes (*Orion*, *Flambeau* and *Honeywell*)
  - Does the existence of an incentive payment affect the voluntary nature of a medical examination?

EEOC Wellness Plan Rule, Continued

- Answer to only Question 2:
  1. The incentive may not be the absence of a punishment.
  2. A positive incentive may not exceed 30% of the employee's normal portion of a premium.

G4S (NLRB) & Velasquez (FLSA)

- Proof of supervisory status may include job descriptions and statements of authority.
- Proof must include detailed evidence of actual exercise of authority.
  - Look at job descriptions
  - Save and present proof of action
    - While you're at it, do they list essential functions?

Maliniak v. City of Tucson

- A single incident within the limitations period may be combined with other incidents outside the period to show adequate severity.

Sabo, Inc.

- Disclosure of "other job opportunities" is inherently concerted.
- A matter of mutual concern does not require a call for group action.

Bosh Imports

- Alteration of an illegal policy requires:
  1. Effective notice.
  2. Assurance that offending policy will not be enforced.

S. New England Telephone Co. v. NLRB

- Employees barred from wearing "inmate" shirts stating "prisoner of the company."
- "Special circumstances" exception bars messages harming public image or customer relationship.

Southwestern Bell Tel.

- *Weingarten* allows a union representative to be present for an "investigatory interview."
- Search of a vehicle is not an "interview."

Other Weingarten Cases

- The giving of *Miranda* warnings to an employee, in and of itself, gives rise to a reasonable belief that discipline could result from the interview. *Sheriff of Cook County*.
- Employees have no objectively reasonable expectation of anonymity from their exclusive representative when filing workplace misconduct complaints against coworkers. *Foothill De Anza Faculty Association*.

General Counsel Report on Work Rules

- Examples of illegal and legal rules under §§7 and 8(a)(1) of the NLRA.
- Critical topics such as social media, conflicts of interest, solicitations, confidentiality and disclosure of information, behavior standards, use of logos and third-party contacts.

Howard Industries

- Employer entitled to:
  1. Investigate without union interference.
  2. Insist upon hearing employee's own account.
- Union representative entitled to:
  1. Interrupt to ask clarifying questions.
  2. Advise the employee not to answer.
  3. Remind the employee of a defense.
  4. Use notes to clarify and counsel.

Monico v. City of Cornelius

- Inspirational posters may be unlawful retaliation if they "shame" officers to prevent the exercising of rights.
  - "Don't second-guess the chain of command"
  - How to be "successful as followers"

Dunlap v. Liberty Natural Foods

- Notification of possible need for accommodation through workers' compensation claim filing triggers employer requirement to commence interactive process.

Fort Bend v. Davis

- Under *Harris v. Forklift Systems*, a single incident of harassment is normally insufficient to state a claim under the duration and severity standards.
- However, twice using a severely derogatory racial term in the same day may be sufficient.

Go Bears!! www.calcrew.com

~Thank You~

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