



2010-2011 Employment Law Update

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Overview



- ◆ Gridlock is back
 - ◆ Usually good news for employers . . . BUT
 - ◆ Regulatory agencies have picked up the baton
 - ◆ Activist courts are still activist

- ◆ Keys for Employers
 - ◆ What is the legitimate non-discriminatory reason for my proposed adverse action?
 - ◆ Is there any evidence of pretext (evidence of possible discrimination)?
 - ◆ Have I trained my managers?
 - ◆ What procedures does my company have for (a) finding out about possible legal risks; (b) taking action to fix those risks?



USERRA - *Staub v. Proctor Hospital* (U.S. 2011)

- ◆ **Facts:** Beware the Cat's Paw
- ◆ Staub brought USERRA suit claiming discharge motivated by hostility to military service – jury ruled in his favor (was “a motivating factor”) – 7th Circuit reversed
- ◆ **Key Holding by US Supreme Court (Justice Scalia):** If a supervisor performs an act that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then employer is liable under USERRA
- ◆ **Key takeaways:** Hard to avoid bias of supervisors (what about co-workers?); summary judgment just got more difficult; independent investigation isn't enough; this rule will apply to Title VII as well



Retaliation – *Thompson v. North American Stainless*

(U.S. 2011)

- ◆ **Facts:** What happens when one employee complains about discrimination and the employer fires the employee's fiancée?
- ◆ US Supreme Court (Justice Scalia again) broadly interprets Title VII to provide protection
 - ◆ Did NAS' firing of Thompson constitute unlawful retaliation? Yes (anti-retaliation provision is broad; any conduct that might dissuade a reasonable worker from making or supporting a charge; close family members count, mere acquaintance not)
 - ◆ Does Title VII grant Thompson a cause of action? (Is he a "**person aggrieved**?" Yes. Apply **zone of interests** test.)
- ◆ **Key takeaway:** Title VII retaliation protection is extremely broad – could any other employee be within zone of interests? Possibly . . .





NLRB – On Fire



- ◆ Multiple complaints filed regarding employers who take action against employees because of Facebook posting
 - ◆ Chicago BMW – lousy hot dogs & bottled water don't cut it
 - ◆ Buffalo nonprofit – workers expressed concerns on Facebook about understaffing and workload (not doing enough to assist clients)
 - ◆ Connecticut – boss was a “scumbag as usual” (company policy prohibited slandering management)
- ◆ Section 7 of the NLRB allows employees to engage in “**protected concerted activity**” regarding wages, hours and working conditions



NLRB – On Fire

- ◆ Proposed rule to require all employers (not just union employers or federal contractors) to post a **notice of “employee rights”** under the NLRA



- ◆ Front and center is the right to organize a union
- ◆ Buried lower in the notice is the right **not** to join a union
- ◆ The notice highlights the employee’s right to be free from discrimination and right to solicit during non-work time and right to engage in concerted protected activity

- ◆ Physically post in “customary places” and distribute electronically by email or on an intranet “if the employer customarily communicates with its employees by such means”



NLRB – On Fire

- ◆ Complaint filed against Boeing
 - ◆ NLRB’s General Counsel argues that Boeing’s decision to open a second production line for the 787 Dreamliner in Charleston, South Carolina was motivated by anti-union animus (past strikes, and chilling of future strikes)
 - ◆ South Carolina is “right to work” state – Washington is not
 - ◆ NLRB doesn’t seek to shut down the South Carolina line, but does seek to order Boeing to maintain a second production line in Washington
- ◆ Boeing strongly opposes the Complaint
- ◆ SayWA! Does this mean that an employer cannot leave a strongly union state?
- ◆ And there’s more . . .





DOL on Fire – There's an App for That!

◆ App for timekeeping



- ◆ DOL is offering a free smartphone application intended to assist employees in independently tracking their own work hours, breaks and overtime hours
- ◆ Designed to allow employees to create their own time records either manually or through the use of a timer
- ◆ In addition to simply recording their work hours, the application permits users to record comments relating to their work and to view and email a summary of their working hours (to whom??)



DOL on Fire – Breast Pumping at Work

- ◆ Amendment to Fair Labor Standards Act allows nursing mothers to take a “reasonable” break to express breast milk
 - ◆ Unpaid unless short (regular) break
 - ◆ Applies to non-exempt employees
 - ◆ Must provide room other than bathroom
 - ◆ Allowed for up to one year
- ◆ Small employers exempt only if “undue hardship”
- ◆ DOL estimates 20 minutes, 2 to 3 times a shift
- ◆ DOL says you can provide space “shielded from view” and one where privacy can be ensured – and a place to sit – and a flat surface (and an outlet would be nice!)





DOL on Fire – Wage/Hour

- ◆ New strategic plan – focus on employee misclassification and vulnerable workers
- ◆ Hired 250 new investigators
- ◆ Started broadening investigation into whole business rather than just the employee who complains
- ◆ “We Can Help!” outreach effort
- ◆ DOL also suggested that it would launch a “right to know” initiative that might require employers to prepare classification analyses to support exempt status and provide the result to employees



DOL on Fire – Cross the Bridge

- ◆ The Wage and Hour Division has paired up with the ABA to offer a new attorney referral system
 - ◆ Bridge to Justice (one that employers may wish had its drawbridge up) – “special process” to streamline document requests
 - ◆ When WHD doesn’t pursue claims, they will give worker a toll-free number



UNITED STATES
DEPARTMENT OF LABOR

Wage and Hour Division

BRIDGE TO JUSTICE: Wage and Hour Connects Workers To New ABA-Approved Attorney Referral System

Many workers across the country still struggle to obtain basic employment protections under the nation’s minimum wage, overtime, and family medical leave laws. When denied these protections, the workers are unable to fully contribute to their local communities and businesses. Over the past two years, the U.S. Department of Labor’s Wage and Hour Division (Wage and Hour Division) has added 350 new investigators and stepped up its efforts to help these workers through both complaint-driven and targeted enforcement. In a typical year, over 35,000 workers contact the Wage and Hour Division for help, including the 25,000 who need assistance with their minimum wage, overtime, or family medical leave claims – and this number does not even include many more workers who do not contact us after their rights have been violated.



DOJ on Fire! Nonsolicitation Agreements



- ◆ United States Department of Justice settled with 5 technology companies
- ◆ Views “no cold call” agreements as *per se* illegal
- ◆ OK for business to have nonsolicit agreements with their own employees
- ◆ Also, increased ICE audits!



EEOC on Fire – Be Careful Around GINA!

- ◆ 2008 Genetic Information Nondiscrimination Act (Title II) bars an employer from requesting, requiring or purchasing an individual's genetic information or making employment decisions (discriminating) based on such data
- ◆ EEOC issued final rules late last year – what do you need to know?
 - ◆ Specific “**safe harbor**” language on medical request form (if you use and if doctor gives you information, it's inadvertent)
 - ◆ No intent needed – but list of “**inadvertent violations**” – brush up on your genetic etiquette!
 - ◆ **Definitions** (genetic information doesn't include race but is very broad - includes family's medical history to the 4th degree; genetic tests don't include cholesterol)
 - ◆ Meaning of “**request**”



EEOC on Fire – Be Careful Around GINA!

- ◆ **Wellness Programs** – generally no financial inducement for employees to provide genetic information, but you can offer it for employees to complete a health risk assessment, **ONLY IF** the assessment identifies which questions request genetic information and the assessment makes clear that the questions are optional **AND** the employee will get the financial reward regardless of whether he/she completes that portion

- ◆ **Social Media**



- ◆ **Good/In the clear!** – running a Google/Bing search of the employee's name and learning about genetic condition **OR** becoming a Facebook friend or joining LinkedIn network and later learning about genetic condition



- ◆ **Bad/GINA infraction** – conducting a search to find out genetic information

- ◆ **NOTE!** You do not have to go back in personnel files and remove genetic information

- ◆ **NOTE!** Limit responses to Subpoena unless it specifically references genetic information



GINA's Safe Harbor

The **Genetic Information Nondiscrimination Act of 2008**

(GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family

member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.





ADAAA Regulations from EEOC (Effective May 24)

- ◆ What is a **major life activity**? Major means minor – no longer “central importance to daily life” – almost any activity or body function (or organ) will do
- ◆ What does **substantially limits** mean? EEOC says, it’s not what it is, it’s what it *isn’t*! It’s not: demanding, doesn’t mean severely restricts or prevents, doesn’t mean significantly, is lower than before, does not require medical evidence or statistics, and should not require extensive analysis!
- ◆ Are some conditions **automatic** disabilities? Well, some are “virtually” always – but still individual analysis (deafness, blindness, intellectual disability, autism, CP, diabetes, HIV, MS, MD, major depressive disorder, bipolar, PTSD, OCD)



ADAAA Regulations from EEOC (Effective May 24)

- ◆ Do you consider **mitigating measures**?
No, unless they are glasses/contacts
- ◆ What about “**regarded as**”? Big changes here – employee need only show that employer took action because of a perceived physical or mental impairment – defense if impairment was actually transitory AND minor (keep in mind, this is **ONLY** a defense to “regarded as” claim)
***Key takeaway:** Employee can use “regarded as” claim whether or not they are disabled
- ◆ Disability claims with the EEOC were highest since 1992





OFCCP on Fire

- ◆ Proposed changes to audit scheduling letters
 - ◆ Reports by **job group AND job title**, instead of the current requirement of reporting by job group **OR** job title
 - ◆ Data reported by **racial/ethnic group** (African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White) instead of just minority/non-minority and gender
 - ◆ Production of **leave policies** and **accommodation policies**
 - ◆ **Compensation data** for every employee as of the nearest February 1st, including race/ethnicity, gender, date of hire, job title, EEO-1 category and job group (and ICs and temps)
 - ◆ ID whether the **termination** was voluntary or involuntary
- ◆ Proposed changes re: reporting on veterans



OFCCP Strategies

- > We are using new approaches.
 - OFCCP will broaden its enforcement efforts and will investigate and resolve cases of both individual and systemic discrimination to ensure that individuals as well as classes are given a fair chance in the workplace.
 - OFCCP will target recidivism of discrimination by contractors.
 - To increase compliance OFCCP will conduct corporate wide multi-establishment reviews as well as industry-specific reviews.
- > Our strategies to achieve these goals include:
 - Dedicating resources to enforce Section 503 of the Rehabilitation Act, VEVRAA and E.O. 11246.
 - A renewed emphasis on conducting construction reviews.
 - Increasing resources to monitor contractors' self-audit and self-correction of identified problems.
 - Strengthening relationships with the contractor community and developing a comprehensive stakeholder strategy.
- > Do these strategies make sense to you?



Social Security Administration is Warm

- ◆ Issuing no-match letters again
- ◆ No guidance for employers on how to respond!
- ◆ No-match letters make clear that they do not mean that the employee is ineligible to work in United States – BUT in ICE audits, ICE is asking for no-match letters, so employers ignore them at their peril
- ◆ **Bottom line** – show good faith effort to address the match – give plenty of time



City of Seattle on Fire!

- ◆ Proposal to add mandatory paid sick leave for all Seattle employers
 - ◆ Federal legislation in this area was proposed again, but chance of passage is remote
 - ◆ State sick leave is dormant – postponed to October 2012 at this point (employees will receive up to 5 weeks of family leave insurance benefits; maximum weekly benefit will be \$250 per week)





Washington State Human Rights Commission – Not on Fire

- ◆ HRC now has authority to dismiss complaint of unlawful discrimination without a full investigation if the facts as stated in the complaint do not constitute a violation of the WLAD
- ◆ Full investigation is still required for real estate transaction complaints





- ◆ Patient Protection and Affordable Health Care Act
– 1 year later
- ◆ What's new?
 - ◆ 1400 Waivers
 - ◆ Pending court battles
 - ◆ High Risk Pools empty?



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