Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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ON-LINE JOB APPLICATIONS CAN CREATE ISSUES OF LACK OF AGREEMENT TO ONEROUS TERMS

A recent development is the shift of employers to the use of on-line job applications. Another relatively recent development is the use of job applications with provisions intended to preserve an increasing list of management rights. Recent case law suggests limitations on the binding nature of onerous terms on applications that limit otherwise applicable employee rights.

Perhaps the most long-standing employer effort to maintain its management rights pertains to the use of "at-will" employment terms on a job application, in which the applicant understands and agrees that an employer has the right to terminate an employee at-will, at any time, and for any reason. The second management right often written into job applications is that employer policies are subject to change at any time, at the discretion of the company, and sometimes indicating that not even notice to the employee is required. More recently, a litany of other terms are often added to applications.

Today, a majority of employees are subject to some type of individual arbitration agreement, often included in the job application. These arbitration terms require employees to bring any legal claim regarding employment through an arbitration process set up by the company, as opposed to going to court. One benefit to such agreements is that, under applicable law, they can require the employee to bring only individual claims, and to waive class or collective actions involving others. A still more recent trend is the inclusion of provisions on a job application such as waiver of jury trial rights, and sometimes agreement to shorter statutes of limitations to bring a claim than would otherwise be applicable.

With all these type terms included on job applications, on-line applications create special issues as to whether there is "agreement" on such terms or to make them binding. Further, whether there is such a contractual-type "agreement" on such terms usually depends upon the law of the state in which the issue arises. The states vary somewhat in the treatment of whether a document constitutes an agreed-upon "contract."

The issue becomes complicated with on-line applications because of the varying use of on-line terms with a click of "I Accept," or something of that nature, and courts are increasingly sensitive to such issues in response to arguments that almost no one reads the on-line terms. A recent ruling from the federal Fourth Circuit Court of Appeals points out the limitation of on-line applications reaching a contractually binding arbitration agreement. *Marshall v. Georgetown Memorial Hospital*, No. 22-02010 (4th Cir., 8/13/24).

The on-line application in question was presented to employees without the arbitration agreement being visible on the screen the applicant initially saw. Applicants could submit the application by checking a box at the top of the screen, but would have had to pull down the screen to see the arbitration agreement at the bottom of the application. The court concluded that an applicant is not obligated to scroll down to view and thus agree to an arbitration agreement in these circumstances. The court rejected the employer's argument that the applicant should be considered to have agreed with the promise to arbitrate because the applicant could have scrolled down to view it at the bottom of the application. The court indicated that there was no reason to assume an on-line user will scroll to subsequent screens when they can complete their business on one screen.

The court pointed out that on-line applications are different from physical contracts, as terms are hard to miss on a physical contract so there is a duty to read the whole document. In contrast, an applicant may not realize there are contract terms submerged elsewhere or in hyperlinks. The court also pointed out the distinction between buttons or boxes labeled "I Accept" or "I Agree" than those marked "Submit." An on-line user's agreeing to contract terms by checking a box or clicking a button must be clearly indicated.

The bottom line in these type cases is that, in order to create a contractually binding waiver of rights by the applicant, it may require a formation of contract under applicable state law. Employers relying on on-line applications to limit employee rights must insure the on-line applications meet applicable state requirements. In general, such requirements include an obligation to provide reasonable notice to the applicant of employment terms in question, and indicating that the applicant accepts those terms. A Massachusetts appeals court is currently dealing with a similar issue, where on-line contracts are subject to a two-prong test to determine whether they are enforceable. They must give the signor reasonable notice of the terms, and obtain a reasonable manifestation of consent to those terms. The applicant checked several boxes in the "New Hire Policy Acknowledgment Form," indicating he had read eight different company policies, including the arbitration agreement. The court suggested that one way to do this would be to force applicants to scroll through the terms before they signed them, and the fact pattern that also involved the issue that the company has users check boxes next to each individual policy. *Longobardi v. Gulfstream Aerospace Servs. Corp.*, Mass. App. Ct. No. 2023-P-1096, Oral Argument 9/2/24.

There is some overlap between this issue and the issue of whether such contract terms are so onerous as to "shock the conscience" of the court, often called "unconscionable" terms. In other words, there must also be a degree of fairness in the employer's issuing of the binding employment terms to make such terms enforceable.

POLITICS IN THE WORKPLACE IN THIS ELECTION SEASON

Employers are being increasingly concerned about how the polarization in the political environment affects their workplaces. While in the past, many employers chose, with employee support, to take public stands on political/social issues, but today the trend is to stay away from such issues except those directly affecting the operation of the business. Employees themselves often take part in vigorous discussions of current political and social issues, including gender and racial equity, reproductive rights, and gun control. Vigorous discussion of these issues can lead in some circumstances to disagreements among employees and divisive controversy.

In general, political/social advocacy by employees is not normally protected by federal workplace and discrimination laws. However, sometimes the political/social issues are connected to current workplace issues potentially making

the "political" speech protected by Section 7 of the National Labor Relations Act, which protects "concerted activity for mutual aid or protection" in the workplace. A current and highly relevant example is that of the issue of the wearing of "Black Lives Matter" buttons or similar items or discussions in the workplace. The National Labor Relations Board (NLRB) has ruled that the wearing of such items is protected concerted activity where related to recent events in the workplace, but where not so related, it is considered unprotected political/social speech. See *SFR, Inc.*, NLRB Case 10-CA-268413 (8/21/24).

Of course, employers have an interest in respecting individual political freedoms, but employers also have a strong interest in providing a harmonious work environment. There is some difficulty in drawing the line.

In general, therefore, an employer can regulate political/social speech in the workplace if there are legitimate business reasons for doing so. If the employer's policies or standards are properly drafted, common work rules can be a valid reason for discipline of violations, even those related to political/social issues. However, another issue is created, in that under NLRB rules, such rules must be narrowly and legally drawn so as not to be deemed overbroad and thus "chilling" legitimate employee concerted activities to improve the workplace. It should also be noted that a few states have laws that apply to certain types of political activity.

The general rule is that an employer should have properly prepared and legally reviewed policies that can be applied to situations where the political advocacy crosses the line and is disruptive in the workplace. Such rules need not be drafted to apply particularly to political issues, but instead be applied to political discussions just like other speech in the workplace. Those rules might include, for example, prohibitions against threatening or coercing a fellow employee, or it might refer to other company policies such as those dealing with harassment or workplace violence. Unfortunately, general terms like "harassment" can get an employer in trouble under the NLRB doctrine, as the NLRB considers just the term "harassment" to be overbroad and thus may "chill" the legally protected right of advocacy of employees on matters affecting the workplace. Other employer rules that may come into play include prohibiting solicitation during working time, and distribution of literature in working areas of the facility at any time.

UPDATE ON EEO-1 REPORTS AND I-9 FORMS

Employers with 100 or more employees and federal contractors employing 50 or more employees are generally required to file Component 1 data reports annually with the Equal Employment Opportunity Commission (EEOC) called the EEO-1 Report. This form reports on the racial, ethnic and gender composition of workforces across certain job categories. Because of widespread non-compliance with the reporting obligations, the EEOC recently has taken a dramatic step of actually suing a few employers, reportedly about 10, about not filing such documents. Previously, there was no enforcement mechanism to require the filing of these reports.

The EEOC requires the filing of such report through electronic submission through a web-based portal referred to as the "EEO-1 Component One On-Line Filing System." There is also an EEOC filing support message center available to assist filers and answer questions. The on-line filing system can be found at www.eeoc.gov/data/eeo-date-collections. The time for filing the 2023 report has passed, but the opportunity to file the 2024 report will be early next year.

Concerning I-9 forms, the U.S. Citizenship & Immigration Services (USCIS) has updated the August 1, 2023 edition of its Form I-9, Employment Eligibility Verification, to extend the expiration date to May 31, 2027. There are actually two different versions of this form, with different expiration dates (07/31/2026 or 05/31/2027), but either can be used until its expiration date. The form currently available for download has the later May 31, 2027, expiration date.

BIDEN-HARRIS ADMINISTRATION ATTEMPTS TO GRANT WORK AUTHORIZATION TO MORE ILLEGAL ALIENS

DHS has announced a new parole in place ("PIP") program that would allow as many as 1,300,000 aliens who have been unlawfully present in the United States for ten or more years to receive a grant of "parole"-without leaving the United States and attempting to come back and apply for admission at a port of entry-if the alien is the spouse or stepchild of a U.S. citizen. See Implementation of Keeping Families Together, 89 Fed. Reg. 67,461 (Aug. 20, 2024). In addition, those who qualify would receive work authorization.

Sixteen states challenged this controversial action by filing a lawsuit against the federal government. State of Texas, et al. v. United States Department of Homeland Security, et al., No. 6:24-cv-00306 (E.D. Tex. Aug. 23, 2024). Texas and the other States seek an injunction to prevent implementation of the PIP program. Texas and the other States contend that longstanding federal law prohibits aliens who entered the United States unlawfully from obtaining most immigration benefits. This includes obtaining lawful permanent resident status-without first leaving the United States and waiting outside the United States for the requisite time-based on an approved family-based or employment-based visa petition. Further, because the parole power may only be exercised to allow an alien to come "into" the United States, it may not be lawfully exercised for aliens already present in the country.

If Texas and the other States obtain the injunction that they seek, implementation of the PIP program should be delayed if not permanently abandoned. If the injunction is denied, employers in the near future may find a new group of potential workers or an existing pool of employees who want to correct their employment records with new names and Social Security numbers.

The court has issued a temporary administrative stay of the PIP program while it considers whether to grant an injunction.

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WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
ADDRESS SERVICE REQUESTED