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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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SOME OF THE CONTROVERSIAL ISSUES CURRENTLY BEING FACED BY EMPLOYERS IN LIGHT OF RECENT DEVELOPMENTS

Although the list of current issues that are relatively new and critical affecting employment decisions could get quite lengthy, this author suggests the following issues are particularly current and critical:

1. Coming into compliance with the new Diversity, Equality and Inclusion (DEI) concepts (see article on this subject in this newsletter).

2. Dealing with the bathroom/locker room issues regarding gender identification and the use of proper pronouns addressing employees.

3. Dealing with the new and more onerous religious accommodation requirements as to faith-based objections to workplace policies.

4. Dealing with the additional new requirements for accommodations relating to pregnancy, childbirth, or related conditions.

5. Keeping up with immigration law changes and enforcement priorities.

We will continue to address these issues in our monthly newsletters and other Alert newsletters, but please let us know if you have any questions or concerns about these issues.

THE EEOC AND DOJ ISSUE GUIDANCE ON DEI

In the Guidance from the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) released March 19, 2025, the government warned against unlawful DEI- related discrimination. Included in the Guidance is a one-page technical assistance document, "What To Do If You Experience Discrimination Related To DEI At Work." There is a second longer question-and-answer technical assistance document, "What You Should Know About DEI-Related Discrimination At Work." These Guidance materials do not have the force of law, but certainly outline the two important agencies' enforcement priorities.

The Guidance lists samples of prohibited disparate treatment as including:

- "Access to or exclusion from training (including training characterized as leadership development programs);"
- "Access to mentoring, sponsorship or workplace networking/networks;"
- "Internships (including internships labeled as 'fellowships' or 'summer associate programs);"
- "Selection for interviews, including placement or exclusion from a candidate 'slate' or pool;"
- "Job duties or work assignments."

The Guidance goes on to explain the following:

> This prohibition applies to employee activities which are employer-sponsored (including by making available company time, facilities, or premises, and other forms of official of unofficial encouragement or participation), such as employee clubs or groups. In the context of DEI programs, unlawful segregation can include limiting membership in workplace groups, such as Employee Resource Groups (ERGs), Business Resource Groups (BRGs), or other employee affinity groups, to certain protected groups.

It is emphasized that: "Title VII does not provide any diversity interest exception to these rules." It points out also that DEI training can create a hostile work environment if "the training was discriminatory in content, application, or context." It cites cases pointing out dangers associated with "balanced workforce initiatives," citing explicit, specific racial goals for each grade and job level, and evaluating managers on how well they comply with such goals, as evidence that the employer considered race in making employment decisions."

One thing clear from the Guidance is that these agencies will enforce discrimination claims in the DEI context, as such claims apparently are given special attention now by the relevant government agencies. The new Director of the Office of Federal Contract Compliance Programs (OFCCP) indicated she plans to apply the principles in *Students for Fair Admissions v. Harvard*, the Supreme Court ruling curtailing race-based affirmative action in higher education, to workplace discrimination. A simple explanation of the new enforcement concept is that consideration of race in decision-making in employment matters is prohibited. The enforcement concept seems to be that certain DEI plans are discriminatory "if they involve an employer or other covered entity taking an employment action motivated - in whole or in part - by an employee's race, sex, or another protected characteristic."

The OFCCP reportedly will even look at affirmative action plans that have been submitted to the government to look for discriminatory DEI practices therein. The mechanism being commonly used to comply with the new standards is to focus on "merit-based" employment decisions.

CONSIDERATIONS WHEN GOVERNMENT OFFICIALS SHOW UP AND REQUEST TO MEET WITH INDIVIDUAL EMPLOYEES

Occasionally, Immigration & Customs Enforcement (ICE) agents, or those from other state and local agencies, come to an employer's facility asking to meet with one of more employees. The crucial issue is the extent to which agents can make entry with or without an arrest warrant, as someone at the employer's premises must make a decision to allow or refuse entry. Various documents may be used by ICE officials, for example, including an ICE Warrant for Removal/Deportation (ICE Form I-205), and a DHS Warrant for Arrest of Alien (Form I-200). Neither of these forms requires the signature of a judge.

The issue thus is whether or not to permit the agents to make entry based on the document provided. Some employers may decide that agents possessing judicial warrants will be allowed to make entry, but those with administrative forms will not. It is suggested that employers determine in advance, as a matter of policy, whether to refuse law enforcement agents lacking the judicial warrant entry into non-public areas, as they do have a right of entry into the public areas. If an employer wishes to permit entry to non-public areas to those law enforcement agents having a judicial warrant, then the frontline employees need to be trained to recognize the difference between judicial warrants and the administrative forms, both search and arrest. However, employers must determine whether to refuse law enforcement agents possessing even arrest warrants entry into non-public areas, as the case law is not clear on this subject. In making this decision, the employer may wish to provide a written explanation to law enforcement officials, and possibly even a citation to cases, to discourage unnecessary conflict.

Some employers may feel they are not adequately protecting the "rights" of their own employees by granting such entry and the like. However, having a good relationship with ICE and other law enforcement agencies is also important. A practical result may be to cooperate with the authorities by sending the employee(s) to meet with the ICE or other law enforcement officials in the front office. Such tactic keeps the law enforcement officers out of sight in the work area and maintains cooperation with the law enforcement officers.

Indeed, ICE officials are increasingly making public statements that they consider a lack of cooperation an "obstruction of justice," an offense itself that can be the subject of prosecution. This writer suggests cooperation is the wiser choice for the employer.

HOW JURORS EVALUATE THE FAIRNESS OF AN EMPLOYER'S ACTIONS

Fairness is a fundamental human instinct. For example, whatever the rights and wrongs of an employee's firing, the manner in which the employee is fired may seem unfair, as few things matter more to people than fairness. While people differ over what counts as a right outcome, they can usually agree on what makes for a fair process.

For these reasons, the plaintiff's battle cry in employment litigation may be "that's not fair." Plaintiffs often build their cases around the concept of fairness and easily capitalize on jurors' predisposition to impose fairness upon situations. A majority of jurors probably believe that some things are wrong, even if they are legal. For

example, laying off a long-time employee when that employee's skills are no longer needed. Many jurors realize that such a layoff is perfectly legal, but feel it is absolutely unfair. Given a choice, only half of jurors say they can set such feelings aside and focus on the "letter of the law." Thus, attorneys should support their legal positions with common sense fairness arguments. A company argument that it "had a legal right to terminate him under these circumstances" may not "carry the day" with jurors. Some jurors believe that employees are the "little guys" who need to be taken care of, and the jurors need to send a message to corporate America in order to engender change.

Thus, many jurors have a tendency to want to give employees the benefit of the doubt in disputes with employers. Asked whom they would tend to believe in a dispute between an employee and his or her employer, many jurors say they would believe the employee. Some studies reveal that less than half of the jurors polled nationwide did not believe that when employees are terminated, they usually deserve it. It is easier for jurors to relate to the employee than the employer, and thus plaintiffs carry this advantage with them into the courtroom.

In discrimination cases, many jurors believe they themselves have witnessed and/or experienced discrimination in the workplace. In spite of legal instructions in the standards required by the law that defines discrimination, many jurors do not have to see blatant and overt discrimination in order to find in favor of the plaintiff. They may believe that discrimination has become more subtle and want to remedy this situation despite the legal standards.

Thus, it is crucial for employers to have appropriate policies and procedures as jurors expect these standards to be met, and jurors may expect that the policies and procedures are followed without exception. To jurors, inconsistency or failure to apply these policies and procedures seems unfair. Many jurors work in settings such as in government and in unions where there are seniority rules and strict policies and procedures in hiring, promotion and termination.

In most employment lawsuits, there is an individual plaintiff going up against a corporate defendant. The fact that the corporation is not a human compounds the immediate feeling of unfairness. In many mock trial settings, the jurors express the desire to make a statement to the corporate defendant or to demand that the corporate defendant implement certain policies, procedures or training. A majority of jurors are much more open to the defense position if the defense addresses the issue of, and juror concerns about, fairness.

To address fairness, corporations should have clear guidelines, policies and training. Sometimes a plaintiff never complains or complains only after losing his or her job. Therefore, all of the opportunities for complaints should be explained to the jury so that they understand the option a plaintiff had for complaining earlier.

Once the employer is aware of complaints or allegations, employers must show that immediate steps were taken in line with policies and procedures. Jurors often are interested in understanding what type of investigation was conducted and what the findings were. There is a need to understand what response was taken in light of those findings. Many jury consultants recommend showing that the plaintiff's contentions ultimately disadvantage other employees, plaintiff's co-workers, and not just the corporate employer.

Pointing out the steps the company has taken goes a long way to show that it is a fair company dedicated to treating all of its employees with respect and fairness, as this approach is more likely to be perceived as a "winner" in the eyes of the jury.

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