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EMPLOYMENT LAW BULLETIN

A Monthly Report On Employment Law Issues

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DEPARTMENT OF LABOR PROPOSES INDEPENDENT CONTRACTOR RULE THAT WOULD BENEFIT BUSINESS

Many businesses adopt an independent contractor method of utilizing workers, including the construction industry, portions of the trucking industry, franchisors, and most of the Gig economy. Since the employment laws, minimum wage and overtime rules, various forms of legal liability, are generally not applicable to independent contractor relationships, civil rights and plaintiffs' groups argue for a broader application of the employment laws. A few states such as California, Massachusetts, New Jersey, and Connecticut have enacted state laws making independent contractor relationships very difficult to maintain. The Obama Administration issued a Department of Labor (DOL) Guidance, broadly expanding the definition of employment and even indicating that most workers were employees, not contractors. The business community therefore praised the DOL-proposed regulation issued on September 22, 2020, adopting a shorter and simpler legal test favoring industry as to when employers may legally classify workers as independent contractors.

The Trump Administration is expediting the regulatory process by setting only a 30-day comment period, in hopes that the new regulation could issue before a possible changeover in administrations. There is some risk in such a late issuance of a federal regulation, as if the Senate were to come under Democratic control, the Senate could reverse the rule under the Congressional Review Act to prohibit any similar rule in the future.

The proposed rule adopts an "economic reality" test, which requires that contractors must be in business for themselves, rather than being economically dependent, and explains that the "inquiry into economic dependence is conducted through application of several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible."

The rule proposes narrowing the test into five factors. Two of the factors would have the greatest weight: the nature and degree of the employer's control over the work and the worker's opportunity for profit or loss based on personal initiative or investment. The other factors would be considered if the initial two core factors are conflicting. These criteria are the amount of skill required in the work, the degree of permanence in the work relationship, and whether the work is part of an integrated unit of production.

While most agree that the proposed rule simplifies the legal test, many commentators believe that the test is simplified in a manner that presumes workers are not employees. In contrast, the Obama Administration guidance presumed that workers were employees. Obviously, one result of the proposed rule would free many employers from providing health insurance and other benefits to these individual workers.

The economic analysis in the proposal suggests the proposed regulation would save companies about $841 million per year. A majority of the savings come from reduced litigation costs and more certainty in making classification decisions.

REVERSE DISCRIMINATION ISSUES EMERGE IN BLACK LIVES MATTER DEBATE

Moderator Chris Wallace asked President Trump during the Presidential debate why he directed federal agencies to end racial-sensitivity training that addresses white privilege or critical race theory. President Trump answered: "I ended it because it's racist."

What is this critical race theory and could sensitivity training actually be racist? A diversity trainer for federal agencies conducted training with accompanying documents stating that "whiteness includes white privilege and white supremacy." He instructs managers to conduct "listening sessions" in which black employees can speak about their experiences and "seeing their pain," while white employees are instructed to "sit in the discomfort" and not "fill the silence with your own thoughts and feelings." Some training sessions among federal employees have been held in racially segregated sessions to examine "white male culture" and make employees take responsibility for their "white privilege," "male privilege," and "heterosexual privilege."

While the above examples may not be typical, they raise questions under the President's Executive Order regarding "offensive and anti-American race and sex stereotyping and scapegoating." Accordingly, the Executive Order prohibits the federal government and its contractors from teaching that the U.S. is fundamentally racist or sexist; that an individual should bear a responsibility for actions committed by past members of the person's race or sex, or that an individual has privileges because of the individual's race or sex.

This may be the first ever federal effort to address the contents of diversity training. A federal hotline has been established to review complaints and inquiries about such training.

Not only civil rights groups, but many corporations have objected to the Order asserting that it creates confusion for their diversity training. A further complication is that federal agencies have sent inquiries to various major corporations, including Microsoft and Wells Fargo, asking about whether the companies' pledges to hire more black managers constitutes unlawful quota-based discrimination in itself. The agency reminded these companies that while affirmative outreach is lawful, they may not discriminate on the basis of race in their hiring programs. The government wrote: "Although contractors must establish affirmative-action programs to set workforce utilization goals for minorities and women based on availability, contractors must not engage in discriminatory practices in meeting those goals." In a related development, the Justice Department has filed a lawsuit against Yale University alleging the school violated civil rights laws by discriminating against Asian-American and white applicants. Such race-based programs are being investigated at Harvard and Princeton as well.

Some commentators try to explain the emphasis on non-discriminatory diversity training as avoiding "divisive concepts" such as the idea that the U.S. or certain racial or sexual groups are inherently sexist or racist. Sections of the Order allow "employers to continue to promote inclusion, without attributing blame based on race or gender." Otherwise, supposedly the workers being trained could allege their training amounted to harassment. A spokesman for the DOL Office of Federal Contract Compliance Program stated that unconscious-biased training is "perfectly fine," as long as it teaches that everyone, based on the human condition, has unconscious biases, and doesn't specifically call out a particular race or sex as being inherently biased. For years, several high-profile suits have been filed against major corporations alleging discrimination against white workers and men under Title VII, and these cases are often referred to as "reverse" discrimination cases. In general, employers are allowed to use proactive plans to address areas where there has been racial inequality, as long as they do not have an exclusionary effect on a white or male person. See **United Steel Workers v. Weber** (U.S., 1979); **Johnson v. Transportation Agency,** (U.S., 1987). Some address the situation as requiring employers not to institute illegal quotas or use race or sex as the sole factor in promotion or hiring, which is distinct from efforts to create equal opportunities for all.

If some consider this analysis hard to follow, consider that women and older employees may not be stereotyped as unfit for certain jobs, and stereotyped characteristics should not be attributable to any racial or sexual group. An example is that

Muslims are not to be considered violent simply because of certain terrorist activities in the Middle East. Similarly, racism and/or sexism are not to be attributed solely to whites and males.

Some commentators would argue that the standard being established is not realistically achievable and will not improve the understanding of diversity in the workplace. Others suggest that currently much diversity training is not well received by employees, in part because of the stereotyping, thus suggesting the Executive Order could actually improve diversity training.

KEEPING POLITICS OUT OF THE WORKPLACE IS DIFFICULT

As the election approaches, employees are taking an increasing interest in political issues. Corporate America traditionally has avoided speaking out on political issues, but now it is becoming more common to do so. Indeed, some surveys indicate that a majority of employees expect and want their employers to speak out on social and political issues. However, there are two sides to every story and every political issue, and thus in taking controversial political and social positions, employers risk offending at least some segment of their workforce and/or customer community. It should be noted that surveys suggest that millennials more than previous generations value working for a company with a noble mission, and want their employers to make a positive impact on society. Walk-outs have even occurred at large employers such as Amazon and Google over politically-related issues. In some cases, employee activists have been fired, causing Amazon CEO Jeff Bezos to state at his company's annual meeting in May, "We support every employee's right to criticize their employer's working conditions," "but that doesn't mean that they're allowed to not follow internal policies."

Such situations create genuine employer concern as to what internal policies can be adopted and applied on a non-discriminatory basis to lessen conflict. Several ideas include carefully worded equal employment statements against harassment and hostile environment actions, and appropriate dress codes. But the situation can be quite complicated. Consider that one major employer allegedly banned Make America Great Again (MAGA) attire, but Black Lives Matter (BLM) attire was acceptable. The debate is continuing whether BLM and MAGA are political and racial, and whether they are appropriate in the work setting.

Employers must thus avoid items being offensive to some, but at the same time contend with legally protected conduct. Employers are obviously concerned about minimizing conflict in the workplace and keeping everyone focused on work rather than contested personal views.

In general, one's political views or activities are not legally protected in the workplace, and thus they are not addressed under the regular discrimination laws. In general, therefore, employers can normally limit political rhetoric in the workplace, but complications can arise. For example, an unfair labor practice charge is currently pending against Kroger, for banning BLM buttons in some of its supermarket chains. The unfair labor practice charge alleges the employer has "interfered with the concerted activities of UFCW Local 21-represented employees by ordering them to remove the buttons the union furnished them to support racial justice and equality in the workplace." The charge asserts that the two Kroger supermarket chains maintain "a vague and overly broad dress code policy that chills an employee exercise" of union rights.

The answers to such issues are not easy. In general, employers may have a neutral dress code such as creating a "no logos" policy of banning clothing with any writing. An effort through a neutral dress code, even if perceived as somewhat tough, mitigates the potential disruption of an employee trying to make a political statement on clothing. Obviously, employers should act with competent counsel and act cautiously, using progressive discipline only if necessary. The employer must be consistent with any rules, witness the debate over Black Lives Matter, White Lives Matter, Blue Lives Matter, or All Lives Matter. An employer can also remind employees that everyone has and is entitled to an opinion, but the focus in the workplace is to get the job done, and to treat everyone equally under the law.

All of this granular analysis may result in attempts to ban all political speech in the workplace for fear of violating the law and being drawn into litigation. There are many fine lines of distinction being drawn between "right" and "wrong." For instances, let's say an employer bans all buttons or masks with sayings or insignias (e.g., Black Lives Matter, All Lives Matter, MAGA (Make American Great Again), Gun Control Now). How will that affect the workforce and relations among

various employee groups? Does this result in a lose/lose result in trying to have a more tolerant and collegial workplace? Without a lot of fine tuning and thoughtful execution, little may be accomplished and worthwhile discussion may not be achievable.

ADMINISTRATION ATTEMPTS TO MAINTAIN GOP MAJORITY AT NLRB AND EEOC REGARDLESS OF ELECTION RESULTS

Republicans have done their best to maintain their majority at the Equal Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) regardless of November's election results. In September, two Republicans and one Democrat were confirmed to the EEOC in separate votes. Confirmation of the three new Commissioners provides the EEOC with its first full complement of Commissioners during the Trump Administration. The confirmation of the three new Commissioners give the Republicans three members on the five-seat Board until at least July 2022.

An example of the importance of these developments is that in the near future, the EEOC will have to resolve new regulations dealing with company-sponsored wellness programs, whether or how to collect workforce pay data, and a joint employer proposal under Title VII.

Similar developments have occurred at the NLRB, as the current Republican majority will also remain in place until at least mid-2022.

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