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Newsletters

Employment Practices Alert - April 2010

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Honest Belief in Nondiscriminatory Reasons for Failure to Promote Bars Discrimination Claim

A city fire department did not promote four white firefighters who had applied for open positions of deputy chief and assistant chief. In each case, the fire chief was the final decision maker with regard to the applicants. The chief believed that the firefighters in question were not strong candidates for the open positions because they were, respectively: (1) negative and might undermine management and resist change; (2) unsupportive because the position of fire chief was coveted; (3) unsupportive because of actions taken to show dissatisfaction; and (4) soon to retire. The firefighters sued the city, alleging that the fire department failed to promote them because of their race in violation of Title VII of the Civil Rights Act of 1964, as amended. The United States Court of Appeals for the Seventh Circuit rejected the firefighters' claim, holding that even if the court assumed that the firefighters had established a *prima facie* case of failure to promote, the firefighters had to establish pretext by showing that: (1) the fire department's nondiscriminatory reason was dishonest; and (2) its true reason was discriminatory intent. The court noted that even if a business decision seems unreasonable, pretext does not exist if the decision maker honestly believes the nondiscriminatory reason given. The firefighters presented no evidence that the fire chief did not believe the justifications given, and so could not establish pretext. Further, the court noted that before making the final promotion decision the fire department offered the positions to four different white males. Employers should conduct a selection process which does not include race as a determining factor, and keep records of their justifications for the reasons for selecting applicants within the process.

Stockwell v. Harvey, No. 09-2355 (7th Cir. Mar. 12, 2010)

ADA Offers No Protection Against Drunk-Driving Discipline

The police chief for a county forest preserve rear-ended another car while driving home after drinking four or five glasses of wine at a local watering hole. Two passengers in the car he struck were sent to the hospital. The chief's driver's license was suspended. After learning of the incident, the forest preserve terminated the chief, and he sued alleging he had been discriminated against on the basis of his disability — alcoholism. In upholding the entry of summary judgment in favor of the forest preserve, the United States Court of Appeals for the Seventh Circuit held that the chief did not qualify as "disabled" under the Americans with Disabilities Act (ADA) because he could not perform

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the essential functions of his job as chief. First, in that role, the chief was required to maintain the ability to legally operate an automobile, which he could not do because of his suspended driver's license. Second, the court noted that the violation of workplace rules is a valid basis for termination, even where it was caused by a disability. The forest preserve required all employees to refrain from engaging in public drunkenness and from violating any federal, state, county or municipal law. The court held that the chief's violation of these rules rendered him no longer qualified to perform his job as police chief. This case demonstrates the importance of implementing and disseminating well-crafted workplace rules, as the violation of them may often serve as a valid explanation for an adverse employment action.

Budde v. Kane Co. Forest Preserve, No. 09-2040 (7th Cir. Mar. 4, 2010)

For Changes to Employee Benefit Plans, Employers Must Avoid Tripping on Their Own Amendment Procedures

An employer's retirement plan provided for death benefits to a "surviving spouse," a term defined as a spouse to whom the employee was "married for at least one year immediately preceding" his or her death, or the parent of a child of the marriage. A purported plan amendment changed the definition of surviving spouse to a spouse to whom the employee "was married for at least the year immediately preceding and ending" on the date that retirement benefits were scheduled to commence. Under the new definition, a retired employee's wife became ineligible for the death benefits. The retired employee and his wife sued on the grounds that the amendment was invalid because the plan's amendment procedures were not followed. The United States Court of Appeals for the District of Columbia ruled that the employer's failure to follow its own amendment procedures meant the amendment was not adopted. The Employee Retirement Income Security Act of 1974 (ERISA) requires that every employee benefit plan provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan. But it is silent as to the level of detail and as to the nature of procedural requirements. In the case before the court, the plan's amendment procedure required, among other things, that the trustees submit the proposed amendment to the plan's actuaries. Neither the trustee meeting minutes nor outside counsel's notes indicated that the amendment was submitted for an actuarial cost review, which the court found sufficient to establish that such a review had not taken place. As a result, the court found the purported amendment invalid because the plan's own procedures had not been followed. Employers must act with care when changing retirement and welfare benefits plans to ensure that: (1) the exact procedure set forth in the plan is followed; (2) the plan is amended by those with authority to do so; and (3) the amendment is properly documented and retained in the employer's plan files.

Overby v. National Ass'n of Letter Carriers, 595 F.3d 1290 (D.C. Cir. Feb. 26, 2010)

69-Year Old Manager Fired for Sexual Harassment Lacks Age Discrimination Claim

A 69-year old manager was accused by co-workers of sexually inappropriate conduct. His employer conducted both internal and external investigations, involving interviews of both male and female employees, into the manager's alleged sexually inappropriate behavior. The interviews corroborated allegations of the manager's sexual harassment, and the employer fired him. The manager sued his former employer for age discrimination asserting that the executive who fired him had once called him an "old, grey-haired fart." The United States Court of Appeals for the Fifth Circuit rejected the age discrimination claims because the manager failed to present any evidence suggesting that the former employer lacked a good-faith belief that the manager had violated the employer's sexual harassment policy. The court explained that in cases in which an employer discharges an employee based upon another employee's complaint, the issue is not the truth or falsity of the allegation, but rather whether the employer reasonably believed the employee's allegation and acted on it in good faith. This case illustrates the importance of conducting thorough investigations, and the impact of those inquiries on termination decisions.

Jackson v. Cal-Western Packaging Corp., No. 09-20411 (5th Cir. Mar. 2, 2010)

Employee's Lay Testimony Combined With Medical Evidence May Establish "Serious Health Condition"

A receptionist working for a medical practice was diagnosed with a urinary tract infection. Her doctor prescribed at least a three-day course of antibiotics and wrote a note stating that the receptionist was unable to work for the next two days. The receptionist taped the note to her supervisor's door and went home. The receptionist was already scheduled to be on

vacation leave following the doctor's prescribed two-days off, so she did not return to work until a week later. The receptionist claimed that she remained sick for four of the days that she was out of the office, but did not indicate that she wanted that four-day absence designated as Family and Medical Leave Act (FMLA) leave, nor did she convert her two vacation days into sick days. The employer later terminated the receptionist for failing to "call off" to report her doctor-recommended two-day sick leave. The receptionist sued claiming that the employer interfered with her rights under the FMLA and fired her in retaliation for taking FMLA-protected leave. The employer argued that the receptionist's leave did not qualify under the FMLA because she had not demonstrated a "serious health condition" with a period of incapacitation of more than three days. The receptionist countered that her combination of personal and medical testimony regarding her illness and incapacitation was sufficient to raise jury issues whether she had a serious health condition. The United States Court of Appeals for the Third Circuit held that although the FMLA regulations require a showing of at least three days of incapacitation and that some medical evidence is necessary to establish a serious health condition, there was no reason to categorically exclude all lay testimony regarding the length of an employee's incapacitation. Accordingly, employers must be aware that in certain circumstances, an employee may establish the requisite period of incapacitation under the FMLA through his or her own testimony, in combination with information provided by the employee's physician.

Schaar v. Lehigh Valley Health Servs. Inc., No. 09-1635 (3rd Cir. Mar. 11, 2010)

Firefighter/Model Lacks Discrimination Claim for Posting Images on Social Media Site

A female firefighter trainee, who was also a part-time model, was in the midst of her initial one-year probationary status with a city fire department when she posted two revealing photographs of herself and other members of the Department on her MySpace webpage. The firefighter also posted an image from the fire department's website, which she had obtained without permission. The fire department was alerted to the firefighter's photographs by an anonymous caller, who noted that the pictures "may conflict" with the image the organization wanted to convey. After an internal investigation, the fire department issued the firefighter an oral reprimand — the lowest level of discipline available — for her "unbecoming conduct" which "brought discredit" to the organization, and for using her position with the department to "enhance and to seek personal publicity." In response, at a meeting with three chief officers, the firefighter denied violating any rules, claimed that she was being singled out, and ultimately began speaking in a loud and combative manner to her supervisors. The firefighter was terminated, and she subsequently sued claiming that she was let go on the basis of her gender in violation of Title VII of the Civil Rights Act of 1964, as amended, and Section 1983 of the Civil Rights Act of 1871. The United States Court of Appeals for the Eleventh Circuit rejected the firefighter's claims, holding that the fire department had legitimate non-discriminatory reasons for terminating her. Most notably, the firefighter had become "combative," "aggressive," "argumentative," "disrespectful" and "insubordinate" in response to a fairly minor oral reprimand by chief officers. The termination was ultimately not a result of the firefighter's posting of the questionable photographs online, but rather her denial of any violation of department rules, and her insubordination towards superior officers. While employers can take steps to limit the improper or unauthorized use of their intellectual property and identity by employees, public employers must be careful not to trample employees' First Amendment rights. Also, all employers must be careful to ensure that they obtain content online through only lawful means.

Marshall v. Mayor & Aldermen of Savannah, No. 09-13444 (11th Cir. Feb. 17, 2010) (unpublished)

Elementary School Teacher Not Subject to "Ministerial Exception" Under "Primary Duties" Test May Pursue ADA Retaliation Claim

A former Lutheran elementary school teacher took a disability leave of absence for the upcoming school year and subsequently received a diagnosis of narcolepsy. When the teacher advised the school that she was returning to work after six months, the school asked the teacher to accept a "peaceful release agreement" under which she would resign in exchange for a partial payment of her health insurance premiums. The teacher refused, and after a conflict arose about her return to work, the school board rescinded the teacher's "call" and terminated her employment. The United States Equal Employment Opportunity Commission (EEOC) sued the school alleging unlawful retaliation under the Americans with Disabilities Act (ADA). The teacher intervened adding a claim under the Persons with Disabilities Civil Rights Act. The district court granted summary judgment in favor of the school on the basis that the court lacked subject matter jurisdiction under the ADA because the teacher was a "ministerial" employee exempt from the ADA. The United States Court of

Appeals for the Sixth Circuit reversed the district court's ruling and revived the EEOC's retaliation suit on the grounds that the teacher was not subject to a "ministerial exception" because she was a parochial school teacher whose "primary duties" were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using the same secular textbooks used in public schools, but also because nothing in the record indicated that the Lutheran church relied on her as the primary means to indoctrinate its faithful into its theology. Employers must be mindful of the need to engage in the interactive accommodation process with employees possessing qualified disabilities under the ADA.

EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School, No. 09-1134 (6th Cir. Mar. 9, 2010)

District Court Finds That Certain Severance Payments Are Exempt From FICA Tax

An employer operating a chain of retail stores was experiencing financial difficulties and closed a number of facilities prior to entering bankruptcy proceedings. As part of this reduction in force, the employer provided certain severance benefits to terminated employees. The employer treated the severance benefits as income and reported them as wages on Forms W-2, with Federal Insurance Contributions Act (FICA) taxes withheld. After turning over the taxes to the United States Internal Revenue Service (IRS), the employer filed a claim for refund seeking to recover more than $1 million in FICA taxes, arguing that the severance payments were not properly treated as "wages" for FICA tax purposes. The bankruptcy court agreed, reasoning that the payments fell within a special exception for certain payments made by an employer and conditioned on eligibility for, and receipt of, state unemployment benefits (also known as "supplemental unemployment compensation benefits" or "SUB pay"). The IRS challenged the bankruptcy court's decision, arguing that recent guidance had made clear that SUB pay was exempt from FICA tax only under limited circumstances that were not present in this case. The United States District Court for the Western District of Michigan rejected the IRS' reasoning and ruled in favor of the employer. The court found that the severance benefits were properly treated as "supplemental unemployment compensation benefits" and therefore excluded from wages for FICA purposes under a special statutory provision relating to mandatory withholding of income (and not FICA) taxes. In so holding, the district court expressly rejected the reasoning from a recent case decided by the United States Court of Appeals for the Federal Circuit (*CSX Corp. vs. United States,* 518 F.3d 1328 (2008)). Thus, the district court's decision should be read narrowly, and employers seeking to avoid wage treatment for the payment of supplemental unemployment compensation benefits to terminated employees should closely review whether such payments would qualify for any available exception.

In re Quality Stores, Inc., 2010 WL 679136 (W.D. Mich. Feb. 23, 2010)

Hospital Staff Privileges Do Not Confer Property or Contractual Rights Upon a Physician

A Georgia hospital suspended the privileges of an African American neurosurgeon after an investigation by its medical care evaluation committee found that he was involved in 18 instances of inappropriate patient care. The neurosurgeon sued the hospital claiming that it had treated non-African American physicians preferably by not disciplining them despite their engaging in improper behavior when treating patients. The neurosurgeon argued that his ability to practice medicine conferred upon him a property interest that the hospital violated by revoking his privileges. The trial court dismissed that theory for failure to state a claim. The United States Court of Appeals for the Eleventh Circuit affirmed. The appellate court reasoned that physicians accept medical staff privileges with the understanding that they can be revoked at any time and that therefore, there was no property interest. The neurosurgeon had also claimed that the hospital violated his right to contract with others for his medical services. The court rejected that theory because the hospital's policies expressly provided that staff privileges did not result in contractual rights. This case underscores the importance of setting written polices that clearly define what rights are not intended to be conferred upon employees through their work.

Jimenez v. WellStar Health Sys., No. 09-10917 (11th Cir. Feb. 18, 2010)

California Employers May Be Required to Compensate Employees for Commute Time

A technician employed by a manufacturer of vehicle tracking and recovery systems sued on behalf of himself and other technicians under the Fair Labor Standards Act and California law. The technician claimed that he was entitled to compensation for commuting time while operating a company vehicle, and for "postliminary" work performed after his shift

was over. The technicians' workday began when they received assignments and then mapped out routes prior to leaving home. They would then use a company vehicle to travel to clients' locations to install the vehicle tracking and recovery system. After completing the installations for the day, technicians were required to return home and use a modem to transmit company data on the installations performed that day. Technicians were prohibited from using company vehicles for personal activities and transporting passengers. The United States District Court for the Central District of California granted summary judgment to the manufacturer. The United States Court of Appeals for the Ninth Circuit held that the technicians could proceed with a state law claim for commuting compensation, but not a federal law claim. Under state law, the Ninth Circuit determined that the "total control" exercised by the manufacturer (i.e., requiring technicians to drive the company vehicle, no personal usage, and no passengers) gave the technicians a valid state law claim for compensation. As to the federal law claim, the court held that the plain meaning and legislative history of the Employee Commuting Flexibility Act did not support the technicians' claim for compensation for commuting time. Furthermore, the Ninth Circuit opined that the postliminary data transition work might be compensable if the technicians could show it was related to their principal activities and that the time was not *de minimus*. Employers are advised to be aware of the level of control imposed upon employees during their commute, as employers may be required to compensate those employees for the time they spend commuting.

Rutti v. Lojack Corp., No. 07-56599 (9th Cir. Mar. 2, 2010)

Indiana Enacts Workplace Gun Law

On March 18, 2010, Indiana Governor Mitch Daniels signed into law P.L. 90-2010, which allows workers who may otherwise lawfully possess firearms or ammunition to keep firearms and ammunition in their locked vehicles in trunks, glove compartments, or out of plain sight while parked on company property. The new law bars Indiana employers from adopting any policy that prohibits, or has the effect of prohibiting, employees from having firearms in their locked vehicles while the vehicle is on company property. In addition, the law authorizes civil lawsuits by employees and allows for actual damages and attorneys' fees for employees who prevail in a court action against an employer maintaining a prohibited workplace policy. The law provides exemptions for certain public utilities, chemical plants and agencies whose drivers transport developmentally disabled people, as well as for schools, child care centers, domestic violence shelters and group homes. Indiana employers should carefully review their workplace gun policies and/or workplace violence procedures to ensure that they are in compliance with the provisions of the new Indiana workplace gun law.

Mortgage Loan Officers Not Exempt Under FLSA

The United States Department of Labor's Wage and Hour Division (WHD) recently issued an "Administrator's Interpretation" (AI) concerning the applicability of the Fair Labor Standards Act (FLSA) administrative exemption to mortgage loan officers and similar jobs. The AI was issued "to provide needed guidance on this important and frequently litigated area of the law." The AI draws from numerous federal decisions to identify typical job duties of mortgage loan officers, which include working leads, collecting financial data from customers, running the data through software to determine what products are available, and then selling the product to the customer. After analyzing the regulations and court cases on point, the WHD determined that the FLSA's administrative exemption does not apply to this type of job. Specifically, the WHD determined that the second part of the administrative exemption could not be met because the primary duty of these positions is not in the "performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." Rather, these jobs are sales jobs, which are more akin to production positions, not duties associated with the operation of the business itself. It is interesting that the WHD issued this AI on its own volition as opposed to in response to a request for an opinion, especially on an issue that is fairly settled in the courts, as the opinions cited in the interpretation overwhelmingly held that the administrative exemption did not apply to these jobs. This can be interpreted as a sign that the WHD intends to police these exemptions more closely than in the past and issue its own interpretations to ensure a uniform application of the FLSA exemptions. Employers should consult counsel when making FLSA exemption determinations.

U.S. Department of Labor Administrator's Interpretation No. 2010-1.