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Newsletters

Employment Practices Alert - February 2010

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Executive Order Requires Posted Notice Detailing Employees' Right to Organize

On January 30, 2009, President Obama signed Executive Order 13496, creating new obligations for government contractors and subcontractors. The Order's stated purpose is to keep employees informed of their rights under the National Labor Relations Act (NLRA) in an effort to see government contracts "performed by contractors whose work will not be interrupted by labor unrest." Employers that are covered by the Order will be required to "post a notice of such size and in such form, and containing such content as the United States Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the NLRA engage in activities relating to the performance of the contract." The United States Department of Labor's rule proposal seeking to implement the Order mandates that the notice: outline "the fundamental rights regarding union activity and collective bargaining that employees have under the NLRA; provide examples of conduct that is illegal under the NLRA; and provide contact information in the event that an employee suspects that the law has been violated." If an employer fails to post this notice, its "contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts." Exemptions can be granted where the Secretary of Labor finds that the purpose of the Order would not be served in requiring the notice. Notably, the Order revokes President George W. Bush's Executive Order 13201, which required notice to employees of their rights not to join a union and not to pay agency fees for nonrepresentational union expenditures. Employers that are subject to Executive Order 13496 should prepare to post notices proponing union activity in order to keep their contracts, and should be ready for any repercussions that the notice might have.

Executive Order 13496 as of January 30, 2009

For more information, please contact your regular Hinshaw attorney.

Mixed Motive Theory Not Available Under the ADA

A female employee had difficulty walking and standing, but was not actually disabled. After the employee was terminated, she sued alleging that her employer fired her because it regarded her as disabled. At trial, the district court allowed the employee to proceed on her Americans with Disabilities Act (ADA) claim under a "mixed-motive" theory, which would have allowed the employee to

Attorneys

Robert J. Finley

Linda K. Horras

Philip R. Kujawa

Daniel L. (D.L.) Morriss

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recover from the employer if she could prove that the employer acted, in part, for illegitimate discriminatory reasons. A jury found that the employer did perceive the employee as disabled, and that its perception played a role in the employee's termination. However, the jury also found that the employer would have discharged the employee despite this perception. After the United States Supreme Court held that the mixed-motive theory does not apply in Age Discrimination in Employment Act (ADEA) cases, as it does in Title VII cases, the employer appealed. Although the U.S. Court of Appeals for the Seventh Circuit had previously held that the mixed-motive theory was available in ADA cases, it reversed itself and held that an employee seeking to recover for an adverse employment action under the ADA must show that the adverse action was "because of" his or her disability. This standard is often expressed as a "but for" standard, meaning that the employee must show that he or she would not have been terminated but for his or her actual or perceived disability. While this decision appears to be a victory for employers, its effect may be limited. A bill currently pending in Congress, H.R. 3721/S. 1756, would reverse the Supreme Court's ADEA decision. Likewise, a new interpretation of the ADA may be required in light of the ADA Amendments Act of 2008, which took effect in January 2009, after this case came before the trial court. Employers must be careful not to make staffing decisions on the basis of protected classifications such as race, gender, religion, disability or age.

Serwatka v. Rockwell Automation Inc., No. 08-4010 (7th Cir. Jan. 15, 2010)

For more information, please contact your regular Hinshaw attorney.

Employer's Restraints on Union Activity Illegal

A manufacturing employer imposed several new restrictions on its employees' union activities, including that: (1) management approval was required before anything could be posted on bulletin boards; (2) employees were prohibited from placing flyers on windshields of cars in the parking lot; and (3) shift leaders were told that they were supervisors, which meant that they could not engage in union activities. In response to unfair labor practice charges filed by the union that was attempting to organize the employees, the National Labor Relations Board (NLRB) found that all three policies violated the National Labor Relations Act. The United States Court of Appeals for the Seventh Circuit upheld the NLRB's determinations. The court found that the new bulletin board policy was motivated by anti-union animus because the employer was aware of the ongoing union organizing activity. With respect to the new parking lot rules, the court held that while an employer may limit solicitation in the workplace during working time, it could not do so in the parking lot. Finally, the court found that shift leaders operated the same machinery as the five workers they work with, answered their questions and made job assignments as instructed by upper management. Therefore, the court held that the shift leaders were not supervisors because they did not have authority to take disciplinary action. Although the shift leaders could require a worker to stay late to complete an assignment, that was determined not to be the same as disciplinary action. Employers must be very careful in efforts undertaken to maintain union-free status. Changes made to policies during a union organizing effort will be viewed suspiciously, especially if they do not comply with well-established NLRB precedent.

Loparex LLC v. NLRB, No. 09-2187 (7th Cir. Dec. 31, 2009)

For more information, please contact your regular Hinshaw attorney.

Conduct Alone May Show Assent to Increased Contribution Rates to Employee Funds

In 1993, an electrical contracting company and member of a local chapter of the National Electrical Contractors Associations began making payments to a multi-employer welfare fund for electrical workers. In 2005, the local chapter entered a collective bargaining agreement with the electrical workers' union that increased employers' hourly contribution rate to the fund. Thereafter, the corporation made payments to the fund at this higher rate despite the fact that it did not sign a letter of consent binding itself to these new terms, as required by the agreement, until December 7, 2006. After the company failed to make payments in the three months following execution of the letter of consent, the union sued to collect on the delinquent amounts, as well as any payments not made prior to execution of the letter of consent. The company conceded liability for delinquent payments after December 7, 2006, but contested liability for any alleged deficiencies prior to that date on the basis that it had not yet signed the letter of consent agreeing to the terms of the 2005 agreement. The United States Court of Appeals for the Seventh Circuit held that neither the Employment Retirement Insurance Security Act (ERISA) nor the Labor Relations Management Act required a signed written agreement to

demonstrate assent. The court then concluded that the company's undisputed course of events, making payments consistent with the terms of the 2005 agreement in the absence of an executed letter of consent, sufficiently manifested the company's assent. "[A] contrary rule would ignore commercial realities and would create a loophole for parties seeking to escape responsibilities that they have acknowledged through their behavior." Employers should recognize that their actions may bind them to certain policies under collective bargaining agreements, even where there is no written document to evidence a contract.

Line Constr. Benefit Fund v. Allied Elec. Contractors Inc., No 09-1546 (7th Cir. Jan. 8, 2010)

For more information, please contact your regular Hinshaw attorney.

Motor Carrier Act Exempts Intra-State Truckers From Overtime Pay

Truck drivers working for a wine distributor made deliveries within Illinois only. The distributor did not pay its drivers overtime, instead claiming that they were exempt under the Motor Carrier Act (MCA). The drivers sued seeking overtime pay and alleging that the Fair Labor Standard Act (FLSA) required that the distributor pay them overtime. At issue was the interplay of the FLSA and the MCA. The FLSA, which normally requires payment of overtime for hours worked over 40 per week, exempts employees covered by the MCA from overtime pay. The drivers argued that the MCA did not apply to their case because they did not engage in interstate commerce when making only intrastate deliveries. The distributor argued that the goods had come from other states, and that the drivers' deliveries therefore constituted participation in interstate commerce. The United States Court of Appeals for the Seventh Circuit ruled in favor of the distributor, agreeing that the goods traveled in interstate commerce and stopped only briefly in the distributor's warehouse before being delivered. The temporary stop of the wine at the employer's warehouse did not terminate the interstate nature of the drivers' work. Moreover, the drivers operated trucks that were often registered for interstate travel on interstate roadways in an industry that is regulated by the U.S. Department of Transportation (DOT) in an interstate manner. Although employers must be careful to properly pay wages and overtime, those operating in industries regulated by the DOT should be aware of other regulations that might impact the way wages may be paid.

Collins v. Heritage Wine Cellars Ltd., No. 09-1181 (7th Cir. Dec. 21, 2009)

For more information, please contact Linda K. Horras or your regular Hinshaw attorney.

Where Offensive Conduct Permeates Workplace, Comments Need Not Be Directed at Employee

The work environment on the sales floor of a shipping company was coarse. The sales floor consisted of a group of cubicles that were staffed by six men and one woman. On a daily basis, the male employees regularly used "generally indiscriminate vulgar language" that was not gender-specific. Gender-specific comments were also made regularly. These included discussions regarding female body parts and using gender-specific slurs to refer to female clients or to women in general. It was also common practice for the sales team to listen to a radio program that regularly discussed sexual topics. It was undisputed that none of these offensive comments were ever directed at the employee herself. The female employee complained to her supervisor on several occasions, but with no response. She eventually complained to corporate officials, but no action was taken. Eventually, the female employee resigned and sued the employer for sexual harassment. The district court granted summary judgment for the employer, ruling that the workplace conduct was not actionable because the comments were not directed at the female employee directly. On appeal, however, the United States Court of Appeals for the Eleventh Circuit reversed, holding that a hostile work environment could exist even when there was no direct insults or comments leveled at a specific employee. While acknowledging that Title VII of the Civil Rights Act of 1964, as amended, is not a general civility code, the court held that it is enough for an employee to hear co-workers refer to females using derogatory comments on a daily basis to understand that they view women negatively. Consequently, the harasser need not close the loop with a specific reference to the offended employee. While Title VII does not render every offensive comment actionable, this case stands as a reminder that harassment cases are often about the cumulative impact of such statements, i.e., whether they were pervasive. Employers must react quickly to complaints of offensive comments in order to limit their cumulative impact and avoid liability.

Reeves v. C.H. Robinson Worldwide, Inc., No. 07-10270 (11th Cir. Jan. 20, 2010)

For more information, please contact your regular Hinshaw attorney.

Applicant Has ADA Claim for Pre-Offer Medical Inquiry, Regardless of Disability Status

A temporary employee working as a "debug tech" for an electronics company was asked to submit an application for permanent employment by his supervisor. As part of the application, the employee was required to submit to drug testing. The employee's drug test returned positive results for barbiturates. While in an office with the employee, the supervisor called the employer's medical review officer (MRO), and stayed in the room after passing the phone to the employee. With the supervisor in the room, the employee revealed to the MRO that he suffered from epilepsy and took a prescribed dosage of barbiturates to control his condition. The employee was terminated. In response, the employee sued the company, alleging a violation of Section 12112(d)(2) of the Americans with Disabilities Act (ADA), which prohibits medical inquiry into a job applicant's disability during the pre-offer stage of employment. Summary judgment was granted to the employer. The United States Court of Appeals for the Eleventh Circuit reversed and reinstated the employee's case. The court, addressing a matter of first impression, stated that it "now explicitly recognizes that a plaintiff has a private right of action" under Section 12112(d)(2), irrespective of his disability status, for pre-offer medical inquiries. The court concluded that while an employer may inquire into an applicant's ability to perform job-related functions, it may not make targeted disability-related inquiries. The court further determined that a jury could infer that the supervisor's presence in the room was an intentional attempt likely to elicit information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries. Employers must be careful that their pre-offer medical inquiries do not go beyond questioning regarding an applicant's ability to perform required job duties, and into the individual's disability or medical status.

Harrison v. Benchmark Elecs. Hunstville, Inc., No. 08-16656 (11th Cir. January 11, 2010)

For more information, please contact your regular Hinshaw attorney.

Fourth Circuit Opens Door to Whistle Blower Litigation

A former employee of a hospital instruments and equipment manufacturer alleged that he was fired in retaliation for complaining that his superiors were not accurately tracking, reporting and paying certain administrative fees, which he believed impacted the accuracy of the company's financial reporting to shareholders. Pursuant to the Sarbanes-Oxley Act (SOX), the employee filed a retaliation claim with the Occupational Safety and Health Administration (OSHA). While his complaint was still pending review by a Department of Labor (DOL) Administrative Review Board (ARB), the employee also filed a lawsuit in a Maryland district court seeking independent review. The district court dismissed the action, holding that the employee's remedy was to pursue an appeal before the ARB, and directed the ARB to decide the matter within 90 days. On appeal, the United States Court of Appeals for the Fourth Circuit concluded that the plain language of Section 1514A(b)(1)(B) of SOX unambiguously establishes the right of a whistleblower complainant under the act to independent review in federal court if the DOL has not issued a final decision and the statutory 180-day period has expired. This decision may have a significant impact on SOX claims and whistleblower claims brought under statutes with similar language. Employers should be prepared to defend against whistleblower claims at the administrative as well as federal court level.

Stone v. Instrumentation Lab. Co., No. 08-2196 (4th Cir. Dec. 31, 2009)

For more information, please contact your regular Hinshaw attorney.

Municipality Not Required to Hire Applicants Over the Age of 45

A police department applicant over 45 years of age was denied employment by an Oklahoma municipality and sued under the Age Discrimination in Employment Act (ADEA). The applicant had previously worked for another municipal police department, but left that position to seek employment in other law enforcement agencies. The municipality denied his

application based on Oklahoma's pension and retirement system (OPPRS), which subjected participating municipalities to age requirements. Full-time law enforcement officers were only hired between the ages of 21 and 45. Exceptions to the age requirement were allowed where the municipality employed two or fewer full-time police officers who never participated in the OPPRS and where the new officer did not participate in the system. While the ADEA prohibits workplace discrimination based on age, Section 623(j) of the act provides an exception for law enforcement personnel, so long as the applicant denied employment is over the maximum age of a bona fide hiring or retention plan that was in force after March 3, 1983 and was not a subterfuge to evade the purposes of the ADEA. Based on secretly taped conversations recorded during interviews, the applicant alleged that the municipality was not an OPPRS participant at the time of his application in October of 2004 and thus violated the ADEA. Furthermore, the applicant alleged that the OPPRS was a subterfuge to enhance the state's pension fund. The United States Court of Appeals for the Tenth Circuit disagreed and affirmed the district court's judgment against the applicant. Because the content of the taped interviews expressly related to events that took place after the municipality adopted the OPPRS, the court reasoned that the applicant failed to raise a material fact issue as to his ADEA claim. Additionally, the court held that a municipality's hiring plan in accord with ADEA law enforcement exceptions could not be a subterfuge. The applicant also failed to raise, or waived, other allegations that the OPPRS was subterfuge to avoid alternative ADEA provisions such as those pertaining to benefit plans and retirement. Employers should seek legal counsel to ensure that any age-based hiring plans in place are in accord with state and federal provisions.

Kannady v. Kiowa, No. 07-7002 (10th Cir. Jan. 6, 2010)

For more information, please contact Daniel L. Morriss or your regular Hinshaw attorney.

Charter School Not "State Actor" Solely Due to Receipt of Public Funds

After a charter school teacher engaged in questionable communications with a student, the school chose not to renew his employment contract. The teacher attempted to gain employment at other schools, but to no avail. The teacher alleged that he could not gain employment elsewhere because his former school was calling him a pedophile, and he demanded that it stop doing so and conduct a name clearing hearing. The school did not respond to his request. The teacher sued the school and its executive director under Section 1983 of the Civil Rights Act of 1871, which allows a party to sue a public official acting under color of state law for a wrongful act in violation of an individual's constitution rights. The teacher alleged that the school had violated his due process rights by denying him a hearing. The district court determined that the teacher could not make a valid claim under this particular statute because the charter school, though a public school, was not a "state actor." The United States Court of Appeals for the Ninth Circuit Court of Appeals affirmed, reasoning that the teacher failed to state facts establishing that the school engaged in state action. The court further rejected the teacher's contention that the school was a "state actor" simply because it provided public education. Rather, the court determined that the charter school was a private entity, which had a contract with the state to provide educational services that are funded by the state. Additionally, state law did not support the teacher's contention that charter school teachers have the same rights as public school teachers. This case demonstrates that the receipt of public funds, in and of itself, does not make an entity a "state actor" for the purposes of imposing liability under Section 1983. Employers should be careful, however, to properly document termination decisions and not to provide defamatory information to potential employers when responding to reference check requests.

Caviness v. Horizon Cmty. Learning Ctr. Inc., No. 08-15245 (9th Cir. Jan. 4, 2010)

For more information, please contact your regular Hinshaw attorney.

Court Awards Punitive Damages of Three Times Back Pay for Sexual Harrasment

A male physician repeatedly propositioned female employees, routinely commented on their appearance and dress, attempted to kiss them and touched them without their consent. The female employees sued the doctor and his clinic for sexual harassment, and a jury awarded them $257,000. The award amounted to $51,286 in back pay, $42,000 compensatory damages, and $164,000 in punitive damages. The doctor appealed, arguing that the women did not produce sufficient evidence to establish a sexually hostile work environment. The United States Court of Appeals for the

Fifth Circuit applied the multifactor "totality of the circumstances" standard as set forth by the U.S. Supreme Court, and upheld the verdict. The court specifically focused on the frequency and crudeness of the remarks, as well as the frequent inquiries about the women's sexual activity to determine that there was sufficient evidence of a hostile work environment. The court noted that this evidence was sufficient even absent the propositioning and unwanted touching. Employers should be aware of the substantial liability which may attach to sexual harassment and hostile work environments.

Alaniz v. Zamora-Quezada, No. 07-40325 (5th Cir. 2009)

For more information, please contact Justin M. Penn or your regular Hinshaw attorney.

Illinois Employee Entitled to Workers Compensation Benefits Despite Termination for Cause

A union carpenter sustained work-related injuries resulting in temporary "light duty" restrictions, which were accommodated by his employer. While on light duty, the employee wrote graffiti in his employer's storage room and was fired for defacing the employer's property. At the time of termination, the employee was still receiving medical treatment for his injuries which had not yet stabilized. The employer refused the former employee's claim to weekly lost time or temporary total disability benefits (TTD). In reversing the appellate court and reinstating the Illinois Workers' Compensation Commission's decision, the Illinois Supreme Court held that an employer is obligated to pay TTD until its former employee's medical condition has stabilized, irrespective of whether that employee is terminated for conduct unrelated to the work injury. The court reasoned that the Commission is limited to powers granted by the legislature and that any actions must be specifically authorized by statute; therefore, whether an employee's termination is valid or not is "foreign" to workers' compensation cases. It further explained that the test for TTD entitlement is whether the employee's disability resulted from a work-related accident and whether he or she is capable of returning to the workforce. However, the court also provided grounds within existing law and Commission authority to dispute TTD benefits, which employers should consider on a case-by-case basis—namely whether the employee is cooperating in treatment and "rehabilitation," or whether he or she "refused" a job accommodation. Employers may want to assess whether the purpose of their return-to-work or light duty programs are "rehabilitative" in nature, and whether certain prohibited conduct is tantamount to "refusing" a job accommodation.

Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission, No. 107852 (Ill. Jan. 22, 2010)

For more information, please contact Robert J. Finley or your regular Hinshaw attorney.

Former Employees Only Entitled to "Unequivocally Promised" Bonus, Illinois Court Rules

A company in the business of manufacturing and selling light fixtures promoted one of its sales managers to the position of vice president of sales. With the promotion, the company gave the employee the potential to receive a "sales performance bonus." To earn it, the employee had to increase his net sales in comparison to the previous year by a certain percentage. Shortly after the employee was promoted, complaints surfaced regarding his lack of interpersonal skills. The employee did not improve his interpersonal skills, and he was ultimately terminated. The employee then sued the company seeking to recover a *pro rata* share of his bonus pursuant to the Illinois Wage Payment and Collection Act (Wage Act). He relied on Section 2 of the Wage Act where it is provided that employers must pay terminated employees "final compensation" including "earned bonuses." The Illinois Appellate Court rejected the employee's claim, holding that only employees who are "unequivocally promised" bonuses (e.g., bonuses for length of service) must be paid under the Wage Act's "earned bonuses" provision. Examining the employee's bonus, the court found it conditional upon his sales performance, and therefore not "unequivocally promised" by the company. Therefore, the company was not required to pay the subject bonus. When offering bonuses, Illinois employers should be mindful of whether they are creating "unequivocal promises" such that terminated employees will be entitled to a *pro rata* share of their bonus upon exiting.

McLaughlin v. Sternberg Lanterns, Inc., 917 N.E.2d 1065 (Ill. App. 2009)

For more information, please contact your regular Hinshaw attorney.

Alarm Company Did Not Violate Public Policy for Firing in Response to State Inquiry

An employee of an Oklahoma alarm company regularly worked through his lunch period. After some informal internal complaints were rejected, the employee contacted the Oklahoma Department of Labor (ODOL) to inquire whether employees were entitled to pay for work performed during lunch break periods. A co-worker informed management of the employee's call, and the employee was later fired. The employee sued in federal court alleging that the employer had unlawfully deducted time for lunch breaks when he was actually working, in violation of the Fair Labor Standards Act (FLSA), and claimed that he was wrongfully discharged in violation of Oklahoma public policy for contacting the ODOL. The federal court asked the Oklahoma Supreme Court to issue an opinion regarding the state law claims. The Oklahoma Supreme Court recognized that an employee might have a claim for retaliatory or wrongful discharge where he or she makes a complaint or charge with the ODOL, or otherwise refuses his employer's demand to act in a way that is unlawful or contrary to recognized public policy. However, the employer's refusal to pay wages for work performed during meal periods, when work was not authorized, did not rise to the level of misconduct required to be actionable. Nor did the employee's call to the ODOL constitute the sort of "whistle blowing" activity normally required for a retaliatory discharge claim to lie. However, the question before the Oklahoma Supreme Court, as asked by the federal district court, was somewhat ambiguous, requiring it to be reformulated in this case. Nonetheless, employers must be careful not to retaliate against employees who contact government agencies for assistance or to inquire about their rights under state or federal law.

Reynolds v. Advance Alarms Inc., No. 2009 OK 97 (OK Dec. 15, 2009)

For more information, please contact Philip R. Kujawa or your regular Hinshaw attorney.

Female Deemed Too Masculine May Assert Sex Bias Claim

A female employee who had previously filled multiple positions for her employer with a great deal of success was assigned to fill a position working at the front desk during regular business hours. When the employer's female director of operations noticed the employee working at the front desk, she informed the employee's female manager that the employee was not a good fit for the front desk because she did not have a pretty, "Midwestern girl" appearance because she dressed in a more stereotypical masculine manner. Ultimately, the director of operations terminated the employee. Reversing summary judgment entered in favor of the employer, the court held that the employee had established a prima facie case of sex bias based on a "gender stereotyping" theory in that the director of operations sought the employee's removal from the front desk position because of her masculine appearance. Employers should remember that sex discrimination claims may exist even where the parties involved are all of the same gender.

Lewis v. Heartland Inns of America LLC d/b/a Heartland Inn Ankeny,
No. 08-3860 (8th Cir. Jan. 21, 2010)

For more information, please contact your regular Hinshaw attorney.

Employees Protected from Discrimination as to Genetic Information

Enacted in 2008, the Genetic Information Nondiscrimination Act (GINA) took effect on November 21, 2009. GINA provides further protections for employees against discrimination. It prohibits employers from, among other things, using genetic information to make decisions regarding hiring, promotion, terms or conditions, privileges of employment, compensation or termination; using genetic information as a basis for limiting, segregating or classifying an employee or family member, or depriving that employee or family member of employment opportunities; or requesting, requiring or purchasing genetic information of the individual or family member. Genetic information encompasses many things, but generally involves information about an individual's or his or her family's genetic background or the manifestation of a disease or disorder in an individual's family history. Genetic information does not include information about an individual's sex or age. To the extent that an employer has any genetic information about its employees, GINA requires the employer to maintain it in a separate file and that the information be treated as a confidential medical record. GINA applies to private companies with

15 of more employees; employment agencies; labor organizations; some public sector employers; and training programs. Employers are required to post new United States Equal Employment Opportunity Commission (EEOC) posters which contain references to GINA.

For more information, please contact your regular Hinshaw attorney.

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