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Newsletters

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Affordable Care Act's Contraceptive Care Mandate Applies to Covered For-Profit Corporate Employers

For employers covered by the Affordable Care Act (ACA), Congress requires that their group health plans supply "additional preventive care and screenings" for women which includes certain contraceptive methods, sterilization procedures, and patient education and counseling. The guidelines exempt religious employers. Employers who fail to comply with the mandate may be subject to daily fines for non-compliance, as well as additional penalties. In this case, the employer and its corporate officer sought a court order stopping enforcement of the contraceptive coverage requirements based upon the Religious Freedom Restoration Act (RFRA). The trial court denied the request and the U.S. Court of Appeals for the Sixth Circuit affirmed. The court found that the individual corporate officer lacked standing under corporate law to bring a claim in his individual capacity and that the corporation was a distinct entity with its own rights and obligations. Further, the court noted, the ACA places contraceptive care coverage obligations on the corporate employer, and not the corporate officer. The court further found that the RFRA did not apply because as a for-profit commercial entity, it cannot exercise religion. The cited mandate has been challenged unsuccessfully by for-profit covered employers, and has

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the force of law behind it. Employers should accordingly ensure that the coverage afforded to their employees complies with the mandate.

Eden Foods, Inc. v. Sebelius, No. 13-1677 (6th Cir. October 24, 2013)

Employee's Facebook Venting Not Protected Speech

A police officer posted a comment on her Facebook page wherein she criticized an investigator in her department. Though the page was set to "private," her numerous friends could see the post and feasibly pass it on to others. The department had a rule requiring that any criticism of a fellow officer be directed through official department channels, and should not harm the reputation or operation of the department or employees. The officer filed suit, claiming that the chief failed to promote her in retaliation for the Facebook comment, and claimed a violation of her First Amendment right to free speech. The department and chief argued that she was not eligible for promotion because of the pending disciplinary investigation. The district court granted summary judgment in favor of the city and the police chief and dismissed the officer's suit. The officer appealed, arguing that her comments did not cause any sort of interference or disruption in the efficient operation of the department. The U.S. Court of Appeals for the Eleventh Circuit looked at whether the speech was a matter of public concern, whether the officer's interest in speaking outweighed the government's legitimate interest in efficient public service, and whether the speech played a substantial part in the government's challenged employment decision, and ultimately disagreed with the officer. Indeed, the court found that that the officer did violate the work rule, and that the legitimate interests of the department outweighed the officer's interest in speaking in this manner. The context of the officer's speech was not calculated to bring an issue of public concern to the attention of persons with authority to make corrections, nor was it an effort to bring matters to the public's attention, but instead was an officer venting her frustrations with her superiors. Thus, her free speech rights were not violated, and the district court's judgment was affirmed. Given the extensive litigation in this area of the law, employers should take caution when making employment decisions based upon employees' comments on social media to ensure that any such actions do not infringe an employee's constitutional right to free speech.

Gresham v. City of Atlanta, No. 12-12968 (11th Cir. October 17, 2013)

EEOC Fails to Establish Employer's Alleged Religious Discrimination

An applicant sought a position with a retail clothing company that had a "Look Policy," which required employees to dress in clothing that was consistent with the type of clothing sold in the stores, and the policy precluded the wearing of caps. The applicant was a practicing Muslim who wore a black headscarf, and during the interview, did not inform the managers that she was Muslim or that she wore the headscarf for religious reasons or that she would need an accommodation in order to comply with the Look Policy. Though the manager initially recommended the applicant for hire, she was ultimately not offered a position because she wore a headscarf, which was inconsistent with the Look Policy. The U.S. Equal Employment Opportunity Commission (EEOC) brought suit against the employer, alleging violations of Title VII on the grounds that the employer refused to hire the applicant because of her headscarf and failed to accommodate her religious beliefs. The district court granted summary judgment in favor of the EEOC. The employer appealed. The U.S. Court of Appeals for the Tenth Circuit reversed, finding that the applicant never informed the employer prior to its hiring decision that she wore her headscarf for religious reasons and that she required a religious accommodation in light of the employer's clothing policy. The case was remanded for further consideration. When hiring, it is important to ensure that decision-makers are making decisions based on legitimate, non-discriminatory business reasons, and to consult with human resources or counsel where special circumstances exist.

EEOC v. Abercrombie & Fitch Stores, Inc., No. 11-5110 (10th Cir. October 1, 2013)

Eighth Circuit Rules Employer-Paid Disability Payments Constitute Earnings For Purposes of Wage Garnishment

An employee was injured on the job and could no longer work. She therefore began receiving payments under a disability insurance program paid for by the employer. Some time after the employee began receiving disability payments, the employee was incarcerated and upon her release, was forced to pay restitution. The Internal Revenue Service (IRS) sought to garnish these disability payments pursuant to her restitution sentence. The employee challenged the

garnishment, claiming that the disability payments constituted earnings under the Consumer Credit Protection Act (Act) and thus were subject to the limitations that the Act places on the amount of earnings subject to garnishment. The district court held that the disability payments did not constitute earnings and thus could be fully garnished by the IRS. In a case of first impression by the federal appellate courts, the U.S. Court of Appeals for the Eighth Circuit reversed the holding of the district court by focusing on the character of the payments and determining whether the disability payments constituted "compensation paid or payable for personal services." In its analysis, the court held the disability payments were earnings, as the payments served as wage substitutes payable from the employee's former employer because of past services she provided to such employer. Employers should watch for further guidance regarding garnishments of disability payments as this is a case of first impression.

United States v. Ashcraft, No. 12–2449 (8th Cir. October 09, 2013)

Employer Prevails Against FMLA Interference Claim But Sixth Circuit Declines to Apply Directly the "Honest Belief" Defense

A telephone repair technician employee diagnosed with severe back pain requested and was granted leave under the Family and Medical Leave Act (FMLA). The employer noticed, however, that the employee often requested FMLA leave in what appeared to be a strategic way to create three- or four-day weekends and that he would often request leave in advance despite his doctor indicating that his need for leave would be unpredictable. The employer obtained video of the employee performing physical tasks contradicting his claimed limitations on two days on which the employee claimed FMLA leave, and an independent physician opined that the employee's video activities were inconsistent with his FMLA limitations as outlined by the employee's personal physician. The employee was terminated for abusing his FMLA leave and he filed suit claiming interference with his right to FMLA leave and retaliation. The trial court granted summary judgment on both claims for the employer based on the "honest belief" defense, which it is well established protects an employer from retaliation liability so long as as the employer made a reasonably informed and considered decision before taking adverse employment action. The employer is not required to "leave no stone unturned" or pursue all possible evidence to prevail on this defense. In affirming, the U.S. Court of Appeals for the Sixth Circuit declined to decide whether the "honest belief" defense applies to an inference claim, but held that, because the employee failed to disprove the same "honest belief" evidence, the employee failed to prove he was ever even entitled to leave in the first place and thus had no right with which the employer interfered. The employer in this case was successful because it took reasonable steps to document and to investigate the employee's spurious claims for FMLA leave, but what is reasonable is a very case-specific determination and employers should fully vet an employee's claimed need for FMLA leave before taking any adverse employment decision.

Tillman v. Ohio Bell Telephone Co., No. 11-3857 (6th Cir. October 8, 2013)

When Employer Errs, Foreign National May Challenge Denial of Immigrant Visa Petition

To become a permanent resident based upon employment, a foreign national and his or her employer must complete a three-step process wherein an application is made to the U.S. Department of Labor; an immigrant visa petition is filed by the employer; and the employee requests an adjustment to his or her status from non-immigrant to immigrant. In this case, the prospective employee started the green card process with one employer, but then obtained another job in another state. The new employer re-started the process, but failed to obtain a new labor certification and instead utilized the former employer's form. Because a labor certification is not transferable to a new location, the petition was denied. The prospective employee sought review of the decision, but was denied due to a lack of standing. On appeal, the U.S. Court of Appeals for the Sixth Circuit considered whether a foreign national employee may seek review of a decision to deny an immigrant visa petition filed by the foreign national's employer on his behalf. The panel held that he could. Specifically, the judges ruled that the foreign national had both "prudential" and "constitutional" standing to seek review — his interests were "within the zone of interests" that immigration law seeks to regulate (the "prudential" part), and he alleged an injury that could be alleviated by a favorable decision (the "constitutional" part). His case therefore was sent back to the district court for further consideration. This case demonstrates the importance of ensuring that the employer and the foreign national employee alike are mindful of the various obligations and work collaboratively to avoid any potential incorrect filings that could significantly impact the foreign national's ability to remain in the United States.

Patel v. USCIS, No. 12-1962 (6th Cir. October 11, 2013)

Employer's One-Sided Arbitration Policy Found to be Unconscionable and Unenforceable

A group of grocery employees were subject to an arbitration agreement. One of the employees filed a class action lawsuit claiming various violations of California labor laws, and the employer sought to compel arbitration of the individual employee's claim based on the arbitration agreement. The district court found the employer's arbitration policy to be unconscionable under California contract law, which ultimately rendered it unconscionable and unenforceable, and therefore denied the employer's motion to compel arbitration. The U.S. Court of Appeals for the Ninth Circuit affirmed, finding that the employer's arbitration policy was procedurally unconscionable because it was presented as a "take it or leave it" condition of employment. Further, the employee was not provided with the terms of the arbitration agreement until weeks after she had already agreed to be bound by it. The policy was further declared to be invalid because it was extremely one-sided in that the arbitrator would almost always surely be proposed by the employer, and employees would be priced out of the dispute resolution process. The court also determined that state law supporting the unconscionability holding was not pre-empted by the Federal Arbitration Act because it did not, in practice, impact arbitration agreements disproportionately. Employers should revisit their arbitration policies and procedures to ensure that they are compliant with federal and state authorities, as recent case law has led to numerous changes as to what constitutes a valid agreement.

Chavarria v. Ralphs Grocery Co., No. 11-56673 (9th Cir. October 28, 2013)

Shifting Explanations for Salesman's Termination Raise Triable Question of Whether the Reasons Given Were Pretext for Age Discrimination

A top-selling fire truck salesman in his fifties was terminated and replaced by two inexperienced workers in their twenties. The employee brought suit, claiming he was terminated because of his age and in violation of the Age Discrimination in Employment Act. The company's chief executive officer originally told the employee that the company was paying him too much for his sales, but hired younger and less experienced salesmen at comparable salaries. The employer later cited poor performance and the employee's failure to abide by company policies and procedures among other reasons for the decision to terminate. The employee's supervisor testified that he was disappointed that the employee did not attend two company-sponsored events and that he did not consistently attend the weekly sales meetings. The supervisor further testified that "the straw that broke the camel's back" was the employee's failure to show up for a customer's scheduled factory visit. The employee claimed he was not invited to one of the events and did, in fact, attend the other. The employee also testified that all of the company's salespersons occasionally missed the weekly meetings because their jobs required frequent travel. Finally, with regard to the factory visit, three of the customer's employees testified that the employee was at the factory with them during the entire visit. The district court granted summary judgment in favor of the employer, and the employee appealed. The U.S. Court of Appeals for the Seventh Circuit found that standing alone, none of the incidents, events, or alleged justifications would likely suffice for the employee to survive summary judgment. In combination, however, "they point to a string of questionable conduct," which raise a triable question as to whether the reasons given for his termination were a pretext. The case was reversed and remanded to the district court for further consideration. Employers should be mindful of shifting and inconsistent explanations for terminating an employee, even if those explanations are legitimate.

Mullin v. Temco Machinery, Inc., No. 13-1338 (7th Cir. October 10, 2013)

Employee Fails to Prove Equitable Estoppel Regarding Her FMLA Eligibility

A building maintenance manager was temporarily reassigned to a better position with a higher salary. Two weeks later, she needed time off to care for her terminally ill uncle. She sent her manager an email entitled "FMLA" and asking for emergency leave and for a Family Medical Leave Act (FMLA) package. The manager simply wrote back "approved." Four days later, the employer rescinded the temporary reassignment due to her absence. When she returned to work, she returned to her regular building maintenance manager position. The employee later filed a charge with the Equal Employment Opportunity Commission on an unrelated issue, but during the investigation, complained about her removal from the temporary reassignment. The employee then filed a complaint alleging constitutional violations, Title VII retaliation, FMLA retaliation, and emotional distress alleging that her employer demoted her from the temporary

assignment in retaliation for taking time off in order to care for her sick uncle. Since she was approved for FMLA leave, she claimed her employer should be equitably estopped from disputing her FMLA eligibility. The employer prevailed on summary judgment and the employee appealed. The U.S. Court of Appeals for the Eleventh Circuit upheld the district court's ruling, finding summary judgment was appropriate because the employee did not contend that she reasonably and detrimentally relied on any misrepresentation of the employer. Because she could not produce evidence of an essential element of the equitable estoppel claim, the district court correctly granted summary judgment in favor of the employer. The court declined to determine whether federal common law equitable estoppel is applicable to the FMLA. This case signals that employers should take caution when responding to leave requests, ensuring that a vague "approval" does not somehow constitute an admission of eligibility for protected leave.

Dawkins v. Fulton County Government, No. 12-11951 (11th Cir. September 30, 2013)

Employer Fails to Establish "Nature of Work" Exception to On-Duty Meal Period Claims

The employer employed security guards who performed various security duties at hospitals, warehouses, and construction sites. Most of the stations were "single post" locations, meaning no other guards were on duty at the same time. The employer required all security guards to sign "on-duty meal period agreements" as a condition of employment. The guards claimed their employer committed numerous violations of California labor law, including requiring the guards work through meal periods and not paying the premium compensation related to those on duty meal periods. The district court ordered certification of the class of former and current guards, and the employer appealed, arguing that the "nature of work" exception required an independent factual inquiry. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling. The court agreed that the issue of whether guards were required to work on-shift meal periods was a company policy and therefore was common issue susceptible to class treatment. The employer failed to demonstrate that its guards' duties varied, and failed to show that they varied to an extent that some posts would qualify for the "nature of the work" exception while others would not. The only reason the guards were prevented from taking a meal period, the court said, was because the employer chose to adopt a single-guard staffing model. On-duty meal periods are typically for situations where the nature of the work (not the employer's choices) *prevent* the employee from being relieved of duty. The court concluded, accordingly, that the district court did not abuse its discretion in certifying the class. Employers who utilize on-duty meal periods should examine their policies to determine whether the nature of the work truly prevents the employee from taking a meal period, or whether the meal period is construed as such solely due to the employer's desire to limit staffing.

Abdullah v. U.S. Security Associates, Inc., No. 11-55653 (9th Cir. September 27, 2013)