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Newsletters

Employment Practices Newsletter - May 2014

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- EEOC Fails Again in its Effort to Bring Disparate Impact Claim Based on Background Checks
- Court Upholds Employee Waiver of FMLA Claims Based on Past Employer Conduct
- Arbitration Clause Survives Expiration of Independent Contractor Agreement
- NLRB Finds Employer Failed to Bargain in Good Faith and Requires Reimbursement of Union's Negotiating Expenses
- Joint and Successor Liability May Be Imposed Against Predecessor and Successor Employers for FLSA Violations
- Sixth Circuit Rules that Revised Arbitration Agreement did Not Apply to Pending Class Action
- National Labor Relations Board Shoots Down an Overbroad Online Communication Policy
- Court Questions Whether Physical Presence in the Workplace is Essential Job Function
- Florida Supreme Court Rules that State Law Bars Pregnancy Discrimination

Service Areas

Labor & Employment

EEOC Fails Again in its Effort to Bring Disparate Impact Claim Based on Background Checks

A group of educational institution employers used the credit history of prospective employees as part of their hiring process to fill positions that had access to sensitive financial and student information. The employers started this screening process after they discovered that employees were stealing student financial aid payments. The U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit against the companies claiming that use of these credit checks had a "disparate impact" on non-white job applicants, which was a concern reflected in the EEOC's 2012 "Enforcement Guidance" about the proper use of credit history information. The district court granted the employers' motion for summary judgment and the EEOC appealed. The U.S. Court of Appeals for the Sixth Circuit affirmed. In analyzing whether a disparate impact on minority applicants existed, the Court of Appeals was sharply critical of the EEOC for several reasons most prominently the agency's own use of credit checks in their hiring decisions for similar job related reasons and its use of an unreliable expert and faulty statistical analyses (which the court referred to as "laughable"). Employers should be aware of the EEOC's ongoing strategy to target the hiring process focusing on the disparate impact on racial minorities

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of an employer's use of background checks. Employers who are not government contractors must remain vigilant to ensure that use of criminal and credit background checks comply with federal and state law and these efforts do not adversely impact any protected classes, are justified by legitimate concerns about sensitive jobs duties, and seek to gather only information relevant to performance.

Equal Employment Opportunity Commission v. Kaplan Higher Education Corporation, No. 13-3408 (6th Cir. April 9, 2014)

Court Upholds Employee Waiver of FMLA Claims Based on Past Employer Conduct

An insurance company employee requested and received large amounts of leave under the Family and Medical Leave Act (FMLA). During the midst of additional FMLA leave requests, the employee received a negative evaluation and was given two options. First, she could sign a resignation agreement that would provide for several months' severance pay but waived any FMLA claims. Second, she could agree to a performance improvement plan under which she would be terminated if she failed to meet performance benchmarks. The employee elected to resign with severance. The employee then proceeded to sue the employer for alleged FMLA interference and retaliation. The employer moved for summary judgment based on the waiver. Federal regulations provide that an employee may not waive a prospective FMLA right and the employee opposed the motion, claiming that the waiver violated this rule because she had a pending FMLA request and that, even if it did not, her waiver was not knowing and voluntary. The U.S. Court of Appeals for the Eleventh Circuit affirmed. That court held that prospective FMLA rights are rights to invoke the FMLA in the future. The employee, on the other hand, had waived only her rights relating to her previous invocations of the FMLA and this did not violate the regulation. Moreover, the evidence showed her waiver was knowing and voluntary because it was undisputed she was a 20-year insurance industry veteran, had the opportunity to review the agreement for 21 days, admitted she understood it before signing, and she received consideration for signing it. This decision clarifies for employers that, if careful steps are taken to obtain a voluntary waiver, even a pending FMLA request need not prevent them from eliminating a problem employee.

Paylor v. Hartford Fire Insurance Co., No. 13-12696 (11th Cir. April 8, 2014)

Arbitration Clause Survives Expiration of Independent Contractor Agreement

A group of workers filed a class and collective action under the Fair Labor Standards Act and state law equivalent for unpaid overtime due to their alleged misclassification as independent contractors. The company moved to compel binding arbitration based on an arbitration clause contained in a Professional Services Contract Agreement (Agreement) signed by the workers. The Agreement ended upon termination of the independent contractor relationship, which preceded the workers' lawsuit. The Agreement contained a "survival" clause that specifically identified a number of provisions that would survive the expiration of the Agreement. Although the arbitration clause was not included in the survival clause, the company argued that it survived the termination. Noting that other non-enumerated clauses, such as the non-competition, severability, and integration clauses, survived contract interpretation, the U.S. Court of Appeals for the Sixth Circuit held that the Agreement did not evidence a sufficiently "clear intention" that the list of provisions contained in the survival clause was exhaustive. Without a clear intention to the contrary, coupled with the strong federal presumption in favor of arbitration, the court concluded that the arbitration provision was enforceable. The court cautioned, however, that its holding did not mean that an omission of an arbitration clause from a survival clause could never satisfy the "clear implication" standard. For example, the court stated, if the survival clause listed all of the Agreement's clauses except the arbitration clause, that might constitute a clear implication and yield a different result. Employers that intend to require arbitration even after an agreement expires should make clear that the arbitration obligation does not expire with the agreement by including the arbitration agreement in a survival clause.

Huffman v. The Hilltop Companies, LLC, No. 13-3938 (6th Cir. March 27, 2014)

NLRB Finds Employer Failed to Bargain in Good Faith and Requires Reimbursement of Union's Negotiating Expenses

A union was certified in May 2012 and the parties held their first bargaining session on July 3. The union filed Section 8(a)(5) and 8(a)(1) unfair labor practice charges against the employer. The Administrative Law Judge (ALJ) found that the employer engaged in bad faith bargaining from the outset and the conduct continued until the final bargaining session in

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January 2013. Thereafter the employer refused to respond to any of the union's request for future bargaining dates. The matter then was presented to the National Labor Relations Board (NLRB) for review and the NLRB supported the ALJ's conclusion that an extension of the certification year is warranted where, as here, "an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of the opportunity to bargain during the time of the union's greatest strength." The NLRB concluded that under the circumstances, a full one-year extension of the certification year is warranted. The NLRB also overruled the ALJ's denial of the union's request for reimbursement of negotiations expenses, finding that the employer's conduct infected the core of the bargaining process to such an extent that its effects cannot be eliminated by the mere application of traditional remedy of an affirmative bargaining order. Reimbursement to the union of its negotiation expenses was warranted both to make the union whole for the resources that were wasted because of the employer's unlawful conduct and to restore economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. Employers should remember that the NLRB will carefully examine an employer's bargaining conduct during the first year following a union's certification. Employers, while they may want to engage in hard bargaining during this period, must be careful that their conduct does not rise to the level of bad faith bargaining to violate the National Labor Relations Act.

Fallbrook Hospital Corporation, No. 21-CA-090211 (NLRB April 14, 2014)

Joint and Successor Liability May Be Imposed Against Predecessor and Successor Employers for FLSA Violations

Employee was hired as an underwriter by mortgage company A and was immediately assigned to training led by a representative of a mortgage company B. The employee ended up performing the same duties, received the same pay and had the same supervisors with both mortgage companies. When work issues arose, the supervisors would consult with the co-owners and presidents of both mortgage companies. At some point employee asked co-owner of mortgage company B about overtime compensation, to which co-owner B responded that he "did not pay overtime to underwriters." Employee quit and filed a complaint alleging: (1) that both mortgage companies were in violation of the Fair Labor Standards Act (FLSA) for failure to pay employees overtime compensation and for misclassification of employees as exempt from the overtime wage requirements of the FLSA; (2) that mortgage company B was jointly liable for mortgage company A's statutory violations and as the successor; and (3) that co-owner A and co-owner B were personally liable for violations of the FLSA and the corresponding state laws. The district court dismissed the complaint and the employee appealed. The U.S. Court of Appeals for the Third Circuit found that the training of mortgage company A employees by a representative of mortgage company B, the abrupt and seamless integration of mortgage company A employees to mortgage company B and the continued payments by mortgage company A to mortgage company B employees, supported employee's claim that the two companies shared authority over hiring and firing practice, a factor to be considered when trying to establish a "joint employer" relationship. The court also found that the federal common law standard for successor liability applied to employee's FLSA claim, as opposed to New Jersey law, and employee's allegations satisfied the federal common law standard. Finally, the court determined that the allegations that supervisors would consult with the co-owners, and that co-owner B told employee that he "did not pay overtime to underwriters," were enough to allow the court to draw a reasonable inference that both companies are liable for the misconduct alleged. Failure to maintain a clear separation between predecessor and successor employers may result in joint and successor liability for violation of the FLSA and corresponding state laws.

Thompson v. Real Estate Mortgage Network, No. 12-3828 (3d Cir. April 3, 2014)

Sixth Circuit Rules that Revised Arbitration Agreement did Not Apply to Pending Class Action

The employee worked at a call center in Florence, Kentucky from 2004 to 2009. He had signed an employment agreement to arbitrate any disputes, but the agreement only covered individual claims and not class actions. In January 2012, he filed a class action wage and hour complaint alleging that the employer failed to pay its employees for time spent logging in and out of their phone systems each work day. In late 2012, with the class action lawsuit still in progress, he re-applied to work at the call center. The employee was hired in January 2013 and was asked to sign a new arbitration agreement that covered class actions. Based on the new agreement, the employer moved to arbitrate the pending class action. The U.S. Court of Appeals for the Sixth Circuit found that the text of the amended agreement did not apply to pending claims. In reaching this conclusion, the court examined the prospective language in the contract, which included the word "arise" to

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describe any potential disputes. The court also considered evidence regarding the intent of the parties which failed to show either side intended the arbitration agreement to cover existing claims. Although the post-suit arbitration agreement was found to be unenforceable in this case, the court's analysis suggests that such contracts may be enforceable if drafted correctly. To avoid this issue altogether, employers should review their existing arbitration agreements to make sure they encompass both individual and class claims.

Russell v. Citigroup, Inc., No. 13-5994 (6th Cir. April 4, 2014)

National Labor Relations Board Shoots Down an Overbroad Online Communication Policy

A former grocery store employee filed an unfair labor practices charge with the National Labor Relations Board against the company alleging violations of the National Labor Relations Act (NLRA). The former employee alleged that the company's Online Communications Policy (Policy), which required that they use a disclaimer any time they publish any work-related information online, was overbroad and would have a reasonable tendency to chill employee discussion, debate, and communication regarding workplace terms and conditions, all of which are protected by the NLRA. The Administrative Law Judge (ALJ) agreed. The ALJ opined that the Policy's posting requirement had a chilling effect on communication because it was overbroad and extremely burdensome to the employee, and manifestly broader than the company's legitimate interest. Furthermore, the ALJ determined the Policy's blanket restriction on use of company intellectual property was overbroad and chilled speech because it did not allow for the fair use, such as parody, comment, and other non-commercial uses permitted under intellectual property laws. Lastly, the ALJ opined that the Policy's restriction of discussions of "personnel matters" and "rumors or speculation related to the company's business plans" would chill discussions about employment issues that the NLRA protects. Employers should review their online communication policies to ensure they do not contain provisions that may chill employees' rights to discuss, debate, and communicate with each other regarding workplace terms and conditions of employment.

Kroger Co. of Mich., No. 7-CA-98566 (NLRB ALJ, April 22, 2014)

Court Questions Whether Physical Presence in the Workplace is Essential Job Function

A resale steel buyer suffering from irritable bowel syndrome requested to work from home on an as-needed basis, up to four days a week, pursuant to the employer's telecommuting policy. The employer denied her request, finding that her particular position was not suitable for telecommuting, however, suggested several alternative accommodations, such as moving her cubicle closer to the restroom or transferring her to another position within the company that would be more appropriate for telecommuting. The employee rejected these options and filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging the employer failed to accommodate her disability in violation of the Americans with Disabilities Act (ADA). Several months later, the employee received a negative performance review and was placed on a performance enhancement plan. She was subsequently terminated. The EEOC filed a complaint on the employee's behalf, and the district court granted summary judgment in favor of the employer, reasoning that attendance on the job site was an essential function of the employee's job, and, therefore, the employee was not a qualified individual under the ADA due to her excessive absenteeism. On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court. Although the court acknowledged precedent holding that regular and predictable attendance is essential for most jobs, it cautioned that the law must respond to advances in technology and recognize that the "workplace" is anywhere the employee can perform her job duties. The court further noted that whether attendance is essential for a particular position is a highly fact-specific question and, in this case, one that should be answered by the jury. In light of this decision, employers should be extra diligent in reviewing an employee's request to work from home and review whether it is truly necessary for the employee to be present in the office.

Equal Employment Opportunity Commission v. Ford Motor Co., No. 12-2484 (April 22, 2014)

Florida Supreme Court Rules that State Law Bars Pregnancy Discrimination

The front desk manager of a residential property became pregnant and, shortly thereafter, believed that her employer began discriminating against her on that basis. The employee alleged that before she went on maternity leave, her employer conducted heightened scrutiny of her work and refused to allow her certain workplace flexibilities offered to others, such as changing shifts, working extra shifts, and covering shifts for other employees. The employee also alleged

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that after she returned from maternity leave, the employer refused to schedule her for work. The employee sued in Florida state court under the Florida Civil Rights Act (FCRA), which prohibits employers from discriminating against employees on the basis of sex. The trial court dismissed her complaint for failure to state a cause of action and the intermediate appellate court affirmed, both holding that the prohibition against sex discrimination in the FCRA did not apply to pregnancy because it was modeled after the pre-1978 federal Civil Rights Act of 1964 and that statute, at the time, did not ban pregnancy discrimination, so neither did the FCRA. The Florida Supreme Court reversed and found that the FCRA bans pregnancy discrimination. The Florida Supreme Court acknowledged it took an act of Congress in 1978 to make pregnancy a protected class under the federal act, but nonetheless found that being pregnant was a natural condition unique to only one sex — women — and was therefore covered by the FCRA's ban on sex discrimination. Pregnancy discrimination was already illegal under federal law, but employers should take note that this decision opens the door to qualifying plaintiffs to a new state court forum for bringing such a claim.

Delva v. The Continental Group, Inc., No. SC12-2315 (Fla. April 17, 2014)

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