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Newsletters

Employment Practices Newsletter - June 2015

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- Retailer Liable for Failure to Hire Applicant with Suspected Need for Religious Accommodation
- Plan Fiduciaries Have Continuing Duty to Monitor Plan Investments
- NLRB Rejects Employer's Handbook Policies
- Employee Required to Arbitrate Claims After Generally Acknowledging Receipt of Employer's Policies
- Franchisor Avoids Joint Employer Liability for Franchisee's Labor Disputes
- Failure to Verify EEOC Charge Not a Jurisdictional Bar to Suit
- California Court Allows Employee to Disaffirm Arbitration Agreement Due to Age
- EEOC Retains Subpoena Power Even after Private Lawsuit Dismissed
- Connecticut Employers Cannot Require Social Media Access, Passwords of Employees or Applicants

Retailer Liable for Failure to Hire Applicant with Suspected Need for Religious Accommodation

Samantha Elauf, a practicing Muslim who wears a headscarf, applied to work at Abercrombie & Fitch. She was denied employment because the retailer had a Looks Policy which prohibited the wearing of any "caps" and thus, the wearing of a headscarf would violate the Policy. The U.S. Equal Employment Opportunity Commission (EEOC) filed suit on Elauf's behalf, alleging that Abercrombie violated Title VII of the Civil Rights Act of 1964 (as amended) by failing to accommodate her religious practices. The matter proceeded to trial and Elauf was awarded $20,000. On appeal, the U.S. Court of Appeals for the Tenth Circuit reversed and found in favor of the employer, concluding that an employer cannot be liable for a violation of Title VII unless the applicant provides the employer with actual knowledge of a need for an accommodation. The U.S. Supreme Court granted certiorari, and reversed. The majority held that there is no "knowledge" requirement in Title VII and thus, an applicant need only demonstrate that her need for an accommodation was a motivating factor of the employer's decision to not hire. The court held that "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." The applicant's failure to request an accommodation is not a condition of liability. Thus, even though, at the time of the employment decision, there was no request by the applicant for an accommodation from the Looks Policy for religious reasons, nor was there any discussion by the applicant or employer about whether the wearing of a headscarf was for

Service Areas

Employee Benefits

Labor & Employment

Workers' Compensation Defense

religious reasons, because this was a motivating factor in the decision to deny employment, the Court concluded that it violated Title VII and remanded the case for further determination.

As pointed out in the concurring and dissenting opinions, this decision expands potential liability for employers, and almost creates a strict liability standard whereby an employer who does not even "suspect[t] that the practice in question is a religious practice" can still be held liable for intentional discrimination.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., No. 14-86 (June 1, 2015)

Contact for more information contact you regular Hinshaw Attorney.

Plan Fiduciaries Have Continuing Duty to Monitor Plan Investments

Beneficiaries filed a claim against plan fiduciaries, claiming that the fiduciaries violated their duty to prudently monitor their investments. The district court found that a portion of the complaint was untimely because the investments were added to the plan more than six years prior to the complaint being filed, and the circumstances had not sufficiently changed during the statutory period so as to require the plan to review and convert the funds. One part of the Employee Retirement Income Security Act's (ERISA) provisions on statute of limitations states that claims must be brought within six years of the alleged breach. The U.S. Court of Appeals for the Ninth Circuit agreed with the district court. The U.S. Supreme Court, however, agreed with the beneficiaries. Applying the law of trusts, which are often used to determine ERISA fiduciary duties, the court held that a fiduciary usually has an ongoing duty to monitor investments and remove those which are imprudent. Accordingly, a beneficiary can pursue a claim on the basis that the fiduciary breached the duty of prudence by failing to take such action. So long as the alleged breach of the continuing duty takes place within six years of the filing of the suit, the claim is deemed timely. The case was remanded for further consideration.

Given the long-term nature of 401(k) investments, this ruling will likely hold fiduciaries to a higher standard and not relieve them from oversight just because the investment was made years prior.

Tibble v. Edison Int'l, No. 13-550 (Sup. Ct. May 18, 2015)

Contact for more information contact you regular Hinshaw Attorney.

NLRB Rejects Employer's Handbook Policies

The employer's social media policy required employees to identify themselves when posting comments about the company, its business, or a policy issue. It also prohibited employees from using the company's logo in any manner. Upon investigation, the National Labor Relations Board found that the policy interfered with the employees' Section 7 protected activity rights. The Board also found that the employer failed to demonstrate special circumstances justifying its overly-broad dress code policy, which prohibited employees from wearing pins, insignia, or other message clothing. Though the employer did update and issue a new handbook, the Board found the revisions were nevertheless inadequate in the absence of notice to the employees that the company would not interfere with their Section 7 rights.

This decision reminds employers that even a good faith attempt to correct an unfair labor practice does not amount to effective repudiation. Reissuance of any policies, procedures, or handbooks should be performed properly and timely.

Boch Imports, Inc., 01-CA-083551, 362 NLRB No. 82 (April 20, 2015).

Contact for more information: Your Hinshaw attorney.

Employee Required to Arbitrate Claims After Generally Acknowledging Receipt of Employer's Policies

The employee signed an acknowledgment of receipt stating that he had received the employer's handbook, which included several policies, including a dispute resolution policy regarding arbitration. The employee later filed suit in state court claiming unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964 (as amended) and equivalent state law claims. The employer removed the case to federal court and then sought to compel arbitration. The district court

issued an order denying the employer's motion to compel arbitration, because it found the policy failed to give the employee adequate notice to knowingly waive a jury trial, and the employer appealed. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded for entry of an order granting the employer's motion on the grounds that the employee knowingly waived his right to proceed in court on his Title VII and state-law equivalent claims. In this case, the employer's policy expressly stated that the company had a dispute resolution policy which contained an arbitration provision, and the employee expressly agreed to adhere to that policy. The court of appeals found that the acknowledgment executed by the employee was sufficient to put the employee on notice that he was agreeing to adhere to the dispute resolution policy. Even though the acknowledgment did not specifically spell out the terms of the arbitration policy, that did not render it invalid. The employee could easily access it and acknowledged that he could.

Employers should not only review their arbitration agreements to ensure compliance with federal and state authorities, but also the acknowledgments of receipt to make sure the language is sufficiently comprehensive.

Ashbey v. Archstone Property Management, No. 12-55912 (9th Cir. May 12, 2015)

Contact for more information contact you regular Hinshaw Attorney.

Franchisor Avoids Joint Employer Liability for Franchisee's Labor Disputes

The employer Nutritionality operated a single store in Chicago, Illinois pursuant to a franchise agreement with Freshii Development, LLC, a fast-casual restaurant franchisor. Nutritionality terminated one employee and disciplined and terminated another employee for attempting to unionize the workforce. The employees filed unfair labor practice charges with the National Labor Relations Board (NLRB) regarding the terminations and discipline. The NLRB sought advice as to whether Nutritionality was a joint employer with Freshii and/or was Freshii's franchise development agent for the Chicagoland area. The NLRB will find separate entities to be joint employers of a single workforce if the business entities meaningfully affect matters relating to the employment relationship including hiring, firing, discipline, supervision, and direction, as well as the compensation of the affected employees. Here, Freshii played no role in Nutritionality's decisions regarding hiring, firing, disciplining or supervising employees, determining wages, scheduling and/or setting work hours of the affected employees. Freshii's control of Nutritionality's operations was limited to ensuring a standardized product and customer experience, factors that clearly do not evince sharing or codetermining matters governing essential terms and conditions of employment. Ultimately, the Board found that the relationship between the two companies centered more on protecting brand standards than involvement in the franchisee's employment decisions, human resources, and labor relations, and concluded that the franchisor was not a joint employer for unfair labor practice charges.

Franchisors should review their agreements to determine what level of responsibility, if any, it may have for a franchisee's labor and employment disputes.

Nutritionality, Inc. d/b/a Freshii, Case No. 13-CA-134294, 13-CA-138293, and 13-CA-142297

Contact for more information contact you regular Hinshaw Attorney.

Failure to Verify EEOC Charge Not a Jurisdictional Bar to Suit

The employee filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC), claiming that she was discriminated against in her effort to become promoted to a tenure-track faculty position. The EEOC sent her a formal charge document to sign and verify, but she never did. Title VII requires a claimant to verify the charges against an employer. The EEOC did not pursue her case, but she brought an individual Title VII action against her employer. The district court found that it lacked jurisdiction due to the lack of a verified charge and dismissed the case. On appeal, the U.S. Court of Appeals for the Tenth Circuit reversed. The court concluded that Title VII does not make the verification requirement jurisdictional and thus failure to follow this particular rule does not mean that suit cannot be filed. The court recognized that the failure to verify the charge could still be asserted as a defense by the employer, but in the end, it was not a jurisdictional bar.

Employers should always review any agency charges or complaints to determine if any deficiencies exist on the face of the document which may provide a defense to a claim.

Gad v. Kansas State University, No. 14-3050 (May 27, 2015)

For more information, please contact your regular Hinshaw Attorney.

California Court Allows Employee to Disaffirm Arbitration Agreement Due to Age

The employer distributed its employment policies and conducted onboard training via an online training system. Employees were required to log in with a personal identification and password, and then to acknowledge receipt of certain policies, including an arbitration agreement. In this particular case, the employee was hired as a cashier when he was 16 years old. He acknowledged receipt of the arbitration agreement through the online system. Almost two years later, one month after his eighteenth birthday, he filed a class action complaint against the employer alleging wage and hour violations. The employer timely removed the action to federal court and filed a motion to compel arbitration. The U.S. District Court for the Northern District of California held the arbitration agreement was valid, but that the employee exercised his statutory right of disaffirmance, and thereby rescinded the contract. California Family Code Section 6710 states "a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards." The court held that filing the instant action within a month of maturity was sufficient to disaffirm the contract within a reasonable time.

This ruling is significant because it could also apply to disputes involving confidentiality agreements, non-compete agreements, and even severance/separation agreements. Employers may therefore wish to consider having minor employees sign a second set of employment paperwork upon reaching maturity (or within some period of time reasonably thereafter). While this may be a logistical and administrative nightmare, it may be the best way to protect the employer from a future disaffirmance.

Lopez v. Kmart Corp. No. 15-01089 (N.D. Cal. May 4, 2015)

Contact for more information: your regular Hinshaw attorney.

EEOC Retains Subpoena Power Even after Private Lawsuit Dismissed

The Equal Employment Opportunity Commission (EEOC) began an investigation after two African American employees filed charges alleging that Union Pacific had denied them promotions because of their race. During the EEOC investigation, the complainants received a right to sue letter and filed a private lawsuit in federal court. The case was dismissed in favor of the employer on summary judgment. The EEOC continued to investigate the possibility of class-wide discrimination by issuing a subpoena for additional information, but the employer refused to comply. The U.S. District Court for the Eastern District of Wisconsin decided the EEOC's investigation power does not end when a private lawsuit is filed or concluded. The Court recognized that the EEOC has the authority to challenge any discrimination that it discovers while investigating the claims in a charge.

Employers should be aware that the settlement or dismissal of a private lawsuit does not preclude the EEOC from investigating other issues not raised in the initial complaint.

EEOC v. Union Pacific R.R. Co., No. 14-0052 (E.D. Wis. May 1, 2015)

Contact for more information: your regular Hinshaw attorney.

Connecticut Employers Cannot Require Social Media Access, Passwords of Employees or Applicants

Connecticut has joined a growing number of other states in seeking to protect personal social media accounts of employees and potential hires. The state's General Assembly passed Senate Bill No. 426 (2015) titled "An Act Concerning Employee Online Privacy." The law prohibits employers, both public and private, from requiring employees or job applicants to disclose their username and password information for their personal Facebook or other online accounts. Employers also cannot require that employees or job applicants access their personal accounts in the employer's

presence, nor can they require employees or job applicants to "connect with" or invite the employer to join their personal account networks. This new law will likely take effect October 1, 2015, and violations could result in civil fines of up to $1,000 for repeat offender employers.

Employers with employees in Connecticut should ensure that handbooks and new hire policies and procedures are updated to ensure they are compliant with the new law.

Connecticut S.B. 426 (May 19, 2015)

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