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Newsletters

Employment Practices Newsletter - July 2015

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Eleventh Circuit Declines to Aggregate Workers of Multiple Contractors for WARN Act Notification Purposes

For some time DHL maintained a network of independent contractors who, in turn, employed delivery drivers in the United States for the purpose of delivering DHL packages. A driver for one of these contractors was laid off, and later filed suit against DHL on the grounds that it failed to comply with the Worker Adjustment and Retraining Notification Act (WARN Act) by giving him sufficient notice of layoff. Though the contractor had less than 100 employees, and was thus exempt from the WARN requirements, the driver claimed that notice had to be provided since DHL had more than 100 employees and was the joint employer of all of the drivers. The trial court granted summary judgment in favor of DHL, and the U.S Court of Appeals for the Eleventh Circuit affirmed. The court reasoned that a single site of employment can refer to either a single location or group of continuous locations, but that there can be several single sites of employment within a single building if separate employers conduct activities within that building. Even contiguous buildings owned by the same employer which have separate management and workforces are each considered separate single sites. With these principles in mind, the court found that each contractor constituted a single site because each had distinct

management and employee structures. Thus, DHL was not responsible for providing WARN Act notice to the employees of the contractor who were laid off.

Understanding your obligations as an employer under the WARN Act and corresponding state provisions is critical. Consult with counsel before planning any mass layoffs to ensure compliance with the law.

Likes v. DHL Express (USA), Inc., No. 14-13076 (11th Cir. May 29, 2015)

Contact for more information: your Hinshaw attorney

Decision Maker Should Investigate Employment Recommendations Before Taking Action

The employee began working for the employer when she was approximately 51 years old as an order puller in the company's distribution center. After a while, she began to report to a new direct manager who allegedly made several ageist comments. The new direct manager was also critical of her work and ultimately recommended the employee's termination. A male in his twenties was hired to replace her. She filed suit for retaliation in violation of the ADEA claim; discrimination based on a failure to accommodate in violation of the ADA claim; and retaliation in violation of the ADA claim. The court granted summary judgment in favor of the employer. On appeal, the U.S. Court of Appeals for the Eleventh Circuit held that there was a triable issue of material fact as to whether the employer discriminated against the employee. The court looked to the cat's paw doctrine, stating that employee had to prove that her manager's age-based animus was the but-for cause or the determinative factor on the employer's termination decision. The court reasoned that the employee could establish but-for causation if she showed that the unbiased decision-maker followed the biased recommendation for termination without independently investigating the complaint against the employee. Under this standard, the court noted the "ample" evidence that employee's manager recommended her termination because of discriminatory age-based animus and that this recommendation was a determinative factor when the decision-maker stated employee was not his direct report and that he did not conduct an independent investigation to verify the accuracy of the information employee's manager provided him.

This case is an important reminder to employers that, even if the decision-maker does not have discriminatory animus towards an employee and there is no record evidence of the decision-maker's discriminatory animus, it is important for the decision-maker to independently investigate the employment recommendation before making the employment decision under the cat's paw doctrine.

Godwin v. WellStar Health Sys., Inc., No. 14-11637 (11th Cir. June 17, 2015)

Casino Handbook Provision Banning the Distribution of Union Material Violated the NLRA

Several casino employees were disciplined after they distributed union leaflets at the valet entrance of the casino, which is on the front or "public" side of the casino, about 75-100 feet from the front doors of the casino. The employer argued that the employees' conduct violated the casino's employee handbook which prohibited the distribution of literature in "working or guest areas" at any time. The National Labor Relations Board (NLRB) found that the employer's application of the no-distribution/solicitation rule in guest areas was vague, ambiguous, overbroad, and thus unlawful, because it prohibited the distribution of literature in areas where work was not being performed and where the employer had no compelling interest to suppress or control employees' rights under Section 7 of the National Labor Relations Act (NLRA). Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRB found that because the casino's handbook policy did not explicitly restrict protected Section 7 activity, the employer's policy violated Section 8(a)(1) of the NLRA because employees would reasonably construe the rule to restrict Section 7 activity.

Employers should carefully review all policies restricting the distribution of union materials to ensure that such policies are limited to areas where work is normally performed.

Casino Pauma, No. 21-CA-125450 (NLRB June 4, 2015)

Contact for more information: your Hinshaw attorney

Employer Hit with Significant Jury Verdict for GINA Violation

Atlas Logistics Group Retail Services out of Atlanta operated a retail grocery warehouse. It was discovered that someone was defecating on the floor of the warehouse and causing damage to grocery goods. The employer demanded saliva samples from all of its employees, by way of a cheek cell swab, in order to figure out who the perpetrator was. The employer did not, however, apprise employees of their rights under the Genetic Information Nondiscrimination Act, 42 U.S. C. §2000ff, et seq. Two employees sued, claiming violations of GINA. The parties filed joint motions for summary judgment, and the Court concluded that the information requested and obtained by the employer was, in fact, "genetic information," and granted the employees' motion for partial summary judgment and denied the employer's request. The matter proceeded to trial as to damages only. The two employees recovered around $500,000 total in emotional pain and suffering damages, and the jury imposed punitive damages on the employer in the amount of $1.75 million for acting with malice or reckless indifference to the employees' federally protected rights.

Any employer who ever contemplates seeking any genetic information from an employee in connection with any purpose should consult with human resources professionals or legal counsel to obtain guidance, as the ramifications for failure to comply can be costly.

Lowe v. Atlas Logistics Group Retail Services (Atlanta), LLC, No. 13-2425 (N.D. Ga. June 22, 2015)

Contact for more information: your Hinshaw attorney

Texas Supreme Court Clarifies Employer Liability on Obvious Risk in Workplace Injuries

Kroger Texas, L.P. opted out of the Texas Workers' Compensation Act (TWCA), which is permitted under the law. A Kroger employee slipped and fell on an oily substance and broke his leg. This particular employee was responsible for cleaning up spills on the floor, and he was, in fact, directed by his supervisor to clean up such spills. Though the employee was supposed to use a certain cleaning system to reduce the likelihood of persons slipping and falling, the employee instead attempted to clean up the liquid with a mop. He recognized the danger that the spill presented, and fell while cleaning it up, fracturing his femur and dislocating his hip, which left him with permanent disabilities. The employee sued for various negligence claims, and his claims were dismissed. Thereafter, the U.S. Court of Appeals for the Fifth Circuit certified to the Texas Supreme Court the question of "can an employee recover against a non-subscribing employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy? Put differently, does the employee's awareness of the defect eliminate the employer's duty to maintain a safe workplace?" The Texas Supreme Court held that an employer has a duty to maintain its premises in a reasonably safe condition for employees and warn employees of concealed dangers, but that an employee generally cannot recover against an employer for an injury caused by a premises defect which he was fully aware of and that his job duties required him to remedy.

Employers should always take care to maintain safe workplaces, address premises defects immediately upon knowledge, and inform employees of any defects or dangerous conditions once known. These three actions will assist in negating liability.

Austin v. Kroger Texas, L.P., No. 14-0216 (Tex. Sup. Ct. June 12, 2015)

Contact for more information: Mellissa A. Schafer

Uber Driver Found to be Employee, Not Independent Contractor

An Uber driver initially filed a claim with the California Division of Labor Standards Enforcement (the Commission) stating that she was owed wages for a roughly two month period, was entitled to reimbursement of expenses, and sought related penalties and damages. After a hearing, the Commission found that the driver was an employee, and not an independent contractor because Uber is involved in "every aspect of the operation" in that it vets prospective drivers (who must provide

the company their personal banking and residence information) and conducts background and DMV checks. Furthermore, although drivers use their own vehicles, Uber controls the tools the drivers use because they must register their cars with Uber, their cars must not be over 10 years old, and drivers are required to use company provided iPhones and applications. Though Uber argued that it was nothing more than a "neutral technological platform," the Commission found otherwise, stating that the reality of the situation was that Uber was involved in every aspect of the operation. Uber filed a timely appeal to the San Francisco Superior Court, and the Award issued by the Labor Commissioner is not binding precedent; thus, it remains to be seen how this issue will be interpreted going forward.

Companies should take caution when classifying any individual as an independent contractor as it is becoming more difficult under California law to lawfully do so.

Berwick v. Uber Technologies Inc. No. CGC-15-546378 (Cal. Super. Ct. June 16, 2015)

Contact for more information: your Hinshaw attorney

Employee Permitted to Maintain Claim Despite Deficient Pleadings

After her employer fired her, the employee filed a complaint asserting racial discrimination in violation of Title VII, disability discrimination in violation of the Americans with Disabilities Act, Family and Medical Leave Act (FMLA) interference, and FMLA retaliation. After multiple amended complaints and the employer's continued failure to respond, the employee moved for default judgment on all claims. The district court denied her motion for default judgment and sua sponte dismissed with prejudice her second amended complaint. The employee appealed, and the U.S. Court of Appeals for the Eleventh Circuit vacated the district court's denial of default judgment on the race discrimination claim and remanded the case for reconsideration. The court clarified that a default judgment may be entered on a claim for racial discrimination when the well-pleaded factual allegations of a complaint plausibly suggest that the employee suffered an adverse employment action due to intentional racial discrimination. The district court, however, erred because it considered whether the employee alleged sufficient facts to state a prima facie case under the burden-shifting framework, which is not a pleading standard.

Many employers are able to file early challenges to pleadings because of deficiencies in allegations. This ruling seems to loosen the rules so as to allow an employee to state a claim, even if the alleged facts do not establish the prima facie elements.

Surtain v. Hamlin Terrace Found., No. 14-12752 (11th Cir. June 16, 2015)

Contact for more information: your Hinshaw attorney

DOL Issues Updated FMLA Certification Forms

The U.S. Department of Labor (DOL) recently issued updated health care provider certification forms for employers to provide employees who request leave pursuant to the Family and Medical Leave Act. The new forms include, among others, a new Certification of Health Care Provider, Notice of Eligibility and Rights & Responsibilities, and Designation Notice. The most notable update is a reference to the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which is a federal law prohibiting employers from discriminating because of employees' or applicants' genetic information. This reference, found in the form's opening instructions, warns health care providers not to provide information about "genetic tests, as defined in 29 C.F.R. §1635.3(f), genetic services, as defined in 29 C.F.R. §1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. §1635.3(b)." Essentially acting as a safe harbor, this instruction protects employers from a GINA violation if they inadvertently receive genetic information from a health care provider in response to a lawful request for information under the FMLA. The DOL also revised the certification forms to instruct employers that "genetic information" received in response to the certification must be kept confidential, in accordance with GINA's requirements.

Employers should begin using these forms, which are set to expire in May of 2018, immediately.

FMLA Certification Forms

Contact for more information: Your Hinshaw attorney.

OSHA Issues Guidance on Transgender Workers and Workplace Restrooms

OSHA has published a "Best Practices" guide addressing restroom access for transgender workers. To be clear, as "guidance," the OSHA publication is not a rule or regulation, and does not create legal obligations for employers. OSHA advises that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity. For example, a person who identifies as a man should be permitted to use the men's restroom, and a person who identifies as a woman should be permitted to use the women's restroom. The *employee* should be the one to determine the most appropriate and safest option for him- or herself. OSHA cautions that best practices include allowing an employee to choose a gender-neutral or unisex facility if one exists, and warns that segregating a transgender worker by requiring him or her to use a bathroom separate from the usual men's and women's bathrooms would not comport with best practices. Employees should not be asked to provide any medical or legal documentation of their gender identify in order to support the desired bathroom use.

Given this climate, it is important to be aware of all developments on this topic so that when (not *if)* you do have transgender employees in your workforce, you can address this and other employment issues that may arise from an informed position.

Contact for more information: Aimee E. Delaney

Employer's Drug Testing Policy Prevails In Termination Challenge

A Colorado employee held a state-issued license to use medical marijuana, and was employed as a customer service representative. The employee tested positive during a random drug test at work, and informed the company that he was a registered medical marijuana patient and planned to continue using the substance for his condition. The employee was not accused of using marijuana at work; instead, he used it at home, after work, in accordance with his license and Colorado law. Regardless, the company terminated the employee for violating its drug policy. The employee filed suit claiming that his termination was unlawful—it was based on his lawful use of marijuana off premises and outside of work hours. The employer sought to dismiss the claim on the grounds that medical marijuana use is not a "lawful activity" because it is prohibited by Colorado law. The case forced the lower courts and, ultimately, the Supreme Court to address the interplay between state statutes legalizing medical marijuana, federal law criminalizing marijuana use, and an employer's policy prohibiting the use of illegal drugs. The court first determined that the term "lawful" as used in the statute was not restricted in any way and, therefore, the court could not infer on its own, for example, that "lawful" just meant lawful under state law. Without any clearer statutory language, the court upheld the dismissal of the case and, more broadly, to conclude that an activity such as medical marijuana use that is unlawful under federal law is not a "lawful activity" under the Colorado Medical Marijuana Amendment.

While this decision is specific to Colorado law, it may also provide a useful guide to employers. If you are in a state that legalizes the use of medical marijuana, check the language of the statute and any use parameters.

Contact for more information: Aimee E. Delaney

San Francisco Retail Workers Gain New Rights—What Employers Need to Know

In addition to San Francisco's laws on paid sick leave, minimum wage, family friendly workplace, and health care security, starting July 3, 2015, employers should now get acquainted with Formula Retail Labor Protections, also known as the Retail Workers Bill of Rights. The Bill applies to any employer that has at least 20 employees within the city of San Francisco, has a least 20 retail sales establishments worldwide and operates a "Formula Retail Establishment," otherwise known as a "chain store." Under the Bill, qualifying employers must, among other things, offer more hours to existing employees before hiring new employees; provide new employees with the expected number of shifts for the month; provide employees with schedules two weeks in advance; and pay premium for last minute scheduling changes. The City Office of Labor Standards Enforcement may impose fines of $500 per eligible employee, per violation and award a penalty of $50 to each employee whose rights were violated.

Covered employers should prepare for the Bill to take effect on July 3, 2015 by reviewing current hiring, wage, and scheduling policies to confirm equal treatment of part-time and full-time employees, as well as preparing to draft compliant scheduling notices and updating employees and managers about the new requirements.

Contact for more information: your Hinshaw attorney

Chicago Minimum Wage Hike Is Here: Are You Ready?

Starting July 1, 2015, all employers that maintain a business facility within the city of Chicago and/or are required to obtain a business license to operate in Chicago must increase all minimum wage jobs to $10/hour for any employee who works at least two hours in Chicago within a two-week period. The ordinance also increases the minimum wage for tipped employees from the current state minimum of $4.95/hour to $5.45/hour on July 1, 2015. (Unions may elect to waive their members' rights under collective bargaining agreements.) Over the course of the next four years, the minimum wage will increase from the current $8.25 to $13 per hour. Employees will be called upon to increase enforcement of the ordinance through the filing of complaints with the Department of Business Affairs and Consumer Protection (BACP). Once a complaint is filed, the BACP advised it will give employers two weeks to respond to the complaint before the BACP decides to issue a citation of $500 to $1000 for each offense. The employer may also be ordered to pay the employees the amount of money owed under the higher minimum wage ordinance. Repeat offenses may prompt the City to revoke a company's license.

Qualifying employers should review their current pay policies to ensure compliance with the new law, and make sure that handbooks, new hire materials, and paychecks are updated accordingly.

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