Employment Practices Newsletter - January 2012

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Ledbetter Act Only Affects Limitations Period for Claims Involving Actual Discrimination in Pay

In 2003 and 2004, a school district eliminated two employees' custodial positions. The district offered the employees lower-paying janitorial jobs along with a promise to maintain their prior pay for two years. The employees accepted and continued to receive higher custodial wages until the pay cuts took effect in 2005 and 2006. When those pay cuts went into effect, the employees filed administrative charges alleging that the school district had violated the Age Discrimination in Employment Act (ADEA) by forcing them into lower-paying positions because of their age. The district court concluded that the charges were barred because they had not been filed within 300 days of the discriminatory decisions in 2003 and 2004, as required by the ADEA. The employees appealed based upon the Lilly Ledbetter Fair Pay Act of 2009 (Act). The Act changed how the limitations period is calculated for claims under the ADEA and Title VII of the Civil Rights Act of 1964, as amended, that involve "discrimination in compensation." Under the Act, in applicable cases, each paycheck issued to an employee is treated as a new act of discrimination, and thus each paycheck resets the 300-day limitations period. The employees argued that their charges were filed within 300 days of their most recent paychecks, and therefore were timely under the Act. The U.S. Court of Appeals for the Tenth Circuit rejected this argument, holding that the Act was intended as a narrow adjustment that only applies to claims involving actual discrimination in rates of pay (i.e., unequal pay for equal work). In this case, the employees had alleged discrimination in their demotion, not that younger employees were paid more for equal work. Accordingly, the employees' 2005 and 2006 paychecks were not fresh acts of discrimination under the Act, and their claims were time-barred. This decision is a positive development for employers and if followed by other federal courts will limit the Act to claims involving actual pay discrimination and will not allow employees to bring stale claims involving other forms of discrimination.

Almond v. Unified Sch. Dist. #501, No. 10-3315 (10th Cir. Nov. 29, 2011)

For more Information, please contact your regular Hinshaw attorney.

Even Under ADAAA, Major Life Activity of Working Still Requires a Heightened Showing

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Service Areas

Employee Benefits

Immigration

Labor & Employment

Workers' Compensation Defense

A medical assistant began suffering migraine headaches after being reassigned to a new doctor within the medical group by which she was employed. The headaches occurred several times per week and varied in severity. Shortly after submitting a letter of resignation, the assistant asked to rescind it. The request was denied. The assistant sued the medical group under the Americans with Disabilities Act (ADA), alleging that the employer failed to accommodate her disability and wrongfully terminated her employment. During discovery, it was established that the assistant had never suffered migraines prior to working for the specific doctor to whom she was reassigned, and stopped suffering headaches after her employment ended. Under the ADA, to qualify as disabled an individual must establish that he or she suffers from a physical or mental impairment that substantially limits a major life activity. Before the trial court, the assistant argued that she was substantially limited in the major life activity of working. Prior to the passage of the ADA Amendments Act of 2008 (ADAAA), establishing a substantial limitation in the ability to work required a showing that one was limited in a class of jobs or a broad range of jobs, rather than simply unable to perform a specific job or work for a specific employer. Nevertheless, the assistant argued that under the new U.S. Equal Employment Opportunity Commission (EEOC) regulations interpreting the ADAAA, she could establish a substantial limitation on her ability to work even if she was only unable to perform a single job. The U.S. Court of Appeals for the Tenth Circuit rejected this argument. While it noted that the EEOC's amended regulations no longer specifically refer to the "class of jobs or a broad range of jobs" requirement, the agency's interpretive guidance makes clear that this remains a required showing to establish a substantial limitation in the major life activity of working. Consequently, the assistant could not establish that she was disabled under the ADA, and summary judgment was granted to the employer. Employers should focus on specifically how an employee is limited in performing his or her job, as those facts may be crucial in determining whether the individual is disabled under the ADA.

Allen v. Southcrest Hosp., No. 11-5016 (10th Cir. Dec. 21, 2011)

For more information, please contact Tom H. Luetkemeyer or your regular Hinshaw attorney.

Employer's "100% Healed" Policy Did Not Support "Regarded as" Disability Claim

A long-haul truck driver requested a transfer to a local driving route for personal reasons. Shortly after transferring, the driver discovered that the increased lifting requirements of the local position aggravated a preexisting back injury. Consequently, the driver requested a transfer back to a long-haul position. His request was denied based on the requirements of the collective bargaining agreement. As a result, the driver went on medical leave. The driver returned with restrictions from his treating physician that prevented him from performing the physical work required as part of the local route and stating that he could only work as a long-haul driver. The employer informed the driver that he could not return to work until he was released without restrictions. The driver sued the employer, alleging that the employer's "100% healed" policy established that the employer regarded him as substantially limited in the major life activity of working in violation of the American's with Disabilities Act (ADA). The U.S. Court of Appeals for the Seventh Circuit rejected this argument because the driver failed to establish that the employer believed that he was unable to work in a class of jobs or a broad range of jobs. Absent such a showing, the driver could not establish that the employer regarded him as disabled simply because it required him to establish that he was fully able to perform the specific requirements of the job he was performing for the employer. While implementing a "100% healed" policy may not serve as a *per se* violation of the ADA, employers must carefully apply such a policy to ensure that it does not trigger liability and should consult with counsel regarding any concerns.

Powers v. USF Holland, Inc., No. 10-2363 (7th Cir. Dec. 15, 2011)

For more information, please contact your regular Hinshaw attorney.

Transsexual Employee Covered by 14th Amendment's Equal Protection Clause

A public employee was terminated after she alerted her supervisors of her intent to transition from a man to a woman and come to work as a woman. The decision to terminate the employee was based on the employer's perception of the employee as "a man dressed as a woman and made up as a woman" and on the "sheer fact of the transition." The employee sued the employer, alleging claims of sex discrimination in violation of the Equal Protection Clause of the 14th Amendment. The U.S. Court of Appeals for the Eleventh Circuit held that discriminating against someone on the basis of his or her gender nonconformity constitutes sex-based discrimination under the Equal Protection Clause. In effect, discriminating against someone who fails to act according to socially prescribed gender roles constitutes actionable discrimination. Public employers should be aware that the Equal Protection Clause provides another legal basis for some employees, including individuals who otherwise may not be able to claim protected status under Title VII of the Civil Rights Act of 1964, as amended, to contest gender discrimination in the employment context. While this opinion is somewhat limited to public employers, all employers should also refrain from taking disciplinary action against individuals solely for not conforming with societal gender norms, as similar legal theories have been successfully litigated under Title VII.

Glenn v. Brumby, No. 10-14833 & No. 10-15015 (11th Cir. Dec. 6, 2011)

For More Information, please contact Jeffrey M. Novell or your regular Hinshaw attorney.

Human Resource Director's Statements Serve as Direct Evidence of Discrimination

An employee who worked in a law firm's marketing department took leave under the Family Medical Leave Act (FMLA). The leave was scheduled to begin just before the birth of her child and continue after the birth. While the employee was on leave, the employer decided to eliminate the employee's position "as part of an organizational restructuring." When the employee came to the employer's office to remove her belongings, the employer's director of human resources allegedly told her that she "was let go because of the fact that [she] was pregnant . . . and took medical leave." The employee sued, alleging that she was discriminated against based upon her pregnancy, that she was retaliated against for taking FMLA leave, and that the employer interfered with her right to take FMLA leave by failing to reinstate her when her leave expired. The employer argued that the employee had no evidence to support her claims because the director's statements were "hearsay," (statements that were made outside of court that may not be considered as evidence). The U.S. Court of Appeals for the Seventh Circuit held that the director's statements were admissible evidence. While the director's statements were "hearsay," the court found that an exception applied to allow them to be considered. Specifically, the exception allowing out of court statements or "admissions" made by a party to a lawsuit to serve as evidence was applicable. The director's statements were "admissions" attributable to the employer because the director made them within the scope of her employment, which included regular involvement in the elimination of positions and termination of employees. Because the director's statements were admissible, the employee had direct evidence that she was terminated because of her pregnancy, that she was fired in retaliation for taking FMLA leave, and that the employer unlawfully denied her right to reinstatement after she completed her FMLA leave. Consequently, all of the employee's claims survived summary judgment. Human resources employees must be aware that statements they make to employees concerning the reasons they were terminated are admissible evidence that could later be used to support a legal claim. Moreover, employers should never terminate an employee because she is pregnant or retaliate against an employee because he or she takes FMLA leave.

Makowski v. SmithAmundsen, LLC, et al., No. 10-3330 (7th Cir. Nov. 9, 2011)

For more information, please contact your regular Hinshaw attorney.

RICO Claim of Retaliation for Whistleblower Activity Restored on Appeal

A tax manager at a home products company was terminated after reporting a tax fraud scheme to the company and federal agencies. Following the internal report, the tax manager received a negative performance evaluation from a supervisor involved in the alleged scheme. After the external reports and failed attempts to get the tax manager to sign a release of claims, the company terminated him and sued the tax manager for breach of contract and conversion. In response, the tax manager sued for a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). In a RICO claim, recovery is available upon a showing that the plaintiff was injured "by reason of" a pattern of racketeering activity. Based on the pleadings, the tax manager was limited to showing that he was injured "by reason of" the company's retaliatory conduct to his whistleblower activity. In allowing the tax manager's claim to survive a motion to dismiss, the U.S. Court of Appeals Seventh Circuit focused on a provision of the Sarbanes-Oxley Act making it unlawful to "knowingly . . . take[] any action harmful to any person . . . for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense." Violation of this provision is a "racketeering activity" under the RICO, and the Seventh Circuit held that retaliatory acts are inherently connected to the underlying wrongdoing exposed by the whistleblower. Accordingly, the alleged tax fraud scheme and retaliatory acts could not be viewed as isolated acts. After all, the same supervisors involved in the tax fraud scheme were responsible for the retaliatory conduct. Additionally, the timing between the whistle-blowing, attempts to get a release and the decision to terminate could support an inference that the tax manager was terminated for whistle-blowing after attempts to silence him failed. If possible, employers should prohibit supervisors accused of wrongdoing from making disciplinary decisions related to the complaining employee.

DeGuelle v. Camilli, No. 10-2172 (7th Cir. Dec. 15, 2011)

For more information, please contact your regular Hinshaw attorney.

Employer's Lack of Knowledge of Employee's Overtime Dooms FLSA Claim

A sewing manager at a Midwestern manufacturing company sued her employer for violations of the Fair Labor Standards Act (FLSA), alleging that the employer failed to pay her overtime. The former manager testified that she regularly arrived to work between 15-45 minutes prior to the official start of her shift and spent that time unlocking doors, turning on lights, turning on the compressor, punching-in, preparing coffee for the rest of the employees, reviewing schedules, gathering and distributing materials to her subordinates' workstations and cleaning up workstations. Her timecards often reflected that she punched in early. The former manager was aware that her employer had a policy requiring employees to request pre-approval to work overtime, and on one occasion she had even reprimanded one of her subordinates for punching in too early. The former employee admitted that she never complained or made her employer aware that she needed to be paid for arriving early. The district court dismissed the claim finding that the employee's pre-shift activities were "preliminary" and "*de minimis*," and that her employer did not know that she was engaging in pre-shift work. The U.S. Court of Appeals for the Seventh Circuit disagreed with the district court's conclusions about the "preliminary" and "*de minimis*" nature of the work. But it affirmed the dismissal because it agreed that the sales manager did not show that the employer knew, or had reason to know, that she was working before her shift. Although the employee had pointed to her timecards to impute knowledge on behalf of her employer, the court noted that punching in early does not necessarily mean that an employee is working pre-shift. More persuasive was the fact that the employee had weekly meetings with her managers where she failed to disclose the pre-shift work or to complain about improper compensation. Additionally, she was aware of the overtime policy and had enforced it. Employers should note that the mere promulgation of a rule against overtime work is insufficient to justify the nonpayment of overtime if an employer has the opportunity through reasonable diligence to acquire knowledge that an employee worked outside of his or her official work hours.

*Kellar v. Summit Seating Inc.,*No. 11-1221 (7th Cir. Dec. 14, 2011)

For more information, please contact Aimee Delaney or your regular Hinshaw attorney.

No Overtime for Banquet Hall Sales Managers

Sales managers for a company that owns high-end banquet halls were expected to maintain relationships with existing clients and secure new clients for custom events, such as weddings or corporate parties. Sales managers functioned as the primary client contact and were responsible for designing, coordinating and executing the event to the client's approval within the fee structure outlined by their employer. They were given a handbook that contained some sales guidelines, but the handbook did not provide prescribed techniques or "sales pitches." Also, the sales managers could neither issue discounts to clients nor sign-off on client contracts without the employer's consent. They received salaries and were not paid overtime if they worked more than 40 hours in a week. A group of former sales managers challenged this practice and sued to recover overtime under the Fair Labor Standards Act (FLSA). The employer claimed that the sales managers were not entitled to overtime because they fit within the statute's "administrative exemption." To establish that the sales managers qualified under the administrative exemption, the employer had to demonstrate that the sales managers routinely exercised "discretion and independent judgment with respect to matters of significance." The U.S. Court of Appeals for the First Circuit held that the sales managers were exempt in spite of their lack of authority to make financial and contractual decisions on behalf of their employer because their work in securing clients and creating a custom product, personalized to individual tastes and budgets, was sufficient to meet the independent discretion requirement. Regarding the handbook, the court concluded that the rules were not so numerous or specific as to restrict the judgment required to engage with clients and prospective clients. Employers are reminded that not all "sales managers" will meet the independent-discretion factor of the administrative exemption. Employers are urged to work with their counsel to review the business practices in place and the responsibilities assigned to a position to determine if the position is properly classified as exempt from the overtime requirements.

*Hines v. State Room, Inc.,*No 10-2298 (1st Cir. Nov. 28, 2011)

For more information, please contact Brette Bensinger or your regular Hinshaw attorney.

Pension Plan Administrators Did Not Breach Fiduciary Duty, Despite Allegation of Excessive Investment Fees

Participants in an employer-sponsored defined contribution pension plan sued their employer, alleging that the plan administrators violated their fiduciary duties under the Employee Retirement Income Security Act (ERISA) by paying excessive fees to investment advisors and requiring plan participants to pay the cost of mutual fund fees instead of having the fees paid by the plan. The district court dismissed both ERISA claims. The U.S. Court of Appeals for the Seventh Circuit affirmed, holding that nothing under ERISA required the plan administrators to find and offer the cheapest possible funds. With regard to the second claim, the Seventh Circuit held that no fiduciary duty was breached by requiring the participants to pay for advisor fees instead of having them paid for by the plan. ERISA does not impose a duty on employers to contribute to employee benefit plans at a certain level and, in determining the contribution an employer chooses to make, the employer may act in its own interests. This case is another important decision in favor of qualified retirement plans and plan administrators. However, as other courts have found in favor of plan participants in similar cases, plan administrators should be mindful of the competitiveness of the fees charged and ultimately borne by plan participants.

Loomis v. Exelon Corp., No. 09-4081 & No. 10-1755 (7th Cir. Sep. 6, 2011)

For more information, please contact your regular Hinshaw attorney.

State Claims for Wrongful Discharge Related to Facebook Post Not Preempted by Federal Law

A nurse posted complaints about high patient-to-nurse ratios at the hospital where she worked on her Facebook page, and asserted that the high ratio negatively impacted patient safety. The nurse was subsequently warned that she should think about her behavior because her actions—whether at work or at home—reflected on the hospital. Fearing termination, the nurse deleted the Facebook page. Five months later, the nurse was terminated for substandard customer service. She sued the employer in Kentucky state court, alleging that she was fired in retaliation for exercising her free-speech rights under the Kentucky Constitution. The hospital sought to remove the lawsuit to federal court on the basis that the nurse's complaint involved claims for violations of federal law, including the National Labor Relations Act (NLRA), and that those federal laws preempted her complaint. The U.S. District Court for the Eastern District of Kentucky found that the nurse's claim was firmly rooted in Kentucky state law and that neither the NLRA nor the Labor Management Relations Act preempted the claim. Accordingly, the case was remanded to the state court. Employers should be mindful that an employee's public complaints about working conditions on social media networks may be protected by various state law protections that vary depending on the state of employment, which could in turn support a claim for wrongful discharge. Consequently, it is important to fully evaluate not only applicable federal laws when making an adverse employment decision, but also applicable state and local laws that may offer additional protections to an employee.

Moore v. Highlands Hosp. Corp., No. 7:11-cv-131 (E.D. Ky. Nov. 17, 2011)

For more information, please contact your regular Hinshaw attorney.

National Labor Relations Board Issues New Rules Designed to Speed up Union Elections

On December 21, 2011, the National Labor Relations Board (NLRB) issued final amendments to the procedures governing union representation elections. These amendments become effective on April 30, 2012. Employer groups have asserted that the changes allow unions to "ambush" businesses with union elections and force employees to make quick, uninformed decisions about whether to unionize. Union advocates, on the other hand, claim that the amendments will prevent unnecessary litigation and remove what they believe to be unnecessary delays in effectuating an "employee's free choice" to unionize.

The amendments eliminate the pre-election appeals process, such that an employer can no longer appeal its election dispute to the NLRB prior to the election. This appellate process had guaranteed a timeframe of at least 32 days between a union election petition and the date of a union election. With the amendments, the U.S. Department of Labor's (DOL's) regional director will have complete authority to set the timeframe for an election. According to U.S. Representative John Kline (R-Minn.), the amendments would allow an election to occur in as little as 10 days after an election petition is filed.

Employer groups have complained that limiting this "critical period," or the time between the filing of a petition and the election, could prevent an employer from fully informing its workforce about the impact of unionization. Further, they argue that sufficient time to hear from all sides is critical because the consequences of a union vote are not short-lived and could significantly affect an employee's livelihood.

Almost immediately after the final amendments were issued on December 21, 2011, the ranking member of the U.S. Senate's Health, Education, Labor and Pensions Committee, Senator Mike Enzi (R-Wyo.) announced that he would introduce a resolution of disapproval under the Congressional Review Act (CRA). If passed, this resolution would block the DOL from implementing the amendments. Action under the CRA cannot be filibustered, needs only a simple majority to pass, and must be called within a 60-day window. Opposition to the amendments is also present in the U.S. House of Representatives, where members voted on November 30, 2011 to pass the Workforce Democracy and Fairness Act, which would prohibit unions from holding a representation election until at least 35 days after filing a petition (H.R. 3094). Other opponents of the amendments include the U.S. Chamber of Commerce, which filed a federal lawsuit against the Board in the District of Columbia on December 20, 2011, seeking to prevent the enforcement of the amendments (Case No. 11-cv-2262).

The NLRB will begin 2012 without a quorum, as only two members will remain on the five-person board in the new year. The length of time the NLRB will remain without a quorum is questionable, as President Obama is set to appoint two new members, Richard F. Griffin (General Counsel for the International Union of Operating Engineers) and Sharon Block (DOL's Deputy Assistant Secretary for Congressional Affairs) in the new year, while the President's previous appointment of Terrance Flynn (R) in early 2011 has not been acted on by the Senate. With legal and Congressional challenges to the amendments in the works and possible "recess appointments" to the Board, employers are encouraged to keep a watchful eye on the NLRB's activity in the upcoming year.

For more information, please contact your regular Hinshaw attorney.

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