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Employment Law Update: An End of Summer Synopsis

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September 4, 2014

As summer winds down and we look back over the past few months, there are several significant changes in the employment law realm worth noting. Here is a brief recap of what the summer months entailed for labor and employment law:

Executive Order 13672

On July 21, 2014, President Obama signed Executive Order 13762, amending prior Executive Orders 11478 and 11246, which prohibit discrimination on the basis of certain protected categories. Specifically, before President Obama's amendment, Executive Order 11246 prohibited federal contractors from discriminating against employees or applicants for employment on the basis of "race, color, religion, sex, or national origin;" whereas, Executive Order 11478 prohibited discrimination against federal government employees on the basis of "race, color, religion, sex, national origin, disability, and age." Executive Order 11478 was amended in 2010 by President Clinton to include sexual orientation, but Executive Order 11246 had received no such amendment until this summer. With President Obama's amendments to Executive Orders 11478 and 11246, federal employees and employees of federal contractors now are protected against discrimination on the basis of sexual orientation and gender identity, in addition to the already existing protected categories. Although the Equal Employment Opportunity Commission ("EEOC") and the Office of Federal Contract Compliance Programs have long taken the position that sexual orientation and gender identity are protected under Title VII's prohibition on sex discrimination, President Obama's Executive Order solidifies the protection from discrimination for the lesbian, gay, bisexual, and transgender community.

EEOC's Enforcement Guidance on Pregnancy Discrimination

In other news regarding discrimination in the workplace, on July 14, 2014, the EEOC issued its Enforcement Guidance on Pregnancy Discrimination and Related Issues. The Enforcement Guidance is intended to provide clarification and interpretative guidance on the Pregnancy Discrimination Act and the Americans with Disabilities Act ("ADA") as it relates to pregnancy, childbirth, and related medical conditions. A full treatment and analysis of the EEOC's new Enforcement Guidance on Pregnancy Discrimination will be forthcoming on this blog. Stay tuned for more information.

Affordable Care Act Employer Mandate Update

Many employers are curious about the status of the Patient Protection and Affordable Care Act ("ACA"). In July 2013, the Shared Responsibility for Employers Regarding Health Coverage component (commonly referred to as the "Employer Mandate") of the ACA was delayed one year from its original effective date of January 1, 2014 to January 1, 2015. Earlier this year, a portion of the Employer Mandate was delayed for another year. Applicable Large Employers with 100 or more full-time equivalent employees still are required to comply with the Employer Mandate beginning January 1, 2015; whereas, employers with at least 50, but less than 100, full-time equivalent employees may be eligible for an additional one-year grace period for compliance until

January 1, 2016. For more information on whether your company must comply with the Employer Mandate beginning January 1, 2015 or January 1, 2016, please see Affordable Care Act Update: Are You Eligible For A Grace Period Until January 1, 2016?, written by Bridget L. Welborn and Devon D. Williams.

Hobby Lobby Decision – ACA Contraceptive Mandate

In addition to the one-year grace period for certain Applicable Large Employers, the ACA also suffered a blow from the United States Supreme Court in *Burwell v. Hobby Lobby*. On June 30, 2014, our High Court struck down a portion of the ACA, which requires employers to provide preventative care to women, including contraceptives without any cost-sharing ("Contraceptive Mandate"). The ACA exempts religious organizations, like churches, from the Contraceptive Mandate; however, prior to the Hobby Lobby decision, other employers, such as closely-held corporations, did not qualify for the religious exemption and were required to provide contraceptive services irrespective of their religious beliefs on the subject. The Court held that, as applied to closely-held for-profit corporations where the corporation's owners hold Christian beliefs that life begins at conception, the Contraceptive Mandate violates the Religious Freedom Restoration Act. Since the Hobby Lobby decision was announced, the Centers for Medicare and Medicaid Services ("CMS") has been active in promulgating new rules that would promote the purpose of the ACA's provisions on preventative care and contraceptive services for women, while simultaneously providing accommodations and/or exemptions to closely held for-profit entities that have religious objections to providing contraceptive services.

Noel Canning Decision and President Obama's Recess Appointments

In addition to the Hobby Lobby decision, the Supreme Court delivered another crippling decision to the Obama Administration in *NLRB v. Noel Canning*. In the Noel Canning case, the Court was tasked with determining the validity and constitutionality of President Obama's January 2012 recess appointments to the National Labor Relations Board ("NLRB"). The Court unanimously concluded that President Obama lacked the authority to make the NLRB recess appointments at issue in the case. As a result of the Court's decision, numerous NLRB decisions have been placed in limbo as the NLRB works to determine which, if any, decisions need to be revisited, modified, or set aside. Even though the NLRB is examining all cases where the recess appointees were involved, we can expect most of the decisions will be affirmed. We also can expect delays and administrative backlogs as the NLRB works through their review of these prior decisions.

Update on NLRB's Social Media Campaign

Despite the full-plate it will have re-examining its prior decisions in light of Noel Canning, the NLRB shows no sign of relenting on its enforcement of employee's Section 7 rights in the social media realm. Section 7 of the National Labor Relations Act provides employees with 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." Employers are prohibited from interfering with employees' Section 7 rights. Now-a-days, employees can engage in concerted activity on social media platforms. Over the past couple years, the NLRB has paid particular attention to employers' social media policies and whether employers are unlawfully interfering with employees' rights to engage in concerted activity on social media outlets. For more information on this topic see: When Employees' Facebook® Posts Turn into Protected Activity written by Kyle R. Still, EEOC Weighs In On Discrimination Issues Related To Social Media written by William A. Oden, III and Kyle R. Still, and Freedom Of Speech On Facebook® written by Hayley R. Wells.

As evidence of its continued pro-employee treatment on social media and Section 7 issues, the NLRB recently decided Three D, LLC dba Triple Play Sports Bar and Grille, where it concluded that an employee's name-

calling on Facebook® was not so disparaging or defamatory to take the employee's comments outside Section 7 protection. The NLRB likewise determined that the employer's social media policy, which prohibited employees from having "inappropriate discussions," unlawfully interfered with employees' Section 7 rights. Employers are encouraged to consult legal counsel before developing a social media policy and before contemplating adverse employment action as a result of an employee's social media activity.

To further complicate these issues, the NLRB soon may find itself extending Section 7 rights to employees' use of employer-provided computers, internet, and other electronic communication systems. Currently, employers lawfully may prohibit employees from using company provided email or internet for non-work purposes. However, if the NLRB were to agree with its General Counsel and many labor unions, employers will be forced to review their current personnel policies, which likely forbid employees from using company-provided email or computer systems for non-business purposes, as well as open their computer systems to employees for non-work purposes. The NLRB's monumental decision in this case can be expected as early as this fall or winter. Ward and Smith, P.A.'s Labor and Employment attorneys will continue monitoring these issues as they develop.

This post is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this post without obtaining the advice of an attorney. If you have questions concerning this post, please contact Devon D. Williams at ddwilliams@wardandsmith.com.

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