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Deciphered Insights: Labor and Employment Legal Considerations

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Five Ward and Smith attorneys provided updates related to employment law, including non-compete agreements, unionization efforts, pregnancy laws, and overtime rules for exempt employees, during the firm's recent In-House Counsel Seminar.

In a fast-paced session, the attorneys discussed key employment law changes, including:

- New employer guidelines for religious accommodations
- The validity of non-compete agreements
- Guidelines for accommodating pregnant workers
- New standards from the NLRB on workplace policies
- Changes for determining joint-employer status

Non-Competes and Non-Disclosures

Avery Locklear, a labor and employment attorney, offered guidance on a proposed rule from the Federal Trade Commission regarding non-compete agreements: "Employers need to be proactive, and one way to do that is to review existing non-compete agreements to ensure they're not overly broad."

Recruiting and retaining the right people is essential for driving an organization forward, and that is partially why these agreements are a hot-button issue. "There has been a lot of debate about this since it was proposed by the FTC, but non-compete agreements are still valid," noted Locklear.

Under the proposal, which Locklear expects will not be finalized until April of 2024 at the earliest, employers would be prohibited from entering into non-compete agreements with workers, a term encompassing independent contractors, interns and externs. Notifying workers that existing non-compete agreements are invalid would also be required.

If enacted, the proposal would force employers to apply a functional test to all restrictive covenants, including non-disclosure agreements and non-solicitation agreements. "The crux of the matter is whether a rule would prohibit a worker from accepting or seeking employment," Locklear said.

After the proposal went public, the National Labor Relations Board (NLRB) stated in a memo on May 30 that most post-employment non-competes and non-solicitation agreements violate the National Labor Relations

Act. “Their stance is these agreements chill an employee’s exercise of their Section 7 rights by preventing them from seeking better employment or going to a competitor,” added Locklear.

Religious Accommodations Requests

Justin Hill, a labor and employment attorney, discussed a recent opinion by the Supreme Court related to religious accommodation requests. Prior to the opinion, an employer that wanted to deny a religious accommodation request only needed to show it presented a minimum amount of hardship.

“To some extent, the minimum cost test had been around since 1977,” noted Hill. Now, an employer must show that granting a religious accommodation request would present an undue hardship.

The change follows an uptick in religious accommodation requests as a result of Covid-19, though the actual case involved a USPS worker asking for Sundays off due to religious beliefs. Hill explained that allowing the request was not a problem until the USPS contracted with Amazon, which delivers on Sundays.

The Postal Service tried a variety of strategies to accommodate the worker. Eventually, however, the service subjected the worker to progressive discipline, arguing the accommodation was too difficult.

The carrier quit and sued the USPS, stating the denial of his request was in violation of his rights under Title VII of the Civil Rights Act. The Supreme Court essentially sided with the employee, based on the opinion a denial would require the employer to prove the request presented an undue hardship.

“Unfortunately, the Supreme Court did not provide a guideline related to the facts that are required to meet this substantial burden test,” said Hill. “This has left us with an influx of questions and no answers outside of what is provided by this example.”

Considering the lack of clarity, prudent employers should require that accommodation requests be submitted in writing. Similarly, it is vital to engage in an interactive process and document everything.

“If there’s no documentation, it didn’t happen,” advised Hill. “It is also advisable to err on the side that a religious belief is sincerely held.”

Contractor or Employee?

Genesis Torres, a labor and employment attorney, provided an overview of the numerous discussions surrounding the classification of independent contractors and employees under the Fair Labor Standards Act. Since contractors are not entitled to benefits, the costs for many employers would skyrocket if they needed to be reclassified as employees.

This is one reason why there has been significant controversy. In fact, when the Department of Labor announced in October of 2022 that it was considering rescinding the rule from 2021 advocating for two "core factors", it received over 54,000 public comments.

The two core factor analysis is a way to determine if a worker is a contractor or employee. The analysis involves evaluating whether an individual:

- Has a substantial degree of control over the work; and
- Has the opportunity to earn profits or incur losses.

Under this analysis, if the two "core factors" indicate the same classification, then there is a substantial likelihood it is the worker's classification. The test under consideration is a totality of circumstances analysis,

which places equal weight on five factors. In addition to the two core factors, it considers the amount of skill the work requires, the degree of permanence of the working relationship, and whether the work is performed as part of an integrated unit of production.

Ward and Smith will issue a prompt update when the matter is decided.

Heightened Standards from the NLRB

X. Lightfoot, an employment and personal injury attorney, discussed an NLRB update concerning workplace rules, as well as new guidelines for determining whether an independent entity is a joint employer. He commented, “Navigating the landscape of employment law is challenging, but as Elon Musk said, ‘we must embrace change if the alternative is a disaster.’”

The NLRB recently issued an opinion that will potentially impact most employers. In the opinion, titled *Stericycle, Inc.*, the NLRB stated a policy or work rule is “presumptively unlawful” if the General Counsel can prove it has a reasonable tendency to chill employees from exercising their Section 7 rights.

Lightfoot advised the opinion could affect a variety of policies and/or work rules, including:

- Confidential information
- Workplace conduct/standards of conduct
- Information systems
- Social media
- Conflicts of interest
- Codes of ethics

In prior years, the NLRB would review the nature and extent of the potential impact on the employee’s Section 7 rights, along with an employer’s justifications for maintaining a rule. “The current composition of the NLRB is more employee-friendly than it was in years past,” noted Lightfoot.

Employers are now required to analyze situations from the perspective of a reasonable employee. The employer would then need to determine whether an employee can reasonably interpret the work rule/policy to have a coercive meaning.

“This is subjective and vague, so it’s going to create some headaches,” Lightfoot said. “Nonetheless, it is the new standard and we have to be aware of it to avoid potential liabilities.”

Employers could rebut the presumption that a policy or rule is presumptively unlawful by proving there is a substantial and legitimate business interest, and the employer is unable to advance such interest with a more narrowly tailored rule. The new standard is being applied retroactively and the result will be a low threshold for the General Counsel to prove a work rule/policy is in violation of employees' rights.

Another hotly contested issue is related to joint employer status. When two businesses simultaneously employ the same worker, it creates a variety of potential liabilities.

Of course, joint employer status is determined by the independent entity’s ability to control what the worker does, including the terms and conditions of employment. The NLRB found the rule enacted in 2020 under the Trump administration made it too easy for joint employers to avoid a finding of joint employer status because the threshold for ‘substantial direct and immediate control’ was too high.

The new rule, set to take effect December 26, 2023, is more favorable for employees as it expands and broadens the old rule. “It’s very expansive and does not include an exception for businesses with unique

situations, such as contractors, hospitality providers, and franchisees," noted Lightfoot.

Prudent employers should review current and pending agreements with third parties. "We believe there is going to be a substantial amount of litigation because of this," added Lightfoot, who then encouraged the audience to reach out with questions on how to avoid disastrous changes/liabilities.

Nursing and Pregnant Workers

"There was so much activity in the world of employment law this year I had to revisit the stage," joked Locklear. Her second presentation featured an overview of the PUMP for Nursing Mothers Act and the Pregnant Workers Fairness Act (PWFA).

The PUMP Act was enacted in December of 2022, and extends protections for the right to express breast milk in the workplace. The PUMP Act requires employers to provide nursing mothers with reasonable break time and a private space for the employee to express breast milk for their nursing child. The space can be temporary, but it cannot be a bathroom.

Compensating employees for breaks is not a requirement, however, the employee must be completely relieved from duty or they must be compensated. Smaller companies with less than 50 employees are not subject to the break time and space requirements if the employer can show that doing so presents an undue hardship, however, that will be difficult to prove, advised Locklear.

The PWFA, which was enacted in June of 2023, requires that employers offer reasonable accommodations for limitations associated with pregnancy, childbirth, or related medical conditions.

Similar to the ADA, an employee or applicant will still need to be qualified, meaning they can perform essential job functions with or without a reasonable accommodation. The PWFA expands qualified to include those who cannot perform essential job functions, if:

- The inability is for a temporary period.
- The essential function(s) can be resumed in the near future.
- The inability to perform the essential function(s) can be reasonably accommodated.

"Interestingly, the PWFA does not give a clear definition as to the meaning of 'temporary' or 'in the near future,' but the EEOC's proposed rule provides guidance" noted Locklear. The EEOC's proposed rule defines "temporary" as lasting for a limited time (not permanent) and may extend beyond "in the near future" which is defined as 40 weeks from the start of the temporary suspension of an essential function. The EEOC has yet to finalize the proposed rule, but Locklear advised that the EEOC's proposed rule provides insight into how the EEOC will interpret the PWFA and its specific terms.

Examples of reasonable accommodations could include a closer parking space, flexible hours, a larger uniform, leave time and/or lighter duties. As always, engaging in an interactive discussion and avoiding retaliation is essential.

Overtime

Ken Gray, leader of the labor and employment practice group, concluded with a discussion of recent updates related to salary threshold requirements for exempt employees. Currently, an employee must receive at least $35,568 in guaranteed annual compensation (or $684 per week) as a preliminary hurdle to be considered exempt; otherwise the employee is entitled to receive overtime pay.

A proposed rule from August of 2023 would increase the threshold for annual compensation to more than

$55,000. “The DOL expects that 3.6 million workers nationwide would have to be given raises or reclassified if this standard goes into effect,” Gray commented.

The DOL is collecting and reviewing comments; a final ruling will be issued in 2024. “When the current change was enacted in 2016, this was a very hot topic,” explained Gray.

The new rule is not getting much publicity, however, Gray expects litigation. To be proactive, employers should begin identifying exempt employees earning less than $55,000 annually. The next step would be to consider implementing a pay increase or reclassifying employees as nonexempt as the yet-to-be-known effective date approaches.

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