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Key 2018 Legal Updates for Employers: Report from Ward and Smith's 2018 Employment Law Symposium

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This is the third in a series of articles summarizing key topics addressed at the Ward and Smith, P.A. 2018 Employment Law Symposium held in Wilmington, North Carolina.

Ward and Smith's 2018 Employment Law Symposium kicked off with Ward and Smith attorneys providing a rapid-fire legal update.

The panel addressed key issues employers will face this year and the future. Tax law changes, significant court decisions, and legal trends have all raised a host of issues about which employers need to be aware.

Affordable Care Act Awareness

Perhaps one of the most confusing areas of law right now is who has what obligations under the Affordable Care Act (ACA). Devon Williams, a labor and employment law attorney, noted that despite several attempts in 2017, Congress failed to repeal the ACA outright. However, a change in federal tax law has ensured that, by the end of 2018, the individual mandate will be meaningless—there will no longer be a tax penalty for people who don't carry health insurance.

But, according to Williams, employers still have obligations under the ACA. The employer mandate is still in place and is being enforced, she said. That mandate requires certain employers to offer qualifying health insurance coverage to their full-time employees, but it only applies to organizations with 50 or more full-time or full-time equivalent employees.

Williams has represented clients who have received penalty notifications from the IRS for allegedly failing to meet ACA requirements, but she noted that, in many cases, those penalties are due to mistakes on the filing forms or other routine errors. They can be challenged, and fines can sometimes be reduced or even eliminated entirely.

Treating Employees Properly

Jerry Sayre, an employment law attorney, is keeping a close eye on the issue of pay equity between men and women. According to Sayre, pay statistics clearly show that women, on average, are paid less than similarly employed men. Court decisions, meanwhile, continue to make it easier for employees to show they've been illegally denied equal pay based on their gender.

If you are an employer, and you've got a wage disparity—you've got something to explain, he said. You can defend such a claim by showing that the wage gap is due to some other reason than gender. However, in many places, previously acceptable justifications for the wage gap, such as prior wage history, are no longer valid. Furthermore, the United States Court of Appeals for the Fourth Circuit, which includes North Carolina, recently ruled that just a single instance of gender inequality in pay creates a prima facie showing of illegal discrimination, allowing a plaintiff to avoid summary judgment in most cases. This means employers will likely be forced to prove to a jury or a judge (if a jury trial has been waived) that those wage differences aren't due to gender.

Nondisclosure Agreements

Sayre also touched upon trends in nondisclosure provisions. Sayre reported that many federal agencies and courts are taking a harder look at employee nondisclosure provisions, in some cases finding them overbroad. To enhance the likelihood a nondisclosure provision will be upheld, employers should build in appropriate disclaimers and limits. If you don't, Sayre said, be aware they very likely are overbroad and unenforceable and could even result in liability.

Application of Gender Discrimination Law Widens

Historically, courts have refused to apply Title VII, the federal law that prohibits gender-based discrimination in employment, to cases involving discrimination based on sexual orientation/preference or gender identity. Recently, however, a number of courts have applied Title VII in cases involving this type of discrimination, thus expanding the law's protection, reported attorney Hayley Wells, whose practice is focused on labor and

employment law as well as civil litigation.

The Equal Employment Opportunity Commission (EEOC) has pursued cases based on these classifications and obtained victories that establish a precedent in two federal circuit courts—the United States Courts of Appeals for the Second and Seventh Circuits. While that precedent hasn't yet been established in the Fourth Circuit, Wells warned that the EEOC is looking for test cases arising in the Fourth Circuit.

In 2016, the EEOC brought a case against a fast-food chain in North Carolina for mistreatment a transgender restaurant manager endured at work. The case resulted in a fine against the restaurant chain and an agreement that similar complaints from employees in the future would be reported directly to the EEOC, which will monitor how the company responds.

We don't anticipate this will be the last case of this kind that we see in North Carolina or in the Fourth Circuit, Wells reported. To avoid becoming that future case, companies should update their policies and provide training, especially to frontline managers, to ensure all employees are treated equally, regardless of sexual preference, gender identity, or their personal relationships outside of work.

Taxing Details

Attorney Steven Long, who leads Ward and Smith's tax and employee benefits practice, discussed tax law changes that could affect employee benefits. While the sweeping tax changes enacted at the end of 2017 resulted in big tax cuts for many businesses, it also means employers and employees may have to reconsider a variety of benefits.

The new tax law, Long explained, eliminated some deductions employers often use and also some provisions related to salaries.

For example, reimbursements employers provide employees for moving expenses are, for the most part, now taxable as income to the employee. Likewise, certain achievement awards and employee safety awards, including cash, gift certificates, meals, vacations, and tickets to events, must now be reported as employee income. The law has also changed how certain stock options are taxed.

And, for tax-exempt organizations, such as nonprofit hospitals and universities, employers may end up owing an excise tax on employee salaries over $1 million.

For these employers, it's a big deal, Long said. They also view these changes as a restriction on their ability to attract highly skilled workers.

Whistleblower Awareness

Finally, white collar defense and investigations attorney Wes Camden, a former federal prosecutor, talked about how recent court decisions have changed whistleblower laws and what that might mean for employers.

In one recent case, the United States Supreme Court unanimously held that a whistleblower wasn't entitled to legal protections because he hadn't reported the alleged corporate wrongdoing to the appropriate federal agency in time. Camden said that, broadly, this might reduce whistleblower complaints; it also might motivate employees and others to skip internal reporting procedures and go straight to federal agencies.

"You need to be all the more vigilant in explaining to employees that they should use internal reporting mechanisms," Camden said.

Camden also noted that whistleblowers are defined differently, and treated differently, under different federal laws. It's essential that employers understand which federal laws apply to them and how whistleblower provisions in those laws work. If you're not sure which laws regulate your business or what the applicable laws mean for your organization and potential whistleblowers in your organization, he suggested that it's time to talk to an experienced attorney.

More insights from Ward and Smith's 2018 Employment Law Symposium:

Preventing and Dealing with Workplace Harassment
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