Employer Express October 2014 Newsletter

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Key developments in the Employer Express October 2014 newsletter include:

IN THE NEWS

Ebola In The Workplace

While the Ebola virus thankfully has not yet presented a direct threat to most employers, concerns about how to handle employee questions about fear of transmission have arisen. Of particular concern is how an employer should balance the fear and risk of transmission against possible claims of discrimination and obligations under the Americans with Disabilities Act ("ADA") and Family Medical Leave Act ("FMLA").

Kelley Drye Labor and Employment partner Mark Konkel co-authored an article which addresses a number of those questions.

We also attach a link to the latest CDC guidance. This is a challenging and evolving area. As more guidance is issued, the Kelley Drye Labor and Employment Practice will keep you apprised. Our general advice is, if there is a legitimate reason to believe someone in your workforce has been exposed to the virus, err on the side of employee health. Just be careful that no one allows rumors or bias to overtake facts. When in doubt, call your lawyers.

SUPREME COURT NEWS

High Court Continues To Review Labor & Employment Cases

This past year, the United States Supreme Court issued decisions in at least nine cases having significant ramifications in the workplace. These cases touched on various labor and employment issues, including whether time spent putting on protective gear is compensable under the Fair Labor Standards Act, payment of union dues, religious exceptions to coverage under the Affordable Care Act, and—perhaps most notably—appointments to the National Labor Relations Board in the Noel Canning *decision. As the Court starts its October Term, employers can expect a number of important employment decisions on the way.*

On October 8, 2014, the Supreme Court heard oral argument in *Integrity Staffing Solutions, Inc. v. Busk*. The issue before the Court is whether employers must pay hourly workers for time spent waiting in line and going through mandatory end-of-shift security screenings. In particular, workers who fill orders in Amazon.com's warehouses claimed they were required to spend up to 30 minutes each day going through security screenings, which were implemented to detect employee theft of merchandise. The workers were not paid for this time.

The Supreme Court heard the case after the U.S. Court of Appeals for the Ninth Circuit said that this time should be compensable under the Fair Labor Standards Act ("FLSA") because the screenings are an integral part of the warehouse job and done for the benefit of the employer. The warehouse company, on the other hand, focused on the fact that the security checks take place after the workday is over and do not in any way affect the duties the employees are hired to perform on the warehouse floor. Accordingly, the employer argued, the time is non-compensable—just like time spent waiting in line to clock-out at the end of a shift. The federal government and many retail groups support the employer's position.

A decision is anticipated in the coming months and is sure to have significant implications for all employers who require their employees to participate in security screenings and various other types of pre- and post-shift activities.

In addition to the FLSA case, the Court has also agreed to review cases on: (1) when an employer must provide work accommodations to pregnant employees, (2) when retiree health-care benefits are available under the terms of a collective bargaining agreement, and (3) whether the EEOC must attempt to settle a discrimination claim through its conciliation process prior to filing a lawsuit on behalf of a complaint.

We will continue to monitor the Supreme Court's docket and update you on important decisions as they come down.

Supreme Court to Review Abercrombie Hijab Dispute

The U.S. Supreme Court recently agreed to hear an appeal challenging the Tenth Circuit's reversal of summary judgment for the Equal Employment Opportunity Commission ("EEOC") in the case of a 17-year old Muslim who Abercrombie & Fitch allegedly refused to hire because her hijab violated the company's "Look Policy."

The District Court in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, entered summary judgment for the EEOC in 2011, finding that the retail clothing chain had sufficient notice that a conflict existed between its “Look Policy” that prohibits headgear and the exercise of religious rights of a Muslim applicant who wore a hijab to her interview. However, in 2013, the Tenth Circuit overturned that decision, finding that the applicant in question, Samantha Elauf, despite wearing a hijab to her interview, did not notify her employer of her need for a religious accommodation. The Supreme Court granted certification and will now review this decision.

In their petition, the EEOC argued that Title VII does not require an employee or applicant to explicitly state that a practice conflicts with his or her religious beliefs. If the Supreme Court agrees with the EEOC, it will provide significant clarification for employers who question when they may be liable for discrimination even if applicants or employees do not directly request accommodations for religious practices.

While the Tenth Circuit’s position on notice of the need for religious accommodation arguably takes a rigid view that conflicts with common sense where an applicant is wearing a hijab, more subtle situations will often put an employer in a difficult situation. While certain manifestations of religious observation may be visible and obvious, interviewers and managers could be labeled as discriminatory if they overreach and stereotype an employee or applicant by asking questions about their religious practices in less clear-cut circumstances. For that reason, it is generally better to wait for an employee to request an accommodation. Employers should watch this case closely, and in the meantime, use a common sense approach to offering religious accommodations to both applicants and employees.

Kelley Drye’s Labor & Employment Practice has experience assisting employers through all stages of the religious accommodation practice.

THE EEOC IN ACTION

EEOC Equal Pay Act Suit Fails

In late September, the Second Circuit affirmed the dismissal of a case brought by the Equal Employment Opportunity Commission (“EEOC”) against the Port Authority of New York and New Jersey, where it alleged female attorneys were paid less than male attorneys in violation of the Equal Pay Act (“EPA”). In a nutshell, the Second Circuit found that “broad generalization” about jobs, without actual comparisons of employees experience, training, education or ability was not sufficient to support an EPA Claim.

The Second Circuit’s decision in *Equal Employment Opportunity Commission v. Port Authority of New York and New Jersey* demonstrates the often hasty comparisons drawn by the EEOC in discriminatory pay cases and the important task of highlighting all factors that result in differing pay between employees in different positions. The Equal Pay Act prohibits the payment of a higher salary to a male employee, when a female employee is performing “substantially equal” work for a lower wage.

The EEOC argued that all attorneys at the Port Authority performed substantially equal jobs because they had the same job codes, were evaluated based on the same criteria, and received salary increases based on the same “maturity curve.” The Second Circuit held that the claims were based upon “broad generalizations” and failed to provide any detail regarding the employees’ experience, training, education, or ability, or the complexity and varying demands faced by Port Authority attorneys.

The Second Circuit confirmed that an EPA plaintiff must “establish that the jobs compared entail common duties or content, and do not simply overlap in titles or classifications.” This principle is also supported by the EEOC's own regulations and Compliance Manual. It also went on to condemn the failure of the EEOC to bring forth any cognizable claim, other than unsupported comparisons: "That the EEOC faulted the Port Authority for paying a male attorney only $2,000 more in salary than his female co-worker with sixteen less years of legal experience only serves to underscore the paucity of support offered by the EEOC's selection of comparators." Further, the comparison table showed many male attorneys were paid less than their similarly qualified male co-workers.

EEOC Attacks Employer Wellness Programs

Many employers offer corporate wellness programs to their employees in an effort to promote employee health and curb healthcare costs. Although no regulations have been issued clarifying the Americans with Disabilities Act's ("ADA") application to these programs, the Equal Employment Opportunity Commission ("EEOC") has filed its first two lawsuits challenging wellness programs it believes violate the ADA.

While corporate wellness programs are touted as beneficial to employees these programs must be voluntary. The rub comes with whether or not the penalties for non-participation, or the inducement to participate, are high enough to render the program "involuntary." Under the terms of the ADA, an employer may make "disability-related inquiries" of a current employee only if the inquiries are job-related and consistent with business necessity. EEOC guidance provides that disability-related inquiries are permitted if they are part of a "voluntary wellness program" – one which does not compel the participation of individuals who either cannot participate due to disability or do not wish to answer disability-related inquiries.

In these two cases, the EEOC alleges that a program is not "voluntary" if the employer either requires participation or penalizes employees who do not participate. Further, it alleges that an employer health program is not voluntary if it offers participants significant financial incentives or penalizes employees who do not participate or cannot meet a program's goals, by requiring them to pay significantly higher premiums. The EEOC has refused to define the contours of what a "significant financial incentive" or "significantly higher premiums" are under the ADA. While HIPAA and other federal agencies set the threshold at 20% of premiums, the EEOC rescinded an Opinion Letter that agrees with this, and earlier this month stated that clarification in the near future was unlikely.

The wellness programs at issue in the EEOC's first two lawsuits are alleged to offer significant incentives to participate, such as offering to pay the entire cost of coverage for employees participating in the program, while shifting the entire burden of coverage to employees who do not participate. These cases go to the extreme of what an employer *can't* do, but provide no meaningful guidance on what an employer can do. The EEOC also has not spoken to how these programs may lead to liability under the Genetic Information Nondiscrimination Act, Title VII, the Pregnancy Discrimination Act, and the Age Discrimination in Employment Act.

Kelley Drye's Labor & Employment Practice has conducted extensive research and provided guidance on wellness programs and can help you navigate a reasonable path toward a program that can both lower your health costs and keep you out of court.

EEOC Files First-Ever Gender Bias Suits on Behalf of Transgender Employees

In late September, the Equal Employment Opportunity Commission ("EEOC") took an unprecedented move in filing its first two lawsuits in federal court alleging that employees were terminated because they were transitioning between genders.

In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, and *Equal Employment Opportunity Commission v. Lakeland Eye Clinic*, brought in Michigan and Florida respectively, the EEOC alleged that employees were terminated for being transgender and not conforming to the employer's gender-based expectations. The suits are historic for the EEOC, an agency that despite proclaiming in the past that Title VII protects transgender workers, has never filed a case in federal court on their behalf. Title VII's prohibition of sex discrimination includes discrimination on gender stereotyping.

While these are the first lawsuits filed in federal court, the EEOC has advised for years that discrimination against transgender individuals constitutes sex discrimination. In 2012, the EEOC found that sex discrimination includes gender identity discrimination in an agency decision regarding a transgender woman who was denied a job by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATF"). In that case, the applicant disclosed her gender transition midway through the hiring process, and the BATF allegedly informed her that funding for the position was suddenly cut.

The EEOC has announced that the recent historic suits are part of an organized campaign of strategic enforcement, that places top priority on coverage of gay and transgender people under Title VII's prohibition of sex discrimination. This follows a number of state court suits under state, city, and municipal laws alleging transgender discrimination, as well as President Obama's recent executive order making it illegal for federal contractors to discriminate on the basis of sexual orientation or gender identity.

Employers should be careful to ensure that their employees have proper training, and to draft broad equal opportunity policies that invite inclusion of and deter discrimination against LGBT employees in the workplace.

NEW YORK NEWS

New York Mayor Bill de Blasio Enters Onerous New Minimum Wage Executive Order

New York City's Mayor, Bill de Blasio, has entered a far-reaching minimum wage executive order that affects many employers without their knowledge – and the City has not worked out how to let employers know that they are covered by the new requirements.

In late September, a New York City mayoral executive order immediately placed a $13.13 per hour minimum wage on businesses that are located in buildings that receive $1 million or more in city subsidies and do not offer health insurance to workers. For employers in such buildings that do offer health insurance, the minimum wage has been raised to $11.90 per hour. The Mayor has also expressed his intention to increase the minimum hourly rate under the order to $15.22 by 2019, and to lobby the state government for the authority to increase the state minimum wage on a city-wide level.

The order is expected to apply to an estimated 18,000 employees, including many restaurant and retail workers, over the next five years. Previously, it largely excluded retail employees and applied to some 1,200 workers. There are some exemptions to this order, including small businesses whose revenues fall below $3 million and buildings that have a certain percentage of their space filled with residential units. If you fear this order may affect you, your tenants, or a commercial property you are seeking to occupy, Kelley Drye's Labor & Employment Practice will know – because the City won't tell you until they find you have violated it.

INTERN CASES CONTINUE

No Funny Business – SNL Unpaid Intern Reaches Class Settlement with NBC

The use of unpaid interns is a common practice in many industries which has increasingly come under fire. A tentative deal reached by NBCUniversal Inc. to pay $6.4 million to settle its intern suit highlights that employers should be careful how they utilize unpaid interns to avoid costly lawsuits and settlements when they are revealed to be performing the work of entry-level employees.

In *Moore v. NBCUniversal Inc.*, the named plaintiff sued on behalf of a class of unpaid interns working on Saturday Night Live and for MSNBC. The complaint alleged that her work on Saturday Night Live – running errands and other alleged "menial" tasks – was unproductive work that provided benefit to NBC without any corresponding benefit to the intern. A class settlement has purportedly been reached, in the amount of $6.4 million. This is just the latest in a series of media and retail companies who have been targeted by unpaid interns' attorneys. A swell of such lawsuits began in 2011, and federal courts have seen numerous filings since this summer – including complaints by unpaid interns against Coach, Inc., the Late Show with David Letterman, the Wendy Williams Show, and Marc Jacobs International LLC.

In a recent discussion, the Solicitor of Labor noted this hot-button issue, and emphasized that this will be one of the Department of Labor's ("DOL") key enforcement agendas, as evidenced by their filing of an amicus brief in an appeal of a similar suit against Hearst Corporation. The DOL finds that an unpaid internship is only lawful if it is part of an educational training program. Productive work should not be completed by unpaid interns, and the employer is not supposed to derive any direct financial benefit from its unpaid interns. If an employer would have hired additional employees or required paid staff to work additional hours had interns not performed the work, the DOL will consider those interns to be viewed as employees and entitled to compensation under the Fair Labor Standards Act.

Employers should be wary of blurring the lines between interns and employees, and if in doubt, provide some compensation to their interns. Kelley Drye's Labor & Employment Practice can help you structure a lawful internship program.

FAIR LABOR STANDARDS ACT NEWS

J.C. Penney's Failed Attempt to Pick-Off FLSA Plaintiffs Provides Guidance to Employers Seeking to Avoid Costly Collective Action

Earlier this month, the Eastern District of New York denied J.C. Penney Co. Inc.'s attempt to end a putative collective action under the Fair Labor Standards Act ("FLSA") by offering to pay the named plaintiffs' claims – but left open the possibility that if an employer acts fast enough, and generously, such a move could be successful.

The named plaintiffs in *Afza Anjum et al. v. J.C. Penney Co. Inc. et al.* refused to accept the employer's offer of judgment, which appears to have included the maximum amount the plaintiffs could recover under the FLSA. Last year, in *Genesis Healthcare v. Symczyk*, the Supreme Court gave the green light to employers to use this pick-off strategy in FLSA collective actions, however, left open the question of whether an unaccepted offer can work to dismiss a case.

The Eastern District of New York answered this question in part, stating that an offer of judgment does not render a case moot "unless and until the court actually enters judgment over the plaintiffs' objections." In this case, the Court found that the offer did not appear to cover all relief the named plaintiffs could recover – such as damages under the New York State Labor Law and an award for post-judgment interest. The court found that the existence of these issues and need for adjudication of the maximum value of each plaintiff's stake "foreclose[d] the possibility that the . . . offer extinguished the controversy at the time J.C. Penney made the offer." After the offer was made, the plaintiffs' attorneys found approximately 50 other employees who have sought to opt-in to the litigation.

The lesson from this case is that employers must act decisively, quickly, and robustly to foreclose the possibility of an FLSA collective action. Not only must employers provide an offer of judgment that covers all possible relief (including interest and state law claims), but they must offer it quickly and simultaneously move to dismiss. Because an offer of judgment does not moot a case until the court enters judgment, it is imperative to put the issue before the judge prior to the joinder of additional plaintiffs. While the strategy may not be a "one size fits all" policy for collective actions because tag-along suits by other employees are possible, this decision offers hope to employers in the Second Circuit that an unaccepted offer may still avoid costly litigation.

Department of Labor Delays Enforcement of FLSA Minimum Wage and Overtime Requirements Against Home Healthcare Agencies

In September 2013, the Department of Labor ("DOL") issued a final rule that narrowed the Fair Labor Standard's Act's ("FLSA") companionship exemption for domestic care workers. The new rules were set to go in to effect on January 1, 2015, but the DOL has decided to delay enforcement and penalties for at least six months.

The FLSA currently provides that domestic care workers providing "companionship services" to elderly persons and sick or disabled individuals are exempt from the minimum wage and overtime requirements of the law. When the DOL's new rules go into effect on January 1, 2015, however, the exemption for companionship services may only be claimed for home health aides employed directly by the individual, family, or household using the service. This means that third-party employers—such as home health care agencies that employ care workers and send them to assist clients of the agency—cannot claim the FLSA exemption and are subject to the overtime and minimum wage requirements.

This change is expected to result in nearly two million domestic care workers being entitled to overtime. It is also anticipated that this change will lead to significant increases in the cost of home care services.

On October 7, 2014, the DOL announced that it would delay enforcement of the new FLSA regulations (as well as penalties for their violation) for six months until June 30, 2015. In addition, the DOL said that for the second half of 2015 it would exercise its "discretion" in determining whether to bring enforcement actions against home health care agencies based on the extent to which employers have made "good faith efforts to bring their home care programs into FLSA compliance."

Although the DOL will not strictly enforce the new rules for at least the first half of 2015, home healthcare employers are still required to begin complying with the FLSA regulations as of January 1, 2015.

CALIFORNIA NEWS

California's New Law Requiring Anti-Bullying Training

In the past few years, bullying in schools and in the workplace has come to the forefront of media and legislative attention. In 2003, California became the first state to propose workforce anti-bullying legislation. Since then, 23 other states have proposed similar laws, but these efforts have been *largely unsuccessful. Until now.*

In September, California Governor Jerry Brown signed into law AB 2053, the first state law requiring anti-bullying training in the workplace. The law requires employers with 50 or more employees to train supervisors on the prevention of “abusive conduct” in the workplace.

The new law defines “abusive conduct” as conduct “with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests.” The law also provides examples of what might constitute abusive conduct, including: repeated use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance. The new law adds that a “single act shall not constitute abusive conduct, unless especially severe or egregious.”

California law already requires employers with 50 or more employees to provide at least two hours of sexual harassment training to all supervisory employees at least once every two years. The new anti-bullying training must be incorporated into the sexual harassment training.

Employers with a presence in California should review their supervisor training programs to ensure they address not only discrimination and harassment, but also bullying in the workplace. The new training requirements are required beginning on January 1, 2015. For purposes of satisfying the 50-employee threshold under the law, all employees are counted, regardless of whether or not they are based in California. However, only California-based supervisors must be trained.

It is important to note that the new law does not prohibit or subject employers to liability for workplace bullying. It simply requires that employers provide training to supervisors on the prevention of abusive conduct.

Kelley Drye’s Labor & Employment Practice frequently conducts harassment and discrimination training and also assists employers in developing training programs.

HEALTH CARE REFORM

Health Care Reform – What You Should Know for 2015

Our colleagues in our Employee Benefits Group recently issued a Client Advisory in which we thought you’d be interested. Certain provisions of the Affordable Care Act (“ACA”) become effective in 2015 and employers covered by the ACA may be subject to tax penalties if they do not offer affordable coverage with a minimum level of benefits to full-time employees (and their dependents) and insurers and employers must annually report information about the coverage provided and individuals covered under their plans starting in 2016.

The 2015 requirements affect all employers with at least 50 full-time employees and it is important to begin preparing for compliance before January 1, 2015. To read more, click here.