EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

Sarbanes-Oxley Revisions. The final SOX whistleblower regulation revisions have been published (80 Fed. Register 11865). Among other items, the new rules expand protection to employees of subsidiaries of publicly-traded companies, prohibits the use of arbitration agreements in whistleblower matters, and clarifies DOL administrative processes and time frames.

Kansas Governor Revokes EEO Protection For LGBT Employees. Gov. Brownback has signed an Executive Order removing LGBT status from the state's discrimination protection. The state had added sexual orientation and gender identity to the EEO protections in 2007.

TRENDS – HANDBOOK POLICIES

Employee handbooks are essential. They create consistency and provide guidance so that people understand how to follow procedures. The EEOC and other government agencies require certain handbook policies on harassment, wage corrections, GINA, attendance, etc. Failure to have these generates liability. Yet handbooks with "problem policies" backfire and also cause liability, creating contracts, invading privacy, threatening employees' labor, political, religious or constitutional rights. Handbooks continue to be both a help and a focus of regulatory attention.

NLRB Issues New Restrictions On Employee Handbooks. Be aware that the NLRA covers non-unionized companies, as well as those with Collective Bargaining Agreements. In the past few years the NLRB has been focusing on the employment handbooks of non-union companies and finding that very small "picky points" in many policies can "chill" employees' rights to engage in protected concerted activity. The

NLRB has been issuing Unfair Labor Practice violation rulings, and assessing economic damages against the employers. Now the NLRB has issued some guidance on several of the areas it considers to be problematic. This is Memorandum GC 15-04. Employers should pay heed. Now is a good time to review and revise handbooks, and avoid an NLRB issue.

LITIGATION

Employment Agreements

Handbook Policies Are Unenforceable – But Signature On "Free Standing" Agreement Is Valid. Many employers make the faulty presumption that a policy in an Employee Handbook is enforceable after the person leaves employment, if they sign the handbook authorization page. This is rarely the case. The handbook is generally only valid while the person is employed. The "enforceability" is termination of the employment for violating the policy. After that the policy has no effect at all. Employers who try to do post-employment enforcement of handbook policies are often surprised when their cases are summarily dismissed. However, a separate signed agreement, covering the same issues, may be legally enforceable post-employment. In *Serafin v. Balco Properties, Ltd.* (Cal. Ct. App., 2015) an arbitration of discipline provision was held valid because not only was it in the Handbook, but it was also separately signed by the employee as a stand-alone agreement, at the time of hire. It was not "hidden" in a multi-page handbook. It had all of the stand-alone extra provisions necessary for contract enforceability.

BUT

Not meeting the right standards voids stand-alone agreement. A non-competition agreement was voided because it was not signed at the time of hire. An enforceable agreement generally requires signature at the time of receiving *something of value*. "Consideration" *(something of new and extra value)* such as hire, promotion, bonus, etc. Signature even a day later can be too late, making the agreement unenforceable. *Symphony Diagnostic Services v. Greenbaum* (W.D. Mo., 2015).

U.S. Supreme Court

Young v. UPS. The Supreme Court overturned a summary judgment decision against the plaintiff and ordered a trial on the claim that UPS's denial of work accommodations for pregnancy violated Title VII's Pregnancy Discrimination Act

provisions. The court found enough evidence that UPS granted accommodations for a variety of other non-work-related disabilities and short-term conditions. It seemed that pregnancy stood out for non-accommodation, while people with similar restrictions on driving, lifting or other work duties did get short-term lighter duty. The court decided that Ms. Young should get the chance to prove her case, and UPS should have to prove to a jury why there might be a valid reason to treat pregnancy differently than other conditions in terms of light duty. [The case may not go to trial. In the interim, UPS has changed its policy to include pregnancy-related conditions. So the point may be moot, and the case could be settled on that basis.] This case will lead to more evaluation of light duty policies. The court did not invalidate policies which restrict light duty to work-related injury only. It did not give an all-clear on such policies either.

Discrimination

Age

Informal Promotion Process Creates Liability. Usually one must formally apply for a job or promotion, then get denied, before suing. In *Digilov v. J.P. Morgan Chase Bank* (S.D. N.Y., 2015), the Bank asked for dismissal of a 57-year old employee's ADEA case because he never filled out the formal posting for promotion, as required by company policy. However, the evidence showed that the Bank really had an informal practice of pre-selecting people for promotion to branch managers. The plaintiff had repeatedly approached his superior regarding receiving training for and being slotted into a promotional status. However, five younger employees were given those opportunities. None of those younger employees filled out a prior posting. In fact, the evidence showed that any posting was put up after they were selected. The Bank's defense appeared to be pretext.

Disability

Cannot Require Job Applicant To Pay For Own Pre-Employment Medical Evaluation. The ADA allows a pre-employment medical evaluation as a hiring condition, after a "conditional offer of employment." Further exams can be requested if the first one identifies a tangible job-related issue "consistent with business necessity." In *EEOC v. BNSF Railway* (W.D. Wash., 2015), the company doctor certified a job offeree as able to work as a security guard. However, the evaluation identified that the person did have some medical conditions. The company requested a follow-up MRA – to be paid for by the candidate. The candidate's medical insurance would not cover this, since it was not required for any treatment. He could not afford it on his own. So, the company refused to hire him. The court found violation of the ADA. Job candidates should not be required to pay for tests required by the company. Further, there was no job-related

necessity for the MRI. The company's own doctor had already cleared the candidate as "able to work." The MRI was an unnecessary extra step, out of unjustified over-caution.

Race

Faculty Who Made Racially Hostile Comments Should Not Have Been Allowed On Tenure Committee. A Native American associate professor of English had excellent performance. He was given an appointment to head the Language and Literature program. This made some people jealous and hostile (so far just "standard academic hostility – common to many campuses"). However, three professors included nasty and stereotypical comments about the associate professor's Native American status in their e-mail and Facebook comments. The associate professor complained. All three professors were reprimanded and one resigned. However, the two remaining professors were allowed to be on the committee which voted on the associate professor's application for tenure. They voted against him, tenure was denied, and he was terminated at the end of his associate professor contract. He filed Title VII and 42 U.S. Code §1981 race discrimination and retaliation cases. The court found ample evidence that including faculty with a history of prior racially hostile behavior to be on the committee "was likely to result in discrimination." *Hannah v. North Eastern State U.* (E.D. Ok, 2015).

Sex

Numbers Count – We Just Can't Find Any Or Keep Any Who Are Qualified Is An Excuse – Not A Defense. In *Smith v. City of New Smyrna Beach* (11th Cir., 2015), a female firefighter won a sexual harassment and sex discrimination in discharge case. Evidence showed ongoing hostile comments about women not belonging as firefighters, and "when are you getting pregnant, so you can be a secretary instead of a firefighter?" She was disciplined and discharged for items which men were not even cautioned about. There seemed to be an effort to create a hostile environment and drive her out. A key factor in the court's ruling was that out of 45 firefighters and EMTs the department had not managed to have more than two women. *"The jury was allowed to consider the nearly complete absence of women from a department this size as evidence of the inhospitable working conditions for women at that department."* This case applies not only to gender, but to all EEO areas. In a diverse society it is increasingly not credible that an employer cannot include a reasonably diverse workforce, unless there were efforts to avoid recruiting, hiring a diverse workforce, and avoidance of reasonable efforts to create a hospitable work environment to retain the various people who are hired. The old, stale excuse of "we just can't find any of them who are qualified" is of itself becoming an admission of discrimination and a lack of effort to comply with the employment laws. The courts are interpreting it as an "intentional disregard" of the law, and are assessing liability. Now may be a good time to assess recruiting, hiring, and especially respectful environment and retention practices.

Labor Arbitration

Prison Guard Could Not Plausibly Maintain His Biker Gang Membership Was Innocent Activity. A 14-year prison guard was fired when it was discovered that he had joined a criminal "biker gang." The guard claimed he had no knowledge of any criminal involvement by the club members, it was a group of people who just wanted to enjoy riding motorcycles as a recreational activity, and no one was involved in any wrongful activity. The arbitrator rejected this. The evidence showed: (1) The "club's" current president had been convicted and was in the very prison the guard served at, under the guard's watch; (2) The guard had been appointed as the club's "enforcer," a title inconsistent with a "fun loving recreational group;" (3) The guard had in fact been arrested for club activity, but the local police let him go and kept it quiet because of "professional courtesy" to another officer; (4) He never reported membership, affiliation with a prisoner, or the arrest to management as required by prison policy. In *Re Ohio Dept. of Corrections & Ohio Civil Service Employees Assoc.* (2015).

Video Is Everywhere – Bus Driver Should Not Be Surprised That Short-Cutting The Restroom Was Caught On Camera. A bus driver stopped his empty bus in a traffic lane for 25 minutes while he went into a grocery store to shop. He came back, put the groceries in the bus, urinated right beside the bus, and then drove back to the garage. When asked why he was about 25 minutes late, he claimed there was heavy traffic. However, a video surfaced showing the bus parked, blocking a traffic lane, and the driver relieving himself by the bus. He was fired for lying and for the public exposure. The arbitrator upheld the discharge. He had just been in a store with a restroom. There was no excuse for not using a proper facility. The driver should have expected to be noticed and videotaped; there is little expectation of privacy by a public street. In *Re Amalgamated Transit Union 1433 and Veolia Transportation Services* (2015).