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Legislation & Administrative Actions

GOVERNMENT SHUTDOWN

The Federal Shutdown is a partial shutdown. "Essential functions" for national security, transportation and commerce continue (about 2/3 of the Federal employees and services). Functions funded by separate legal authorizations continue, so mail will be delivered, and Social Security checks will continue. Do not fear, the IRS will continue to actively assess and collect your payroll and other taxes, but current audits and tax refunds may halt. In the employment area, non-essential functions can include some parts of DOL, the EEOC, OFCCP, some court functions and more. This may create issues for statute of limitations and other filing dates if the agency is not processing cases (latitude and extensions will probably be allowed). Government contractors may not be paid for services provided until the next budget is authorized. State government agencies will continue to operate, and may pick up some of the slack. Though they too can be impacted if they depend on Federal subsidies, reimbursements, etc.

Government Accountability Office and Dept. of Labor at Odds Over Protecting Child Labor. The U.S. Government Accountability Office (GAO) issued a December 3, 2018 report recommending that the Dept. of Labor needs to do more to protect children. For instance, youth under 18 comprise over half of all deaths in the agriculture industry, yet DOL's pilot study to improve agricultural safety did not even include child labor. DOL standards of industrial safety and wage and hours were faulted for not being comprehensive and lacking metrics regarding child labor. The GAO made several recommendations for improvement.

At the same time, **DOL proposed eliminating current child labor restrictions and training for equipment use in care facilities**. DOL is eliminating hazardous occupational protections and will allow 16 year olds in care facilities to operate power driven patient lifts alone, without any supervision and without any training. DOL states the change will foster job growth for teens and will not compromise safety according to its survey. A dozen states' Attorney Generals plus several members of Congress have filed objections, that this change will endanger health and safety of both young workers and residents/patients of care facilities. They claim the DOL is ignoring a prior NIOSH study which found many 16 and 17 year olds did not have the strength or judgment and appreciation of risk to safely operate these mechanized lifts on their own, and had a significant risk of injury. They criticized DOL's nationwide "survey" as an unscientific gloss to justify an unsafe decision, since it was an online voluntary Survey Monkey effort which they claim had incredibly few responses.

Trends

EXPANDING THE LIMITS OF ACCOMODATION

The ADA requires Reasonable Accommodation of disabilities. This has traditionally meant ongoing, longer term conditions (at least six months). The EEOC's interpretations under the ADA Amendments Act created confusion and some controversy by its description of a short-term, non-disability as a condition expected to last "only six months and have minor effects." This opened the question as to whether short-term conditions which are less than six months but have "major" life effects can still be disabilities. So, courts have been exploring whether a short-term condition is covered by the ADA. The Pregnancy Discrimination Act (PDA) does not have a Reasonable Accommodation provision and pregnancy itself is certainly not a "disability." The PDA requires the condition of pregnancy and any accompanying medical issues to be treated similarly to the employer's treatment of other short-term medical conditions. However, the parameters have been moving under both laws. The EEOC, plaintiffs and some courts have been demanding accommodation of short-term conditions, and some have been interpreting the Pregnancy Discrimination Act to require similar accommodation as for disabilities under the ADA. The following three cases illustrate this trend. [Also be aware that Reasonable Accommodation of other sorts is required under the religious discrimination provisions of Title VII, and a form of National Origin accommodation is required regarding provision of policies, information, and employment practices for those who do not understand the language of the standard handbook or employment forms – see December Update on Signature On Harassment Policy Is Meaningless If Employee And Supervisor Do Not Read English And Have No Idea What They Signed.

Court Rules Four Month Lifting Restriction Was A Disability Under ADA In A*ustin v. Children's Hospital Colorado* (D. Col., 2018), the court rejected the employer's argument that a short-term duration for limitations and full recovery could not be a "disability" under the ADA. A nurse had shoulder surgery and was limited for four months to 20 lb. lifting. The Position Description required lifting up to 100 lbs. (She actually regained full ability in just over three months.) After the operation she requested return to work with restrictions. The employer felt she could not perform the requirements of the job and terminated the employment. It claimed it had no obligation to engage in an interactive process nor to Reasonably Accommodate since this was a short-term – non-disability situation. The court found otherwise, ruling there was sufficient foundation for an ADA case. The EEOC guidance "makes clear that an impairment lasting fewer than six months can still be substantially limiting." At the time she was fired the nurse could not lift over 20 lbs., and in her personal life "could not reach her hand above her head nor around her back to fasten her bra or remove her shirt as she had done before," both major life activities of personal care and dressing as described in the ADA. Thus the employer's failure to engage in the Interactive Process regarding accommodation could be a violation of the law.

$3.5 Million To Settle Pregnancy Accommodation Issue. A national women's fashion retailer has agreed to settle a case in which the EEOC alleged it failed to grant reasonable accommodations to pregnant employees and to disabled employees in terms of leaves, job duties and job modifications. In addition to payment of $3.5 million, it will modify its policies and practices to give similar accommodation for pregnancy and disability, conduct disability discrimination training for 10,000 employees and report to the EEOC on reasonable accommodation for three years. *EEOC v. The Cato Corp.* (EEOC settlement, 2018).

$1.75 Million To Settle Systemic Pregnancy Case. A health care company will pay $1.7 million and change its "rigid leave policies and practices" which allegedly denied pregnant employees the same reasonable accommodations of extra leave, and job modifications, as done for disabled employees. In addition the company's owners have agreed to undergo special training in prevention of discrimination, harassment, accommodation and pregnancy discrimination. The EEOC will monitor, review and verify for a three year period. *EEOC v. Family Health Care Network* (E.D. Cal., 2018).

Other Litigation

AFFORDABLE CARE ACT

Court Overrules ACA – Nothing Changes A federal court in Texas ruled that the ACA's individual mandate is unconstitutional and unenforceable. Then it held that the individual mandate is the "lynchpin" of the whole law and cannot be severed from the other provisions. So the Entire ACA collapses and is void. *Texas, et al. v. U.S.A.*, et al. (D.C. N.D., TX). However, this ruling is stayed and will not go into effect during the lengthy appeal process. This is a ruling of one court of one of the several federal circuits. So it cannot be seen as "the law of the land" quite yet. The U.S. Supreme Court will make the ultimate decisions on both (1) the individual mandate; and (2) whether the individual mandate is or is not the unseverable lynchpin of the whole ACA. So in the meantime the sign-ups, the coverage, the insurance provisions and payments all continue exactly as is. If the decision is ultimately upheld, there will be major effects in all health insurance which could include elimination of pre-existing condition coverage, restoration of lifetime limits, end of coverage of children up to age 26, and more.

FAMILY & MEDICAL LEAVE ACT

AGENCY

You Hire An FMLA Payroll/Administrative Company To Handle The Process For You, But. . . . you are still responsible for the mess-ups of the "agents" you use. In *Eagle v. SMG Salt Palace* (D. Utah, 2018), the court granted Summary Judgment to the employee without a trial, finding that the employer "undisputedly interfered with FMLA rights" by unreasonably delaying his return to work. The employee stated that he was ready and able to return from FMLA leave and provided a return certificate from his doctor. HR sent this to the outside administrator it had hired to manage FMLA, and did not allow him to return until ok'd by the administrator. Nothing happened for three weeks. The employee made written inquiry as to why he was still out. HR again forwarded this to the administrator, which for some reason requested additional certification. The doctor again provided a full release to return. A week later the employee inquired why he was still being kept off the job. HR again forwarded this to the administrator. A week later the administrator told HR that the employee should be allowed back to work, immediately. In the ensuing FMLA complaint, the employer blamed its Third Party Administrator and sought to get itself off the hook. This failed. An organization is responsible and liable for the acts of the third party agents it selects, and which it entrusts to handle employment issues. Further, the company was itself liable due to HR's negligence in simply passively forwarding messages and "abrogating" its own responsibility to monitor the process and to check and problem solve an obvious issue, which the employee kept messaging HR about.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

Recruiting Firm Liable When Upcoming Six Month Air Guard Duty Crash Lands Hiring Process. A top candidate for a technical job was also a member of the Washington Air National Guard. A recruiting firm was conducting the hiring process, and very enthusiastic about the candidate. There was a six month "place to hire" arrangement. In an interview he told the recruiter that he had an upcoming six month active Guard deployment. The interview suddenly went from enthusiastic to "cautious, and a quick end." The recruiter then sent an email stating "Is it accurate you have an appointment in June?" He replied, "A deployment in late July and I will be back by January." She emailed that the employer was looking for someone full-time. He replied that he intended to have a long-term career with the employer and would come back to the job immediately on return from duty. She emailed that she and the employer wanted someone who would be there for the full six months of the placement for hire contract. The recruiter then proceeded to refer another candidate, not even checking the Guard member's references. The Guard member sued under USERRA and the Washington Law Against Discrimination (WLAD). The court found that the emails constituted direct evidence that the upcoming deployment was a motivating factor in rejecting the applicant. Deployment interruption of a placement for hire or a probationary period is not grounds for not hiring. The time frame can always be extended upon return from duty. *Kimm v. Aerotek, Inc.* (E.D. Wash., 2018).

DISCRIMINATION

HARASSMENT

Manager's Acts Bind Company. Employee Does Not Have To Follow Internal Harassment Complaint Policy When Supervisor Was Present And Participated. A court has allowed a racial harassment case to proceed to trial, even though the employee never followed the company's written complaint policy, and did not inform Human Resources of the hostile environment until her last day of employment (after two months). The plaintiff alleges that her work unit was permeated by daily hostile racial comments such as "blacks are scum," "monkeys," "apes," references of mixed race people as "mixed monkeys," and "chain them and send them back to Africa." The supervisor was present for many of these comments and "thought they were funny." The employee filed a harassment case. The company's defense that she never availed herself of the Harassment Policy failed. The supervisor knew of the behavior, and that management knowledge is "imputed to the company," the same as if the employee had filed a complaint with HR. The company could be liable for failing to address a known situation. *Smelter v. Southern Home Care Services* (11th Cir., 2018).

In a similar case, **An HR Manager could sue without having filed an internal harassment complaint.** The case alleged she received ongoing sexual comments, genital touching, and propositions from the company CEO. When she rebuffed the advances she was isolated, demoted and compelled to quit. The court found that the CEO's behavior constituted a "company endorsement" of the harassment and it would have been futile for the employee to report the behaviors, since she would have been reporting it to the very person who was allegedly harassing her. *Powell v. New Horizons Learning Solutions Corp*. (E.D. Mich., 2018). Many companies have sought to remedy this situation with the Harassment Policy designating a Board member employees can go to regarding unwelcome attention from top executives. It is crucial that the Board member(s) have special training on how to handle the complaints, and that there are alternative procedures, other than HR (which reports to the Executives), to investigate.

RETALIATION

Anti-Retaliation Provisions Do Not Protect One From Illegal Acts. Those who complain, whistleblow or engage in other protected activities have legal protections from retaliation. However, this does not immunize them from all consequences. A Sheriff's Dept. supervisor was engaged in a Title VII Race/Religion discrimination case against the department. She decided to gather evidence for her case by making unauthorized copies of other employees' personnel records, and turning them over to her attorney and the EEOC. She was fired. So she added a retaliation claim to her case. The court granted Summary Judgment against her. State law specifically made it a crime for unauthorized copy or disclosure of personnel records. The anti-retaliation laws do not protect one who engages in unreasonable or illegal behaviors even in pursuit of their discrimination claims. These are not "protected activities." *Netter v. Barnes* (4th Cir., 2018).

Employee Was Sleeping On The Job While Using Her Cell Phone. A court decided that the Postal Services' explanations for firing an employee were pretexts to hide retaliation. The postal security officer, of Asian origin, filed an internal EEO discrimination complaint regarding her supervisor. She was then subjected to a series of negative supervisory actions, culminating in being fired for sleeping on the job. In the ensuing suit the evidence showed that the supervisor seemed to go out of his way to find reasons to discipline her. This included denying her accommodation for an ankle injury, taking away her chair and giving her a broken stool, reversing another manager's grant of permission for her to leave work for a family emergency and turning it into discipline for unauthorized leaving of work. The final instance of sleeping on the job was found to be particularly unfounded. The officer's cell phone record showed that she was engaged in calling or texting other employees during the exact time the supervisor claimed he observed her sleeping (sleep phoning?) plus the court found even if the supervisor's story had been true, "sleeping on the job was not taken seriously in the Boston office. No witness could recall a Boston officer ever being terminated for this." The court found USPS liable for retaliation. *Anderson v. Brennan* (1st Cir., 2018).

LABOR ARBITRATION

Sleeping ? Or Just Deep Listening? A mine worker was fired for sleeping on the job, after already being at the last rung of the disciplinary ladder. He originally admitted he was tired and drowsy, hoping for clemency. Then when he did not get the forgiveness he expected, he changed his story. He claimed he had only closed his eyes so he could listen more intently for any fan defects in the air circulation system. The Arbitrator did not buy the explanation and upheld the discharge. *Morton Salt, Inc. and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, Local 1-00966* (2018)