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Hot off the Press! Legal Updates & Cases for 2023

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A wider lens on workplace law

Job Environment

- The Great Resignation
 - ~47 million people quit in 2022
 - 80% report regretting the decision
 - 70% reported trying to get their jobs back
- Freelance Work
 - 60-70 million freelancers in the U.S. as of 2022
 - 39% of the U.S. workforce



- 5 Generations Actively in the Workforce
 - Silent Generation (78 – 95 years old)
 - Baby Boomers (59 – 77)
 - Generation-X (43 – 58)
 - Millennials (27 – 42)
 - Generation-Z (11 – 26)



Non-Compete Agreements (FTC)

- Promoting Competition in the American Economy – executive order
- Proposed nationwide ban on non-competition agreements
- Applies to independent contractors and anyone who works for an employer, whether paid or unpaid
- require employers to rescind existing noncompetes
- actively inform workers that they are no longer in effect
- Limited exceptions for the sale of business



Separation Agreements (NLRA)

With only limited exceptions, *all* employees have Section 7 rights.

“ the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as well as the right “to refrain from any or all such activities.”

And Section 8(a)(1) of the NLRA says it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”



Separation Agreements (NLRA)

- *McLaren Macomb* decision (Feb. 2023)
- Release agreement cannot include broad NLRA waiver
 - Non-disparagement clause that prohibited negative comments about the employer
 - Prohibited the disclosure of the release's terms
- Mere offer is a violation



Separation Agreements (NLRA)

- *Excluded from having Section 7 Rights*
 - Public-Sector Employees
 - Agricultural and domestic workers
 - Independent Contractors
 - Workers employed by a parent/spouse
 - Employees of air and rail carriers covered by the Railway Labor Act
 - Supervisors



Separation Agreements (NLRA)

“Supervisor” for NLRA purposes:

- The authority to hire, transfer, and suspend employees.
- The authority to lay off, recall, and promote employees.
- The authority to discharge, assign, reward, or discipline employees.
- The authority "responsibly to direct" employees.
- The authority to "adjust [employees'] grievances."
- Or the authority "effectively to recommend" the above.
- And the authority cannot be of a "routine or clerical nature" but must require the exercise of independent judgment.



Separation Agreements (NLRA) - Options

1. Offer your normal separation package with an agreement that has non-disparagement and confidentiality-of-agreement provisions, but add a "Section 7 disclaimer."
2. Offer your normal separation package with an agreement that does not contain non-disparagement or confidentiality-of-agreement provisions but that does contain other provisions important to you -- such as a release of claims. And maybe throw in a Section 7 disclaimer for good measure.
3. Offer a modest amount of severance pay without requiring an agreement at all.
4. Don't require an agreement, and don't pay any severance.



Separation Agreements Con't.

- Speak Out Act (Dec. 2022)
 - renders unenforceable non-disclosure and non-disparagement clauses related to allegations of sexual assault and/or sexual harassment and that are entered into “before the dispute arises.”
 - employers likely can continue to include enforceable non-disclosure and non-disparagement clauses in agreements **resolving** allegations of sexual harassment
- Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act
 - employers likely can continue to include enforceable non-disclosure and non-disparagement clauses in agreements resolving allegations of sexual harassment (or, in the more egregious cases, sexual assault).



Department of Labor & Freelancing

- Independent Contractors
 - Changes again to address qualifications
- The changes:
 - “Economic dependence” is key
 - Eliminates core factors
 - De-emphasizing “actual practice”
 - Economic reality test



Department of Labor & Remote Workers

- **26% of U.S. employees work remotely**, as of 2022.
- There are expected to be **36.2 million** American employees working remotely by 2025 (increase of 417% from pre-pandemic levels)
- **16%** of U.S. companies are **fully remote**.
- **66% of U.S. employees work remotely, at least part-time.**
 - With up to 92% of employees working at least one day per week remotely
- **Currently, 68% of Americans would prefer to be fully remote.**



Department of Labor & Remote Workers

- DOL Guidance for Remote Workers (Feb. 9)
 - Compensation for breaks
 - Record-keeping requirements
- FMLA
 - employee's worksite for FMLA eligibility purposes is the office to which the worker reports or from which assignments are made.



Fair Labor Standards Act

- *Helix Energy Solutions Group, Inc. v. Hewitt*
 - Highly Compensated employee (\$200K)
 - USCT confirmed he was owed overtime
 - Salary vs. a daily rate
 - It was not a “guaranteed predetermined weekly amount”
 - The guaranteed amount was not related to what he earned



FMLA Interference

- *Ziccarelli v. Dart* (7th Cir.) – March 2023
 - Employee with PTSD and other medical issues
 - Took most of his leave already
 - Requested 8 weeks off – FMLA and other paid leave
 - Allegedly discouraged from taking leave – but not denied leave
 - Interference claim does not require a denial of leave



FMLA Interference/Retaliation

- *Render v. FCA USA (6th Cir.)*
 - Employee with history of attendance issues
 - Union negotiated return as a probationary employee
 - Requested FMLA
 - TPA provided intermittent leave
 - Confusion with leave approval
 - Fails to mention FMLA when calls out to employer



FMLA Retaliation

- *Milman v. Fieger & Fieger, PC* (6th Cir.)
 - Attorney did not qualify for FMLA leave
 - Took PTO because son had a cold
 - Failed to return to work when expected
 - Firm denied requested “leave”
 - Managing partner accused her of having no intention of coming back to work
 - Retaliation claim moving forward



EEOC Strategic Plan

- Strategic Plan from 2022-2026
- “Targeted, equitable relief” through lawsuits and conciliation
- No mention of mediation
- Systemic discrimination target
- Outreach to better educate the public
- Not clear when it will go into effect



COVID-19 (EEOC FAQs – Sept. 2022)

- Things Employers Cannot Do
 - Disclose the name of an employee (unless absolutely necessary) to supervisors or other co-workers
 - Ask teleworking employees about COVID-19 testing or symptoms (but can ask employees entering a worksite)
 - Ask about a family member's COVID-19 symptoms (but can ask if person has been “exposed” to symptoms)



COVID-19 (EEOC FAQs – Sept. 2022)

- Things Employers Can Do
 - Test employees for COVID-19 (not antibodies)
 - If refuse answer or test – you can deny entrance
 - Ask onsite employees who say they aren't feeling well about the details of their symptoms (as necessary to determine whether they might have COVID-19)
 - Ask employees why they are absent from work.
 - Ask employees returning from travel where they went, to determine whether they visited a COVID-19 “hot spot”
 - Possibly withdraw a job offer



COVID-19 (EEOC FAQs – Sept. 2022)

- Things Employers Can Do
 - Tell co-workers someone is out/working remotely (don't mention COVID-19)
 - Invite employees to be proactive with accommodation requests
 - Telework – trial basis (if rejected pre-COVID)
 - Interim Solutions for ADA accommodations



COVID-19 & The ADA

- *Lundstrom v. Contra Costa Health Servs* (Oct. 2022)
 - COVID infection did not equate to a disability
 - Company implemented COVID protections
 - Daily temperature checks & mask mandates
 - Mandatory vaccines
 - Employee refused to comply
 - Terminated for refusal



ADA & ADEA

Barley v. Option Care (Nov. 2022)

- Inability to use technology
- 70-year-old employee said she could not use point of care computer system
- Had migraine headaches
- Wanted to fax her reports
- Can faxing be considered a reasonable accommodation?



ADA – Gender Dysphoria

- *Williams v. Kincaid* (4th Cir.) – Aug. 2022
 - Sexual orientation (including “transsexualism”) is not a disability
 - 4th Cir. concluded gender dysphoria is covered under the ADA
 - Psychological distress associated with being transgender is a disability
 - Court took the position the ADA is supposed to be interpreted broadly



ADA – Service Animals

- *Bennett v. Hurley Med. Ctr.* (E.D. Michigan, Jan '23)
 - Nursing intern received initial approval for a service dog
 - Issues with nurses and patients had allergic reactions
 - Allergies are generally not enough to prohibit an accommodation
 - Concluded that accommodation could compromise care provided to patients
 - Not willing to transfer employees who were allergic to the dog to other assignments



Pregnant Workers Fairness Act (June 2023)

- Accommodations for pregnancy, pregnancy-related conditions & childbirth
- Qualified Individuals
- Reasonable accommodation/Undue hardship
- Interactive process



Pregnant Workers Fairness Act

- Illegal Acts:
 - Refusal to make reasonable accommodations
 - Denying employment opportunities for qualified employees
 - Mandating leave instead of providing accommodations
 - Adverse action because of a requested accommodation
 - Retaliation for protected activity
 - Coercing, intimidating, threatening or interfering with an individual's rights
- Limited Defenses



PUMP for Nursing Mothers Act (June 2023)

- Unpaid unless not completely relieved of duty
- 10 days to correct compliance failures
- Protections for mother even if place for adoption or baby's death
- DOL's Guidance & Remote Workers



Respect for Marriage Act (Dec. 2022)

- Repeals the Defense of Marriage Act
- Must recognize marriages if legally entered into
- Cannot discriminate against persons in same-sex marriages or inter-racial marriages
- Must offer the same employment benefits
- Exceptions for religious entities re: same-sex marriages



Religious Accommodations

Groff v. DeJoy (Supreme Court Review)

- “undue hardship” standard
 - Current standard is a *de minimis* cost or inconvenience
 - Signs of adopting the ADA standard
 - "undue hardship" involves a "significant difficulty or expense"



Sexual Harassment

- Offensive music at work
 - Two pending lawsuits are moving through Nevada courts (*Tesla* and *S&S Activewear LLC*)
 - Assertions that misogynistic rap lyrics created a hostile work environment
 - EEOC has filed an appellate brief in support of employees
 - Dilemma
 - Allegations that banning rap music itself was discriminatory



Immigration

- “Process Enhancements for Supporting Labor Enforcement Investigations” (Jan 2023)
- Undocumented workers who are victims or witness labor violations
 - Potentially deferred action
 - Ability to obtain employment authorization.
- New EEOC poster
 - File a charge by scanning the poster’s QR code



Immigration – I-9 Flexibility

- Extended through July 31, 2023
- Applies to employees working exclusively in a remote setting due to COVID-19-related precautions
- Temporarily exempt from the physical inspection requirements associated with I-9 until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.



National Labor Relations Board Oct. 2022 Memo

- Employee tracking
 - Disclose how it is monitoring employee activities
 - What is being monitored
 - Conversations
 - Productivity
 - Protected activity
- Reportedly looking to protect Section 7 rights



Artificial Intelligence – EEOC SEP

- Estimated that 40% of employers use it
 - EEOC comment period to discuss its application
 - EEOC's AI and Algorithmic Fairness Initiative
 - Employer liability for ADA violations
 - Accommodation requests
- Not safe from a “bias free” vendor



Artificial Intelligence – EEOC SEP

- Promising Practices
 - Train designated employees on recognizing accommodation needs
 - Train designated employees on alternative ways to assess job candidates
 - Require the vendor to send all accommodation requests to you
 - Let applicants know that accommodations are available
 - Ensure there are no pre-offer medical inquiries



Questions



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