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July 2011

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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

Labor Relations

NLRB Expands the Concept of Concerted Activity

Some 25 years ago the National Labor Relations Board created the standard for determining when a single employee was engaged in concerted activity to be those times when the individual was seeking "to incite, induce or prepare for group action" or to bring group complaints to the employer's attention. However, two cases decided by the NLRB this year demonstrate how it is expanding the concept of concerted activity. A case decided in January 2011, involved an employee who complained to a coworker about her belief that certain employees were paid higher wages and given preferential treatment. The employee told her supervisor of her complaint, who in turn reported it to Human Resources. Later, the Human Resources Director asked the employee about the nature of her complaints. During that conversation, the Human Resources Director asked if the employee had mentioned her complaints to any other employees, and the employee said she had not. Six days later, the employer terminated the complaining employee. Based on existing precedent, an Administrative Law Judge ruled that the employer did not violate the law by discharging the complaining employee. But in a 2-1 decision on review, Chairman Liebman and member Craig Becker ruled that the employer violated the NLRA. They reasoned that the discharge of the employee for expressing her individual complaint was "a pre-emptive strike to

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prevent her from engaging in activity protected by the [NLRA]." The Board continued, stating that "[i]f an employer acts to prevent concerted activity – to 'nip it in the bud' – that action interferes with and restrains the exercise of § 7 rights and is unlawful." *Parexel International, LLC*.

The Board decided a similar case in March. In that case, the employer maintained a "resort casual" dress code under which male employees could wear untucked Tommy Bahama shirts. An employee returned from vacation and heard a rumor about a new dress code that required employees to tuck in their shirttails. The employee confronted his supervisor and complained about the new dress code policy. The supervisor took the employee into his office, with another employee witness, to scold him and "invited" him to quit. A few days later the employer issued the complaining employee a written warning. An ALJ ruled that the employee's protest of the dress code was not concerted because he acted independently of other employees, in his own self-interest and without a common goal. However, Chairman Liebman and member Becker rejected the ALJ's decision and held that the individual employee's actions were concerted and thus protected, because they occurred in front of other employees – even though he had not solicited his fellow employees' input on the policy before voicing his complaints. *Wyndham Resort Development Corp.*

You may ask why you should care about NLRB activities when you are not a unionized employer--because the NLRA prohibits non-unionized employers as well as unionized employers from taking adverse action against employees who engage in protected concerted activities.

Disabilities

Legally Blind Technician Is Not Qualified Individual Under ADA

An electronic technician who is legally blind was ruled not to be a qualified individual under the Americans with Disabilities Act because he cannot perform the essential job function of driving a company vehicle. The employee suggested allowing his wife, a non-employee, to drive him when necessary as an accommodation. However, a federal district court in South Carolina ruled that his suggestion was not reasonable because it would cause undue hardship to the employer. The court explained that the technician was not a qualified individual because he was unable to drive to work to cover on-call off-site weekend shifts. The employee's contention that his ability to work for a number of years and his co-workers' willingness to work his weekend shifts showed that driving was not an essential job function was rejected by the court. A departmental consolidation resulted in changed staffing requirements that mandated the ability to drive on weekends and his co-workers became unable to cover all his weekend shifts. Finally, the court observed that an attempt to excuse him from weekend shifts resulted in a grievance alleging violation of the union contract. The court also ruled that allowing his non-employee wife to drive and enter work sites would expose the employer to potential liability. The court noted that even though weekend shifts were infrequent it would still be required on a permanent basis and the ADA does not require an employer to permit an additional person permanently to perform an essential function of a disabled employee's position. *Hendrix v. AT&T*, No. 3:09-cv-2174 (D.S.C., 6/6/11).

Infrequent Activities May Still be Essential Functions

The Eleventh Circuit Court of Appeals recently ruled that infrequent activities may constitute essential functions of an employee's position. As a result of the ADAAA, the definition of disability is to be broadly construed. Thus, the focus in ADA cases is now on whether discrimination occurred, rather than on whether the plaintiff has a disability. A defense to a claim of disability discrimination is that discrimination did not occur because the employee was unable to perform the essential functions of

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his job, with or without a reasonable accommodation. This defense stems from the definition of a "qualified individual," which is one of the elements a plaintiff must prove as part of his *prima facie* case. A "qualified individual" is someone with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8)).

The Eleventh Circuit Court of Appeals has long noted that essential functions are the fundamental job duties of a position that an individual with a disability is actually required to perform. In May, the court was faced with the issue of how frequently an employee is required to perform fundamental job duties to deem them essential. The plaintiff was a fire investigator for the City of Montgomery, Alabama who, because of his disability, was unable to engage in firefighting. The city argued that it was not required to retain the plaintiff because he could not perform the "essential function" of firefighting. The plaintiff argued that fire investigators rarely had to engage in firefighting and that this was not an essential function of the position. The court referred to the ADA's implementing regulations, which provide a non-exclusive list of factors indicating whether a particular function is essential. They include: (1) the employer's judgment as to which functions are essential; (2) the written job descriptions of the position; (3) the amount of time spent on the job performing the function; and (4) the consequences of not requiring the individual to perform the function. 29 C.F.R. § 1630.2(n)(3). With respect to the first factor, the court noted that courts give "substantial weight" to the employer's judgment as to what functions of a position are essential, "but that factor alone is not conclusive."

In this case fire investigators rarely engage in firefighting activities. Nevertheless a combination of the first factor (the employer's judgment as to which functions are essential) and the fourth factor (the consequences of not requiring the individual to perform the function) was enough to carry the day for the city:

The assistant chief testified that even absent a direct order, fire investigators have a responsibility to engage in fire suppression activities if the lives of other firefighters or civilians are in danger and fire suppression units are not on the scene. Fire Investigators may engage in fire suppression activities infrequently, but that does not mean firefighting is a nonessential function of the position. Indeed, the firefighting function is essential whenever the need arises, and the consequences of not requiring a Fire Investigator to engage in fire suppression activities when necessary could be dire. Accordingly, the court held that the plaintiff was not a "qualified individual" within the meaning of the ADA, and affirmed the district court's grant of summary judgment in favor of the city. *Cremeens v. The City of Montgomery, Alabama*, No. 10-14695 (11th Cir. May 31, 2011)

Employee Medical File

An employer that retains an employee's personal and occupational health information (including workers' compensation information) in a single record runs the risk of violating federal disabilities bias law, federal genetic discrimination law, or both, according to an opinion letter issued by the U.S. Equal Employment Opportunity Commission (EEOC). The opinion letter, dated May 31, 2011, and signed by EEOC Legal Counsel Peggy R. Mastroianni, stated that though employers and some health providers have legitimate rights to access personal health information under certain circumstances, a combined medical record could lead to violations of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

"An employer's right to access personal health information about applicants and employees and to allow access to occupational health information by individuals providing health services

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unrelated to employment is strictly limited under both the ADA and GINA," wrote Mastroianni. "Therefore, maintaining personal health information and occupational health information in a single electronic medical record (EMR), particularly one that allows someone with access to the EMR to view any information contained therein, presents a real possibility that the ADA, GINA or both will be violated." Mastroianni stated that "we do not interpret either statute's confidentiality provisions as applying only to paper records. Therefore, if an employer maintains medical information and genetic information electronically, it must ensure that it is kept confidential, and disclosed only to the extent permitted by the ADA and GINA." So, the message is to keep all medical records kept for various reasons in separate medical files.

Miscellaneous

Government Turns Up the Heat on Independent Contractor Investigations

Legislation in Congress has been introduced over the last couple of years to limit and regulate independent contractor classifications by employers with the intent of requiring most independent contractors to be reclassified as employees. The legislation has been unsuccessful to date and with Republicans dominating the House of Representatives, the passage of such legislation looks bleak.

However, in an effort to avoid Congress, the various agencies governed by the Department of Labor and the Internal Revenue Service have changed tactics. They are increasing their budget appropriation requests to accommodate more investigations. DOL has requested an additional $46 million in its 2012 budget for a multi-agency misclassification initiative. In addition, the agencies have started sharing information they find during investigations with other agencies. The justification behind these new policies is employee protections and revenue generation—employers who misclassify employees as independent contractors are failing to pay state and federal taxes on them. At stake are overtime, Family & Medical Leave Act, employment discrimination, federal employment taxes and FICA, state employment tax, unemployment compensation taxes, workers' compensation, employee benefits, and union membership.

DOL proposed recordkeeping regulations in April which would require employers to conduct and prepare a written analysis supporting the company's decision to treat an individual as an independent contractor or as FLSA exempt, and require that the written analysis be provided to the individual and to wage-hour investigators. Of course, the analysis will be discoverable by plaintiffs' attorneys seeking to sue employers on behalf of affected individuals. The IRS plans to audit 6,000 businesses per year, every year, through at least 2013, with a focus on independent contractor misclassification. The main problem with analyzing whether an individual is an employee or independent contractor is that the various agencies have their own tests—all different. The Wage and Hour Division has a six-factor economic reality test, IRS has a 20-factor test, and workers ' compensation and unemployment compensation have their tests. The one common thread is how much control the employer has over the individual's job duties, hours of work and where the individual does the work. A wise employer will conduct its own investigation to determine whether independent contractors have been misclassified.

Discrimination

UBS Financial Ordered to Pay $10.6 Million For Firing Worker Who Reported Sexual Harassment

A long time employee filed an internal sexual harassment complaint against a company vice president. The employee was discharged shortly thereafter. In her lawsuit, the 51-year-old employee, who worked at UBS for 22 years, said that after she filed the complaint, company

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management subjected her to protracted retaliation. She alleged that the Vice President repeatedly engaged in sexual banter with her, asked her to perform sexual favors on a client and made numerous late-night phone calls to her home. According to UBS, it investigated the claims and determined that they had no merit. The jury disagreed and awarded the plaintiff $10 million in punitive damages, $350,000 for emotional distress and $242,000 in back pay for the retaliation. *Ingraham v. UBS Financial Services, Inc.*, No. 0916-CV-36471 (Mo. Cir. Ct. May 4, 2011).

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