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Preparing for 2013: A Look Back at Significant Labor and Employment Law Developments

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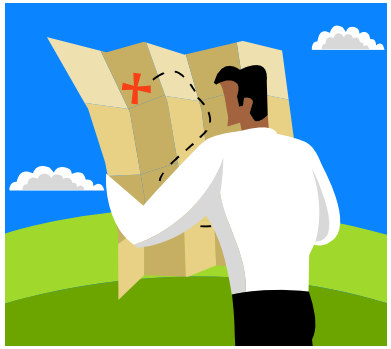
EXPAND YOUR EXPECTATIONS℠

Roadmap

- Employment Discrimination
- Wage and Hour
- ADA
- Labor
- What to expect next year



Criminal Background Checks

- Arguably the most significant development of 2012.
- National incarceration rates support a finding of disparate impact based on criminal background checks.
- EEOC provided new guidance on what it considers lawful in employers' use of criminal background checks
- Blanket exclusion of individuals with a criminal record is unlawful.
- Arrests are not sufficient indicators of criminal conduct.

Criminal Background Checks (cont'd)

- The employer must create a "targeted screen" to analyze how specific criminal conduct is linked to a particular position. Factors include the nature of the crime, the nature of the job, and the time elapsed since the crime.

- In some cases, a targeted screen may be sufficient. The EEOC makes clear, however, that an individualized assessment, with notice to the applicant and an opportunity to demonstrate why he/she should not be excluded, should be conducted in most cases.

If you have not received and reviewed your background check policies, you need to do so.

On A Related Note . . .

- Remember that the Fair Credit Reporting Act also restricts your ability to conduct a background check.
- The FCRA requires written consent prior to a background check. The consent request must be a separate document.
- In Singleton v. Domino's Pizza, plaintiffs brought a class action because Domino's FCRA consent form had a release of liability attached to it.
- The Singleton court held that the Domino's consent form violated the FCRA.

On A Related Note (cont'd)

- Also notable is Pitt v. Kmart Corp., wherein plaintiffs challenged Kmart's use of an electronic signature as a written consent.

- The point of these two cases is that plaintiffs' attorneys are getting creative on FCRA claims and will litigate even the tiniest of issues.

Protection for Transgender Individuals

- What happened: On April 20, 2012, the EEOC determined that discrimination against a transgender individual because that person is transgender is sex discrimination and violates Title VII.

- The Case: Mia Macy, a transgender woman (man to woman), was denied a job with the ATF. Macy applied for the job as a male and was told it was "virtually guaranteed," based on her military and police background and experience with the ATF's ballistics system. After disclosing his gender transition, Macy was told the job's funding was cut. She found out someone else was hired and she sued. The EEOC initially refused to consider her claim for sex-stereotyping/discrimination based on gender identity/sex change. She appealed to the EEOC, which held transgender discrimination equals sex discrimination.

Protection for Transgender Individuals

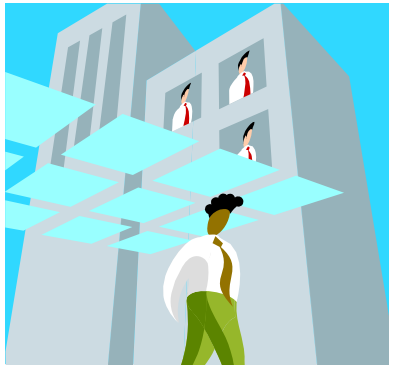
- Title VII prohibits discrimination based on "sex." the courts have interpreted this to mean both sex - - the biological differences between men and women – and gender.

- Example: In *Price Waterhouse,* a female manager was denied partnership because she did not act how some of the partners thought a woman should act (*e.g.*, she should walk more femininely, wear make-up, have her hair styled, etc.). The court held that such sex stereotyping, or failing to conform with gender norms, was sex discrimination.

- Sex stereotyping claims have been recognized here in Tennessee. In *Smith v. City of Salem,* the Sixth Circuit held that a biological male, who presented at work as a female and was suspended, could state a claim of sex discrimination. The Court held that punishing an employee for her gender non-conforming behavior was sex-stereotyping.

Protection for Transgender Individuals (cont'd)

- The EEOC went beyond *Smith* in *Macy*. The EEOC will now consider discrimination because of transgender status to be sex discrimination regardless of whether the claim is based on a sex stereotyping theory.



The EEOC's Systemic Litigation Program

- In a series of rulings, courts across the country have challenged the EEOC's methods in bringing class action/pattern or practice cases. These cases arise out of the EEOC's systemic enforcement initiative, in which the EEOC targets systemic discrimination affecting large numbers or workers or a particular industry.

- The EEOC's tactic has been to file a case on behalf of multiple employees based on a single investigation, often without investigating anything beyond the individual's claim and often without identifying the class members.

The EEOC's Systemic Litigation Program (cont'd)

- This "file first and investigate later (or never)" tactic shirks the EEOC's duty to investigate and conciliate claims before filing suit. It also makes it difficult to resolve claims without litigation, as employers are not willing to pay before the EEOC has made its case that wrongdoing occurred.

- Courts have gone both ways on this issue. Expect to see more litigation over how the EEOC handles large multi-plaintiff cases.

The Cat's Paw

- The theory is that a biased supervisor can impute liability to the ultimate decision maker and the company will be liable, even if the decision maker was not biased.

- The U.S. Supreme Court affirmed the theory in 2011 and we are now seeing cases applying this theory in 2012.

- Chattman v. Toho Tenax America: Supervisor made racist remarks and plaintiff alleged that supervisor's bias was a factor in supervisor asking decision maker to fire plaintiff.

The Cat's Paw (cont'd)

- This arose out of comments made during 2008 presidential election.
- The Sixth Circuit held that the supervisor inserted himself into the decision-making process. He misinformed the decision makers, which led to plaintiff's termination.
- The bottom line is that it is harder and harder to insulate a manager by having a neutral decision maker make the termination decision.

New ADEA Regulations

- The EEOC issued final regulations under the Age Discrimination in Employment Act ("ADEA") on the reasonable factor other than age ("RFOA") defense to disparate impact claims.

- In two Supreme Court decisions, the Court held that disparate impact claims were available under the ADEA but held that an employer did not have to prove the challenged practice was a "business necessity," but only that the practice was based on a RFOA.

- The final rule makes the EEOC's regulation consistent with Supreme Court and explains how the EEOC interprets the RFOA defense.

Reasonable Factors Other Than Age

- It only applies to disparate impact claims -- claims based on a facially neutral policy that disproportionately affects older workers.

- If the employee identifies a specific employment practice or policy and establishes that the policy harms older workers substantially more than younger workers, the employer can defend the claim by showing that its practice is based on a RFOA.

- A practice is based on a RFOA when it is reasonably designed and administered to achieve a legitimate business purpose.

Reasonable Factors Other Than Age

- The extent to which the factor is related to the employer's stated business purpose;

- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

Reasonable Factors Other Than Age

- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

The False Claims Act and Wage and Hour Issues

- The False Claims Act allows whistleblowers to file suit on behalf of the United States if a federal contractor is allegedly defrauding the government and gives the plaintiff a cut of any recovery.

- The FCA applies to federal contractors.

- In Circle K Construction, the Sixth Circuit affirmed the use of the FCA in minimum wage cases. In other words, the plaintiff sued on behalf of the U.S.A. because the contractor was allegedly not complying with federal wage laws. Expect to see this tactic used more in employment cases.

FLSA Private Settlements

- Most courts require the DOL or courts to approve a FLSA settlement.
- This requirement is based on a thirty-year-old case.
- In August 2012, the Fifth Circuit called this case into question and held that private parties may settle cases involving FLSA issues without approval.
- This is important because employers can keep settlements confidential to discourage copycat filings.

FLSA Guidance on Altering Work Schedules to Cut Down on Overtime

- Can you lawfully cut an employee's hours to prevent him/her from working overtime?
- In *Abshire v. Redland Energy Services* (October 2012), the Eighth Circuit upheld this practice.
- Employees worked seven consecutive days, twelve hours a day, followed by seven days off. To cut overtime, the company changed the schedule to a Sunday-to-Saturday schedule.
- Employees filed a collective action, claiming that Redland could not change an existing work week to avoid overtime.
- The Court held that as long as the change is permanent and is implemented in accordance with the FLSA, the employer's reasons for the change are irrelevant.

ADA Causation Standard

- In May of 2012, the Sixth Circuit overturned a previous decision and joined the majority of other federal circuits in adopting a more lenient standard for causation under the ADA.
- Since 1995, the Sixth Circuit has required that disability be the sole factor motivating an adverse decision. Most other circuits require a more lenient standard.
- In *Lewis v. Humboldt Acquisition Corp.*, the Sixth Circuit called its previous standard "wrong." The Court rejected the plaintiff's argument that the test should be whether disability was a "motivating factor."
- Instead, the new standard in the Sixth Circuit is whether disability was the "but for" cause of the adverse action.
- The bottom line for you is that it is easier to prove an ADAAA case. Expect these cases to continue to increase.

ADAAA: The Courts Continue to Define Reasonable Accommodation

- The 2009 amendments to the ADA greatly expanded the definition of "disability" and turned the focus of an employer's defense of an ADAAA claim to issues of defining "reasonable accommodation," "qualified individual," "undue hardship," and "essential functions."
- In 2012, we started seeing these issues litigated.
- In *EEOC v. Eckerd Corp.*, the plaintiff was a cashier who suffered from osteoarthritis in both knees. She sought a reasonable accommodation of being allowed to sit for half of her work day.
- The court held that the plaintiff's proposed accommodation was per se unreasonable because cashiers stock shelves, clean the stores, and work in the photo shop.

ADAAA: The Courts Continue to Define Reasonable Accommodation

- An interesting point from this case is that the store's previous owners had granted her request for accommodation. This highlights the rule that an employer's willingness to provide an accommodation does not establish reasonableness.
- This case highlights the importance of determining a job's essential functions.
- The court also found that the proposed accommodation would have worked an undue hardship on Eckerd. The EEOC argued that the chair was cost free. The court agreed that there was a hardship because plaintiff was essentially to receive the same pay for doing half of the work of the other cashiers.

What the EEOC Has Been Doing . . .

- A Minnesota company settled claims that their policy of requiring employees to come back to work with no restriction unless the injury was on the job.

- A Florida company settled claims that they failed to reasonably accommodate a nurse because they made her compete with other applicants in reassigning her to a vacant position.

- An Oregon company had to pay an applicant after it withdrew a job offer when a pre-employment drug screen revealed that she was taking an anti-epilepsy drug.

- A utility company settled a claim after an applicant for a position on a front-end loader was not hired after failing a DOT physical. The DOT did not require the physical for the particular position and the EEOC believed that an individualized assessment would have shown that the applicant was not a risk.

What the EEOC Has Been Doing . . .

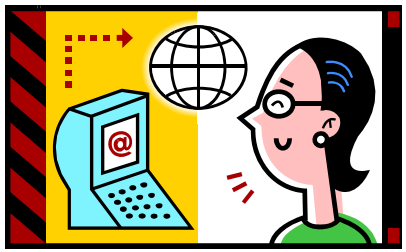
- A Michigan company settled with the EEOC after withdrawing an offer of employment from an applicant who tested positive for tuberculosis. The EEOC determined that the applicant was not contagious and did not pose a risk to himself or others.
- Common threads in ADA cases in 2012: Failure to perform and document the interactive process.
- Failure to conduct an individualized assessment of the person's circumstances compared with the requirements of the job.
- Failure to consider the reasonableness of accommodations and undue hardship.

The NLRB Begins Striking Down Social Media Policies

- In 2012, the NLRB issued multiple guidance documents regarding social media.
- In *Costco Wholesale Corp.*, the NLRB invalidated Costco's employee social media policy.
- The policy prohibited posting any messages that could "damage the Company, defame any individual or damage any person's reputation."
- The NLRB held that employees would reasonably construe this language as interfering with their Section 7 rights.
- In *Knaus Motors*, the NLRB also invalidated the employer's policy on employee courtesy, which prohibited employees from being "disrespectful," or using profanity or other language that "injures the image or reputation of the Dealership."
- The NLRB also invalidated Dish Network's policy, which prohibited disparaging statements about the company or negative electronic discussions on company time.

The NLRB Finally Finds a Social Media Policy It Can Live With

- The NLRB did finally APPROVE a social media policy in 2012.
- In its most recent policy guidance, the NLRB approved of Wal-Mart's social media policy. The Wal-Mart policy should serve as a guide to employers trying to ensure that their policy is in compliance.
- How do you make sure your policy is compliant?
- Model it after the Wal-Mart policy.
- Be very careful disciplining employees for social media posts.



The NLRB Posting Rule

- The rule would have required most U.S. employers to post a notice to employees of their rights under the NLRA.
- The rule was scheduled to go into effect on April 30, 2012.
- The D.C. Circuit Court of Appeals enjoined enforcement of the rule.
- A South Carolina federal court also struck down the rule.
- As of today, the rule is not being enforced. It is likely that this issue will arise again in 2013.

NLRB Guidance on Employment At Will Disclaimers

- Recently, NLRB complaints have raised the issue of whether employers' at will disclaimers were overly broad and could curtail Section 7 rights.
- The NLRB had previously found that the language "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way" was a violation of the NLRA.
- The NLRB's General Counsel recently issued advice memos concluding that two employer handbooks did not violate the NLRA. Handbooks that provide that only certain managers or officials can alter at-will status are lawful. Also lawful are disclaimers that provide that no company representative has the authority to enter into an agreement charging the at-will relationship.

What to expect in 2013?

- More to come on social media. Several states have enacted social media laws. For example, one law prohibits employers from asking for employee passwords.
- The US Supreme Court will decide whether a supervisor must have the ability to hire and fire.
- We will continue to see ADAAA decisions giving further guidance on reasonable accommodation issues.
- The EEOC's tactics in litigation will continue to be litigated.
- Unions and the NLRB will try to move forward with the posting rule.
- Expect further efforts to revise the NLRB's election rules.
- Continued aggressive enforcement by federal agencies in President Obama's second term.

What to expect in 2013?

- Continued focus by the EEOC on large-scale, systemic cases.
- The DOL will continue to focus on misclassification issues.
- The DOL also may move forward with “Right to Know” regulations, which would require employers to prepare a classification analysis explaining why a worker is classified as an employee or an independent contractor.
- The NLRB may decide whether liking something on Facebook is protected activity.