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HR Focus

HUMAN RESOURCES NEWSLETTER SPRING 2016

Move It or Lose It: Plan Sponsors May Not Have the Right to Recover Funds if They Don't Move Fast Enough

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The Supreme Court recently ruled that reimbursement language for the equitable right of recovery—in the event that a third party is found responsible for the expenses paid by the plan or the plan issued overpayment—may not be sufficient to allow the plan fiduciary to recover settlement proceeds that were used on nontraceable items (such as travel, services or consumable goods).

In the case of *Montanile v. National Elevator Industry Health Benefit Plan*, Mr. Montanile was badly injured by a drunk driver in a car accident. He incurred over $121,000 of medical expenses which were paid by his employer-sponsored group health plan. Mr. Montanile later received a $500,000 settlement from the drunk driver's insurance company, of which $240,000 was left after his legal costs were paid. The health plan Summary Plan Description required Mr. Montanile to reimburse the plan for any amounts he recovered from a third party.

When the parties were unable to reach an agreement regarding the reimbursement, the plan sued.

Montanile argued that he'd already spent the money. Both the District Court and Court of Appeals ruled that the plan could go after Mr. Montanile's personal assets.

Mr. Montanile took his case to the U.S. Supreme Court. The Supreme Court ruled that the plan could not go after Mr. Montanile's personal assets if Mr. Montanile had spent all the insurance money on nontraceable items. The Supreme Court held that the plan could only enforce an equitable lien against "specifically identified funds that remain in the [plan participant's] possession or against traceable items that the defendant purchased with the funds."

The Supreme Court sent the case back to the District Court to find out if Mr. Montanile really spent the entire $240,000 on non-traceable items.

The plan argued that the Supreme Court's ruling would encourage participants to spend the settlement money quickly and that this would undermine ERISA's intent to protect plan assets. Only one Supreme Court Justice sided with the plan.

In this particular case, it's quite possible that the plan could have recovered the money had it been more aggressive. Mr. Montanile's attorney gave the plan 14 days' advance notice that he was going to disburse the funds to Mr. Montanile.

The plan did not take action within this window, instead waiting six months before bringing the lawsuit. In the meantime, Mr. Montanile allegedly spent all of the money.

Heads-Up For Plan Sponsors

This case has significant ramifications far beyond group health plans and can also adversely impact disability plans and retirement plans. For example, a plan sponsor who issues a pension plan overpayment may find the error unrecoverable if the participant quickly spends down the payment. In light of this decision, all ERISA plan sponsors need to carefully reevaluate their reimbursement and subrogation procedures. Plan sponsors should:

- Consider monitoring the legal case;
- Put the participant on notice (through his attorney) of the plan's expectation of reimbursement and demand that the proceeds be kept segregated; and
- As soon as the matter is settled, take quick action (through your lawyer if necessary) to make a claim against the recovery.

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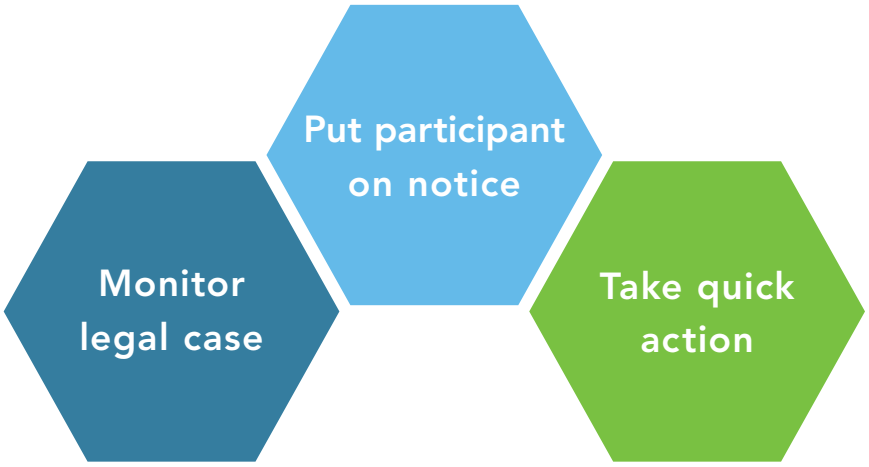

EEOC Reiterates Workplace Protections for Muslim and Middle Eastern Employees

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Following the San Bernardino, California attack in late 2015, crimes against Muslim Americans and mosques spiked in the U.S. This backlash appears to have captured the attention of the Equal Employment Opportunity Commission (EEOC), which has released a Guidance to encourage compliance with workplace protections for individuals who are, or are perceived to be, Muslim or Middle Eastern. Here are some highlights from that Guidance.

Title VII of the Civil Rights Act of 1964 prohibits **workplace discrimination** based on religion, ethnicity, national origin, race or color. This means that employers may not discriminate against Muslim or Middle Eastern employees or applicants. To illustrate, the EEOC presents a scenario in which "Aliyyah," a Muslim woman who wears a hijab (or head covering), applies for a position as a cashier at a retail store. The assistant store manager fears that Aliyyah's religious attire will make customers uncomfortable. The EEOC explains that the employer may not deny Aliyyah the job due to customer preferences about religious attire, because doing so would equate to refusing to hire her because she is Muslim. The employer likewise could not assign Aliyyah to a position with no customer interaction because she wears a hijab.

The EEOC also addresses the issue of **background checks**. In another scenario, "Anwar," whose family is from Egypt, applies for a job as a security guard. The EEOC notes that the employer may require Anwar to undergo the same pre-employment background checks that apply to other applicants for the same position. The employer may not, however, subject him to different or additional screening procedures. To do so would be unlawful discrimination.

The Guidance also addresses the issue of **workplace harassment**. In another scenario, "Muhammad" informs his manager that a co-worker is frequently referring to him as a "terrorist" or "ISIS." Having received this notice, the employer has a duty to investigate. The employer should have Muhammad detail the offensive comments that he has heard, identify others who know about them and interview all involved. The EEOC advises that, if the employer's investigation confirms that this harassing conduct did in fact occur, it must take disciplinary action against the harasser that is sufficient to ensure that it does not happen again.

The EEOC warns that **not all forms of harassment are as obvious**. For example, a well-intentioned co-worker may seek out a Muslim employee—"John"—to learn about his religion. John tells his supervisor about these discussions and says that he is increasingly uncomfortable with them. If John is uncomfortable telling his co-worker that these discussions are actually unwelcome, or if John has already asked him to stop but he has persisted, the supervisor or another appropriate manager should become involved. If the co-worker still persists, the employer should consider taking appropriate disciplinary action.

The EEOC's Guidance serves as a reminder that every employer should have written policies prohibiting ethnic and religious slurs, as well as racial, sexual or other forms of harassment. Those policies should have clear complaint mechanisms for reporting harassment. They should also make it clear that retaliation against anyone who makes a good-faith complaint, or others who provide information about the matter, will not be tolerated. Managers should be trained in how to receive, investigate and resolve complaints of harassment. And when harassment is discovered, the employer must take appropriate action to end the harassment.

The attorneys in our Labor and Employment Law Practice Group can assist employers with the preparation of up-to-date harassment policies, training in implementation of the policies, investigation of complaints, the discipline or discharge of those who violate such policies and other issues or claims that arise out of these harassment and discrimination laws.

Attorney Spotlight: Dean Pacific

Q1: How did your career as an attorney begin?

I attended law school at The Ohio State University and graduated in 1996. During law school, I had the opportunity to work for Warner Norcross as a summer law clerk. After I graduated, I clerked for the Honorable Alan E. Norris of the Sixth Circuit U.S. Court of Appeals. I became very interested in litigation, especially employment litigation, after working at the Court.

Q2: What is your area of specialty?

I specialize in labor and employment litigation. I find the issues (and often the people) that I deal with in these matters fascinating. And I thoroughly enjoy the planning process that goes into preparing to present an employer's case to a judge or jury.

Q3: What is a hot topic for employers right now?

Right now, organizations are competing for talent in the marketplace. That has created an increased focus on covenants not to compete.

Q4: What is a covenant not to compete?

It's an employment contract (or part of a contract) in which the employee agrees that for a certain period of time, they will not engage in competitive activities after their employment with the employer ends.

Q5: How is a covenant not to compete (also known as a non-compete) different than a non-solicitation agreement?

A traditional non-compete agreement will restrict the employee from working for a competitor during a set period of time after employment with the employer ends. A non-solicitation agreement will not restrict an individual's ability to work in the industry, but will prevent them from seeking to do business with their former employer's customers. Some non-solicitation agreements also bar the individual from soliciting their former co-workers to leave the employer and join them somewhere else.

Q6: Do courts generally enforce these kinds of agreements?

Yes, if they are reasonable. The geographic scope of the restriction has to align with the scope of the employer's business, and the time period for the restrictions must also be reasonable.

Q7: In Michigan, what are some of the factors courts take into account when considering whether to enforce a non-compete or a non-solicitation agreement?

The agreement has to protect some legitimate competitive business interest, typically customer relationships or trade secrets. If the employer seeks an injunction—a court order to stop the individual from working for a competitor—they must show that the injunction is the only way to avoid irreparable harm to them. Typically, if the issue could be remedied later simply by awarding monetary damages to the employer, an injunction will not be issued.

Q8: What should employers consider if they are preparing a non-compete or non-solicitation agreement?

Consider who should be signing your non-compete or non-solicitation agreements and the right type of agreement: non-compete, non-solicitation, confidentiality or non-disclosure agreements. Determine which agreement best suits which positions within your organization. And, make sure to structure the agreements so that you protect yourself while successfully recruiting talent.

Q9: What about the employer who is thinking about hiring a competitor's employee? What should that employer consider?

Have an experienced attorney review the agreement in advance of the hire to make sure that employment with your company won't violate it. You don't want to invest your time and resources into bringing a new employee onboard, only to find that she can't actually work for you, or that the hire has resulted in a lawsuit (against your new employee, or even against your company).

The United States DOL Gets Involved in the Reporting of Work-Related Injuries

According to the United States Department of Labor (DOL), a policy requiring an employee to immediately notify the company of a work-related injury is retaliatory and discourages reporting injuries. The DOL articulated its claim in a lawsuit recently filed against US Steel Corporation.

US Steel Corporation suspended two workers for five days because the individuals reported work injuries a few days after the work incidents occurred. In both situations, the employees claim their delay in reporting was because they did not experience symptoms when the accidents took place. Once they became symptomatic, they notified the company of the incidents.

The DOL is seeking for US Steel Corporation to reverse the disciplinary actions and reimburse the injured employees for wages lost during the five-day suspension. Additionally, the DOL is requesting a ruling prohibiting enforcement of a policy that requires employees to report work-related injuries or illnesses less than seven days after the person becomes aware of the condition.

EEOC Proposes Increased Reporting Burden for Many Employers

The Equal Employment Opportunity Commission (EEOC) announced a proposed change to the Employer Information Report (EEO-1) that many employers are required to file annually. The proposed changes will take effect in September 2017 and would require covered employers to provide aggregate data on pay ranges and hours worked along with information already collected. This new pay data will provide the EEOC and the Office of Federal Contract Compliance Programs with information regarding "pay disparities across industries and occupations" and will help to "strengthen federal efforts to combat discrimination." The EEOC states this information would also help employers voluntarily comply with the law and help all agencies "assess complaints of discrimination, focus agency investigations and identify existing pay disparities that may warrant further examination."

Spring Cleaning May Prevent MiOSHA Violations

Instead of throwing things away, do you save things thinking that you may eventually need them? Having a "pack rat" mentality may result in a number of Michigan Occupational Safety and Health Administration (MiOSHA) violations. The most obvious violation is the housekeeping rule (R408.10015) which, in general, requires that all workplace aisles, passageways, storerooms and service rooms be kept clean and orderly. However, other violations may exist including blocked exits (R408.10632(1)), lack of accessibility to fire extinguishers (R408.10831(1)), blocked electrical panels (R1910.303(g)(1)) and lack of accessibility to eye/body wash stations (R325.47201(3)). The next time you are walking through your business, you might want to look for these obvious violations.

Scalia's Death Could Result in the Continuation of Mandatory Union Dues for Public Workers

The death of Justice Antonin Scalia could give unions a reprieve in a suit that could restrict the ability of unions to require dues from public workers. Following oral arguments in January, most expected the Supreme Court to overturn the Appeals Court decision in *Friedrichs v. California Teachers Association* and overturn a nearly 40-year-old standard allowing union fee mandates for all public employees. Without Scalia, the justices would likely be evenly split. In the case of a 4-4 tie, the Supreme Court would issue a one-line ruling saying the lower court decision stands, which would affirm the ruling favoring the unions. The Supreme Court could also delay the case pending the appointment of a new justice, which could mean a year-long delay until the justices can rehear the case.

New EEOC Guidance on Illegal Retaliation Is Proposed

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Nearly 45% of all charges filed with the EEOC allege some form of unlawful retaliation. The EEOC has now issued proposed Guidance on what constitutes unlawful retaliation. The proposed Guidance identifies a three-step analysis:

- An employee must have engaged in a protected activity;
- The employee must have suffered an adverse employment action; and
- The adverse employment action was taken in response to the protected activity.

Public comments were due by February 22, 2016.

The Guidance will be finalized once these comments have been reviewed.

Protected Activities

The Guidance takes a broad view of what constitutes "protected activity." An employee may be protected for calling public attention to claimed discrimination through such activities as:

- Letter writing;
- Picketing; or
- Sending critical communications to a customer, provided the activity is not unreasonably disruptive or excessive.

An employee being harassed will be deemed to have engaged in "protected activity" if she resists a manager's harassing actions and tells him to stop. If the manager then takes or recommends an adverse employment action against the employee, that action could be found to be unlawful retaliation, even though no complaint was ever made by the employee to any other member of management.

Under the so-called "manager rule," some courts have held that a manager is not deemed to be engaging in a "protected activity" if that manager reports or tries to correct what he perceives to be illegal workplace discrimination as part of his job duties. By contrast, the Guidance states that a manager's internal compliance advice concerning civil rights laws can be a "protected activity" and that the manager cannot be punished for rendering such advice.

> Employers must recognize that certain employee words and actions may be legally protected. Employers should not take adverse actions against employees who engage in such "protected activities."

What if an employee makes a broad or ambiguous complaint of unfair treatment to management without indicating a belief that this treatment was due to his race, age, etc.? Such a non-specific complaint will be viewed by the EEOC as being a "protected activity" if the complaint would "reasonably have been interpreted as opposition to employment discrimination."

Retaliatory Actions

An adverse employment action normally must be taken by an employer in response to an employee's "protected activity" for unlawful retaliation to exist.

However, the Guidance cites a number of instances in which nonemployment-related actions could be found to be "adverse employment actions." These could include:

- The employer disparaging the complaining employee to third parties or in the media; or
- The employer making false reports about the employee to government agencies.

Such acts, according to the Guidance, would likely deter "protected activity" and thus be unlawful.

A common defense to a retaliation claim is that the passage of time between an employee's protected activity and an employer's adverse action is not enough to prove retaliation unless there is further evidence of a retaliatory motive. The Guidance does not even make a passing reference to this common defense. Instead, the Guidance gives examples of how a long time period, such as 14 months, may not be enough to disprove a retaliation claim where there is other evidence of a retaliatory motive.

Takeaways

Employers must recognize that certain employee words and actions may be legally protected. Employers should not take adverse actions against employees who engage in such "protected activities." Leaders should be trained to focus on employees' job performance or misconduct when contemplating corrective action and to not retaliate against employees for raising allegations or concerns about workplace discrimination or harassment.

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