Legal Update

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LANCASTER SHRM
Society for Human Resource Management

2023 FALL LEGAL CONFERENCE

AFFILIATE OF SHRM
BETTER WORKPLACES BETTER WORLD™

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Introduction

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Non-Compete

- 2023 FTC proposed ban
- Opinion of NLRB General Counsel
- California strengthens its prohibition
- New state law prohibitions:
  - Minnesota
  - New York (pending)
- New state law restrictions
  - Requirements (for example, Illinois)
  - Restrictions (for example, Washington)

Non-Compete

- Pennsylvania
  - Traps include
    - Same agreement regardless of positon
    - Reaffirmation without consideration
    - Overbroad in terms of duration, geography or activity restrained
  - Proposed legislation
- Template trap

Severance Agreements & McLaren (NLRB)(2023)

- Case involved standard confidentiality and non-disparagement provisions
- NLRB held both interfered with section 7 rights of [former] employees (even though merely proffered)
- NLRB holding applies to union and non-union employees alike but generally only to employees who are not supervisory or managerial employees

Severance Agreements & McLaren (NLRB)(2023)

- Potential remedies
  - Unfair Labor Practice
  - Hold release to be unenforceable

Severance Agreements & McLaren (NLRB)(2023)

- What to do about clause re: confidentiality of agreement?
  - Hard to mitigate risk based on language of case
  - Safest approach relative to NLRB risk: strike the provision

Severance Agreements & McLaren (NLRB)(2023)

- What to do about non-disparagement
  - Number of steps you can consider to mitigate (not eliminate) risk, such as focusing on non-defamation (of products and services) rather than non-disparagement
  - Definitely want strong severability language
  - As with other issues, consult with your counsel

Severance Agreements & McLaren (NLRB)(2023)

- Case is not limited to severance agreements; it likely would apply, at a minimum, to comparable provisions in:
  - Settlement Agreements
  - Codes of Conduct
  - Employee Handbooks/Work Rules
  - Etc.

Increase in Challenges to DEI Initiatives

- Supreme Court 2023 “SFFA” cases.
  - Prior to the 2023 decision, the Supreme Court had held that race could be a “plus factor” in student admissions to colleges and universities under Title VI and the Equal Protection Clause (subject to numerous restrictions and requirements).

Increase in Challenges to DEI Initiatives

- Supreme Court 2023 “SFFA” cases.
  - The Court struck down the affirmative action programs at both academic institutions based on a plethora of concerns
  - While the Court did not expressly overrule precedent, the majority’s analysis creates seemingly-insurmountable obstacles to the affirmative use of race in student admissions
  - Bottom line: the Court effectively has prohibited the use of race by academic institutions as a plus factor in student admissions

Increase in Challenges to DEI Initiatives

- Supreme Court 2023 “SFFA” cases.
  - Opinion does not apply to employment but
    - Spot light on workplace DEI
    - Supreme Court’s articulated concerns are not limited to employment

Increase in Challenges to DEI Initiatives

- Two major legal issues under Title VII:
  - Is it lawful under Title VII for an employer to consider race, gender or other Title VII characteristic in order to increase diversity?
  - Are all discriminatory terms, conditions and privileges of employment unlawful, or is some heightened level of harm required in order for the plaintiff to have a cognizable claim?

Increase in Challenges to DEI Initiatives

- There is no “diversity” exception to Title VII’s prohibition
- The Third Circuit has held that it is unlawful for an employer to consider race, gender or other Title VII factor, (i) even if the goal “laudably” is to increase diversity, and (ii) even if the Title VII characteristic is only a “plus factor” to break a tie. *Taxman/Schurr*.

Increase in Challenges to DEI Initiatives

- Remedial Purpose Exception
  - The Supreme Court has recognized but one narrow exception to the general prohibition on considering a Title VII characteristic: a voluntary affirmative action plan that has a **remedial purpose**, i.e., to eliminate a **manifest imbalance** in traditionally segregated job categories (or to remedy the employer's prior discrimination) *Weber/Johnson*

Increase in Challenges to DEI Initiatives

- Remedial Purpose Exception
  - However:
    - Difficult to meet the statistical and other requirements of the exception
    - Data created to rely on the exception creates legal risks
    - Not entirely clear remedial exception survives in light of analysis in SFFA case

Increase in Challenges to DEI Initiatives

- Issue before Supreme Court next term:
  - Is discriminatory action unlawful only if it "material disadvantages" those who are harmed by it (as the 8th Circuit has held)?
  - Or, is it sufficient for a plaintiff to plead that he or she was harmed by a discriminatory term, condition or privilege of employment without showing a heightened level of harm?
  - Muldrow v City of St Louis Mo, 22-193 (case involves a transfer decision)

Increase in Challenges to DEI Initiatives

- This issue has particular relevance to DEI programs where sometimes an employer provides additional “support” to certain groups with regard to the terms, conditions and privileges of employment based on their Title VII characteristics

Increase in Challenges to DEI Initiatives

- Examples of Unlawful Conduct
  - Establishing a quota
  - Creating a set aside (reserving a positon)
  - Considering in an employment decision race, gender, etc., even if only a plus factor (assuming no remedial purpose)

Increase in Challenges to DEI Initiatives

- Examples of Illegal or Legally Risky Conduct
  - Quantitative (rather than qualitative) diversity goals
  - Linking executive compensation to diversity goals
  - Limiting any program/benefit based on race, color, sex, etc.
    - Mentoring
    - Coaching
    - Training
    - ERG membership
    - Internship

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Increase in Challenges to DEI Initiatives

- Examples of Illegal or Legally Risky Conduct based on language of the SFFA decision:
  - Making employment decision based on stereotypic assumption about diversity of thought or perspective (as opposed to a factual foundation)
  - Making employment decision based on stereotypic assumption about an individual's life experience because of his or her Title VII characteristic (as opposed to the individual's actual life experience)

Religious Accommodations

- General rule: employers must make reasonable accommodations with regard to known religious beliefs, practices or observances that conflict with an employer requirement, so long as the reasonable accommodation does not impose an undue hardship *on the employer's business.*

Religious Accommodations

- Supreme Court granted cert. on 2 issues relative to undue hardship in *Groff*
  - Whether this Court should disapprove the "more-than-de-minimis-cost" test for refusing Title VII religious accommodations stated in *Hardison*?
  - Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employer's co-workers rather than the business itself?

Religious Accommodations

- Issue # 1
  - In *Groff*, the Supreme Court concluded that this long-standing interpretation of *Hardison* was in fact a misinterpretation of *Hardison*.
  - The *Groff* Court then held that *Hardison* actually sets forth a higher standard for establishing undue hardship, one that requires a showing of "substantial" burden on the employer's business.

Religious Accommodations

- Issue # 2
  - Groff makes clear that an employer cannot establish an undue hardship by focusing solely on the impact of a proposed accommodation on co-workers.
  - Instead, employers must go one step further and demonstrate how the burden on co-workers substantially burdens the employer's business.

Religious Accommodations

- Likely impact of Groff
  - Increase the number of religious accommodation claims
  - Make it more difficult for employers to argue successfully undue hardship defense

Religious Accommodations

- Case Study: 5th Circuit decision (just last week): Hebrew v Texas Department of Corrections

Donning and Doffing

- Issue: when do you have to pay for the time employees put on and take off personal protective equipment/gear?
- Under the FLSA, it depends on whether such activities are “integral” and “indispensable” to productive work
  - If yes, the time is compensable
  - If not, the time is not compensable as preliminary and post-liminary work

Donning and Doffing

- Relevant factors under 2023 Third Circuit decision in *Tyger*
  - Changing occurs on the employer's premises
    - By law
    - By the employer's rules
    - By the nature of the work
    - "It is enough that the vast majority do so "regularly" out of practical necessity or in line with industry custom."
  - Laws or regulations require the protective equipment
  - How specialized is the gear
  - Reasonably necessary to perform productive work
  - De minimis exception

Donning and Doffing

- PA state law
  - No prelimnary and postliminary exception
  - No de minimis exception under PA state law as interpreted by the PA Supreme Court decision in *Amazon*
  - If employer requires changing on site, employer must pay per regulations under PA Minimum Wage Law as interpreted in the PA Supreme Court decision in *Amazon*

NLRB Assault on Work Rules

- Stericycle, Inc.:
  - Work rule presumptively unlawful if an employee could reasonably interpret a work rule to restrict or prohibit Section 7 rights (overturns *Boeing and returning to Lutheran Heritage* with a twist)
  - Reasonable employee is economically dependent on the employer and thus would be inclined to interpret an ambiguous rule to prohibit protected activity (beyond Lut*heran Heritage*)

NLRB Assault on Work Rules

- Stericycle, Inc.:
  - If the Board meets its "burden," the burden will shift to the employer to show that
    - "the rule advances a legitimate and substantial business interest" *and*
    - that "the employer is unable to advance that interest with a more narrowly tailored rule."

NLRB Assault on Work Rules

- Examples of types of rules that were found to violate NLRA under *Lutheran Heritage*
  - Respect
  - Civility
  - Non-disparagement
  - Harassment (generic)
  - Confidential Information
  - No recording of conversations
  - No speaking with the media

NLRB Assault on Work Rules

- Minimizing the risk
  - Disclaimer
    - Strong enough?
    - Location?
    - NLRB hostility to disclaimers
  - Wording
    - Check out Memorandum GC 15- 04 dated March 18, 2015 under *Lutheran Heritage*
    - Borrow language where General Counsel opined rule would be lawful

Voluntary Recognition of Union

- NLRB certified election: 30% of eligible employees in appropriate bargaining unit sign authorization cards
  - eligible employees: narrower definition of supervisor under recent NLRB case law
  - micro units (they're back)
  - expedited elections (final rule issued on August 25, 2023 to expedite process)

Voluntary Recognition of Union

- What if union asks for voluntary recognition
  - Decline without looking at cards or petition
  - Training issues

Voluntary Recognition of Union

- What happens if management declines:
  - Historical: union would have to file for an election; no obligation on employer
  - New rule: employer must petition NLRB for an election R case within 14 days of demand by union; failure to meet deadline
    - ULP
    - Management waives right to a board certified election

  See Cemex (2023)

Thank you!

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