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LABOR AND EMPLOYMENT LAW ALERT
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Eleventh Circuit Issues Ruling on Pretrial Disclosures of Expert Witnesses

On August 4, the Eleventh Circuit looked at FRCP 26(a)(2) and pretrial disclosures of expert witnesses and vacated the order excluding the appellant's experts.

The appellant sued the United States under the Federal Tort Claims Act, seeking to recover for damages he allegedly suffered in an accident with a U.S. Postal Service truck. The district court's initial scheduling order included a requirement that "treating physicians offering opinions beyond those arising from treatment" must file a Rule 26(a)(2)(B) report.

The Eleventh Circuit found that the district court wrongly believed Cedant's experts were required by law to submit a full Rule 26(a)(2)(B) report and applied the wrong legal standard. Excluding the witnesses under Rule 37 was an abuse of discretion and thus the summary judgment order was vacated. The court concluded that no rule requires any non-retained expert witness to file a written report under Rule 26(a)(2)(B) and whether a doctor is retained depends on whether she was hired to testify or to treat. The court also wrote that district courts retain the discretionary power to tailor disclosure requirements.

Read the opinion here.

Highlights from the EEOC's Strategic Enforcement Plan for 2023-2027

On August 22, 2023, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) announced it has approved its Strategic Plan for Fiscal Years 2022-2026. The Strategic Plan serves as a framework for achieving the EEOC's mission to prevent and remedy unlawful employment discrimination and advance equal employment opportunity for all.

The EEOC also publishes a Strategic Enforcement Plan (SEP), a separate document which lays out the Commission's specific priorities by highlighting certain areas of law it will aim to address. It is important for employers to familiarize themselves with the SEP as it serves as a litigation-focused agency playbook and outlines issues the Commission seeks to focus on from the investigation and enforcement perspective.

The Draft SEP sets out the EEOC's six subject matter priorities for fiscal years 2023-2027:

- Eliminating Barriers in Recruitment and Hiring;
- Protecting Vulnerable Workers and Persons From Underserved Communities From Employment Discrimination;
- Addressing Emerging and Developing Issues;
- Enforcing Equal Pay Laws;

- Preserving Access to the Legal System; and
- Preventing Harassment Through Systemic Enforcement and Targeted Outreach.

With respect to the first category, the EEOC will focus on recruitment and hiring practices and policies that discriminate against protected groups and marginalized communities. For instance, addressing workplace discrimination caused by artificial intelligence and the lack of diversity in high tech and construction industries will be a heavy area of focus for the EEOC over the next four years.

The Draft SEP's second category expands the "vulnerable worker priority" to a broader range of categories, including: workers with intellectual and developmental disabilities, individuals with arrest or conviction records, LGBTQI+ individuals, pregnant workers, individuals with pregnancy-related medical conditions, temporary workers, older workers, individuals employed in low-wage jobs, and persons with limited literacy or English proficiency.

As for the third category, the EEOC aims to prioritize emerging and developing issues. This priority includes a focus on (1) qualification standards and inflexible policies or practices that discriminate against individuals with disabilities, (2) protecting individuals affected by pregnancy, childbirth, and related medical conditions under the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the newly enacted Pregnant Workers Fairness Act, (3) employment issues relating to backlash in response to local, national, or global events, and (4) "employment discrimination associated with the COVID-19 pandemic.

In the fourth category, the Draft SEP sets out a focus on pay discrimination based on any protected category. The Draft SEP also states the EEOC may use "Commissioner Charges and directed investigations" to enforce equal pay.

The fifth and sixth categories remain largely unchanged from prior EEOC SEPs. The focus for the fifth category, preserving access to the legal system, will continue to identify and target (1) overly broad waivers, releases, non-disclosure and non-disparagement agreements; (2) improper mandatory arbitration provisions; (3) employers failure to keep proper records; and (4) improper retaliatory practices.

Finally, the EEOC will continue to focus on promoting comprehensive anti-harassment programs and practices. This focus will be accomplished through training tailored to the employer's workplace and workforce, using all available agency tools, including outreach, education, technical assistance, and policy guidance.

NLRB Amends Procedures Governing Representation Elections

On August 24 the National Labor Relations Board (NLRB) adopted a final rule which amended procedures for representation elections. The final rule reversed what remained of the amendments made by the 2019 Election Rule. The new rule returns the Board to the election procedures that were put in place in 2014.

The NLRB has stated that the new rule removes delays so that representation elections can be resolved quickly and fairly. For instance, the new rule gets rid of the 20 day waiting period between issuance of the decision and direction of election and the election and instead elections will be scheduled for "the earliest date practicable" after issuance of a decision and direction of election. Some of the other highlights of the new rule are: allowing pre-election hearings to begin more quickly; ensuring that important election information is disseminated to employees more quickly; making pre- and post-election hearings more efficient; and ensuring that elections are held more quickly.

The rule will become effective on December 26, 2023 and will be published in the Federal Register on August 25, 2023.

Find the NLRB fact sheet on the rule **here.**

Find the rule at the Federal Register **here.**

New Minimum Salary Threshold Proposed Affecting Overtime Exemption

The U.S. Department of Labor recently proposed an increase to the Fair Labor Standards Act's (FLSA's) annual salary-level threshold from $35,568 to $55,068 for white-collar exemptions to overtime requirements. The proposed rule would guarantee overtime pay for most salaried workers earning less than $1,059 per week. The DOL is also proposing automatic increases to the overtime threshold every three years.

To be exempt from overtime under the FLSA's "white collar" executive, administrative and professional exemptions, employees must be paid a minimum threshold salary and meet certain duties tests. If they are paid less or do not meet the tests, they must be paid 1 1/2 times their regular hourly rate for hours worked in excess of 40 in a workweek, with certain very limited exceptions.

Prior to January 1. 2020, the salary threshold was $23,660. Former President Obama's administration introduced a rule that would have doubled that threshold, but a federal judge held that the DOL exceeded its authority by raising the rate too high. Former President Trump's administration's then raised the salary threshold to $35,568 per year, at which it currently stands. Economists have observed that, adjusted for inflation, that amount today would be $42,594 annually.

The DOL announced that its new rule would "restore and extend overtime protections to $3.6 million salaried workers." Upon publication in the Federal Register, the notice of proposed rulemaking will be open for public comment for 60 days. The DOL will consider all comments received before publishing a final rule. There may also be legal challenges in the courts.

Source: https://www.dol.gov/newsroom/releases/whd/whd20230830

FTC and NLRB Change Stances on Non-Compete Agreements

On January 5, 2023, the FTC released a proposed rulemaking statement that would essentially ban non-compete clauses in employment. The rule would target non-competes in several ways. "Specifically, the FTC's new rule would make it illegal for an employer to:

- enter into or attempt to enter into a noncompete with a worker;
- maintain a noncompete with a worker; or
- represent to a worker, under certain circumstances, that the worker is subject to a noncompete."

The prosed rulemaking was initially scheduled for a vote later this year, but this has been pushed back to April of 2024. This may be due in part to the 27,000 comments that were received by the closing of the comment period on April 19, 2023.

The proposed rule has supporters and detractors in the legislature with supporters arguing that this will increase wage growth and job mobility, while detractors hold that this will be detrimental to employers who provide specialized training or employ proprietary methods or techniques. Either way, employers should be aware that this potential change could likely become the law of the land within the next year.

As a similar measure with more immediate, but not quite as broad application comes from the NLRB. On May 30, 2023, the NLRB issued a memo to field offices that under some circumstances, non-compete clauses could violate the NLRA. The General Counsel explains:

> "Non-compete provisions reasonably tend to chill employees in the exercise of Section 7 rights when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work," said General Counsel Abruzzo. "This denial of access to employment opportunities interferes with workers engaging in Section 7 activity in a number of ways—for example, workers know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions; their bargaining power is undermined in the context of lockouts, strikes and other labor disputes; and their social ties and solidarity leading to improvements in working conditions at workplaces are lost as they scatter to the four winds."[1]

The General Counsel clarifies that some non-competes, such as those that restrict managerial and ownership interests in competing entities may still be reasonable and enforceable. The primary target here is what the General Counsel refers to as "overbroad' non-compete agreements. This NLRB stance toward non-compete clauses will certainly be tested in the coming months, so employers should pay attention to developments as they unfold.

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[1] https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national

To read more, please refer here.

EEOC Proposes Regulations for Implementing new Pregnant Workers Act

On August 7, the EEOC released its Notice of Proposed Rulemaking for implementing the Pregnant Workers Fairness Act. The Proposed Regulations were published to the Federal Register on August 11, starting the 60-day public comment period. In the interim, the Proposed Regulations provide employers with a glimpse into the EEOC's enforcement strategy. While the PWFA is similar in some respects to the Americans with Disabilities Act and its scheme for providing reasonable accommodations, the proposed regulations provide guidance on how some of the various components of the law should operate. Some highlights include:

Scope, Coverage, and Enforcement: An employer must provide reasonable accommodations to a qualified employee or applicant with a known limitation related to, affected by or arising out of pregnancy, childbirth or related medical conditions, unless the accommodation will create an undue hardship for the operation of the business. The PWFA applies to any employers covered by Title VII, and the enforcement and remedies of PWFA claims are similar to those in Title VII and ADA cases.

"Known limitation": A "known limitation" is a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer where or not such condition meets the definition of disability" under the ADA. In order for a "limitation" to be "known," the employee or employee representative must have communicated the limitation to the employer. The limitation does not have to be severe or require a certain level of severity, and could be something that is "modest, minor, and/or [an] episodic impediment." An employee's limitation could also be related to the health of their pregnancy or seeking health care related to pregnancy or childbirth.

To the extent an employer has "reasonable concerns" about whether a limitation is "related to, affected by, or arising out of pregnancy," the employer should engage in an interactive dialog with the employee and may request certain supporting information from the employee if it is reasonable to do so under the circumstances to make that determination. The ADA can be used as a guidepost for the interactive process which generally involves a discussion between the employer and employee to identify a reasonable accommodation. The EEOC states that in some instances the accommodation request is so straightforward that it would be unreasonable to require supporting documentation, such as if someone who is pregnant asks to carry a water bottle or sit if their job requires a lot of standing.

"Qualified": Employers may be used to having employees labeled as "qualified" who "with or without reasonable accommodation can perform the essential functions of the job," in accordance with the ADA. However, the PWFA is not as strict. Under the PWFA, a "qualified" employee can be someone who is not able to perform the essential functions of their job but only if the inability to perform such functions is a result of a temporary occurrence due to the condition of the employee, the employee can perform the essential functions in the near future and the inability to perform can be reasonably accommodated. In theory, the temporary suspension of a pregnant

employee's ability to perform an essential job function may be 40 weeks or longer. However, an employer may deny such accommodation if it would pose an undue hardship on the business.

Reasonable Accommodations: With the passage of the PWFA, pregnant workers will now have the right to reasonable accommodations similar to the right provided to disabled workers under the ADA. The EEOC's Proposed Regulations list examples of reasonable accommodations under the PWFA, which include: light-duty assignments; frequent break periods; providing an employee with different equipment or devices, such as a stool to sit on; parking; schedule changes; part-time work and paid/unpaid leave; telework; job restructuring; temporarily suspending one or more essential functions; and adjusting or modifying examinations or policies. See the Proposed Regulations for more information and examples of potential reasonable accommodations under the PWFA.

Undue Hardship: Covered employers will be required to provide reasonable accommodations to pregnant employees unless doing so will pose an undue hardship on the employer. Under the PWFA, "undue hardship" means the significant or difficult expense to the operation of the business. Important factors to consider in assessing undue hardship include: the employer's size and financial resources compared to the type and/or form of accommodation requested by the employee; the length of time the employee is unable to perform an essential function; whether there is other work for the employee; the nature and/or frequency of the essential function; whether there are temporary employees that can be hired to complete the job; and whether (and for how long) the essential functions can be postponed. Accordingly, accommodation requests under the PWFA, like ADA accommodations, should be examined on a case-by-case basis.

Note that during this rulemaking process, the EEOC is accepting charges under the PWFA, and employers should take extra care when dealing with pregnancy-related accommodations requests to ensure they are in line with the proposed rules.

The Butterfly Effect? Tort Reform Law Might Lead to Increase in Employment Claims

The Labor and Employment law alert previously wrote on the changes this past legislative session to the law surrounding torts in Florida. One thing for employers to be very cognizant of is the potential impact that this might have on employment related claims. There the effect of the new law will lead to an increase in employment litigation. While Florida is an employment at-will state, employees can bring suit against employers for wrongful termination under any variety of laws. Commonly, such claims would be for employment discrimination or retaliation. Employers would be well-served to evaluate employment handbooks, policies, and procedures and examine best practices to make sure that they are on solid footing to defend against a potential increase in employment related claims. Sound policies and good employment practices are key to defending against such claims.

From the Lighter Side - Whistleblower Tells Congress the U.S. Government Has Secret U.F.O. Program

David Grusch, a former Air Force intelligence officer testified before a congressional committee that the U.S. government has the remnants of a crashed U.F.O. and the corpses of its non-human

pilots. Mr. Grusch said that he had interviewed 40 witnesses over four years, and had been informed of multi-decade government programs to retrieve and reverse engineer U.F.O.s. Mr. Grusch also claims that there exists substantive evidence that criminal activity took place to conceal the programs, and that several people have been killed to keep them secret.

Members of congress have called for wider access to U.F.O. records, including those related to government possession of "technologies of unknown origin." NASA and the Department of Defense refuted Mr. Grusch's claims.

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