HOT ISSUES IN EMPLOYMENT LAW

Presented to
GWSCPA

December 12, 2023

By

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We note that these materials have been prepared as a general discussion outline and should not be deemed to be legal advice. This is an evolving area of the law. Specific questions should be referred to legal counsel.

WHAT IS A UNION?

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UNIONIZATION RATES HAD BEEN ON THE DECLINE

- 1983 – 20.1%
- 2022 – 10.1%
  - Only 7.2% of private sector employees are organized
  - Compare public sector representation at 33.1%

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UNIONS ARE EXPERIENCING A RESURGENCE

- Favorable political landscape
- Union friendly NLRB
- Increase in union activity
  - Petitions for representation ↑
  - Election victories ↑
- Starbucks
- Amazon
- Threatened strikes: railroads, UPS
- Actual strikes – “Hollywood,” Auto (Big 3), Kaiser
- Increased activity among healthcare workers

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WHAT DOES IT MEAN TO OPERATE IN A UNIONIZED ENVIRONMENT?

- Obligation to bargain over wages, hours, working conditions
- Limits on management's rights
- No unilateral changes
- "Weingarten" rights
- Onerous work rules
- "Gotchas"/penalties
- "One size fits all" collective bargaining agreement
- Just cause to impose discipline/employer's burden of proof
- Seniority provisions
- Grievance/arbitration provision
- Union dues – Virginia "Right to Work" state
- Possibility of strikes

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HISTORICALLY – THREE WAYS UNIONS OBTAIN BARGAINING REPRESENTATIVE STATUS

- Voluntary recognition
  - Conditioned upon authorizations from a majority of bargaining unit employees
- *Gissel* bargaining order
  - Pervasive unfair labor practices where there is a majority support
- Secret ballot election

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UNIONS DO NOT HAVE TO ORGANIZE ALL EMPLOYEES

- Appropriate bargaining unit
  - Unions need not seek representation of all employees or all locations
  - The unit does not have to be the most appropriate unit

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MAJOR CHANGE TO EASE UNION ORGANIZING

- NLRB August 2023 decision – *Cemex Construction Materials*
  - Favors union's claim of "majority support" over secret ballot election
  - Employers can be required to recognize and bargain with the union without an election
  - If the union claims majority support among employees and does not file a NLRB petition to represent those employees, the employer must file a RM petition with the NLRB and request an election or face a refusal to bargain charge and a bargaining order without an election ever being held
  - If a petition is filed by the union or the employer and the employer commits unfair labor practices, the election results in favor of the employer can be set aside and the employer may be compelled to bargain with the union – there are no more re-run elections!
  - Therefore, the union can gain bargaining status without the employees voting for that union

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SECRET BALLOT ELECTION PROCESS

- Petition filed with the NLRB
- Identifies bargaining unit
- Petition must be supported by sufficient showing of interest
  - 30% of “employees’ sign cards/petition
  - Generally, full-time and regular part-time employees
  - Supervisors and managers are not employees; generally are not protected by the National Labor Relations Act

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- Majority of valid votes cast determines outcome
- NOTE: Recent NLRB rules expedite the election process, making unionization far easier
- If union prevails, bargaining obligation
  - Upon request, meet at reasonable times/places
  - Mandatory subjects of bargaining
    - Wages, hours and working conditions
  - Post-election and pre-CBA, may have to negotiate over level of discipline before taking action
  - No deadline for reaching agreement
  - If parties fail to reach agreement, neither the NLRB nor courts will dictate terms of collective bargaining agreement

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UNIONIZATION IS USUALLY NOT ABOUT ECONOMICS

- Rather, employees pursue or open to third party representation where:
  - They believe they do not have a voice/advocate
  - Grievances/concerns are ignored
  - Management is out of touch
  - Poor working conditions
  - In sum, poor employee relations/engagement
- But, for employees working for government contractors, unionization can be used in an effort to obtain wage increases above wage determination rates
  - CBA becomes the wage determination

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WHAT MANAGEMENT CANNOT AND CAN DO IN THE EVENT OF UNION ACTIVITY

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WHAT THE SUPERVISOR CANNOT DO

- Don’ts
  - Threaten
  - Interrogate
  - Promise benefits
  - Surveillance

WHAT THE SUPERVISOR CAN DO

- Do’s
  - Facts
  - Opinion
  - Experience

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TIPS FOR AVOIDING EMPLOYMENT LAW CLAIMS

- Review personnel file and ensure ample documentation to support the disciplinary action/promotion decision
- Does the company have a policy regarding discipline for enumerated infractions?
- Is there disparate treatment?
- Beware of the “glowing evaluation”
- Consider the timing of particular employment decisions
  - What is prompting the employment action?
  - Are you inviting a retaliation claim?
- Does the employee enjoy protected status?

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OTHER TIPS FOR MINIMIZING CLAIMS

- Provide regular training on harassment issues/disseminate policies periodically
- Remember – emails count! WAKE UP PEOPLE!!!
- Don't "throw in the kitchen sink" when disciplining or discharging employees
  - False reasons can result in inference of discrimination and merit jury trial

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PREGNANT WORKERS FAIRNESS ACT (PWFA)

- Federal statute
- Effective June 23, 2023
- Expands pregnancy protection by requiring employers to provide pregnant workers reasonable accommodations for pregnancy, childbirth, and related medical conditions unless doing so would create an undue hardship for the employer
- Protects employees from retaliation, coercion, intimidation, threats or interference if they request a reasonable accommodation

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- Remedies and procedures are the same as in Title VII of the Civil Rights Act of 1964
- Definitions for "reasonable accommodation" and "undue hardship" are to be construed the same way as under the ADA
- Damages include reinstatement, back pay, front pay, compensatory damages, punitive damages, and attorneys' fees and costs
- Enforced by the EEOC

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EXAMPLES OF REASONABLE ACCOMMODATIONS UNDER PWFA

- Ability to sit or drink water
- Receive closer parking
- Have flexible hours
- Receive appropriately sized uniforms and safety apparel
- Receive additional break time to use the bathroom, eat, and rest
- Take leave or time off to recover from childbirth
- Be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy

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- Covered Conditions – "known limitations" related to pregnancy, childbirth, or related medical conditions
- Condition does not need to meet the definition of a disability under the ADA
- "Known limitation" is not defined

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PROHIBITED CONDUCT BY EMPLOYER

- Requiring covered employees to "accept an accommodation other than any reasonable accommodation arrived at through the interactive process"
- Denying "employer opportunities" to covered employees "based on the need" to "make reasonable accommodations"
- Requiring covered employees "to take leave, whether paid or unpaid, if another reasonable accommodation can be provided"
- Taking adverse action in terms, conditions, or privileges of employment against covered employees requiring reasonable accommodations

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RECOMMENDATIONS

- Post notice
- Update handbooks/policies
- Train supervisors
- Train HR representatives

- EEOC's Proposed Regulations (Issued in August 2023)
  - Regulations define and interpret requirements of the statute
  - 275 pages of proposed regulations – to be finalized in December

“KNOWN LIMITATION”

- A mental or physical impediment or problem related to pregnancy, childbirth or related medical conditions, including common or minor conditions that have been communicated to the employer
- Unlike the ADA, the PWFA is intended to cover even uncomplicated and healthy pregnancies
- “Limitation” means a modest, minor, or episodic impediment or problem
- Includes “needs or problems related to maintaining the employee’s health or the health or their pregnancy,” as well as when the employee is seeking healthcare for a covered condition

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COVERED CONDITIONS

- "Pregnancy, childbirth and related medical conditions"
- Includes current pregnancy, past pregnancy, potential or intended pregnancy, labor, and childbirth (including vaginal and cesarean delivery)
- "Related medical conditions"
- Examples: termination of pregnancy, including by miscarriage, stillbirth, or abortion; infertility; fertility treatment; lactation and conditions related to lactation; use of birth control; menstrual cycles; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions
- Also, chronic migraine headaches, nausea or vomiting, high blood pressure; incontinence, carpal tunnel syndrome, and many other medical conditions

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QUALIFIED EMPLOYEE

- Employee can be "qualified" even if they are unable to perform essential job functions
- Even if an employee cannot perform one or more essential functions, they are still qualified if:

  (1) the inability to perform an essential job function is for a temporary period;

  (2) the essential job function(s) could be performed in the near future; and

  (3) the inability to perform the essential function(s) can be reasonably accommodated.
- Employees may be required to excuse essential job functions for up to 40 weeks for each accommodation request, absent undue hardship

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QUALIFIED EMPLOYEE (cont'd)

- Childbirth recovery leave period is not included in the definition of "in the near future" for the post-partum period
- Possible accommodations:
  - Temporarily suspending the essential function(s) the employee is unable to perform;
  - Temporarily transferring the employee;
  - Allowing the employee to participate in a light duty program; or
- If no other reasonable accommodation is available, offering a leave of absence

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UNDUE HARDSHIP

- Same as ADA – significant difficulty or expense
- Factors to be considered when employee is unable to perform essential function:

  (1) the length of time that the employee or applicant will be unable to perform the essential function(s);

  (2) whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise;

  (3) the nature of the essential function, including its frequency;

  (4) whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions;

  (5) whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and

  (6) whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long

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ACCOMMODATIONS THAT SHOULD BE GRANTED IN "VIRTUALLY ALL CASES"

- EEOC lists four accommodations that should be provided in "in virtually all cases"

  (1) allowing an employee to carry water and drink, as needed, in the employee's work area;

  (2) allowing an employee additional restroom breaks;

  (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and

  (4) allowing an employee breaks, as needed, to eat and drink.

- EEOC states that these accommodations would rarely impose an undue hardship
- Analysis should be "simple and straightforward" and that requesting documentation, beyond a self-attestation, would not be reasonable.

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