MARYLAND STATE BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
Volume XX, Number 2
Spring/Summer 2015

NEWSLETTER

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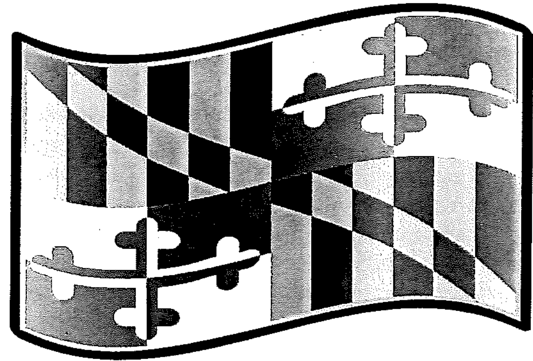

FROM THE CHAIR:
By Darryl G. McCallum

It has been a busy spring for the Labor and Employment Section. On April 9, 2015, we sponsored a Brown Bag Lunch at the NLRB discussing the new rules covering Representation Case Procedures. The new rules, which took effect on April 14, 2015, expedited the union election process. The program featured a presentation by the Regional Director of the NLRB Regional Office in Baltimore, MD, Charles Posner. Mr. Posner's presentation was followed by a question and answer session, including comments from the management perspective by J. Michael McGuire of the law firm of Shawe Rosenthal, and from the union perspective by Jim Rosenberg of the law firm of Abato, Rubenstein & Abato.

On May 7, 2015, the Section sponsored another Brown Bag Lunch, this time at the EEOC featuring the EEOC Administrative Law Judges. A special word of thanks goes to Chief Administrative Judge Mary Elizabeth Palmer for organizing this program, which discussed issues affecting the litigation of federal sector discrimination cases at the EEOC.

On May 12, 2015, the Section sponsored a program in conjunction with the Montgomery County Bar Association discussing recent cases and changes to the Maryland wage laws and the Federal Fair Labor Standards Act. The speakers included Gregg Greenberg from the firm of Zipin, Amster & Greenberg, Jim Hammerschmidt from the firm of Paley, Rothman, Goldstein, Rosenberg, Eig and Cooper, Daniel Katz from the law offices of Gary Gilbert and Associates, Richard Neuworth from the firm of Lebau & Neuworth, and former Assistant Attorney General Jonathan Krasnoff.

On May 18, 2015, in conjunction with the Litigation Section, our Section sponsored a Spring Dinner Meeting in Columbia, MD on temporary restraining orders and preliminary injunctions in federal and state court. The speakers for this event included Judge Benson Legg (ret.) of the U.S. District Court for the District of Maryland, Judge Michael Mason of the Circuit Court for Montgomery County, Matthew Fader, the Deputy Chief of Civil Litigation for the Office of the Maryland Attorney General, and Timothy Maloney from the firm of Joseph, Greenwood and Laake.

Finally, we are excited about our program for the Annual Meeting in Ocean City, MD on Friday, June 12, 2015 which will discuss litigating retaliation claims under federal and state law. Our Program Chair is Melissa Menkel McGuire and our featured speaker for this year's program will be Attorney General Brian Frosh. I look forward to seeing everyone at the Annual Meeting.

EDITOR'S CORNER:
By Albert W. Palewicz

We have (possibly) made it through the interminable winter. Now we just have to hope it will be warm enough in mid-June for some beach time at Ocean City. The Section's program, as described in Darryl's article opposite this one, looks to be of interest to all Section members and others as well. We hope to see a good crowd at the ocean!

The edition of the newsletter has been prepared by attorneys at the Bethesda firm of Paley, Rothman, with Section Council Member Jim Hammerschmidt as coordinator. Many thanks to Jack Blum, Ethan Don, Hope Eastman, and Jessica Summers, who did the greatest share of the work on the articles. The info covers topics from ERISA to the NLRB, from EEOC to OFCCP, from fiduciaries to insurance plans, as well as various other topics of federal, state, and local interest.

Supreme Court opinions as recent as June 1 are included, and everyone who reads the newsletter will find it useful, I am sure. Again, thanks to all those who worked on it.

See you at the Friday morning program of the Section, with Attorney General Brian Frosh as our featured speaker. Be there if you possible can.

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This Maryland State Bar Association Newsletter is not intended to provide legal advice, but rather to provide information concerning recent developments in the field of labor and employment law. Questions concerning individual problems or claims should be addressed to legal counsel. Any opinions expressed herein are solely those of the authors, and are not those of the Maryland State Bar Association. Finally, the articles contained herein are copyrighted, all rights reserved by the respective authors and/or their law firms, companies or organizations.

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ARTICLES

WORKPLACE WOES OVER WEED?

By Ethan L. Don, Paley Rothamn

The attitude toward the use of marijuana for recreational and medicinal purposes is changing rapidly. State governments are passing new laws reflecting these changed views and the federal government has changed its enforcement policies. Federal law, however, specifically the Controlled Substances Act, continues to classify marijuana as a Schedule I controlled substance. Despite this, nearly half of the States (23 in total) plus the District of Columbia and Guam have laws which legalize some form of marijuana use and possession. The scope of the laws varies widely. For example, Maryland has enacted medical marijuana laws (though final regulations have not been implemented) and recreational possession of small amounts of marijuana has been effectively decriminalized. In the District of Columbia, medical marijuana laws exist and the city has further expanded the permissible possession and use of marijuana. In Virginia, marijuana remains criminalized, except for use of marijuana oil by epileptics. By comparison, Alaska, Colorado, Oregon, and Washington have, with certain limitations, legalized both medical and recreational use of marijuana.

The hash of laws is not only complicated for prosecutors, law enforcement officers, and individuals, but it also creates a host of questions and issues, some without any clear answer, for employers. Employers and their legal counsel can expect to face situations regarding background checks, disciplinary policies, impairment and drug use policies, at-work vs. personal time activities, disability accommodations, and even discrimination against marijuana users. This article attempts to provide a high-level overview of some, but not nearly all, of these situations.

Background Check Issues.

Many employers recognize that, at least in the eyes of the EEOC, blanket background checks are now effectively forbidden and that only targeted screens should be used, and even then carefully. The wrinkle put in place by new medical and recreational marijuana laws is how employers review and treat: (1) old offenses which under new laws would not qualify as criminal; (2) new offenses which might be illegal in the state where the applicant lives but not where the applicant would work, or vice versa; and (3) de-criminalized offenses which now result only in fines (like many traffic citations).

For example, how might a Maryland employer treat an applicant for a safety-critical position whose targeted background check reveals that she was convicted in Maryland, two years ago, of possession of 9 grams of marijuana? Under Maryland's current law, simple possession of less than 10 grams can result only in a civil fine, akin to a traffic citation. In effect, the conviction could just be ignored because the underlying acts

are no longer considered criminal at the state level. At the same time, the applicant was still in violation of federal law and the possession is at least an indication of marijuana use which may call into question whether the applicant can perform a safety-critical role. Therefore, despite the state's de-criminalization, the employer probably needs to allow the applicant to explain the conviction and discuss with the employer her ability to perform the job without impairment. If the employer is using a third-party to provide the background check report, it may wish to consider excluding these types of violations, as it might for minor traffic violations or misdemeanors.

Employer policies, public policy, and reasonable accommodations.

For current employees, the employer needs to consider the related issues of the employer's disciplinary policies, drug testing policies, and the relevance of medical or recreational marijuana use both during work and outside company time. Neither the laws of Maryland nor those of D.C. directly address whether an employer may discipline an employee for lawful use or possession of marijuana, whether an employer may discriminate against a user of marijuana, or how an employer may or must accommodate an employee using medical marijuana as prescribed by his or her medical practitioner. Maryland law appears to protect authorized users of medical marijuana from being "denied any right or privilege [] for the medical use of marijuana." See Md. Code Ann., Health-Gen. § 13-3313 (West 2014). D.C.'s code is simpler, stating only that a "qualifying patient may possess and administer medical marijuana, and possess and use paraphernalia[.]" *See* D.C. Code § 7-1671.02 (West 2015). The lack of on-point statutes or regulations likely means it will take litigation and interpretation by the courts to resolve some of these questions. In addition, because both Maryland and D.C. recognize a public policy exception to the employment at-will doctrine, employers have to consider whether specific rights to use medical marijuana and to possess marijuana for recreational use are clear mandates of public policy. If they are, and an employee is terminated for lawful marijuana use or possession, an employee could conceivably bring a wrongful or abusive termination claim based on the violation of public policy.

Let's look at another example. An employee is undergoing chemotherapy treatments for cancer. He is initially able to perform all duties and responsibilities without any accommodation but, as the chemotherapy progresses he frequently becomes nauseous and struggles to stay on task because of it. To combat the nausea, his doctor prescribes medical marijuana, to be smoked, vaporized, or eaten, at least once every 4 hours, but the "dosage" will not exceed the legal limits. This will require the employee to use marijuana while at work. The employer has a strictly enforced zero-tolerance drug policy. What is the employer to do? Must it make an exception to the zero-tolerance policy? Should it? If so, how might it accommodate the employee without interfering with other employees? What is the interplay between accommodation and impairment at work?

Without getting into the fine terms, interpretations, and court rulings, suffice it to say that the Americans with Disabilities Act (the ADA, including its amendments) requires employers to provide reasonable accommodations for employees with disabilities, but the accommodations requirements do not apply to the use of illegal drugs and employers are not required to permit illegal drug use in the workplace. This sets up a tension between federal law, where marijuana remains illegal, and state laws, where its use or possession may be legal. Courts have begun to address this tension, siding with employers based on federal law. The Sixth Circuit Court of Appeals has held that "private employees are not protected from disciplinary action as a result of their use of medical marijuana, nor are private employers required to accommodate the use of medical marijuana in the workplace." *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 437 (6th Cir. 2012). Similarly, the Ninth Circuit has held that medical marijuana users are not protected from alleged discrimination based on their use of medical marijuana. *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012). In Casias, the court was very clear, holding that:

> [D]octor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA, and that the plaintiffs' federally proscribed medical marijuana use therefore brings them within the ADA's illegal drug exclusion. This conclusion is not altered by recent congressional actions allowing the implementation of the District of Columbia's local medical marijuana initiative.

Even Colorado, a state with some of the most liberal laws on the use of marijuana, does not prohibit an employer from terminating an employee for failing a drug test as a result of off-the-job legal (by state law) medical marijuana use. *See Coats v. Dish Network, L.L.C.*, 2013 COA 62,, 303 P.3d 147 *cert. granted sub nom. Coats v. Dish Network, LLC*, No. 13SC394, 2014 WL 279960 (Colo. Jan. 27, 2014)

The Maryland and D.C. courts have yet to weigh in on these issues. As a result, an employer could maintain the zero-tolerance policy and accept the risk of a claim for disability discrimination or failure to provide a reasonable accommodation. Or, the employer could provide for the accommodation, recognizing that it can be narrow and that there is little or no risk that the employer is acting unlawfully in granting an accommodation. To mitigate the risk that other employees may be affected by marijuana smoke or vapor, the employer could require that the marijuana be in edible form and could further provide the employee a short break when necessary to leave the premises in order to consume the marijuana. Whatever the employer decides, it then has the obligation to ensure that its policies and accommodations are uniformly applied. It also seems safe to conclude that the employer does not have to tolerate an employee's impairment caused by use of marijuana. In fact, any impairment which has a negative effect on the employee's ability to perform his or her job or which creates a legitimate safety concern weighs in favor of concluding that the use of medical marijuana in the workplace is not a reasonable accommodation.

What about off-work activities?

Consider another hypothetical situation: On a weekend, at a non-work event at a private location, a supervisor observes an employee smoking marijuana. The following Monday, the supervisor instructs the employee to immediately be drug tested. The employee subsequently fails the test due to the presence of THC from marijuana in his system. The supervisor terminates the employee based on a policy that per-

mits termination for any failed drug test, despite no indication that the employee was ever impaired or under the influence at work. Was the employer within its rights? What can the employee do and how might an employer defend an action?

Presently, there is no specific law in Maryland, D.C., or Virginia which specifically prohibits an employer from disciplining, including terminating, an employee who uses marijuana recreationally or who fails a drug test. (And, as noted above, it's not even clear if the laws in Maryland or D.C. protect medical marijuana users from employment decisions related to the use of medical marijuana.) There are also no laws in these jurisdictions which prohibit a zero-tolerance drug policy. An employee's options are thus quite limited. If not all employees caught using marijuana were treated equally, the employee might have a discrimination claim. Even if those facts do not exist, the employee still might be able to bring a wrongful or abusive termination claim against the employer.

As noted above, both Maryland and D.C. recognize a public policy exception to the employment at-will doctrine, meaning that employers have to consider whether specific rights to use medical marijuana and to possess marijuana for recreational use are clear mandates of public policy. If they are, and an employee is terminated for lawful marijuana use or possession, an employee could conceivably bring a wrongful or abusive termination claim based on the violation of public policy. Maryland has decriminalized, as opposed to legalized, recreational possession of small amounts of marijuana, but the employee could argue that decriminalization equates to a public policy of the State that personal use of marijuana is not to be penalized. If an employer can terminate an employee for exercising his or her right to use marijuana, implicitly forcing the employee to give up a lawful right outside the workplace or face disciplinary action at work, this could be claimed to violate public policy. However, the employer could just as forcefully argue that since federal law continues to criminalize possession of marijuana, and Maryland has not legalized recreational use of marijuana (it decriminalized it), it has a right to maintain a drug-free workplace and no enforceable public policy exists to support a wrongful discharge claim. This may not be a particularly strong claim for an employee, but employers should be aware of such a possible claim. Similarly, the same situation could arise in context of the use of medical marijuana where the public policy argument in favor of an employee may be stronger.

Ultimately, this is probably a push given the state of the law and its development. To help avoid this situation, one practical solution might be to adapt policies to the changing social and political views on marijuana use and revise applicable drug use and testing policies to account for the fact that marijuana (specifically, THC) can remain in an employee's system for days after its effects have worn off. Then, an employer could institute a progressive discipline or testing regimen specific to marijuana.

There are a myriad of other potential scenarios that an employer might face under the new marijuana use laws or enforcement policies. Everyone involved in these situations should keep abreast of the changing laws, especially when the employers involved are multi-state employers, and continually reevaluate policies and actions in light of changes or new legislation.

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[i] *See* Memorandum, Guidance Regarding Marijuana Enforcement, August 29, 2013, available at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

[ii] According to the DEA, "Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote[.]"

[iii] Courts have taken note of the developments in state law and federal enforcement, however, when making rulings. *See, e.g., United States v. Dayi, 980 F. Supp.* 2d 682, 687 (D. Md. 2013) (in a criminal case, specifically discussing changes at the state and federal level when determining sentencing).

[iv] Of course, the situation would only get this far if there were no other reasonable accommodation which could be provided, such as paid leave, an alternative drug, a scheduling change, etc.

[v] This may not end the reasonable accommodation inquiry, however, as the next question would be whether the employer could provide unpaid leave as an accommodation during the period when medical marijuana was prescribed and used.

EEOC LOSES A FOURTH CIRCUIT CASE ON BACKGROUND CHECKS

By Hope B. Eastman, Paley Rothman

Equal Employment Opportunity Commission v. Freeman, No. 13-2365, 2015 WL 728038 (4th Cir. Feb. 20, 2015) deals with the EEOC position on background checks. In this case, the Court of Appeals rejected the report of the EEOC's expert, Kevin Murphy, introduced to show disparate impact. Finding that without Murphy's report the EEOC had failed to make a prima facie case of discrimination, the Court of Appeals upheld the District Court's summary judgment for the defendant. With this decision the Fourth Circuit joins the Sixth Circuit, which in *EEOC v. Kaplan Higher Education Corp,* 748 F.3d 749 (6th Cir. 2014), also rejected the work of Dr. Murphy for similar reasons.

Some history is in order. The allegations against Freeman were that Freeman engaged in a pattern or practice of discrimination against African-American job applicants by using credit history and against African-American, Hispanic, and male job applicants by using criminal background checks, alleging that both have a significant disparate impact. Freeman used credit checks for credit sensitive jobs and criminal background checks for all others. Typically background checks were run after the applicant was offered and accepted a position, but before he or she began work. Freeman only looked back seven years for possible convictions, ignored any arrests that did not result in a conviction or guilty plea, focused primarily on criminal conduct involving violence, destruction of private property, sexual misconduct,

or felony drug convictions, and required a two-level review before a decision to disqualify was made. Although the District Court opinion by Judge Titus focused primarily on the failings of the expert report, the Judge expressed the opinion in a footnote that Freeman's policy seemed "reasonable and suitably tailored to its purpose of ensuring an honest workforce." *EEOC v. Freeman,* 961 F. Supp. 2d 783, 788 n.3 (D. Md. 2013).

Noting that a disparate impact case must be based on "reliable and accurate statistical analysis performed by a qualified expert" to demonstrate disparate impact, Judge Titus looked closely at the expert report relating to the Freeman workforce. He bluntly rejected admission of the report, using strong language. In doing so, he concluded the report contained a "plethora of errors and analytical fallacies," rendering Murphy's conclusions "completely unreliable." Judge Titus further commented that the database contained a "mind-boggling number of errors." He also rejected the EEOC's argument that the case could go forward based on the EEOC's proffered national statistics. He ruled that the case could not go forward without workforce appropriate statistics or a valid expert analysis and further pointed out that the EEOC had failed to isolate a specific employment practice of the defendant that allegedly caused the disparate impact. The Court of Appeals addressed the report issue and national statistics and also held that the EEOC had failed to make a prima facie case and, therefore, the case could not proceed.

A highly pointed concurring opinion by Judge G. Steven Agee of the Court of Appeals expressed distress at the EEOC's conduct in the case, cautioning that the "EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its "significant resources, authority, and discretion" will affect all "those outside parties they investigate or sue." "The Commission's conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so." Judge Agee also excoriated the expert report. He drew on language that the Sixth Circuit had used to reject Murphy's report and testimony, i.e., that his methodology "flunked every test used to assess expert reliability." *Id.* at 752. Judge Agee went on to quote the Sixth Circuit's view that Murphy's testimony and report amounted to "a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." *Id.* at 754. He then concluded that the Sixth Circuit description "describes the EEOC's expert evidence in this case to a tee." In light of the EEOC's long interest in limiting the use of background checks, it is astonishing that the EEOC continued for so long to rely on such sloppy expert work. The EEOC, finally, has brought in different experts for its future work.

Neither the Fourth Circuit nor the Sixth Circuit have ruled on the merits of the EEOC's position on background checks. In the final footnote of its opinion, the Fourth Circuit emphasized that it expressed no opinion on the merits of the EEOC's claims. Given that this issue has been at the forefront of EEOC efforts to eliminate barriers to employment, it is not surprising that it continues to bring suits on this issue. Two to watch are pending in South Carolina and Illinois. It will be interesting to see, as the cases proceed in 2015, whether the EEOC approaches them differently.

The EEOC has been concerned with the issue of credit and criminal background checks since the early days of Title VII and it has been a priority for the Obama Administration. In 2011, U.S. Attorney General Eric Holder assembled a Cabinet-level Interagency Reentry Council to support the federal government's efforts to promote the successful reintegration of ex-offenders back into their communities. The EEOC's Strategic Plan and Strategic Enforcement Plan, adopted in 2012, lists an attack on barriers in recruitment and hiring as the first of the six Commission priorities to which it would devote the time and resources of the EEOC. One of the major pillars of that attack has been challenging employers' use of credit and criminal background checks to screen out applicants for employment. Also, in 2012, the EEOC issued new and detailed guidance on the use of criminal records. *EEOC Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April 25, 2012) (the "Guidance").*

The Guidance asserts that the use of criminal conviction records in employment violates Title VII because it had a disparate impact on African Americans and Hispanics who are more likely than whites to be arrested and/or convicted of crimes.

Despite the *Freeman and Kaplan* losses, the EEOC will continue to rely on the Guidance as its basic policy. The Guidance puts the burden on employers to assess their use of exclusionary background checks to determine if there is an adverse impact on their African American and Hispanic applicants and, if so, to determine whether the background check is job-related for the position in question and consistent with business necessity. The Guidance urges employers to develop policies that restrict the use of criminal records accordingly and involve, at a minimum, an individualized inquiry. The Guidance relies on a 1975 Eighth Circuit Court of Appeals decision in *Green v. Missouri Pacific Railroad,* 523 F.2d 1290 (8th Cir. 1975), where the Eighth Circuit held that it was discriminatory under Title VII for an employer to disqualify for employment any applicant with a conviction for any crime other than a minor traffic offense. The Eighth Circuit identified three factors (the "Green factors") that were relevant to assessing whether exclusion of an applicant is job-related for the position in question and consistent with business necessity. The Commission takes the position that a policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the Green factors because it does not focus on the dangers of particular crimes and the risks in particular positions. Employers must, under the Guidance, consider these factors in their use of such records:

- nature and gravity of the offense or conduct
- time that has passed since the offense or conduct and/or completion of the sentence and
- nature of the job held or sought

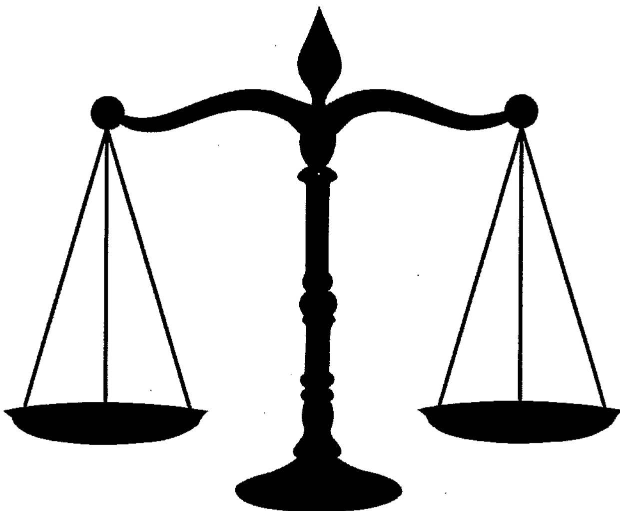
More than sixteen states and localities, including Montgomery County, Prince George's County, Baltimore City and the District of Columbia have passed "ban the box" statutes and ordinances which ban asking about an applicant's criminal record on the employment application question. Quite a number of other jurisdictions have such legislation applicable either to government employees or private employers with government contractors. The four in this area go way beyond "ban the box" to regulate both the timing of criminal background check inquiries and the circumstances under which they can be asked at all. See Montgomery and Prince George's Counties Join Baltimore City in Banning the Box" published herein.

It is important to pay close attention to the jurisdictions where a business operates or an employee works in this area as the four jurisdictions now have laws that differ in significant ways and present significant challenges for multi-jurisdiction employers.

Employers need to monitor developments in this area, review their background check policies against the EEOC Guidance and the plethora of new laws regulating the use of background checks. If the EEOC is unable in future cases to make its statistical case that employer policies have an adverse impact, the role of the EEOC will be sharply limited. Employers must also be sure they are complying with the Fair Credit Reporting Act requirements, especially since there has been a sharp uptake in lawsuits challenging employer failures to comply.

At the same time, however, the battle is shifting to state and local lawmakers who are passing laws without having to make or defend the assertion that there is an adverse impact. It can be expected that this trend will continue as the exclusion of those who have criminal convictions from employment and voting continues to grow as a large public policy issue.

[1] *EEOC v. BMW Manufacturing Co., LLC,* Case No. 13-cv-01583 (Filed Jun. 11, 2013, D.SC) and *EEOC v. Dolgencorp, LLC,* (Filed Jun. 11, 2013, N.D. Ill.).



OFCCP UPDATE: EXECUTIVE ORDER 13673, FAIR PAY AND SAFE WORKPLACES

By Hope B. Eastman, Paley Rothman

Since April 2014, President Obama has signed a long list of Executive Orders affecting government contractors' relationships with employees. None has triggered more opposition than Executive Order 13673 which calls for greater scrutiny of government contractor bidders' compliance with a myriad of federal and state laws relating to labor law and workplace safety and creates a vast new compliance mechanism. Not surprisingly, there is a sharp difference of opinion between proponents of the Executive Order and opponents who have dubbed it the "Blacklisting Order." The opposition has been escalating in 2015.

Along with issuance of the Executive Order on July 31, 2014, the White House issued a Fact Sheet. Based on the Order and the accompanying Fact Sheet, the law's provisions and purposes are as follows:

- Agencies will require prospective contractors to disclose labor law violations from the past three years before they can get a contract. Contractors will be responsible for getting this information from many of their subcontractors as well. The fourteen covered Federal statutes and equivalent state laws identified in the Executive Order include those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections.
- The purpose of the Executive Order is to crack down on repeat offenders. Contracting officers will take into account only the most egregious violations. Each agency will designate a senior official as a Labor Compliance Advisor to provide consistent guidance on whether contractors' actions rise to the level of a lack of integrity or business ethics. The Labor Compliance Advisor will support individual contracting officers in reviewing disclosures and consult with the Department of Labor. The Executive Order states that this process will ensure that the worst actors, who repeatedly violate the rights of their workers and put them in danger, don't get contracts and thus can't delay important projects and waste taxpayer money.
- The goal of the process created by the Executive Order is to help more contractors come into compliance with workplace protections, not to deny contracts to contractors. Companies with labor law violations will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and remedy any problems. Contracting officers will take these steps into account before awarding a contract and ensure the contractor is living up to the terms of its agreement.
- The Executive Order directs companies with federal contracts of $1 million or more not to require their employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when valid contracts already exist). This builds on a policy already passed by Congress and successfully

implemented at the Department of Defense, the largest federal contracting agency, and will help improve contractors' compliance with labor laws.

- As a normal part of doing business, most employers give their workers a pay stub with basic information about their hours and wages. To be sure that all workers get this basic information, the Executive Order requires contractors to give their employees information concerning their hours worked, overtime hours, pay, and any additions to or deductions made from their pay, so workers can be sure they're getting paid what they're owed.

The Executive Order is "effective immediately" but in actuality will not go into effect until the Federal Acquisition Regulatory (FAR) Council (consisting of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of the General Service Administration) adopts amendments to the current Federal Acquisition Regulations. The public will have an opportunity to submit comments before final amendments are adopted. These amendments are not expected to appear in proposed form before 2016.

The burden on the contracting community from the new process is clear when you look at what will now be required. Once the Executive Order is fully implemented, the contractor must go through these following seven steps when each contract is bid prior to each contract award and every six months thereafter:

- The prime contractor must report labor violations at the federal and state level from the past three years under definitions that do not clarify the scope of what constitutes a violation;
- The Contracting Officer must review the labor violations submitted by the prime contractor;
- The Labor Compliance Advisor in each agency must review the labor violations submitted by the prime contractor;
- The Labor Compliance Advisor must consult with enforcement authorities at the federal and state level to determine whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters. This, of course, is the most troublesome as reported violations often have resolutions already agreed to by the employers and the employees or government agencies involved. This provision gives the DOL the power to second guess these resolutions.
- The Contracting Officer must consult with the Labor Compliance Advisor subsequent to the Labor Compliance Advisor's consultation with federal and state enforcement authorities.
- The Contracting Officer must determine whether the prime contractor is a "responsible" source that has a satisfactory record of integrity and business ethics.

The Executive Order requires all seven steps for each contract award at each federal agency, even when separate awards are being made to the same company. If one contractor has 100 different contracts at ten different agencies, the labor violations will need to be considered individually, 100 different times by each Contracting Officer and Labor Compliance Advisor on each contract for the same company.

Additionally, each prime contractor must require each subcontractor with a potential subcontract value exceeding $500,000 to report labor violations at the federal and state level prior to subcontract award. Prior to the award of a subcontract exceeding $500,000, the prime contractor must review the information on labor violations at the state and federal level and determine whether the subcontractor is a "responsible source" that has a satisfactory record of integrity and business ethics." This too will have to be repeated every six months.

The Executive Order has drawn fire from business groups and the contractor community. Representatives have met with government officials to express their concern and a coalition of twenty organizations representing government contractors called upon the Obama Administration to withdraw the proposal in November 2014.

On February 26, 2015, two subcommittees of the House Education and Workforce Committee, the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor, and Pensions held a joint hearing on the Executive Order. Labeled "The Blacklisting Executive Order: Rewriting Federal Labor Policies through Executive Fiat" hearings, the Subcommittees heard testimony from Karla Walker, the Assistant Director of the American Worker Project of the Center for American Progress Action Fund, the U.S. Chamber of Commerce, the Professional Services Council, and Angela Styles, the former Administrator for Federal Procurement Policy at the Office of Management and Budget.

Ms. Walter testified that the Executive Order is needed because too many "bad companies" with a record of violations of the covered statutes are being allowed to get government contracts and the existing mechanisms are inadequate to prevent these abuses. She cited a 2013 report by the Majority Committee Staff of the Senate Health, Education, Labor and Pensions Committee which reported that nearly thirty percent of the top violators of wage and workplace safety laws were federal contractors still receiving contracts after having committed violations. She also cited an analysis from the Center for American Progress Action Fund showing that companies that committed the worst workplace violations - including wage and safety violations - had significant performance problems in their government contracts.

Ms. Styles' testimony succinctly described the concerns of the contractor community. In her words,

> I can tell you with a high degree of certainty that this [Executive Order] will: (1) grind essential federal purchases to a standstill, (2) alter the current legal relationship between prime contractors and subcontractors, (3) illegally and unfairly exclude responsible companies from doing business with the federal government, (4) devastate small businesses, and (5) substantially increase the government's costs of buying goods and services. The potential disruption and damage is particularly troubling because adequate mechanisms already exist in our current procurement system to exclude companies with unacceptable labor practices.

Several aspects of the Executive Order's reporting requirements have the business community particularly concerned. At the same time the Obama Administration issued this new Executive Order creating a whole new pre-award process, it conceded that most contractors were responsible bidders. The existing procedures are adequate to weed out violators, far less burdensome on the contractor and the government, and use a well-established process with significant due process protections in place for contractors. The new procedures, in contrast, may well needlessly add uncertainty, subjectivity and onerous and costly new data collection and reporting requirements for federal contractors. Contractors are further concerned that the definition of violations does not clearly exclude agency "administrative" violations and therefore could include requiring disclosure of government actions that are not equivalent to a finding of liability.

Most troubling of all is that the Executive Order creates a process whereby the contracting agency can and must second guess resolutions and settlements entered into with respect to violations. The Labor Compliance Advisor in each agency, as indicated above, is given the authority and the obligation to go in and determine that further remedial programs are necessary both by the contractor *and* by its subcontractors, with pre-bid exclusion, contract loss and debarment as possible results. The Executive Order empowers the Labor Compliance Advisor to pursue suspension and debarment referrals for "appropriate" violations without providing any clear guidance to define such violations. The broad range of laws covered by the Executive Order, the many types of claims that these laws have been violated and the relationship of these claims to union organizing activity which typically triggers complaints to government agencies will put contractors in the position of having to settle baseless claims in order to avoid loss of government contracts. This is problematic for very large employers which very often do have multiple complaints and or litigation involving employment laws, but also a problem for small prime contractors and subcontractors. This Executive Order has dramatically raised the stakes and vastly diminished the ability of government contractor employers to contest claims they in good faith believe are without merit.

The Executive Order also takes aim at pre-dispute arbitration agreements used by government contractors. In 2010, Congress adopted a provision barring pre-dispute arbitration for certain DOD contractors with contracts of more than $1 million. Known as the Franken Amendment, it barred pre-dispute arbitration for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment. Only arbitration agreed to after a claim had been made was to be permissible. This Executive Order extends this prohibition to all government contractors but, like the Franken Amendment, it only applies to contracts valued at more than $1 million. It does not, however apply to preexisting arbitration agreements unless the employer has discretion to modify the agreement and does so.

The controversial Executive Order will likely invite litigation by trade associations as to whether there is statutory authorization for the new requirements and whether the Executive Order conflicts with federal law, especially the Federal Arbitration Act (FAA), as well as policy statements in Title VII and the Civil Rights Act of 1991 that favor arbitration. In recent years, the Supreme Court has unambiguously ruled in favor of binding pre-dispute arbitration provisions as fulfilling the mandate of the Federal Arbitration Act. It has also ruled that binding pre-dispute arbitration provisions should be upheld unless there is a contrary Congressional command to override the FAA.

STAND ALONE HRAS, EMPLOYER PAYMENT PLANS AND THE ACA'S MOST OVERLOOKED EMPLOYER PENALTY

By Jessica B. Summers, Paley Rothman

Employers that currently sponsor employer payment plans or standalone health reimbursement arrangements, which likely violate the Patient Protection and Affordable Care Act (ACA), are running the risk of being liable for an excise tax of $100 per day, per plan participant. Unfortunately, many employers do not seem to know that their plans may now violate the ACA.

Since its passage, the vast majority of employer community attention given to the ACA as focused on the ACA's employer mandate. By now, most employers have a general understanding of the employer mandate. Unfortunately, many employers remain unaware of the ACA's additional restrictions and the related penalties that extend to the other health-related benefits they may have historically offered their employees.

Two of the most common types of benefits that have been significantly affected by the ACA are Employer Payment Plans (EPPs) and Health Reimbursement Arrangements (HRAs). The ACA also affected Flexible Spending Accounts (FSAs) and Health Savings Accounts (HSAs) but to a somewhat lesser extent. These latter types of benefits are not addressed in this article.

An EPP (as defined by IRS Notice 2013-54) is an arrangement under which the employer either (1) reimburses employees for the premiums that the employee has paid for health coverage that is not sponsored by the employer, or (2) makes direct premium payments to an insurance company for employee health coverage that is not sponsored by the employer. In 1961, the IRS (in Revenue Ruling 61-146) confirmed that these premium payments by the employer, (whether directly to the insurance company or in the form of a reimbursement to the employee), were excludable from an employee's gross income and permissible for the employer. Prior to the passage of the ACA, EPPs were seen as a good option for employers who wanted to help their employees cover the cost of obtaining health insurance but did not want to sponsor a plan themselves.

An HRA is a plan funded solely by the employer which reimburses employees for certain permitted medical expenses up to a set dollar amount. Reimbursements from an HRA are excluded from an employ-

ee's taxable income. Prior to the ACA, there were two types of HRAs that were permissible for employers to offer. Employers could offer a standalone HRA, which employees could use to, among other things, pay the premiums for a health plan not sponsored by the employer. In the alternative, employers could offer an HRA accompanied by a standard group health plan which employees could use to cover items not covered by the group health plan, such as prescriptions or co-pays. There is a definitional overlap between EPPs and HRAs. A standalone HRA established solely for the purpose of reimbursing premiums paid by employees for health plans not sponsored by the employer will, in practice, be a type of EPP.

Under the ACA, both EPPs and standalone HRAs will generally qualify as "group health plans." As such, each must comply with the ACA's requirements of a group health plan as articulated in 45 C.F.R. Part 147. These provisions, which apply to all group health plans that have at least two or more employee-participants on the first day of the plan year, include two requirements that, based on their very structure, EPPs and standalone HRAs will be unable to satisfy. First, non-grandfathered group health plans with plan years commencing on or after September 23, 2010, must provide coverage for preventative health services and may not impose any cost-sharing requirements on plan participants. See 45 C.F.R. § 147.130.

- Second, the ACA prohibits all group health plans (both grandfathered and non-grandfathered) from placing any annual or lifetime limits on the amount of benefits that may be paid for any individual. The prohibition against annual limits is applicable to group health plans with plan years beginning on or after January 1, 2014, while the prohibition against lifetime limits is applicable for plan years beginning on or after September 23, 2010. See 45 C.F.R. § 147.126

As set forth under 26 U.S.C. § 4980D, group health plans that do not comply with the ACA's requirements, including the preventative coverage and the benefit limit provisions, may be subject to an excise tax of $100 per day for each participant in the noncompliant plan. **In other words, an employer that maintains a group health plan (including an EPP or standalone HRA) that does not meet the ACA requirements for a year could liable for $36,500 in excise taxes for each participant.**

For EPPs there is no way around the preventative service and benefit limit rules. By its very nature, because the purpose of an EPP is to reimburse a set amount of premiums the EPP will not provide coverage for preventative services and will have a dollar limitation. IRS Notice 2013-54 makes it clear that an EPP's shortcomings cannot be cured by integrating the EPP with an individual health plan (i.e., the EPPs failure to meet the ACA requirements cannot be excused by the fact that the EPP is used to purchase individual health coverage that does meet the requirements). Under 29 C.F.R. § 2510.3-1(j) (as confirmed in IRS Notice 2013-14), employers can still establish a payroll practice essentially allowing employees to direct that a portion of their post-tax wages be forwarded directly to an insurance company to pay premiums. However, under such an arrangement, the employer may not contribute anything towards those premiums. **In short, the only remaining way for an employer that does not want to sponsor a health plan to help employees afford premiums would be to give employees a bonus or increase in salary that would be taxable to the employee and that that the employee could then choose to use for anything, including premiums.**

While the ACA has essentially made it impossible for employer's to offer EPPs without risking the excise tax, there are two circumstances under which employers may continue to offer HRAs to their employees without such risk. The primary way to do this is to "integrate" the HRA with a group health plan. In general, this means that the employer must offer employees a group health plan (other than the HRA) and that the HRA may only be available for employees who are actually enrolled in a group health plan (other than an HRA). This group health plan can be the employer's plan or a spouse's employer-sponsored plan but not an individually-purchased policy. Thus, because the employee simply needs to be offered a group health plan by the employer and enrolled in a group health plan, even if its not the employer's plan, an employee could enroll in his or her employer's integrated HRA and then use the money from that HRA to pay for coverage under his or her spouse's group health plan.

The other way that an employer may continue to offer an HRA to employees, and the only way employers can offer a standalone HRA without violating the ACA, is if the HRA only reimburses "excepted benefits" as defined by the ACA, which include limited vision and dental coverage. Excepted benefits are statutorily exempt from the ACA requirements and therefore HRAs that only cover excepted benefits are not subject to the group health requirements in the same way that broader standalone HRAs are.

For small employers who have failed to eliminate their EPPs, the IRS has recently offered some good news. On February 17, 2015, the IRS issued Notice 2015-17 providing transition relief for employers that had fewer than 50 full time employees and full time equivalents (i.e. those employers not subject to the employer mandate) in 2014 and continue to have less than 50 full time employees and full time equivalents through June 30, 2015. Under Notice 2015-17, these employers will have until June 30, 2015, to eliminate EPPs and avoid penalties. The Notice does not, however, provide relief for larger employers or for improper standalone HRAs being used for more than just reimbursing premiums.

Although the IRS has issued multiple notices on this issue, it does not appear to have begun to seek out violations. However Notice 2015-17 may be an indication that IRS is preparing to do so. In light of the fact that the § 4980D excise accrues on a daily basis, employers and their advisors should waste no time in reviewing the types of benefits that the employer offers to confirm compliance under the ACA provisions discussed above.

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1. *Available at* www.irs.gov/pub/irs-drop/n-13-54.pdf.
2. *Available at* www.irs.gov/pub/irs-drop/rr-61-146.pdf.
3. *Available at* www.irs.gov/pub/irs-drop/n-15-17.pdf.

LOCAL JURISDICTIONS ARE BEATING THE DRUM TO "BAN THE BOX"

By Jessica Summers, Paley Rothman

On January 1, 2015, and January 3, 2015, respectively, Montgomery County and Prince George's County became the second and third jurisdictions in Maryland (in addition to Baltimore City) to have laws restricting when and how a private employer can inquire about, and use, information related to a job applicant's criminal history.

Containing very similar substantive provisions, both of the new laws do far more than simply prohibit an employer from including questions about an applicant's criminal records on an initial job application (i.e. banning the box). Instead, they place clear restrictions on when during the hiring process employers may investigate or inquire into an applicant's criminal history.

Montgomery County

The new Montgomery County law, which was enacted by the Montgomery County Council on October 28, 2014, and which went into effect on January 1, 2015, applies to all employers that employ fifteen or more full-time employees in Montgomery County.

Under the Montgomery County law, an employer may not require an applicant to disclose the existence or details about an applicant's criminal record on an initial job application. Additionally, the law further restricts employers from inquiring about or investigating an applicant's criminal background until the conclusion of the applicant's first interview. As specified in the County Code, an "interview" means "any direct contact by the employer with the applicant whether in person or by telephone or internet communications to discuss: (1) the employment being sought; or (2) the applicant's qualifications[,]" but does not include "(1) written correspondence or email; or (2) direct contact made for the purpose of scheduling a discussion." As an exception to this rule, employers may inquire about criminal history before the end of the initial interview if it is voluntarily disclosed by the applicant.
After an employer has learned of an applicant's arrest or conviction record, the new law requires that, before making an employment decision based on an applicant's criminal record, the employer engage in an individualized assessment, much like that recommended in the EEOC's 2012 Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions. For further discussion of the EEOC's position on background checks see "EEOC Loses A Fourth Circuit Case on Background Checks" published herein. The purpose of this assessment is to consider whether the offense demonstrates a lack of fitness for the position applied for.

If an employer decides to withdraw a conditional offer of employment based on an applicant's arrest or conviction record, the law requires that the employer must: (1) provide the applicant with a copy of the criminal record being referred to; (2) provide the applicant with notice of the employer's intent to withdraw the offer; and (3) delay withdrawing the offer for seven days to give the employee time to review the criminal record and provide notice of any inaccuracies. If an employee comes forward within the seven days to provide notice of an inaccuracy, the employer must continue to delay its withdrawal of the offer and reconsider its decision based on the new information. If the employer ultimately decides to move forward and withdraw the offer, the law requires the employer to provide the applicant with written notice of the final action.
The statute does carve out certain exceptions to the restrictions set forth above. In the context of private-sector employers, the rules do not apply to (1) criminal background inquiries that are required by federal, state or county law, (2) employers "that provide programs, services, or direct care to minors or vulnerable adults" and (3) employers hiring for positions that require security clearance with the federal government.

Under Montgomery County law, employers who violate the law may be subject to civil penalties of up to $1,000 per violation. The law sets forth an administrative process for the County Commission on Human Rights to handle violations of this law. This process commences with a complaint being made to the Executive Director of the Office of Human Rights. Ultimately, the Commission's decision is appealable to the courts.

Prince George's County

The new Prince George's law, which was enacted by the Prince George's County Council on November 19, 2014, and which went into effect on January 3, 2015, applies to all employers that employ twenty-five or more full-time employees in Prince George's County (in comparison to Montgomery County's threshold of fifteen or more full-time employees).

Like Montgomery County's enactment, Prince George's County's new law both prohibits employers from asking about an applicant's criminal record on an initial job application and prohibits employers from inquiring about, or investigating, an applicant's conviction or arrest record until the conclusion of the applicant's first interview. The only substantive distinction between the Prince George's County and Montgomery County enactments is that the Prince George's County law does not include any definition of "interview" while Montgomery County's does.

As with Montgomery County, Prince George's County also requires that the employer engage in an individualized assessment before taking an employment action based on an applicant's criminal record and that the employer follow the same steps, as set forth above, before revoking a conditional offer based on an applicant's criminal record.

The Prince George's County law specifies that private employers are exempt from the statute's restrictions if (1) the inquiries are required by federal, state or county law or regulation or (2) the employer provides "programs, services or direct care to minors or vulnerable adults." In other words, the Prince George's County law has two of the same exemptions as Montgomery County, but unlike Montgomery County, does not include an express exemption for employers hiring for positions requiring security clearance.
The Prince George's County statute does not itself set forth the penal-

ties for violation of the law but, instead, instructs the Director of the Office of Human Rights to establish rules and regulations as to enforcement for the Prince George's County Council to approve.

Comparison of County Ban the Box Laws

Montgomery and Prince George's Counties' new laws on employer investigations and inquiries into applicants' criminal histories are significantly less restrictive than Baltimore City's law on the same subject. As was discussed in Donald F. Burke's article in the Fall 2014 edition of this Newsletter, Baltimore City's background investigation law prohibits employers from making any inquiry or investigation into an applicant's criminal record until a conditional offer of employment has been made, whereas Montgomery and Prince George's Counties allow such inquiries after the completion of the initial interview. In this respect, the Baltimore City law more closely resembles the District of Columbia's ban the box law , which also requires employers to make a conditional offer before investigating an applicant's criminal conviction history. Baltimore City also applies its law to smaller employers than the other two counties, making the law applicable all employers with ten or more full-time employees.

Concluding Comments

It is important to note that in all of the above mentioned jurisdictions, if the employer is using a consumer reporting agency, as defined by the Fair Credit Reporting Act (FCRA), to perform an investigation into an applicant's or employee's background, the employer will also be obligated to follow the requirements set forth by the FCRA. These requirements include obtaining the employee or applicant's advance consent before running the background check and providing the employee or applicant with specific notices both before and after taking adverse actions based on a background check.

With local background check laws applicable to an increasing number of employers in Maryland, employers and their counsel should review their current background check and hiring processes and forms in relation to applicable law and train all employees involved in the hiring process to ensure no premature inquiries or investigations of criminal histories are made.

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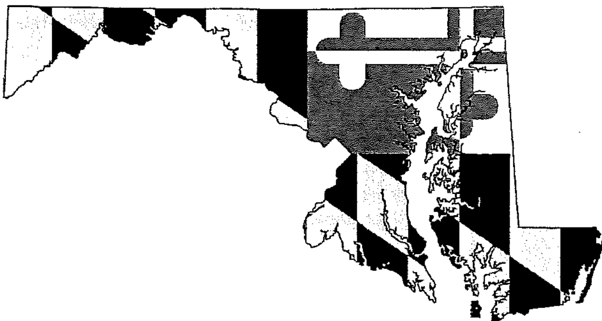
1. Codified at Montgomery County Code, Chapter 27, Article XII.
2. Codified at Prince George's County Code, Subtitle 2.
3. Codified at Baltimore City Code, Article 11, Subtitle 14.
4. Codified at D.C. Code, Chapter 20-152



DUELING WAYS SUBCONTRACTOR EMPLOYEES ARE COVERED FOR WORKER'S COMPENSATION CLAIMS

By Ethan L. Don, Paley Rothman

The Court of Appeals, in *Elms v. Renewal by Anderson*, 439 Md. 381 (2014), set forth two (2) ways in which a prime contractor could be liable for work-related injuries suffered by employees of a subcontractor. The facts of the case are not particularly unique, making the analysis broadly applicable.

Richard Elms, the plaintiff, was a sole proprietor who operated an unincorporated home improvement business, Elms Construction, which did window and door installation work for Renewal by Anderson ("Renewal"), the defendant in the case. Mr. Elms represented to Renewal that he carried worker's compensation for his employees, but apparently did not notify Renewal that he was not covered by that policy.

In August 2008, Elms was injured installing a window at a Renewal customer's home. He filed a workers' compensation claim alleging that he was a common law employee of Renewal. Renewal argued that he was an independent contractor and therefore not a "covered employee" under the law. The Maryland Workers' Compensation Commission ruled in Renewal's favor finding Elms to be an independent contractor. The Circuit Court overturned the Commission ruling. The Court of Special Appeals reversed the Circuit Court and held that Md. Code Ann., Lab. & Empl. § 9-508 – entitled "principal contractor liability for compensation" and commonly known as the statutory employer provision – abrogated the common law. The Court of Appeals granted Elms' petition for certiorari. The basic question was the interplay, or lack thereof, between the common law employer/employee relationship and a statutory employer/employee relationship created to cover principal contractors that ordinarily would not be considered the worker's employer under common law rules of master and servant.

The primary issues in Elms were nicely summarized by the Court as follows:

> [T]he initial determination in any workers' compensation case is whether the injured worker maintains a common law employer/employee relationship with an alleged employer. If the injured worker does not maintain a common law employer/employee relationship with the alleged employer, the inquiry is over, and the worker is not entitled to recover compensation benefits through the alleged employer. By contrast, when a common law employer/employee relationship exists between the injured worker and his or her direct employer (e.g., a subcontractor), but the injured worker is unable to recover compensation benefits through that employer, only then do we analyze the constructs of the relationship of the injured worker and the principal contractor under § 9-508 [the statutory employer provision]. This conclusion is consistent with the intent and purpose of the statute, specifically, to provide protection to employees of subcontractors who would otherwise be unable to recover for their work-related injuries.

Common Law Employer/Employee Analysis

The Court of Appeals first found that Elms was a common law employee of Renewal entitled to workers' compensation benefits under Renewal's policy. The Court came to this conclusion quickly, noting that Maryland law presumes an individual is a covered employee and that application of the common five (5) factor test – power to select and hire, payment of wages, power to discharge, power to control employee's conduct, and whether work is part of the regular business of the employer – supported a finding that Elms was an employee of Renewal.

The Court reiterated that the power to control employee conduct is the most important factor and noted that Renewal's control over Elms was clear. The Court specifically noted that Renewal controlled the dates and times of all Elms' schedule of jobs and provided detailed training and instructions (down to the type of screws, shims, caulking, and molding) and spot-checked Elms' jobs.

The Court looked at the following additional factors. Elms Construction derived approximately 80-85% of its income from window installations for Renewal. As a contractor for Renewal, Elms was subject to several requirements, including wearing shirts bearing Renewal's logo, and placing Renewal signs in customers' yards. Elms used his own trucks and usually his own tools, but obtained all supplies and materials from Renewal's warehouse. Where spot-checked jobs required corrections, Renewal expected and required Elms to make corrections. Renewal expected Elms to adhere to the policies and instructions contained in the "Installation Job Expectations" manual, and it required customers to rate Elms' performance on report cards at the end of each installation. Further, Renewal provided Elms with a schedule of jobs that included the address of the sites, the names of the residents, and the time frame for each job.

Statutory Employer Analysis

The Court then turned to § 9-508. It creates an employer/employee relationship by statute. The Court concluded that § 9-508 provided an additional source of prime contractor liability when the prime contractor was not the common law employer.

The Court of Appeals concluded that § 9-508 applies if the worker is a "covered employee," not an independent contractor, of the subcontractor. It imposes liability on the prime contractor in the absence of a common law employer/employee relationship between the prime contractor and the worker when the following conditions are met: (1) a principal contractor; (2) who has contracted to perform work; (3) which is part of its trade, business or occupation; (4) contracts with any other party as a subcontractor to do all or any part of the work. When all of the conditions are met, under the Act, an employee of a subcontractor will be able to recover workers' compensation benefits from a principal contractor as the "statutory employer." As the Court explained, "the purpose of the statutory employer provision is the protection of the injured worker who might otherwise receive no compensation for work-related injuries if the worker's immediate employer had not obtained workers' compensation coverage and had little resources to pay damages in a personal injury action." *Elms* at 400. [Citations omitted.] Accordingly, "by its terms, § 9-508 only operates to make a principal contractor liable when an employee is unable (apparently for whatever reason) to recover from his direct employer, the subcontractor."

There are exceptions to this liability. One key such exception relates to coverage for a "sole proprietor." A sole proprietor is unable to recover from a principal contractor under § 9-508 unless he/she meets very specific notice and election requirements of the law.

The *Elms* Court summed up its analysis stating, "[i]n our view, the statute does not 'abrogate' the common law employment relationship; instead, it creates a potential alternative relationship where the common law employer/employee relationship does not exist between the injured worker and the principal contractor." *Elms* at 404. As a result, the Court made expressly clear that it will first apply the common law employer/employee relationship test when looking at workers' compensation claims, but will then apply § 9-508 to insure coverage for the worker when the common law test does not make the prime contractor liable .

At the end of the day, the Court of Appeals held that a worker who is deemed to be a direct common law employee of the prime contractor can collect workers' compensation from the prime contractor, but where the worker cannot get coverage for some reason through his/her direct employer, § 9-508 provides an additional basis for holding the prime contractor responsible for workers' compensation insurance or damages. *Elms*, 439 at 404-05.

There are several practical considerations that attorneys and their employer clients should consider as a result of this decision:

1. Employers (primes) or counsel should review the "control" factors to see whether the employer is likely to be considered a common law employer and whether the employer can take steps to make such a determination less likely.
2. Employers (primes) should make certain that all subcontractors certify and represent both that they carry workers' compensation insurance and that all workers assigned to the employer's jobs are covered by workers' compensation insurance.
3. Employers should review and be certain that workers' compensation insurance policies cover workers deemed to be common law or statutory employees, even though such employees are not typically counted for purposes of determining insurance premiums.
4. Employers (primes) should make sure that any sole proprietor or partner in a subcontractor who does work for the prime follows the procedures to elect to be covered under the subcontractor's workers' compensation policy.

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1. In contrast, a corporate officer of a subcontractor would be covered without meeting the notice and election requirements, because corporate officers are covered under the Act unless they elect not to be covered. *Inner Harbor Warehouse, Inc. v. Myers*, 321 Md. 363, 582 A.2d 1244 (1990).

NLRB RULES THAT EMPLOYEES MAY USE EMPLOYER E-MAIL SYSTEMS TO ENGAGE IN CONCERTED ACTIVITY

By Jack Blum, Paley Rothman

In a recent decision, the National Labor Relations Board (NLRB) ruled that employees who are granted access to their employer's e-mail system for business purposes are generally entitled to use these work e-mail systems to engage in discussions about the terms and conditions of their employment while on non-working time. This decision, which applies to both union and non-union workplaces, overruled a precedential decision issued by the NLRB in 2007. As a result of this decision, many employers may need to revise their employee handbook provisions regarding the use of the employer's computer systems in order to avoid a potential unfair labor practice charge.

In *Purple Communications,* 361 N.L.R.B No. 126 (2014), an employer assigned its employees individual e-mail accounts on its e-mail system, which the employees could access from both their workstations and their personal computers and smartphones. The employees' use of the employer's e-mail system was subject to several provisions set forth in the employer's handbook. One provision stated that access to the employer's e-mail system "should be used for business purposes only." Another provided that employees were "strictly prohibited" from using the e-mail system to engage in activities on behalf of "organizations or persons with no professional or business affiliation with the Company" or to send "uninvited e-mail of a personal nature."

The NLRB charges at issue in *Purple Communications* arose out of an unsuccessful union organization election at two of the employer's worksites. The union filed objections to the election results, claiming that the employer's electronic communications policy interfered with the election. It also filed an unfair labor practice charge with the NLRB. Based on the union's complaint, the NLRB's general counsel issued a complaint against the employer regarding the policy.

Section 7 of the National Labor Relations Act (NLRA) provides that, "[e]mployees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This right protects the efforts of employees to induce or initiate group action to improve the terms or conditions of employment. Section 8(a)(1) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title." **While many of the Section 7 rights are tied to collective bargaining and union membership, the "concerted activities" right does not require that the employee be a union member or that the activity have any connection to a labor union.**

The employer's e-mail policy appeared to have sound support in the NLRB's 2007 decision in *Register-Guard,* 351 N.L.R.B. No. 70 (2007). There, in a case of first impression, the NLRB ruled that an employer could prohibit its employees from using its e-mail system for non-business activity if the prohibition was applied in a non-discriminatory manner. Accordingly, *Register-Guard* held that there is no statutory right to use an employer's e-mail system for Section 7-concerted activity. The NLRB based the *Register-Guard* ruling on a line of cases which had previously held that employers have a "basic property right" to restrict and regulate the use of their equipment.

The *Purple Communications* decision did not distinguish *Register-Guard,* but rather overruled it outright. In doing so, the NLRB cited statistics showing that workers increasingly use e-mail in the performance of their jobs, and that employees' personal use of an employer's e-mail system is a common and accepted practice. The NLRB also criticized its *Register-Guard* predecessors for treating an e-mail system in the same manner as other types of physical equipment, noting that an employee's non-business use of an e-mail system would not interfere with other business uses of the e-mail system. In that respect, the NLRB found, the cases cited in *Register-Guard* involving an employer's copy machine, bulletin board, television and VCR, and telephone line were materially different from and not applicable to the use of an employer's e-mail system.

The NLRB did not stop with its assault on the *Register-Guard* majority's reasoning, however, and also attacked the reasoning of the equipment cases on which the *Register-Guard* decision relied. While acknowledging that cases like *Mid-Mountain Foods,* 332 N.L.R.B. No. 19 (2000), did declare that "there is no statutory right of an employee to use an employer's equipment or media," the NLRB criticized such statements as dicta and unsupported by persuasive and substantive authority, and demeaned the principle itself as "hardly self-evident." By noting that it "question[ed] its validity elsewhere," the NLRB hinted that it may in a future case seek to curtail the employer's broad control over its equipment that has been established in past precedents.

Having discarded *Register-Guard* and seriously threatened its underlying principles, the NLRB held that employees did have a statutory right to use their employer's e-mail system to engage in Section 7 concerted activity during non-working time. While the NLRB recognized that an employer could potentially show that "special circumstances" made a business-only prohibition necessary to maintain production or discipline, it also hinted that such circumstances would rarely be present and would not justify a total ban on non-business e-mails. **Because the NLRB described the new right to use an employer's e-mail system as a "presumption," it will be the employer's burden to show the existence of special circumstances justifying a limitation on such use.**

The NLRB emphasized that its holding was limited in several respects. For instance, the NLRB made clear that an employer has no obligation, even under Purple Communications, to provide employees with access to its e-mail system in the first instance. Instead, the right to use the employer's e-mail for Section 7 activity arises only where the employer has provided an employee with access to its e-mail system for work-related purposes. Nor did the decision require that non-employees be given permission to access an employer's e-mail system. In addition, employers are not precluded from enforcing uniform and non-dis-

criminatory restrictions, such as prohibiting large attachments or the sending of audio or video files, in order to ensure the e-mail system's efficient functioning. Finally, *Purple Communications* does not affect the employer's right to monitor employees' use of an e-mail system or the right to notify employees of such monitoring.

Both union and non-union employers will need to reevaluate their existing policies regarding e-mail usage in light of the new framework established in Purple Communications. Blanket prohibitions on non-business use of employer provided e-mail by employees will now, absent a very narrow exception for special circumstances, constitute an unfair labor practice. These restrictions should be curtailed so as to only prohibit such use during working hours. Notably, however, the NLRB's decision provided no guidance as to what constitutes working and non-working time, an area of ambiguity in the digital age when employees may send work-related e-mails from home via smartphone outside of the traditional working hours. In addition, policies relating to non-business related use of other types of equipment should also be reviewed in light of the NLRB's criticism of the equipment restriction cases as the NLRB has not been hesitant to apply newly-created policies, including the one in Purple Communications, retroactively against employers.

There may be a considerable delay before the policy announced in *Purple Communications* is subjected to judicial review. The NLRB remanded the proceedings in *Purple Communications* to an administrative law judge to provide the parties an opportunity to present evidence and argument under the new standard. After the administrative law judge issues a new decision under Purple Communications' standard, there could be additional proceedings before the NLRB itself. Only after those proceedings concluded would the policy finally be subject to review by a federal court. Because the NLRB will likely seek to enforce the new standard in the interim, employers may wish to comply while awaiting further developments.

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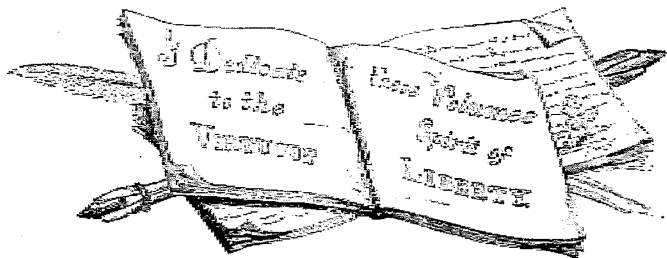
1. 29 U.S.C. § 157.

2. *See, e.g., Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565 (1978).

3. 29 U.S.C. § 158(a)(1).

4. *See, e.g., Pressroom Cleaners*, 361 N.L.R.B. No. 57 (2014); *Pacific Lutheran University*, 361 N.L.R.B. No. 157 (2014); *Huntington Ingalls Inc.*, 361 N.L.R.B. No. 64 (2014).



SUPREME COURT RULES THAT ERISA FIDUCIARIES HAVE DISTINCT LIABILITY FOR ONGOING DUTY TO MONITOR PLAN INVESTMENTS

By Jessica B. Summers, Paley Rothman

In a recent decision that has surely unnerved many retirement plan fiduciaries, the Supreme Court, in the case of *Tibble v. Edison International et al.*, No. 13–550, 2015 WL 2340845 (May 18, 2015), weighed in on the issue of whether a retirement plan fiduciary can be held liable for retaining an imprudently selected investment after the statute of limitation has run from the date of the initial selection of the investment.

Overruling the Ninth Circuit in a unanimous opinion, the Court held that retirement plan fiduciaries have an ongoing duty to monitor investments that is distinct from their duty to prudently select investments. As such, the Court established that, depending on the circumstances, the six year statute of limitation for breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) can extend not only from the date on which an investment was selected but from a later point at which the fiduciary was obligated to monitor the investment.

The *Tibble* case was brought by participants in Edison International's 401(k) plan against the plan's fiduciaries. The participants alleged that the fiduciaries imprudently, and in breach of their fiduciary duties, chose to offer participants six higher priced retail-class mutual funds when they could have offered lower cost institutional-class mutual funds. Of the six funds in question, three were added to the plan in 1999 and three were added in 2002. The participants filed their claim in the U.S. District Court for the Central District of California in 2007.

In deciding the case, the District Court held that the defendants had breached their fiduciary duties with respect to the three mutual funds selected in 2002. However, as to the mutual funds selected in 1999, the District Court held that the claims related thereto were barred by ERISA's statute of limitations. The ERISA statute of limitations provides that a complaint must be filed within six years of "the date of the last action which constitutes a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." The District Court reasoned that the selection of the funds had occurred more than six years prior to the filing of the complaint and that the funds had not undergone sufficient change in the preceding six years for the fiduciaries to have a duty to review the funds. The Ninth Circuit affirmed the District Court's decision.

Reversing the Ninth Circuit's decision and remanding the case for further consideration, the Supreme Court relied heavily on the common law of trust, from which ERISA fiduciary duties are derived. The Court noted that both sides had acknowledged that, under the common law

of trusts, fiduciaries have a continuing duty to monitor investments. The Court emphasized that this duty to monitor and remove improper investments is distinct from the duty to prudently select investments and rejected the District Court's position that the duty to monitor is only triggered when the investment has undergone substantial changes.

In finding that fiduciary duties include a duty to monitor, the Court clarified that a claim for breach of fiduciary duties related to a specific investment may still be sustainable after the statute of limitations has run on claims for breach related to the initial selection of the investment. However, the Court expressly declined to weigh in on the nature or scope of the review or monitoring required of a fiduciary to discharge his or her duties, leaving this issue for the Ninth Circuit on remand.

Given the narrow scope of the Court's decision, far from setting a clear line for when a plan fiduciary may be subject to a claim for breach of fiduciary duties, the decision leaves a number of unanswered question about scope of fiduciary duties and timing of claims which we can expect to see litigated in the years to come.

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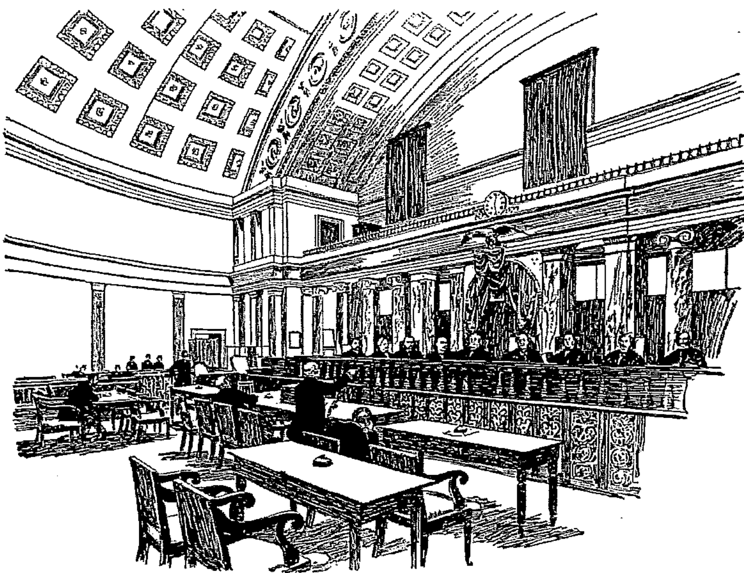
[1] The Supreme Court also left the Ninth Circuit to consider the fiduciaries' assertion that the participants waived any claim of breach related to the duty to monitor the investments because they did not specifically plead this duty in the earlier stages of the case.



AN ACTIVE TERM: SUPREME COURT EMPLOYMENT CASES OF 2015

By Hope B. Eastman, Paley Rothman

The Supreme Court has issued opinions in a number of significant employment law cases during its 2015 term. Additionally the Court is considering at least one case which is not strictly an employment case, but which will have important effects on employers.

Decided Cases

This term, the Court decided six employment-related cases, one involving religious accommodation, one involving the EEOC conciliation requirement, one involving the Pregnancy Discrimination Act, one involving the FLSA, one involving whistleblower protection for federal employees, and one on the DOL interpretive guidance on the exempt status of mortgage brokers.

EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86, decided June 1, 2015

In its most recent employment law ruling, the Court made clear that an applicant may prevail on a claim of religious discrimination by showing simply that her need for an accommodation was the motivating factor behind the employer's decision not to hire her. Overruling the Tenth Circuit, the Court held that the applicant was not required to show that the employer had actual knowledge of her need for a religious accommodation.

This case presented the Court with the question of whether an employer can only be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

This case involved an applicant who wore a headscarf to her interview for a position as a sales employee at *Abercrombie & Fitch*. The applicant was not hired because wearing a headscarf conflicted with Abercrombie's "look policy" which set forth the dress requirement for sales employees and prohibits employees from wearing "hats." Although the manager who performed the interview believed that the headscarf was worn for religious reasons, the applicant herself never actually informed the manager of this nor indicated that she would need any accommodation.

Each side in this case, during oral arguments, sought to persuade the Court that the rules they propose would be workable. The government argued that accommodation requirements should be triggered if the employer knows the practice (in this case the wearing of the headscarf) and correctly understands the practice to be religious. Abercrombie & Fitch argued that such a rule would require it to make impermissible inquiries into an applicant's religion and sought to put the burden on

the applicant to come forward and tell the employer about their religious practice and need for accommodation.

In an 8 to 1 decision authored by Justice Scalia, the Court rejected Abercrombie's argument that an applicant must demonstrate that the employer had actual knowledge of her need for an accommodation. The Court emphasized that, unlike other anti-discrimination statutes, such as the Americans with Disabilities Act, Title VII does not include a knowledge requirement. The Court refused Abercrombie's push for it to "add words to the law to produce what is thought to be a desirable result," noting that such a change would be for Congress not the Court. Instead, the Court highlighted the distinction between knowledge and motive, noting that Title VII looks only to the issue of whether an employer failed to hire an applicant because of his or her religion. However, in doing so, the Court made it clear in a footnote that they were not deciding a case in which the employer did not know or suspect it to be a religious practice but that rather Abercrombie suspected that the applicant wore the head scarf for religious reasons.

The Court concluded that the applicant could sustain a disparate-treatment claim under Title VII by demonstrating that the employer did not hire her because of her religion, which the Court noted to be synonymous with a refusal to accommodate the religious practice. The Court emphasized that this is true regardless of whether the applicant has requested an accommodation or otherwise made the employer aware of a need for accommodation. The Court remanded the case to the Tenth Circuit, which had previously granted summary judgment in favor of the employer, for further consideration.

Mach Mining v. EEOC, 135 S.Ct. 1645, decided April 29, 2015

In a unanimous decision authored by Justice Kagan, the Court held that the statutory requirement that the EEOC attempt conciliation before filing suit is subject to limited judicial review.

This case resolved the fascinating question of whether a court can require the EEOC to fulfill Title VII's conciliation requirement in good faith, which is hardly something that ought to require judicial intervention. The EEOC has been subject to intense employer criticism over the years for the manner in which it conducts conciliation of cases where reasonable cause findings have been issued, including the failure to specify the violation or the suggested remedies and relief, and the failure to engage in anything that represented a real effort to resolve the matter. Additionally, the EEOC has presented a demand for relief on a take it or leave it basis and then simply moved to file suit. Under Title VII of the Civil Rights Act, the EEOC is required conciliate the dispute with an employer before bringing suit. The EEOC views the obligation as being minimal at best and argues that the failure to conciliate in good faith should not be a valid defense against a suit by the EEOC.
This case involved a woman who alleged that she was denied a job based on her gender. The EEOC found reasonable cause that the company had discriminated against female applicants and sent a letter to Mach Mining inviting it to participate in conciliation. The letter did not offer any suggested remedial steps it was asking the company to take and notified the company that the EEOC would be in contact to begin the conciliation process. Approximately one year later, the EEOC sent Mach Mining another letter stating that conciliation had failed and proceeded to file suit. What occurred in the interim between the two letters was not addressed in the judicial record. Mach Mining argued that the EEOC had not conciliated in good faith. The EEOC moved for summary judgment on whether failure to conciliate in good faith is a viable defense. The district court denied the motion and held that courts may review the EEOC's informal settlement efforts to determine whether the EEOC made a sincere and reasonable effort to negotiate. The Seventh Circuit reversed and held that, so long as the EEOC has pleaded that it complied with Title VII and the relevant documents are facially sufficient, judicial review is satisfied.

In overruling the Seventh Circuit, the Supreme Court emphasized the strong presumption in favor of allowing judicial review of administrative actions. The Court concluded that there is nothing in Title VII to indicate that Congress intended the conciliation process to be exempt from judicial review.

In finding that the EEOC's conciliation obligation is subject to judicial review, the Court recognized that Title VII does give the EEOC "wide latitude over the conciliation process." As such, the Court held that judicial review of conciliation must be limited to enforcing the statutory obligation. In other words, a court may review whether the EEOC actually tried to conciliate, but not scrutinize the conciliation process itself. In setting forth this limitation, the Court rejected Mach Mining's assertion that a court's inquiry should include a factual look at the conciliation process. The Court concluded that allowing broad judicial review of this nature would conflict with both the significant discretion that the Title VII gives the EEOC in how to proceed with conciliation as well as the related confidentiality provision.

In concluding its decision, the Supreme Court noted that generally an affidavit from the EEOC is sufficient to establish that the conciliation requirement has been met. However, in the event that the employer responds with evidence to the contrary, a court may engage in a factual investigation to determine whether conciliation actually occurred. In the event that the court finds that conciliation has not occurred, the remedy in such a situation is for the EEOC to be ordered to make appropriate conciliation efforts. The Supreme Court vacated the judgment of the Court of Appeals and remanded the case for further proceed-ings consistent with its opinion.

Young v. United Parcel Service, 135 S.Ct. 1338, decided March 25, 2015

In a decision authored by Justice Breyer, the Court addressed the question of what the Pregnancy Discrimination Act (PDA) means when it requires employers to treat pregnant employees the same as non-pregnant employees who are "similar in their ability or inability to work."

The employee in question was a delivery driver for United Parcel Service (UPS) who became pregnant and was advised by her medical practitioners not to lift more than twenty pounds while working. UPS's employee policy requires their drivers to be able to lift up to seventy pounds. Due to Young's inability to fulfill this work requirement, as well as the fact that she previously had used all her available family/

medical leave, UPS forced her to take an extended, unpaid leave of absence and denied her light duty. Young sued UPS and claimed she had been the victim of gender- and disability-based discrimination under the Americans with Disabilities Act and the Pregnancy Discrimination Act, highlighting the fact that UPS had accommodated other employees with work limitations, specifically (i) drivers disabled on the job, (ii) drivers who lost their Department of Transportation certification, and (iii) drivers suffering from a disability covered by the Americans with Disabilities Act (ADA). UPS moved for summary judgment and argued that Young could not show that UPS's decision was based on her pregnancy or that she was treated differently from a similarly situated co-worker. Furthermore, UPS argued it had no obligation to offer Young accommodations under the ADA because Young's pregnancy did not constitute a disability. The district court dismissed Young's claim. The U.S. Court of Appeals for the Fourth Circuit affirmed.

In reviewing the issue, the Court ruled 6-3 (with Justice Alito issuing an opinion concurring in the judgment only) to vacate the Fourth Circuit's affirmation of summary judgment and to remand the case for further consideration by the Fourth Circuit. In doing so, the majority declined to adopt either the employer's or the employee's statutory interpretations of the PDA, finding both to be too extreme in different directions. Instead, the majority cut a middle ground holding that, where an employer has asserted that its employment decision was based on a neutral policy in which pregnancy was not a factor, the employee may respond, and create a triable issue of fact, by demonstrating that the policy imposed a significant burden on pregnant employees and that the non-discriminatory reason for the policy was insufficient to justify the burden.

It is important to note that, as the Court recognizes in its decision, the ADA was amended in 2008 (after the lawsuit began) to broaden the definition of disabilities to include those of limited duration. The Court declined to take a position on whether this means that impairments related to pregnancy (such as Ms. Young's) may be covered by the ADA. However, the EEOC has taken this position and asserts that certain impairments related to pregnancy are protected under the ADA as amended.

Integrity Staffing Solutions v. Busk, 135 S.Ct. 513, decided December 9, 2014

On December 9, 2014, the Court ruled 9-0, in a decision authored by Justice Thomas, on a case involving time spent by a putative class of warehouse workers waiting for and undergoing security screenings. The employees in question were employed by Integrity Staffing which provided warehouse workers to Amazon. The issue was whether the employees' waiting and screening time was compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, and turned on the oft-litigated question under these statutes as to what activities are considered preliminary or postliminary to the performance of the principal activities that an employee is required to perform.

The issue is framed by two somewhat conflicting principles: the Portal-to-Portal Act exception for preliminary/postliminary activities versus the continuous workday rule. In early days of the FLSA in 1946, the Supreme Court held in the case of *Anderson v. Mt. Clemens Pottery Co.*, 66 S.Ct. 1187, that the term "work" in the statute broadly encompasses time spent "pursuing certain preliminary activities after arriving ... and such as putting on aprons and overalls, removing shirts, taping or greasing arms [etc.]" Immediately thereafter, organized labor seized on the ruling and by late 1946 "portal pay suits" had exploded, with over 1,500 cases seeking nearly $6 billion in claims. In response, Congress passed the Portal-to-Portal Act in 1947, which excluded from compensable time "activities that are preliminary to or postliminary to the principal activities [that an employer is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activities." On the flip side, the FLSA regulations include what is commonly known as the "Continuous Workday Rule," which states that compensable time comprises "the period between commencement and completion on the same workday of an employee's principal activity or activities ... whether or not the employee engages in work throughout all of that period."

In Integrity Staffing, the Supreme Court recognized that its earlier decisions consistently interpreted "principal activity or activities" "to embrace all activities which are integral and indispensable part of the principle activities" an employee performs. The question the Court faced this time around was what does "integral and indispensable" mean. It held that an activity is integral and indispensable to the principle activities that an employee is employee to perform "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." Under the Court's analysis, the term "principal activities" includes all activities which are an "integral and indispensable part" of the principal activities.

Under this framework, the Court concluded that the screenings were not part of the principal activities the employees were employed to perform as the employees were not employed to undergo security screenings. The security process could be easily eliminated without impacting the principal job the warehouse workers were required to perform, i.e., stocking the shelves and packaging the goods for shipping. The Court also relied on a 1951 Department of Labor Opinion Letter which found both pre-shift screening for safety and post-shift searches conducted to prevent employee theft to be non-compensable.

Department of Homeland Security v. MacLean, 135 S.Ct. 913, decided January 21, 2015

On January 21, 2015, the Court decided this case by 7-2, with Justice Roberts writing for the Court and Justices Sotomayor and Kennedy dissenting. The case involved whistleblower protection for a federal air marshal who publicly disclosed that the TSA had decided to cut costs by removing air marshals from certain long-distance flights and canceling all overnight missions. The Court held that the marshal was entitled to protection under the federal whistleblower statute because his disclosure did not fall within the statute's exception for disclosures "specifically prohibited by law." Although the disclosure was specifically prohibited by a TSA regulation, the Court held that the "specifically prohibited by law" exception does not extend to violations of rules and regulations, nor was the air marshal's disclosure specifically prohibited

by the statute that authorized the TSA to promulgate those regulations. In July 2003, the TSA briefed all federal air marshals - including Robert J. MacLean - about a potential plot to hijack passenger flights. A few days after the briefing, MacLean received a text message from the TSA canceling all overnight missions from Las Vegas until early August. MacLean, who was stationed in Las Vegas, believed that canceling those missions during a hijacking alert was dangerous and illegal. He disclosed this information to a reporter. The TSA fired him and he appealed to the Merit Systems Protection Board. MacLean challenged his termination on the ground that his disclosure was protected under the Whistleblower Protection Act of 1989 because he reasonably believed that the leaked information disclosed "a substantial and specific danger to public health or safety." The Board held that he did not qualify for protection because his disclosure was "specifically prohibited by law." The Court of Appeals for the Federal Circuit vacated the Board's decision, holding that the applicable regulation was not a valid source of prohibition.

The Supreme Court upheld whistleblower protection for MacLean. It refused to act on the government's argument that providing whistleblower protec¬tion to individuals like MacLean would "gravely endanger public safety" by making the confidentiality of sensitive security information depend on the idiosyncratic judgment of each of the TSA's 60,000 employees. It acknowledged that these concerns are legitimate but concluded that they must be addressed by Congress or the President, rather than by the Court.

Perez v. Mortgage Bankers Association and Nickols v. Mortgage Bankers Association, 135 S.Ct. 1199, decided March 9, 2015

The Supreme Court ruled 9-0 in favor of the Department of Labor (DOL) in a case challenging the ability of the DOL to issue and revise interpretive guidance without notice-and comment rulemaking. These two cases, consolidated for decision, posed the question whether a federal agency, in this case the DOL, must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act (APA) before it revokes an authoritative interpretation of a regulation and replaces it with a new authoritative interpretation that reverses the agency's prior interpretation. The Court has resoundingly said no.

During the Bush Administration, the DOL issued revised regulations relating to various exemptions under the Fair Labor Standards Act (FLSA), including the exemption for administrative employees. The revised regulations included a new section giving examples of administratively exempt employees, including one related to mortgage loan officers in the financial services industry. In September 2006, the DOL issued an Opinion Letter (FLSA2006-31), in response to an inquiry from the Mortgage Bankers Association (MBA), confirming that mortgage loan offers were exempt from the FLSA under the administrative exemption. The DOL held the Opinion Letter out as the Department's definitive interpretation of its regulations as it applied to mortgage loan officers and concluded that mortgage loan officers were not entitled to overtime.

Four years later in March 2010, the DOL withdrew its 2006 Opinion Letter and reversed its position by issuing Administrator's Interpretation No. 2010-1 stating that mortgage loan officers are nonexempt and entitled to overtime. The DOL conceded in an earlier amicus brief in another case that this was a "substantive" change.

The MBA filed suit, challenging the Obama Administration's revocation of the 2006 Opinion Letter and issuance of the contrary guidance. The MBA argued that allowing the DOL to make this change was inconsistent with the principles of the APA which requires that agencies use a notice-and-comment period before issuing legislative or substantive rules which are binding on the public. The MBA's position was based on a long-held judicial principle that when an agency interprets a regulation one way and subsequently interprets it another way, the agency in effect is revising the underlying regulation. Finding against the MBA, the Court accepted the government's position that no notice-and-comment was required for the withdrawal of the Opinion Letter. The Court reached this conclusion based on the fact there is an exemption to the APA notice-and-comment requirement for "interpretive rules," which these were deemed to be. As Justice Sotomayor wrote in her opinion for the Court, under a "straightforward" reading of the APA, "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." The separate concurring opinions by Justices Scalia and Thomas suggest that other challenges may arise. Both of them questioned the basis for judicial deference to agency "interpretations," as opposed to regulations adopted with notice-and-comment. Justice Scalia argued that this practice leaves the agency with largely unfettered freedom to draft broad and vague regulations through notice-and-comment and then use interpretive guidance to fill in the gaps unchecked by notice-and-comment. Justice Thomas, in a lengthy concurring opinion, essentially called for reevaluation of the deference doctrine as a constitutional violation of the separation of powers.

Pending Cases

Still to be decided by the Court is a key Affordable Care Act case which, while not an employment case, may have major impacts on both employers and employees.

King v. Burwell, No. 14-114, argued March 4, 2015

This case, hotly watched throughout the country and awash with amicus briefs, presents the Court with an issue of statutory interpretation of the Affordable Care Act (ACA). While not a constitutional challenge to the ACA, a decision by the Court against the government's interpretation of the ACA could have an enormous an impact on the entire ACA infrastructure. The central question of the case is whether the IRS can make federal subsidies available to individuals in states that did not establish their own state insurance exchanges but instead have exchanges administered by the federal government.

Three years ago, the Court, upheld the so called "individual mandate" under the ACA as a tax. The question in that case was whether the constitution allowed Congress to require everyone to buy health insurance or pay a penalty. In a dramatic opinion on the last day of that term, Chief Justice John Roberts joined the Court's four more liberal Justices in ruling that it does, so the law survived.

The question now is a statutory one which, depending on how it is decided by the Court, could have an impact on the overall health insurance infrastructure created by the ACA, which has been carefully crafted to ensure participation in the insurance marketplace by both healthy and sick people in order to keep coverage affordable.

While many people in this country get their health insurance through their jobs, or their spouse's jobs, not everyone can, or wants to, obtain coverage through an employer. For example, people who are self-employed or work for businesses that don't have to provide them with insurance must purchase their own health insurance. To ensure the availability of health insurance for such individuals, the ACA directed the states to establish "exchanges" – called marketplaces - where individuals can buy coverage. Where states do not set up their own exchanges, as thirty-six states have done, the federal government comes in to administer the exchange in those states.

The ACA authorizes federal subsidies for individuals with certain household incomes who are "enrolled through an Exchange established by the State." The question that the Court is being asked to answer turns on the phrase "established by the State." The IRS has issued regulations making federal subsidies available to qualifying individuals who purchase health insurance on exchanges administered by either a state or the federal government (where the state did not set up their own exchange). Opponents of the law argue that these regulations are an overreach by the IRS and read the language of the ACA as only providing subsidies for purchases on state-established exchanges and not on federally-run exchanges. This argument would mean that people who would be eligible for subsidies on a state-run exchange will no longer be eligible for subsidies if they are enrolled in a federally-run exchange. Given that there are more than 7.5 million people now enrolled in federally-run exchanges this could have widespread implications. Supporters of the law argue that the IRS has the authority to make subsidies available to those enrolled on both the state-run and federally-run exchanges and point to other sections of the ACA as contemplating coverage wherever you live if there is an exchange.

Some interesting points add to the drama facing the Court. If the Court finds that this was a drafting error that only Congress can fix, there is little likelihood that the Republican-controlled Congress would take any steps to remedy the drafting error and give the IRS the authority to provide subsidies for individuals enrolled in federally-run exchanges. Instead, Republican members of both the Senate and the House have already begun floating proposals to create "bridges" out of the ACA in the event that the decision goes against the Administration.

In the event that the subsidies are struck down and Congress refuses to act, legislatures in states without state run exchanges will face pressures from both sides about whether or not to establish an exchange.

As to the implications for employers and their employees, if the Court decides against the Administration and invalidates the subsidies, this will undermine both the employer mandate and the individual mandate in states where the exchanges are federally-run. The penalties under the employer mandate are triggered when an employee who is not offered the mandated health insurance by his or her employer receives a subsidy on the exchange. Thus, if the Court rules that there can be no subsidies in states with federally-run exchanges, there will also be no employer mandate penalties for employers in these states regardless of whether they offer coverage. In other words, because the penalties, which are the enforcement mechanism behind the employer mandate, are tied to individual subsidies, the employer mandate will be unenforceable in states where the subsidies are not available. On the individual side, the individual mandate only applies when the individual has access to "affordable" insurance. Without the subsidies, insurance on the federally-run exchanges will become unaffordable for many, thus eliminating their obligation to purchase coverage or pay a penalty. However, while these individuals will not be obligated to purchase coverage, they may still want health coverage and find that, without the subsidies, they can not afford to do so. Thus, if the subsidies are eliminated in federally-run exchange states, employers in these states who do not offer plans may face increased pressure from their employees to offer plans as, without the subsidies, it may be difficult for the employees to afford plans purchased through the marketplace.
The March 4, 2015, Supreme Court hearing on *King v. Burwell* was expected to focus on the proper interpretation of words and phrases in the ACA discussed above. The Justices did address these issues, however, the oral argument veered surprisingly into the constitutional balance between federal and state power. Commentators have focused on Associate Justice Anthony Kennedy who raised questions about this issue, suggesting he might join the liberal Justices to uphold the subsidies. Although there is a widespread belief that a negative ruling will significantly undermine the law, predicting the outcome from oral arguments is an unreliable game.

Petition for Certiorari

A review of petitions for certiorari this term reveals only two that raise employment law issues. On April 27, 2015, the Court granted certiorari in the case of *Green v. Donahoe*, No. 14-613, in which the Court is being asked to determine, under federal employment discrimination law, whether the filing period for a constructive discharge claim begins to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held. On April 20, 2015, the Court denied certiorari in *Landers v. Quality Communications*, No. 14-969, which asked the Court to address whether plaintiffs seeking overtime under the FLSA must support their allegations with detailed facts demonstrating the time, place, manner or extent of their uncompensated work, or whether it is sufficient if plaintiffs' allegations give defendants fair notice of their claim for overtime and the grounds upon which the claim is based.

Stay tuned as the Court continues to issue decisions on the cases presently before it.