Law @ Work Employer Newsletter

Newsletter

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The savvy employer's guide to legal developments and quirks that affect the workplace
Cherry Hill, NJ

Welcome to the second edition of the Law @ Work Employer Newsletter. For those of you who read the Law @ Work blog, you know that the blog offers both in-depth analysis of important legal developments and highlights overlooked stories that are entertaining and good fodder for learning. Think of it as an ever-evolving employment manual for employers because it is always better to learn from someone else's mistakes.

When Does Working in Massachusetts Mean Working in New Jersey?

An April 2, 2018 New Jersey Appellate Division just crumpled an employer's roadmap when it held an employee working remotely in Massachusetts may still fall within the scope of New Jersey's Law Against Discrimination ("NJLAD"). In *Trevejo v. Legal Cost Control, Inc.*, an employee's NJLAD case was dismissed at the trial court level, after the court allowed some limited discovery, on the basis that the employee, who worked remotely for a New Jersey-based business, was not protected by the NJLAD. The employee appealed the ruling and, in particular, the trial court's order permitting only a narrow scope of discovery as to the employee's connections with New Jersey. The Appellate Division, reviewing the discovery order under an abuse of discretion standard, reversed and held that the trial court was overly narrow in limiting discovery. While it did not reach the issue directly, the Appellate Division, recognized the predominant goal of the NJLAD "is nothing less than the eradication of the cancer of discrimination in the workplace." As such, the Appellate Division left open the possibility that the employee, despite the fact that she admittedly performed no work in New Jersey, may still be protected under the NJLAD. Accordingly, the Appellate Division held the case required additional discovery, including discovery as to the following: where the plaintiff's co-employees worked; whether those co-employees worked from home; the nature of the software used by the plaintiff and other employees to conduct business on behalf of the employer; the location of the server used to connect the plaintiff and other employees to the employer's office in New Jersey; the location of the internet service provider allowing the plaintiff and other employees to connect to the employer's office in New Jersey; the individual or individuals who made the decision to terminate plaintiff and the basis for the decision; and any other issues relevant to plaintiff's contacts with New Jersey and her work for the defendant.

Savvy employer takeaway: New Jersey employers with operations and/or employees located in other states should carefully consider whether their actions might have violated New Jersey law, giving rise to a claim under New Jersey law for employees who are working in other states.

Auto Dealers' Decision Paves the Road for New Interpretations of the FLSA

On April 2, 2018, when the Supreme Court of the United States ruled automobile dealer service advisors fall within the same general exemptions to the Fair Labor Standards Act ("FLSA") overtime and minimum wage rules that apply to car salesman and other auto dealer employees, it also made important new law concerning how the FLSA is to be interpreted that may affect employers outside of the automobile sector. In reaching its conclusion that service advisors are exempt employees, the Court rejected a narrow reading of FLSA exemptions to overtime that had been employed by courts since the 1940s. The so-called "narrow construction" rule has been a guidepost for courts for more than half a century and served to limit expansion of the exemptions to the FLSA's overtime and minimum wage rules. This new case signals a potential change in the ways courts will interpret the FLSA in the future and paves the way for employers to use increasingly expansive interpretations of the available exemptions. Only time will tell what happens next. It is possible a more employee-friendly Congress will amend the FLSA to foreclose the broader reading of FLSA exemptions, but it also possible that we will begin to see a less rigid application of FLSA exemptions take hold.

Savvy employer takeaways: Employers must also comply with state laws that govern exemptions from overtime and minimum wage and this ruling does not necessarily affect the standards used to interpret those laws, so savvy employers will tread carefully and make informed decisions when weighing the risks of characterizing employees as exempt when they do not fit squarely within a well-recognized exemption.

When it Comes to Pay Inequality, The Past is Not Prologue

Courts and legislatures alike have been working to find ways to close the gender pay gap through interpretation of existing laws and new laws. One of reasons often cited for the gender pay gap is the carry-forward effect of historical pay inequality. From an employer perspective, salaries offered to employees are calculated to entice candidates and are often formulated based on the employee's current salary. For example, employers reason that they should not need to double an employee's current salary if a 25% increase will suffice. When this approach is used, if women are historically paid lower salaries, there is a cascading effect that carries through for each successive position.

The U.S. Court of Appeals for the Ninth Circuit ruled that the federal Equal Pay Act does not permit an employer to perpetuate pay inequality by using an employee's prior salary as a factor. The Court expressly ruled that an employer cannot justify a wage differential between male and female employees by relying on prior salary. Rather, the Court held factors that justify such a wage differential must be based on job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. Importantly, the Court's opinion clarified that prior salary is an impermissible basis for paying unequal wages, whether prior salary is considered alone or along with other factors.

Savvy employer takeaways: Employers should audit salaries to ensure that there are not gaps in pay based on gender or other factors and employers should be prepared to explain the factors that account for salaries.

Employment Law Myth Busters – Bullying in the Workplace

We likely have the phrase "hostile work environment" to thank for the all too common misunderstanding that hostility in the workplace is, in and of itself, a violation of law. There is no federal law prohibiting bullying in the workplace. Likewise, while many state legislatures have considered laws to prevent bullying in the workplace, there are no laws of general applicability currently in effect that prevent bullying in the workplace. So, what does a hostile work environment mean and why is it illegal? A hostile work environment refers to a very specific type of bullying that is targeted at a person due to their protected characteristics and can be a violation of anti-discrimination laws. A manager who is an equal opportunity jerk does not create the kind of hostile work environment that would be actionable in a lawsuit. Having said that, bullying in the workplace may well violate internal employer policies relating to civility in the workplace and typically inhibits productivity, so employers should not ignore bullying. Moreover, instances of bullying can be manifestations of unlawful discrimination and should be addressed.

Savvy employer takeaways: Employers ignore reports of bullying at their own peril because such conduct, at a minimum, may interfere with productivity and may be an indicator of discrimination. Nonetheless, just because an employee cannot get along with his/her supervisor does not create a legal claim for a hostile work environment, even if the supervisor is abrasive.

For more information, including news, updates and links to important information pertaining to legal developments that affect businesses ranging from cyber security liability arising from electronically-stored information to evolving issues with employees, subscribe to my blog, or follow me on Twitter @AdamGersh.

ATTORNEYS MENTIONED

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