Advisory

JUNE 2015

If you have any questions about this Advisory, please contact:

MARY GAMBARDELLA
Chair
203.363.7662
mgambardella@wiggin.com

KAREN CLUTE
203.498.4349
kclute@wiggin.com

SHERRY DOMINICK
203.498.4331
sdominick@wiggin.com

PETER LEFEBER
203.498.4329
plefeber@wiggin.com

LAWRENCE PEIKES
203.363.7609
lpeikes@wiggin.com

JOHN ZANDY
203.498.4330
jzandy@wiggin.com

NAJIA KHALID
203.498.4314
nkhalid@wiggin.com

CAROLINE PARK
203.498.4317
cpark@wiggin.com

CHRISTINE WACHTER
203.363.7644
cwachter@wiggin.com

JOSHUA WALLS
203.363.7606
jwalls@wiggin.com

Supreme Court's Labor and Employment Decisions - 2014-2015 Term

The United States Supreme Court's most recent term has been marked by a series of significant rulings that serve to alter the landscape of labor and employment law in significant ways. Over the past few months, the Court has spoken on matters ranging from pregnancy-based discrimination, to workplace accommodations for religious practices and beliefs, to compensability of pre-and-post shift activities, to vesting of retiree health insurance benefits. This advisory couples an overview of these recent decisions with a few practice pointers to help employers maintain compliance with the law as interpreted by the Supreme Court.

ACCOMMODATIONS DUE TO PREGNANCY: *YOUNG V. UNITED PARCEL SERVICE*

The Pregnancy Discrimination Act of 1978 ("PDA") not only prohibits discrimination on account of pregnancy, but requires employers to treat women affected by pregnancy, childbirth, or related medical conditions the same as non-pregnant employees who are "similar in their ability or inability to work." The *Young* case involved a pregnant employee's request for a workplace accommodation and provides important guidance on the PDA's parameters.

Peggy Young was a delivery driver for UPS who became pregnant. Her doctor imposed a 20 pound lifting restriction, but the demands of the job were such that UPS drivers were required to lift upwards of 70 pounds. Young requested an accommodation for her lifting restriction, which UPS denied, telling Young that company policy only provided alternative working arrangements to employees who: (1) were injured on the job, (2) were permanently disabled under the Americans with Disabilities Act ("ADA"), or (3) lost their commercial driver's license. As a result, Young could not work through most of her pregnancy and lost her medical coverage. She subsequently filed suit claiming UPS's refusal to accommodate her lifting restriction—while, at least in certain circumstances, accommodating non-pregnant drivers who also could not perform all the position's job requirements—amounted to a violation of the PDA.

Young argued that if an employer accommodates even one or two non-pregnant employees, the employer must, as a matter of law, provide this same accommodation to all pregnant employees irrespective of other criteria. The Supreme Court rejected this interpretation, reasoning that the PDA does not grant pregnant employees an unconditional "most-favored-nation" status any time an employer accommodates a small group of non-pregnant employees. Instead, the Court held that a pregnant employee can establish a prima facie case of pregnancy discrimination by alleging: (1) she belongs to a protected class (i.e., she was pregnant); (2) she sought an accommodation; (3) the employer denied the accommodation request; and (4) the

CONTINUED ON NEXT PAGE

employer accommodated others "similar in their ability or inability to work."

If the plaintiff makes this initial showing, the employer must respond with a legitimate, non-discriminatory reason for denying the accommodation request. If the employer satisfies this burden, the employee must then demonstrate that the proffered reason imposes a "significant burden" on pregnant women. Applying this burden-shifting framework to Ms. Young, the Court held she could prevail under the PDA if she established that UPS did not have a sufficiently compelling reason for refusing to accommodate pregnant employees with lifting restrictions while, at the same time, accommodating non-pregnant employees with lifting restrictions. The Court therefore sent the case back to the trial court so Ms. Young could have an opportunity to meet this burden of proof.

Employers who exclude pregnant employees from discussions about available accommodations while other categories of employees are eligible for those same accommodations act at their own peril. If accommodations are available to certain categories of employees, such as those injured on the job, those same accommodations should be considered for pregnant employees unless there is a legitimate, nondiscriminatory reason not to do so. Since the potential for liability increases with each employee who is eligible for a particular accommodation that a pregnant employee is not, employers should immediately review and adjust their accommodation policies to avoid becoming the subject of a PDA lawsuit.

It is important to note, however, that *Young* does not absolve employers from reviewing pregnant employees' accommodation requests (as well as other disability related requests) under the ADA. ADA protections, independently of the PDA, extend to pregnancy-related impairments which may fall under the ADA's broad definition of "disability" and, in turn, trigger the employer's obligation to provide a reasonable accommodation. Connecticut employers should also be mindful that state law requires them to grant a reasonable leave of absence to employees for disabilities resulting from pregnancy, and to make a "reasonable effort" to transfer a pregnant employee to a temporary positon if she reasonably believes her current position may cause harm to her or her fetus.

RELIGIOUS ACCOMMODATIONS: *EEOC V. ABERCROMBIE & FITCH STORES, INC.*

In *EEOC v. Abercrombie & Fitch, Inc.*, the Court ruled that Title VII's prohibition against religious discrimination and its mandate that reasonable accommodations be made for religious practices may apply even where an applicant does not specifically notify the employer of the need for a religious-based accommodation.

Samantha Elauf, a practicing Muslim who wore a traditional headscarf, interviewed for a job with Abercrombie & Fitch. At the time of her application, Abercrombie employees were subject to a "Look Policy" (i.e., dress code) which prohibited wearing "caps." Although otherwise qualified for the position, Elauf was not hired because, in Abercrombie's view, Elauf's headscarf violated the Look Policy.

Because Elauf did not, when informed of the Look Policy, disclose that she wore the headscarf for religious reasons, or ask that her religious practice be

CONTINUED ON NEXT PAGE

accommodated, Abercrombie claimed it had no actual knowledge of her need for an accommodation, and therefore, could not have violated Title VII's ban on religious discrimination. The Supreme Court rejected the "actual knowledge" standard, holding that an employer can violate Title VII even when its motive not to hire is based on "an unsubstantiated suspicion" that an applicant needs a religious accommodation. The Court was quite emphatic on this point: "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." Thus, it was of no consequence that Elauf never asked for a religious accommodation or informed Abercrombie that she wore the headscarf for religious reasons. If she can prove her need for a religious accommodation was a motivating factor in Abercrombie's decision not to hire her, she will be able prevail under Title VII.

Going forward, employers should be sure to disclose any dress code requirements to prospective employees and inquire if there is any reason the applicant cannot comply. If an applicant confirms he/she can comply, there is no need for further inquiry. If the applicant says he/she cannot comply with the policy, ask "why." If the applicant responds with a reason that is protected by law (e.g., religious need, disability covered by the Americans with Disabilities Act, etc.), the employer should engage the applicant in a constructive interactive dialogue to see if a reasonable accommodation can be made. The lesson of Abercrombie & Fitch is clear: employers are not off the hook simply because an applicant fails to specifically ask for a religious accommodation, and must remain vigilant in ensuring that an applicant's religion or religious practice does not impact hiring or other employment decisions.

WAGE AND HOUR RULES: *INTEGRITY STAFFING SOLUTIONS, INC. V. BUSK*

The Portal-to-Portal Act amended the Fair Labor Standards Act ("FLSA") to preclude employer liability when an employee claims compensation based on "activities which are preliminary to or postliminary to" (i.e., at the beginning and end of the work day) the employee's "principal activities." In *Integrity Staffing Solutions, Inc. v. Busk*, the Supreme Court interpreted the Portal-to-Portal Act to provide that employees were not entitled to compensation for time spent waiting for, and undergoing, security clearance checks following a work shift.

Integrity Staffing provided employees to an Amazon.com warehouse. After the completion of a their work shift—and prior to leaving the warehouse—each employee was required to pass through a security screening area designed to root out theft. Integrity Staffing did not pay the employees for this time, which allegedly could take upwards of twenty-five minutes. The employees filed suit, claiming the failure to compensate them for time spent going through the security screening process violated the FLSA.

The Court ruled that compensability does not turn simply on whether a time-consuming activity is required by the employer. Rather, only those activities that enhance the safety or effectiveness of an employee's work (e.g., putting on and taking off protective gear for work in a hazardous environment, a butcher sharpening knives) are compensable. Thus, because a security screening does not help warehouse employees carry out their primary activities in a safer or more effective manner, the FLSA does not require compensation for

CONTINUED ON NEXT PAGE

the time dedicated to waiting for, and undergoing, those screenings.

This case serves as an important reminder that in order to avoid a wage claim under the FLSA, employers carefully consider whether any activities performed before or after an employee's principal tasks are "tied to the productive work that the employee is employed to perform," and, if so, compensate accordingly.

OTHER CASES

The Court's decision in *M&G Polymers USA, LLC v. Tackett* answered a long-vexing question as to the vesting of retiree health insurance benefits under the terms of a collective bargaining agreement. Retirees and their former union brought suit against M&G Polymers for requiring retirees to begin contributing to their health benefits, arguing that the expired collective bargaining agreement between M&G and the former union vested them with benefits for life by virtue of a clause stating that certain retirees "will receive a full Company contribution toward the cost of [health care] benefits." The Sixth Circuit Court of Appeals had held that absent specific language to the contrary, courts should presume retiree welfare benefits provided in collective bargaining agreements were vested or guaranteed for life for those employees who retired under that particular agreement. The collective bargaining agreement at issue did not specify a duration and, though it contained termination provisions for active employee benefits and a retiree's spouse and dependent's benefits under certain circumstances, it did not contain termination provisions for the retiree health benefits at issue. Based on this, the Sixth Circuit inferred that the parties intended to vest lifetime contribution-free retiree medical benefits.

The Supreme Court disagreed, holding that collective bargaining agreements should be construed in accordance with traditional principles of contract interpretation, including principles regarding the effect of contractual obligations after termination. Thus, rather than using a bright line rule or a presumption of vesting, the Court endorsed a "bigger picture" approach that focuses on the specific language and underlying intent of the collective bargaining agreement provisions relating to retiree health insurance benefits at issue in the litigation.

Finally, *Mach Mining, LLC v. Equal Employment Opportunity Commission* addressed the provision in Title VII requiring the EEOC to make efforts to confer, mediate, or conciliate a particular dispute before filing suit against an employer. The EEOC argued that its efforts in this regard were not subject to review by courts, and that the nature and extent of conciliation is entirely at its discretion. The Court rejected that view, making clear that the EEOC must, at a minimum, communicate to an employer the substance of its allegations—i.e., the practice alleged to be discriminatory and the employees alleged to have been discriminated against—and permit the employer a chance to remedy that alleged discrimination prior to commencing litigation. Where the EEOC fails to do so, employers may seek dismissal of a complaint on that basis. The failing is of course easily rectified by the EEOC, so a dismissal for failure to conciliate will in most cases merely delay, not obviate, a lawsuit.

If you have any questions about these rulings or their bottom line impact on your business, please do not hesitate to contact us.