Advisory

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Employment Law 2015 - Year In Review

Employment law is a constantly changing legal landscape and the past year provided employers and employees with a great deal of food for thought. The following cases and decisions by courts, the National Labor Relations Board ("NLRB"), and the Equal Employment Opportunity Commission ("EEOC"), affect employers in all industries and should be considered with care in the coming year.

Purple Communications, Inc., 361 N.L.R.B. No. 126 (Dec 11, 2014)

In a reversal of its 2007 decision in *Register-Guard,* the NLRB determined that employees are entitled to use employer e-mail systems for protected Section 7 concerted activity during non-work hours. The decision also prevents the use of blanket bans (prohibiting all non-work use of e-mail systems) unless the employer can show "special circumstances [that] make the ban necessary to maintain production or discipline." However, the decision does not require employers to grant e-mail access to all of its employees. The *Purple Communications* ruling continues a trend reflecting that the Board is highly concerned with preserving the rights of employees to engage in concerted activity on social media and electronic platforms. Both union and non-union employers should review their workplace policies concerning e-mail usage and social media to ensure employees' Section 7 rights are not potentially being violated.

Young v. UPS, 135 S. Ct._1338_ (Mar. 25, 2015)

The Supreme Court clarified the scope of protections afforded to pregnant employees under the Pregnancy Discrimination Act of 1978. The Court held that a pregnant employee may 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 employer accommodated others "similar in their ability or inability to work." Thus, if an employer offers accommodations, such as job reassignments, to certain categories of employees (e.g., employees who suffer work-related injuries), then it may be obliged to extend the same accommodations to pregnant employees unless there is a non-discriminatory reason to deny the accommodation. An employer acts at its own peril where it fails to extend a reasonable accommodation to a pregnant employee while simultaneously extending accommodations to employees in other similar circumstances.

NLRB Election Law Changes (April 2015)

The NLRB implemented changes to its rules regarding union certification elections in April of 2015. The new rules are generally acknowledged as being advantageous to labor interests and restricting the rights of employers in union elections. The specific changes include: (1) employers, once served with a Notice of Petition for Election by the NLRB, must post and distribute the notice by e-mail within 2 days; (2) pre-election hearings will be set for 8 days after a Notice of Hearing is served; (3) pre-election hearings are limited to only "necessary issues," and will not include issues of eligibility or inclusion that affect only a small percentage of a voting unit; (4) employers

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must provide a "statement of position" prior to the pre-election hearing and issues not raised in the statement may not be argued at the hearing; (5) elections will no longer be stayed for 25 days following the issuance of a decision on a petition; and (6) voter lists must be submitted within 2 days of the regional director's approval of an election and must include personal phone numbers and e-mail addresses of eligible voters, if that information is available to the employer. Data through mid-October of this year shows that the median number of days between the filing of an election petition and the election itself was twenty-three, compared to thirty-eight in that same period in 2014.

Employee Benefits Changes – Same-Sex Marriage (June 2015)

This past summer, the Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples have a fundamental right to marry. The impact of this decision on employers is that employee benefit plans, especially in states that had not previously adopted same-sex marriage, must be altered to offer equal benefits to same-sex spouses and families as to opposite-sex spouses and families. Additionally, employers that have private health insurance plans and are not required to provide coverage for spouses may risk a discrimination suit if benefits are offered to opposite-sex spouses and not same sex spouses. Employers must also be careful to ensure that same-sex couples are offered the same tax treatment as opposite-sex couples on benefits, both at a state and federal level, and to communicate these changes to the workforce.

DOL Proposed Rule-Making – White-Collar Employee Exemptions (July 2015)

The Department of Labor issued a Notice of Proposed Rulemaking on July 6, 2015 suggesting changes to the white-collar minimum wage and overtime pay exemptions for executive, administrative, professional, outside sales, and computer employees. Presently, certain employees whose primary job duties fall within certain specified categories are exempt from overtime and minimum wage requirements under the FLSA if they earn a salary of $23,660 per year or more (for a full-time employee). Similarly, an exemption currently also exists under federal law (for which there is no Connecticut equivalent) for highly compensated employees if the employee earns $100,000 per year or more and performs certain exempt tasks. The proposed rule change from the DOL would set new salary thresholds to qualify for both the white-collar and highly compensated employee exemptions, which are currently estimated to be $47,892 per year for white-collar employees and $122,148 per year for highly compensated employees. The comment period for the proposed rule change ended on September 4, 2015. Though no rule change has yet issued, employers should expect new rules regarding these exemptions in mid-2016.

EEOC Ruling Recognizes Sexual Orientation Discrimination Claims Under Title VII

The EEOC changed course in a decision on July 16, 2015, finding that employees have protection under Title VII from discrimination based on sexual orientation. Prior EEOC cases held that sexual orientation was not a protected class for the purposes of Title VII claims but the 2015 ruling against the U.S. Department of Transportation is a clear departure from the EEOC's previous position. In the July case, a male employee of the Federal Aviation Administration claimed he was denied a promotion due to his sexual orientation. The EEOC concluded that the employer relied on a "sex-based consideration" by improperly taking into account an employee's sexual orientation in undertaking an adverse employment action. Accordingly, the EEOC has confirmed that discrimination based on sexual orientation is equivalent to an accusation of sex discrimination under Title VII. It is worth noting that the EEOC's decision in this case was reached a mere month after the Supreme Court overturned generations-long precedent regarding same sex couples in *Obergefell v. Hodges.*

Browning-Ferris Industries, 362 N.L.R.B. No. 186 (Aug. 27, 2015)

The NLRB adopted a new standard to determine when two companies are joint employers in Brown-Ferris Industries, holding that where there is a common law employment relationship with an employee and an entity has either direct or indirect control over terms and conditions of employment, then a joint employer relationship exists. Previously, an entity was required to exert direct and immediate control over the working conditions of employees to be considered a joint employer. Factors to be considered in the determination include power to hire, fire, discipline, supervise and direct, as well as "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance." The Board may also interpret an entity's reservation of the right to invoke these powers, regardless of whether the power has been exercised, as a signal that there is a joint employer relationship. The ruling should guide employers in structuring relationships with third party service providers. Franchisors should also review their relationships with franchisees as their business models may suggest some level of control, regulation, or oversight of franchisee employees that could create a joint employer relationship.