BUGBEE & CONKLE

THE EMPLOYER

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OSHA AND THE TEMPORARY WORKER

For many months we have been reporting about OSHA's increased interest in the relationship that arises whenever a temporary worker is sent by a staffing agency to a host employer's work site. The most recent event in this area of increased activity by OSHA occurred on March 10, 2014, when OSHA issued the first of a proposed series of formal educational guidance documents.

Entitled "Temporary Worker Initiative Bulletin No. 1" this Bulletin indicates that OSHA is going to focus on the injury and illness record keeping and reporting requirements in this situation, under the theory that the staffing agency and the host employer are in a "joint or dual employment" relationship. In the eyes of OSHA, both the staffing agency and the host employer are therefore responsible for the safety and health of the temporary workers. Furthermore, any injuries or illnesses suffered by such workers must be recorded on the OSHA 300 injury and illness log form, and, in most instances, it is the host employer that must complete this form in the case of such injuries.

In addition, the host employer generally is responsible to supervise temporary workers on a day to day basis. Therefore, OSHA also believes that the host employer and the staffing agency should maintain frequent communication, both between themselves and the temporary workers, to ensure that injuries and illnesses, if any, are properly reported and recorded. The Bulletin also explains that such communications will alert the staffing agency to any existing workplace hazards, based upon any pattern or repeat injuries or illnesses, and will also alert the staffing agency to any protective measures which should be implemented to protect temporary workers. OSHA considers both the staffing agency and the host employer accountable for establishing such safety procedures, as well as providing appropriate safety and training of temporary workers regarding workplace hazards.

The Bulletin is simply the most recent document issued by OSHA focusing on the safety and health of temporary workers. We believe there is only one accurate interpretation of OSHA's increased interest in this area: if you are a staffing agency, and/or if you use temporary employees from a staffing agency, OSHA will hold you accountable for all of the "employer obligations" which OSHA imposes on employers generally. These can sometimes be quite burdensome. Therefore, if you have any questions concerning how this new initiative and focus by OSHA may affect you, please contact any member of our Labor and Employment Law practice group.

MARK YOUR CALENDAR!

Bugbee & Conkle will hold its Annual Employment Law Seminar at the Hilton Garden Inn, 6165 Levis Commons Blvd., Perrysburg, Ohio on September 25, 2014!

APPLICATION OF "MINISTERIAL EXCEPTION" EXPANDS INTO AGE DISCRIMINATION CASES

On March 14, 2014, Ohio's First District Court of Appeals decided the case of *Fisher v. Archdiocese of Cincinnati, 2014-Ohio-944,* in which it applied the "ministerial exception" to an age discrimination claim brought against a religious institution. Ms. Fisher worked for the Catholic-owned and operated Gate of Heaven Cemetery for almost 20 years. Ms. Fisher, herself a practicing Catholic, was Co-Director of the cemetery, with her duties focused on contact with families and assisting with burials and services. In June 2011, Ms. Fisher, along with several other employees, was terminated as the result of a restructure in the sales force. Ms. Fisher sued claiming age discrimination.

The court found in favor of the Archdiocese, applying two related doctrines: the "ministerial exception" doctrine, and the "ecclesiastical abstention" doctrine. The ministerial exception applies when individuals are found to be "ministers" under guidelines provided by the U.S. Supreme Court, wherein individuals may be found to be ministers if their job duties play a role in conveying the church's message, or carrying out the church's mission. Here, although not an ordained minister, the court found that Ms. Fisher was a minister under this exception. Important to this finding was the fact that Ms. Fisher's duties included her involvement in the preparation of and attendance at religious rituals at the grave site, daily interaction with clergy, her leadership role at the cemetery, and her attendance at a multi-year doctrine-specific training at a religious university. Also important was Ms. Fisher's own opinion that her role as Co-Director was important to the Archdiocese's greater ministry.

The court also dismissed her claims under the "ecclesiastical abstention" doctrine, which prohibits courts from interfering with the internal affairs of a church. Unlike the ministerial exception, the ecclesiastical abstention doctrine can be applied to matters involving non-ministers. For example, the doctrine has been applied in a sex discrimination case involving a receptionist terminated for opposing the reassignment of a priest. Because the reassignment of the priest was an internal affair, the termination was ecclesiastical in nature, and the court in that case refused to hear the receptionist's complaint of employment discrimination.

Although these two doctrines do not arise in a great number of cases, the role of existing employment laws and the special rules that apply when an employee, or an employer, raise issues of religious freedom continue to generate considerable discussion and an unclear application of those laws. If you have any questions about how the various employment discrimination laws apply, please contact a member of our Labor and Employment Law practice group.

If you have any questions concerning any of the topics in this issue of *The Employer*, please contact a member of our Labor and Employment Law practice group at (419) 244-6788.

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