BUGBEE & CONKLE

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NLRB'S INTERNAL CONFLICT ON SOCIAL MEDIA

As we have previously reported, the National Labor Relations Board (NLRB) is increasingly inserting itself into the relationship between employers and employees, regardless of whether a union is present on site. One of the areas where this intrusion is the most obvious, and yet most difficult to understand, is in the area of employer policies regulating employee use of various forms of social media.

On September 19, 2014, this confusion was increased by the release of an "Advice Memorandum" from the NLRB's Division of Advice. The issue addressed in this Memorandum is whether an employer may lawfully require an employee, who identifies him/herself on a social media site as an employee of the company, to also post a disclaimer. In particular, the Division of Advice was faced with an employer policy that required all employees who identified themselves online as a company employee to post, in a reasonably prominent place, the following disclaimer:

> "The views expressed on this website/blog are mine alone and do not necessarily reflect the views of my employer."

In what is being touted by some as a major victory for employers, the Division of Advice concluded that this policy was lawful. This opinion, however, is in direct conflict with a decision by an Administrative Law Judge of the NLRB. In the case of Kroger Co. of Michigan, which was decided on April 22, 2014, the Judge found that a disclaimer, essentially worded the same as that reviewed by the Division of Advice, was unlawful because it would "chill employees in the exercise of their rights" under federal labor law.

The NLRB has not yet ruled on this issue, and as a result there is an internal conflict within the workings of the NLRB on the issue. However, that conflict will be resolved in the months to come, because the Kroger case has been appealed to the full Board, and is now ready for argument and decision sometime in the next few months. Although we will track how the Board handles this issue and report on its decision when it is issued, it would be prudent for all employers to review their existing policies on this issue and determine whether they have a requirement that employees disclaim any statements they might make, having once identified themselves as employees, and if they do not, whether such a policy should be adopted.

NEW AREAS OF EEOC ACTIVITY

The EEOC continues to push the law into new territories. In particular, the EEOC is pursuing cases of religious and gender discrimination, which if successful could have significant impact on employers.

In the first case, *EEOC v. Abercrombie & Fitch Stores, Inc.*, Case No. 14-86, the EEOC is asking the U.S. Supreme Court to decide whether knowledge of an individual's religion is necessary to make it illegal for an employer to refuse to hire or to terminate an individual based on the individual's religious observance and practice.

In the *Abercrombie* case, a woman applied to work at an Abercrombie store. Although the applicant wore a hijab to her interview, there was no discussion about the hijab or the company's policy on wearing head coverings. Despite being otherwise qualified and deemed a good fit, she was ultimately not hired because her hijab did not meet the right "look," according to the company's "look book" for employees. The District Court sided with the EEOC, finding that Abercrombie had enough information to put it on notice that the applicant may need an accommodation for a religious practice or belief. The Court of Appeals reversed, holding that explicit verbal notice from the applicant was necessary to put the employer on notice. The Supreme Court will now decide what kind of notice was required to trigger the employer's obligation to engage in the interactive process to accommodate the applicant's religious belief.

In a second set of cases, the EEOC is advancing claims of transgendered individuals in two cases, one filed in Florida and one in Michigan. In the Florida case, brought against an eye clinic, the employee presented as a man when hired, and then transitioned to a woman. The employee was told her position had been eliminated and was fired. Two months later, however, she was replaced with a man. In the Michigan case, brought against a funeral home, the employee presented as a man at the time of hire, but was fired after notifying the company that he was going to transition to be a woman. Both cases allege the employees were the victims of sex discrimination. If successful, they would mark the first time "sex discrimination" under Title VII was found to include discrimination against transgender individuals.

We will continue to monitor these cases, and the activities of the EEOC, and provide updates as these issues evolve.

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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