

Emerging Labor and Employment Law Issues Impacting the Healthcare Industry

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OVERVIEW

- **Litigation Update**
 - Supreme Court watch
 - Lower court and state court action
- **Recent EEOC Guidance**
- **NLRA Update**
 - Union organizing efforts targeting healthcare industry
 - Key NLRB decisions – The September Trilogy
- **Whistleblower/SOX Update**
- **Employment Challenges for Government Contractors**

SUPREME COURT WATCH

- **Employment Cases – 2007-08 Term**
 - Seven labor and employment cases pending
 - *Federal Express v. Holowecki*
 - *LaRue v. DeWolff, Boberg & Associates*
 - *CBOCS West, Inc. v. Humphries*
 - No NLRA cases pending

RECENT SUPREME COURT DECISIONS - Discrimination in Pay

- ***Ledbetter v. Goodyear Tire & Rubber Co. (May 2007)***
 - 5-4 Decision (Alito for the majority; Ginsberg dissent)
 - Alleges discrimination in pay based on gender over 19-year employment with company
 - Held: Each paycheck is discrete act; pay decisions outside of 180-day period not actionable
 - Major new roadblock for individual and class action cases alleging discrimination in pay
 - Legislative response

RECENT SUPREME COURT DECISIONS

- Retaliation

- ***Burlington Northern Rwy. v. White (2006)***
 - Alleging transfer and suspension without pay were retaliatory actions and adverse employment actions
 - Held: Both actions constitute actionable retaliation under Title VII
 - Announces new standard – would dissuade a reasonable employee
 - Post-Burlington – Standard applied in various contexts

RECENT SUPREME COURT DECISIONS - Sexual Harassment

- ***Pennsylvania State Police v. Suders (2004)***
 - Alleging sexual harassment was so severe she was forced to resign
 - Held: Constructive discharge theory available in Title VII cases
 - Two-prong defense from Faragher/Ellerth applies
 - Accessible and effective employer policy for reporting sexual harassment
 - Plaintiff's unreasonable failure to avail

RECENT SUPREME COURT DECISIONS - Statutory Coverage – Employee v. Owner

- ***Clackamas Gastroenterology Assoc., P.C. v. Wells (2003)***
 - Disability claim
 - Whether physician-shareholder in professional corporation is an “employee” under the ADA
 - Adopts EEOC guidance; applies six-factor common law control test
 - Can organization hire/fire individual
 - Supervision of individual by organization
 - Does individual report to more senior person
 - Can individual influence organization
 - Is employee issue addressed in any written agreement
 - Does individual share in P&L

LOWER AND STATE COURT DECISIONS INVOLVING HEALTHCARE EMPLOYERS

■ FMLA – Return to Work

– *Bloom v. Metro Heart Group of St. Louis, Inc.* (8th Cir. 2006)

- Ultrasound sonographer returning from leave due to carpal tunnel syndrome could not grip ultrasound equipment. Employer placed her on FMLA leave and required medical certification. After 12 weeks, employer terminated employee because she could not perform essential functions.
- Court agreed with termination.

RECENT HEALTHCARE EMPLOYER DECISIONS

- **FMLA – Paid Time Off**

- *Solovey v. Wyoming Valley Health Corp. System Hospital (Middle District of Pennsylvania 2005)*

- Company policy required 2 week notice before taking paid vacation. Employee took off time to care for her father, but did not have time to give 2 week notice so employer denied request for paid time off.
 - Court held that unreasonable notice requirement was contrary to terms of the FMLA.

RECENT HEALTHCARE EMPLOYER DECISIONS

- **Sexual Harassment**

- *Dunn v. Washington County Hospital, (7th Cir. 2005)*

- A hospital nurse brought a Title VII claim against her employer hospital claiming she was subjected to sexual harassment by an independent contractor physician. The trial court granted summary judgment in favor of the defendant, ruling that the employer could not be held vicariously liable for the acts of those not under its control. A split Seventh Circuit reversed, holding that the vicarious liability doctrine was irrelevant to the case since under *Burlington and Faragher*, employer liability was direct rather than derivative.
 - “It makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter, a customer. Ability to ‘control’ the actor plays no role.”

EEOC GUIDANCE - HEALTHCARE EMPLOYERS AND THE ADA (FEBRUARY 26, 2007)

- **Fact sheet is designed to address problems unique to the health care setting**
- **Lifting Restrictions:**
 - Lifting may not be an essential function of the RN job
 - May be a reasonable accommodation for a hospital to purchase a lifting device to enable a nursing assistant to lift patients

EEOC GUIDANCE – HEALTHCARE EMPLOYERS AND THE ADA

- **Direct Threat to Health or Safety:**
 - Must be made based on an individualized assessment of the employee’s present ability to safely perform the essential functions of the job
 - HIV-positive employees in certain types of positions, including drawing blood in a blood bank and working as nurses’ aides in a nursing home, would not pose a direct threat to health or safety if they follow universal precautions.

EEOC GUIDANCE – HEALTHCARE EMPLOYERS AND THE ADA

■ **Schedule Changes**

- May be a reasonable accommodation to permit a nurse to work a fixed schedule rather than rotating shifts, even though other nurses are required to work rotating shifts
- Even when seniority is involved, an employer (and a union if a collective bargaining agreement exists) should determine whether exceptions to the seniority system exist

EEOC GUIDANCE – HEALTHCARE EMPLOYERS AND THE ADA

- **Healthcare Employers' Bottom Line:**
 - EEOC's attention to this subject ensures that family responsibility discrimination will continue to be a source of discussion
 - And lawsuits

EEOC GUIDANCE - UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (MAY 23, 2007)

- **Employers may violate Title VII or the ADA through actions (and reactions) toward employees and applicants seeking to balance work and family obligations**
- **EEOC advocates flexible workplace policies and practices, designed to make it easier for employees to strike this balance**
- **A new risk-management issue**

EEOC GUIDANCE – UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

■ **Gender Discrimination — Female Caregivers**

– Examples:

- Female applicant rejected after an interview discussion about her childcare responsibilities
- Reducing a working mother's job responsibilities after her return from maternity leave, even if done for benevolent reasons, may violate Title VII - gender-based stereotypes

EEOC GUIDANCE – UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

■ **Gender Discrimination — Male Caregivers**

– Examples:

- Deny male employee's request for childcare leave, although a similar request from a female employee is routinely granted
- Treating men and women differently as to childcare leave requests may violate Title VII - gender-based stereotypes

EEOC GUIDANCE – UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

- **Pregnancy Discrimination**

- Example:

- Pregnant employees who miss work time due to pregnancy-related illness, or who have temporary lifting restrictions, must be treated the same as non-pregnant employees with the same limitations

EEOC GUIDANCE – UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

- **Disability Discrimination — Relationship With a Disabled Individual**
 - Example:
 - An applicant is rejected because he is a single father with sole custody of a disabled child
 - Liability if employer concludes that the applicant's caregiver responsibilities would negatively impact attendance and performance

HEALTHCARE EMPLOYERS' BOTTOM LINE

- **Healthcare Employers' Bottom Line:**
 - The EEOC's fact sheet illustrates the agency's pro-employee position
 - Reflects EEOC focus on health care employers and increasing size and importance of health care industry

NLRA UPDATE – HEALTHCARE IN THE CROSS-HAIRS

- **Union Organizing Efforts Expand**

- New union – “SEIU Healthcare”

- One million members
- Annual budget of \$120 million
- 4,000 organizers target 10 million healthcare workers

- Recent activity

- Target employers – national hospital and nursing home chains, Catholic institutions, teaching hospitals
- Target geography - Massachusetts, Ohio, New Jersey and Pennsylvania
- Test case – mid-October mail ballot election covering 22,000 individuals who provide home care in Massachusetts

NLRA UPDATE – NLRB DECISIONS

- **The “September 2007 Trilogy”**
 - Board at Full Strength – 5 Members
 - Issued Decisions in Three Significant Cases
 - 3-2 majority decision in each, along party lines
 - Probably not the last word
 - *Dana Corp.*, 351 NLRB No. 28 (9/29/07)
 - Most closely-watched case pending at the NLRB
 - Recognition based on card check – union-preferred method
 - New rule – one year “recognition bar” inapplicable if decertification petition filed within 45 days after notice of recognition
 - Likely to be appealed
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NLRA UPDATE – NLRB DECISIONS

- **The “September 2007 Trilogy”**
 - *Toering Electric Co.*, 351 NLRB No. 18 (9/29/07)
 - “Salts” – union supporters obtaining employment in order to organize the employer’s workforce
 - Discrimination based on union activity generally prohibited
 - New rule – refusing to hire salt is lawful if the applicant is not “genuinely interested” in the employment relationship
 - Burden on the union/NLRB to show genuine interest
 - Board majority identifies types of evidence relevant to inquiry

NLRA UPDATE – NLRB DECISIONS

- **The “September 2007 Trilogy”**
 - *BE&K Constr. Co.*, 351 NLRB No. 29 (9/29/07)
 - Extension of Bill Johnson’s to completed lawsuits
 - On remand from the Supreme Court
 - Employer’s “reasonably-based” – but ultimately unsuccessful – lawsuit is not an unfair labor practice
 - Likely headed back to the Supreme Court
 - Too important to unions
 - Tie into organizing efforts

SOX UPDATE – RETALIATION CASES

- ***Welch v. Cardinal Bankshares, (ARB May 31, 2007)***
 - Construes “Reasonable Belief” Standard
 - Former CFO alleges termination in retaliation for his reports of certain accounting practices and issues
 - Misclassification of loan recoveries where no impact on bottom line
 - Violations of accounting standards
 - Insufficient controls over accounting practices
 - External auditors kept CFO out of loop
 - ARB reverses ALJ, holding CFO could not – as matter of law – have a “reasonable belief” that these practices violated fraud or securities laws

SOX UPDATE – RETALIATION CASES

- ***Szymonik v. Tymetrix, Inc., (ALJ Mar. 8, 2006)***
 - Tolling Agreements in Jeopardy
 - 90-day filing requirement for retaliation claims
 - Claimant threatens to file SOX complaint; settlement discussions begin
 - Enter into standard tolling agreement – employer agrees not to raise statute of limitations defense should negotiations fail
 - Negotiations fail; complainant files SOX complaint; shocking
 - ALJ dismisses complaint as time-barred
 - Raised sua sponte
 - Congress not intend “for private parties to enter into private, legally binding agreements” to toll statute of limitations
 - Plaintiff lawyers aware?
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CHALLENGES FOR FEDERAL CONTRACTORS

- **OFCCP – Increasingly Active**

- Audit Authority

- New guidance – focus on systemic discrimination in pay

- Regression analysis appropriate

- OFCCP employing secret methodology

- Dangerous intersection with class action litigation – discovery and privilege issues

- Applicant tracking – new burdens

- Glass ceiling issues – new EEO-1 categories

- New Regulations Regarding Veterans

- Change in Administrations – Watch this Space