Employment Flash

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In This Issue:

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Supreme Court Rules Refusal to Hire Based on Hijab is Religious Discrimination

The U.S. Supreme Court recently held that job applicants need only show that a religious accommodation was a motivating factor in denying employment to prevail on a disparate-treatment claim under Title VII of the Civil Rights Act (Title VII). *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86. Here, the employer refused to hire an applicant because her hijab conflicted with its dress code prohibiting employees from wearing caps. The employer argued that Title VII's prohibition against an employer refusing to hire a job applicant because of her religion requires the employer's actual knowledge of the religious accommodation, and the applicant had not explicitly requested such an accommodation. The Court disagreed, reasoning that Title VII prohibits an employer from having discriminatory motives when making employment decisions, regardless of the employer's actual knowledge.

SEC Diversity Standards and Employer Confidentiality Agreement Action

Section 342 of the Dodd-Frank Act requires the Securities and Exchange Commission (SEC) to establish an inclusion office to provide guidance to entities it regulates. (This requirement also applies to the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Office of the Comptroller of the Currency). The SEC recently issued a joint press release establishing voluntary standards for assessing diversity policies and practices. The standards cover organizational commitment to diversity, workforce profile,

employment practices, procurement and business practices, supplier diversity, promotion of organizational diversity and inclusion.

The SEC announced its first enforcement action based on restrictive language in employee confidentiality agreements. The action was premised on Rule 21F-17 of the Dodd-Frank Act regulations which prohibits companies from taking action that impedes whistleblowers from reporting possible securities violations to the SEC. The SEC brought the action based on an employer's requirement that employees involved in an internal investigation of possible securities law violations were required to sign confidentiality statements agreeing that they could face disciplinary action for discussing matters with outside parties. The employer settled by agreeing to a cease-and-desist order, paying a $130,000 penalty and amending its confidentiality agreement to clarify that employees are free to report possible violations to the SEC and other governmental entities without prior approval or fear of retaliation.

Finally, to close the loop on the SEC's first whistleblower retaliation action (see June 2014 edition of *Employment Flash*), the SEC recently announced that it awarded 30 percent of its recovery in the action spurred by the whistleblower. The SEC explained that it awarded the highest possible recovery percentage, which in this case was over $600,000, because of the retaliation the whistleblower suffered.

DOL Independent Contractor Misclassification Guidance

On July 15, 2015, the Wage and Hour Division of the Department of Labor (DOL), issued an Administrator's Interpretation stating that most workers are employees and not independent contractors under the Fair Labor Standards Act (FLSA). The interpretation relies on the commonly used economic realities test to assess whether a company "employs" a worker under the FLSA, which defines "employ" as "suffers or permits to work." The interpretation provides guidance to determine whether the worker is economically dependent on the employer (and is an employee) or is in business for him or herself (and is an independent contractor). The U.S. Supreme Court recently confirmed that administrator's interpretations, which are agency interpretations not subject to the notice and comment process required for rule-making, are treated as interpretive rules and do not have the force and effect of law. *Perez v. Mortgage Bankers Assn*., No. 13-0421.

EEOC Issues Wellness Program Proposed Rule

The Equal Employment Opportunity Commission (EEOC) recently released a proposed rule on the intersection between employer wellness programs and the Americans with Disabilities Act (ADA). Lately, the EEOC has scrutinized employer wellness programs, including by using them as the basis to bring ADA actions against employers for the first time last year. (See December 2014 edition of *Employment Flash*.) Among other things, the proposed rule lists acceptable parameters for establishing a voluntary health program:

- Programs must be reasonably designed to promote health or prevent disease, including any features which require disability -related inquiries or medical examinations.
- Employers may receive program information only in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals except as is necessary to administer the program.
- Participation must be voluntary and the employer must not (1) require employees to participate, (2) deny access to health coverage or generally limit coverage under its health plans for nonparticipation, or (3) take other adverse action against an employee for refusing to participate.
- The maximum allowable incentive an employer can offer employees to maintain the voluntary aspect of the wellness program is 30 percent of the total cost of employee-only coverage.

NYC Employment Discrimination Investigations and Employer Credit Check Prohibitions

New York City Mayor Bill de Blasio recently signed a bill requiring the New York City Commission on Human Rights to enact a program testing for discriminatory employment practices among employers, employment agencies and labor unions. The program will consist of sending out matched candidate pairs to apply for, or inquire about, the same job. The matched pair will include two individuals with similar credentials, one of whom is a protected class member, to determine if discriminatory hiring practices are present. The New York City Human Rights Law (NYCHRL) prohibits discrimination on the basis of race, color, religion, creed, age, national origin, disability, gender, sexual orientation, transgender status, marital status, military or veteran status, partnership status, alienage, citizenship, unemployment status and criminal history. The commission is required to perform at least five tests per year.

Separately, the NYCHRL recently was amended to prohibit employers in New York City from using or requesting an employee's or job applicant's consumer credit history for employment purposes, unless the job falls under specified exceptions. The exceptions include, among other things, positions for which state or federal law and regulations require the use of an employee's credit history, positions requiring security clearance, positions having signatory authority over third-party funds or assets valued at $10,000 or more, and positions with authority to enter financial agreements valued at $10,000 or more. The law applies to New York City employers with four or more employees and gives plaintiffs a private right of action to recover back pay, front pay, emotional distress damages, attorney's fees and punitive damages. The law goes into effect on September 3, 2015.

OSHA Guidance on Restroom Access for Transgender Employees

The Occupational Safety and Health Administration (OSHA) recently published guidance regarding restroom access for transgender employees. The guidance recommends implementing written, nondiscriminatory policies providing transgender employees the opportunity to pick the safest and most appropriate restroom facility option possible. OSHA noted that employers could accomplish this goal by providing single-occupancy, unisex restrooms or multiple-occupant, unisex restrooms with lockable single occupant stalls. In no event, according to OSHA, should an employer require an employee to use a segregated facility because of gender identity or transgender status. OSHA has indicated that failure to follow its guiding principles could lead to a citation.

On a similar note, the EEOC also has targeted employers who fail to provide transgender employees with appropriate restroom access, including by suing an employer for refusing to allow a transgender woman to use the women's bathroom.

Obama Requests Expansion of Overtime Eligibility

President Barack Obama recently directed the DOL to update and modernize the overtime regulations concerning white collar worker eligibility to receive overtime pay under the FLSA. The purpose of Obama's directive is to allow more workers to qualify for overtime pay. On June 29, 2015, the DOL unveiled a proposed rule that would broaden the overtime regulations to cover an additional estimated 5 million people by raising the minimum salary threshold required to qualify for the "white collar" exemption from $23,660 to $50,440 per year. The DOL also is proposing automatic future updates to the new salary threshold.

Obama Vetoes Joint Resolution to Block NLRB's New Election Rules

Earlier in 2015, the Senate passed a resolution under the Congressional Review Act to block the final union election process rules promulgated by the National Labor Relations Board (NLRB) in December 2014. (See March 2015 edition of *Employment Flash*.) These rules significantly increase the speed of NLRB collective bargaining union representation elections. (See December 2014 edition of *Employment Flash*.) As anticipated, the House of Representatives subsequently passed an identical disapproval resolution, and Obama vetoed the joint resolution. In his memorandum of disapproval, the president wrote, "[b]ecause this resolution seeks to undermine a streamlined democratic process that allows American workers to freely choose to make their voices heard, I cannot support it." The new NLRB election rules are now in effect.

Second Circuit Rules on Internships

The U.S. Court of Appeals for the Second Circuit recently clarified the boundaries of whether unpaid interns have viable minimum wage claims as employees under the FLSA. In 2011, two Southern District of New York courts reached different results by applying two different tests. The *Glatt v. Fox Searchlight Pictures, Inc.* court granted partial summary judgment to the interns, holding that the interns (who worked on the set of "Black Swan") were employees and entitled to minimum wage. The *Glatt* court adopted the six-part test used by the DOL. But in *Xuedan Wang v. Hearst Corporation*, a different court looked to whether the primary beneficiaries of the internship were the interns (who worked for *Harper's Bazaar and Cosmopolitan* magazines) or the companies. The Wang court denied summary judgment to the interns, finding that the internship provided at least some educational benefit to the interns.

The Second Circuit settled the district court split by adopting the primary beneficiary test. In doing so, it vacated the *Glatt* court's partial summary judgment decision in favor of the interns. The Second Circuit explicitly rejected the DOL's six-part test, noting that the test is overly rigid. In contrast, the primary benefit test better focused on the benefits received by an intern in exchange for his or her work, while allowing review of the relationship between the intern and the employer. Among others, the court offered the following factors to consider:

- expectation of the intern and employer of no compensation;
- the program's provision of training similar to an academic environment;

- the receipt of academic credit or integrated coursework with the intern program;
- timing of the intern program with the academic calendar;
- limitation to a time period which provides the intern with beneficial learning;
- the intern's work complements that of paid employees, not displaces it; and
- mutual understanding that the internship will not necessarily lead to a paid job.

Fourth Circuit Vacates Race Discrimination Class Action Decertification

The U.S. Court of Appeals for the Fourth Circuit recently vacated a class action decertification decision, finding sufficient evidence of commonality under Rule 23(a)(2) of the Federal Rules of Civil Procedure. *Brown v. Nucor Corp.,* No. 13–1779. In *Brown*, the lower court relied upon the U.S. Supreme Court's decertification decision involving a nationwide class of female employees making gender bias claims in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541. The Fourth Circuit vacated decertification because the case involved only about 100 plaintiffs from a single facility who were able to show commonality through (1) statistics indicating that promotions depended, in part, on race, (2) anecdotal evidence of discrimination across the plant, and (3) evidence of a racially hostile work environment.

EEOC Investigatory Power Continues After Litigation Ends

The Eastern District of Wisconsin recently held that the EEOC's investigatory authority does not end at the conclusion of private litigation. *EEOC v. Union Pac. R.R. Co.* While EEOC regulations allow the agency to continue an investigation after a right-to-sue notice has been issued, the court found that the EEOC can continue its investigation even past an employee's civil suit that ends with judgment in favor of the employer.

DOL Issues Final Procedural Rules for Administrative Hearings

A final rule became effective by the DOL, which revised the Rules of Practice and Procedure governing hearings conducted before the DOL's Office of Administrative Law Judges (OALJ). The OALJ presides over hearings concerning certain labor-related matters, including whistleblower retaliation claims. The rules primarily harmonize OALJ procedures with the Federal Rules of Civil Procedure. Some key changes include mandatory initial disclosures, unconditional use of deposition testimony at hearings and mandatory 30 days' notice when a party seeks to take a physical or mental examination, unless the parties otherwise agree to a shorter notice period.

Delaware Court Refuses Noncompete Enforcement Based on California Public Policy

The Delaware Court of Chancery recently refused to enforce a noncompete provision in an investment agreement with a California employee, despite a Delaware choice of law provision. *Ascension Ins. Holdings, LLC v. Underwood*, No. CV 9897-VCG. In reaching its decision, the court rejected the argument that Delaware's broad interest in the freedom of contract trumps a state's public policy disfavoring noncompetes. Instead, the court determined that in this instance, California's public policy against employee noncompetes was materially greater than Delaware's general interest for enforcement of contracts.

California 'No Rehire' Provisions May Be Unenforceable

The U.S. Court of Appeals for the Ninth Circuit recently indicated that a "no rehire" provision in a settlement agreement may violate California's statutory rule against noncompetes. *Golden v. California Emergency Physicians Medical Group*. Specifically, Section 16600 of the California Business and Professions Code provides that a contract which restrains anyone from engaging in a lawful profession or business is, to that extent, void. While this statute consistently has been interpreted to void noncompetes in the employment context, the Ninth Circuit remanded and held that its broad application also could apply to the provision in a former employee's settlement agreement requiring him to waive his rights to employment with the company in the future.

Prevailing California FEHA Defendant Not Automatically Entitled to Costs

The California Supreme Court ruled that a successful defendant employer in a discrimination case brought under California's Fair Employment and Housing Act (FEHA) is not entitled to recover ordinary court costs as a matter of right pursuant to Section 1032 of the California Code of Civil Procedure. *Williams v. Chino Valley Indep. Fire Dist.*, 61 Cal. 4th 97. Instead, a trial court retains discretion to award court costs and attorneys' fees under Section 12965 of California's Government Code. Further, a trial court's discretion is limited by the U.S. Supreme Court's decision that a prevailing defendant only receives attorneys' fees if the plaintiff's action was objectively groundless. *See Christiansburg Garment Co. V. EEOC*, 434 U.S. 412.

LinkedIn's Reference Searches Not a Consumer Report Under FCRA

A California federal court recently dismissed a class action brought by a group of LinkedIn users alleging that the site's Reference Search function violated their rights under the Fair Credit Reporting Act (FCRA). *Sweet v. LinkedIn Corporation*. The FCRA regulates, among other things, the exchange of information between employers and consumer reporting agencies. For employers, the FCRA requires written disclosure and consent from the employee before a consumer report is obtained. LinkedIn's Reference Search feature allows premium subscribers to locate people in the searching party's network who may be able to provide feedback about a job candidate or business prospect. In *Sweet*, the court found that such search results were not consumer reports and that LinkedIn was not a consumer reporting agency under FCRA because LinkedIn merely gathers information that users voluntarily provide for the purpose of being published online.

$15 Minimum Wage Coming to LA, San Francisco and Seattle

The $15 minimum wage movement continues to gain momentum as Los Angeles joins San Francisco and Seattle as major cities that have raised their minimum wage to $15 per hour. In Los Angeles, wage increases begin on July 1, 2016, for all employers with more than 25 employees, with the minimum wage reaching $15 per hour by 2020. (Los Angeles employers with 25 or fewer employees have until July 1, 2017, to begin increasing wages, with the minimum wage reaching $15 per hour by 2021.) In San Francisco, wage increases began on May 1, 2015, with the minimum wage reaching $15 per hour in 2018. In Seattle, wage increase began on April 1, 2015, with the minimum reaching $15 per hour in 2017. (Seattle employers with 500 or fewer employees have until 2021 to reach $15 per hour.)

Connecticut Enacts Employee Online Privacy Law

Following at least 20 states with similar statutes, Connecticut enacted Public Act No. 15-6, titled "An Act Concerning Employee Online Privacy." . The act, among other things, prohibits employers from requiring or requesting employees or applicants to: (1) provide user names, passwords or other means to access a personal online account, (2) authenticate or access a personal online account in the presence of a representative of the employer, or (3) invite the employer, or accept an invitation from the employer, to join a group affiliated with the employee's personal online account. In addition, employers may not take adverse action against an employee or applicant for refusing to engage in, or for filing a complaint about, the prohibited activity. The act contains an exception which allows employers to conduct certain investigations to comply with laws, prohibit work-place misconduct or protect the employer's confidential information.

Georgia Allows Employer Preferential Treatment to Veterans

Georgia Gov. Nathan Deal recently signed a law allowing (but not requiring) private employers to give preference to U.S. veterans in their employment policies, including those individuals who served in active duty in the American armed forces and received an honorable discharge. Any preferential policy must be in writing and applied uniformly to decisions regarding hiring, promotion or retention during a reduction in force. When the law took effect July 1, 2015, Georgia became one of approximately 20 states with similar veteran legislation.

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