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Ryan, Swanson & Cleveland, PLLC

24th Annual Employment Law Update

September 25, 2012

What You Need to Know:

Federal Law Update

Britenae Pierce

Latest Employment Law Trends

- Cities/states implementing paid sick leave laws
- "Ban the Box" – employers restricted from asking about criminal history on initial job application (proposed in Seattle)
- Social media and privacy
- Workplace bullying laws

EEOC Record Highs in 2011 (fiscal year)

- **99,947 charges** – the most in the Equal Employment Opportunity Commission's (EEOC's) history
- Retaliation is the number one basis for charges
- Record number of race, national origin, religion, and disability charges
- EEOC filed 300 lawsuits (increase from 2010)

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EEOC Record Highs in 2011 (cont.)

- Resolutions of these lawsuits included $91 million in monetary benefits
- EEOC secured $364 million in monetary relief from employers in administrative enforcement; more through mediations ($170 million) and other resolutions
- EEOC built strong systemic enforcement program – 580 systemic investigations involving more than 2,000 charges

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Fair Labor Standards Act

- *Christopher v. SmithKline Beecham Corp.*, 123 S.Ct. 2156 (2012) (5-4)
- Generally, Fair Labor Standards Act ("FLSA") requires overtime to be paid to employees unless they are exempt
- One category of exemption is outside salesmen, which is defined by the Department of Labor regulations

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Fair Labor Standards Act (cont.)

- Three regulations/definitions:
  - Any employee whose primary duty is making any sale, etc.
  - "sale" also includes transfer of title to tangible, and in some cases intangible, property
  - Employees engaged in "promotion work" – work that is performed incidental to and in conjunction with an employee's own outside sales or solicitation

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Fair Labor Standards Act (cont.)

- In this case, some SmithKline employees worked as detailers or pharmaceutical sales representatives
- They visited doctors to provide them information and increase prescriptions of certain drugs
- Employees were compensated through salary and bonuses dependent on SmithKline's drug sales in a particular geographic area

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Fair Labor Standards Act (cont.)

- Two employees sued claiming they were entitled to overtime pay, citing as authority a DOL brief filed in a similar case
- Supreme Court held: pharmaceutical sales reps are exempt from the FLSA as outside salesmen
- Department of Labor's interpretation given no deference, especially where agency does not warn the public about major shifts in positions

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Religion

- *Hosanna-Tabor Evangelical Church v. EEOC*, 132 S.Ct. 694 (2012)
- Cheryl Perich worked as a teacher at a church/school
- She was a “lay” teacher, meaning she was not required to have theological training nor be Lutheran
- Perich became ill with narcolepsy and took disability leave for half the year

Religion (cont.)

- School then advised that they hired someone to replace her for that year and then that she would likely be fired if she refused voluntary resignation/severance, which she did
- Congregation then terminated her, citing “insubordination and disruptive behavior” and that she did not agree to church’s commitment to internal dispute resolution

Religion (cont.)

- Perich filed a lawsuit claiming disability discrimination
- Supreme Court held Perich was a "minister" because she and the school held herself out as such, she taught religious classes, and performed religious services
- Supreme Court used ministerial exception to preclude Perich's claim of disability discrimination

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Religion (cont.)

- Goal to ensure the church has sole power of selecting and controlling who will minister to the faithful
- This gives broad latitude to religious organizations to freely choose their "ministers"

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Title VII

- Pending case: *Vance v. Ball State University*, awaiting oral argument
- Issue is scope of the "supervisor" liability rule under Title VII
- Whether supervisor liability applies to harassment by (1) those whom the employer vests with authority to direct and oversee their victim's daily work or (2) is limited to those harassers who have the power to hire, fire, demote, promote, transfer, or discipline their victim

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NLRB

- National Labor Relations Act (NLRA), Section 7, states that:
  - "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

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NLRB (cont.)

- The National Labor Relations Board (NLRB) has been making various regional rulings on “at-will” language in employee handbooks
- NLRB’s position is that employee handbooks with the language about at-will employment may violate the National Labor Relations Act right to organize

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NLRB (cont.)

- Offending language:
  - “I understand my employment is ‘at-will’. This means I am free to separate my employment at any time, for any reason, and [company] has these same rights. Nothing in this handbook is intended to change my at-will employment status. I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either [company’s] executive vice-president/chief operating officer or [company’s] president.”

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NLRB (cont.)

- In June, NLRB stated that at-will handbook provisions prohibiting any change in the terms and conditions of employment except in a written document with a company executive violate the NLRA's Section 7
- NLRB position based on assumption that if employees unionize they can alter terms and conditions of employment

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NLRB (cont.)

- Very controversial
- May want to include a savings clause:
  - "at-will disclaimer does not and is not intended to interfere with or limit an employee's right to organize . . ."

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More NLRB

- NLRB launched webpage this summer that describes the rights of employees to act together for their mutual aid and protection, even if they are not in a union
- Tells stories of protected concerted activity
- www.nlrb.gov/concerted-activity
- also NLRB has come out with controversial social media policies

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Confidential Information

- *United States v. Nosal*, (9th Cir. 2012)
- Former executive engaged three employees to download proprietary information so that he could use it to start a competing business

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Confidential Information (cont.)

- The employees had signed agreements restricting the disclosure of such information “except for legitimate Korn/Ferry business”
- Court held that downloading confidential information in violation of employee agreements did not violate the Computer Fraud and Abuse Act where employees were given access to that information

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Thank you!

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