Barley Snyder

Employment Law Update November 2012

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EEOC Releases Draft Strategic Enforcement Plan Outlining Nationwide Priorities

By: Jennifer Craighead Carey

On September 4, 2012, the Equal Employment Opportunity Commission ("EEOC") released a draft strategic enforcement plan identifying its nationwide priorities for enforcement of federal anti-discrimination laws in the private, state and local government, and federal sectors. The nationwide priorities include:

- Eliminating systemic barriers in recruitment and hiring.
- Protecting immigrant, migrant, and other vulnerable workers.
- Addressing emerging issues.
- Preserving access to the legal system.
- Combating harassment.

Recruitment and Hiring Barriers

The EEOC has stated that it will target both intentional hiring discrimination and facially neutral hiring practices that have an adverse impact on particular groups. In particular, the EEOC notes that racial and ethnic minorities, older workers, women, and individuals with disabilities continue to confront discriminatory policies and practices in hiring. As a result, the EEOC will focus on restrictive application processes, the use of screening tools such as pre-employment tests, background screening and date of birth screening in on-line applications, and the steering of certain groups into particular jobs.

Protecting Immigrant, Migrant, and Other Vulnerable Workers.

The EEOC will target discrimination against vulnerable workers who may be unaware of their rights under equal employment laws. Specifically, the EEOC will target disparate pay, job segregation, harassment, trafficking, and discriminatory language policies affecting such workers.

Addressing Emerging Issues

The EEOC intends to continue its efforts to address emerging issues. Current emerging issues the EEOC will target include:

- ADA Amendments Act issues.
- LGBT (lesbian, gay, bisexual, and transgender individuals) coverage as applicable under the sex discrimination provisions of Title VII.
- Accommodating pregnancy when a woman is forced to take unpaid leave after being denied accommodations that are routinely given to similarly-situated employees.

Preserving Access to the Legal System

The EEOC will target policies and practices that discourage individuals from seeking legal protections, including retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information in EEOC and other legal proceedings, and failure to comply with record-keeping requirements.

Combating Harassment

The EEOC intends to re-evaluate its strategies to be more effective in combating workplace harassment on the basis of race, color, sex, ethnicity, age, disability, and religion, including a national education and outreach campaign aimed at both employees and employers.

Given these identified priorities, we recommend employers take the following steps to mitigate any legal risks:

1. Conduct a complete review of hiring and recruitment practices. Employers should review employment applications, including on-line applications, to ensure they are not soliciting impermissible information, including age-related information. Further, employers should thoroughly review their background check processes to ensure that protected groups are not being adversely impacted. This review should include a review and overhaul of criminal background checks and where relevant, credit checks. Employers would also be well served to review their recruitment sources to determine whether their recruit methods have a statistically-disproportionate adverse impact on certain protected groups, most notably African-American and Hispanic males.

2. Employers with large immigrant or migrant populations should ensure that those workers are fully apprised of their rights in the workplace. Ideally, policies and handbooks as well as workplace harassment training should be made available to groups in their primary language.

3. Employers should ensure that they have a process in place for employees to request reasonable accommodation under the Americans with Disabilities Act ("ADA"). Employers should also review their leave policies to ensure that requests for exceptions to leave policies, including extensions of leave, are dealt with on a case-by-case basis and evaluated in conjunction with ADA reasonable accommodation obligations.

4. Employers should review their policies for accommodating individuals in a light duty capacity to ensure that pregnant females are not being treated differently than males who are given accommodations for temporary, non-work-related conditions.

5. Employers should review their severance agreements with legal counsel to ensure that agreements do not contain

impermissible language, including waivers of an employee's right to file a charge with the EEOC.

6. Employers should review their sexual and other harassment policies to make sure they are comprehensive in nature. In addition, employers should implement an anti-harassment workplace program that is designed to combat workplace harassment and demonstrate that the employer takes such issues seriously.

Our employment law attorneys are able to assist employers with the above risk management strategies. Please contact any of our employment lawyers for assistance.

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Out of the Frying Pan . . . But Still in the Fire -- Important Differences Between the Federal Fair Labor Standards Act a

By: Jill Sebest Welch

You've reviewed your policies and pay practices to ensure compliance with the federal Fair Labor Standards Act ("FLSA"). But have you also considered Pennsylvania's Minimum Wage Act ("MWA") and Wage Payment and Collection Law ("WPCL")? Because the FLSA establishes minimum pay requirements, Pennsylvania employers must comply with state law wage requirements that provide additional benefits to employees not required under the FLSA. This is the first in a three-part series discussing several of the important differences between the FLSA and the Pennsylvania wage and hour laws.

My Employee Is Leaving: What Do I Owe and What Can I Deduct at Termination?

Employers frequently ask whether they must pay employees for accrued but unused paid time off-vacation, sick, or other paid time off-at termination. In Pennsylvania, wages include fringe benefits such as vacation and holiday pay. There is, however, no legal requirement that employers provide these fringe benefits. Instead, employers are generally free to design paid time off policies that fit their organizational needs. In Pennsylvania, an employment contract (which can be written or oral) or an Employee Handbook or policy determines whether an employee is entitled to accrued but unused paid time off at the time of termination. Similarly, the employer's policies on severance or termination pay bind the employer if those policies are either communicated to the employee, are found in an Employee Handbook or policy, or are the subject of an agreement between the parties.

Pennsylvania employers may implement both a "use it or lose it" policy and a forfeiture provision regarding accrued but unused paid time off. An employment agreement or policy may also provide for forfeiture of a bonus if an employee is discharged "for cause." But in the absence of a clearly defined contract or handbook provision or policy, Pennsylvania courts will likely require that employees be paid at separation for all wages, including accrued but unused paid time off.

Pennsylvania's wage regulations also limit the deductions that employers may take from a non-exempt employee's wages, and those rules differ from the FLSA. Although the FLSA permits employers to take deductions in certain circumstances, provided the deductions do not reduce an employee's pay below minimum wage and are not discounted from any overtime calculation, Pennsylvania law permits only the following deductions for the convenience of the employee:

- Contributions to and recovery of overpayments under employee welfare and pension plans;
- Contributions-authorized in writing by employees or under a collective bargaining agreement-to employee welfare

and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act. These include group insurance plans, hospitalization insurance, life insurance (provided such insurance policies are written by companies certified by the Pennsylvania Insurance Department), and group hospitalization and medical service programs offered by nonprofit hospitalization and medical service organizations and medical group plans; Deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;

- Deductions authorized in writing by employees or under a collective bargaining agreement for payments into company-operated thrift plans or stock options or stock purchase plans to buy securities of the employer or an affiliated corporation at market price or less, provided such securities are listed on a stock exchange or are marketable over-the-counter;

- Deductions authorized in writing by employees for payment into employee personal savings accounts, such as payments to a credit union, a savings fund society, savings and loan, or building and loan association, the savings department of banks for Christmas, vacation, or other savings funds, or payroll deductions for the purchase of U.S. government bonds;

- Contributions authorized in writing by the employee for charitable purposes;
Contributions authorized in writing by the employee for local area development activities;

- Deductions provided by law, including but not limited to Social Security taxes, withholding of federal or local income, wage taxes, or occupation privilege taxes, and deductions based on court orders;

- Labor organization dues, assessments and initiation fees, and such other labor organization charges as are authorized by law;

- Deductions for repayment to the employer of bona fide loans, provided the employee authorizes such deductions in writing;

- Deductions for employee purchases or replacements of employer goods, wares, merchandise, services, facilities, rent, or similar items, provided such deductions are authorized by the employee in writing or are authorized in a collective bargaining agreement;

- Deductions for employee purchases for his/her convenience of goods, wares, merchandise, services, facilities, rent, or similar items from third parties not owned, affiliated, or controlled directly or indirectly by the employer, if the employee authorizes such deductions in writing; and

- Such other deductions authorized in writing by employees if the Pennsylvania Department of Labor and Industry deems the deductions proper and in conformity with the WPCL's purpose.

As this narrow list illustrates, in Pennsylvania, employers cannot take unauthorized paycheck deductions for the employer's benefit, as in the case of damaged goods or failure to return property. On the other hand, an employer may deduct funds from a paycheck as repayment of a loan made for the employee's benefit or for tuition reimbursement, provided the employee authorized the deduction in writing and in advance of the deduction. In no case, however, can deductions bring a non-exempt employee's wages below the minimum wage in Pennsylvania.

More than ever, businesses need to evaluate their compensation practices to ensure compliance with the FLSA and applicable state laws, like the MWA and WPCL. Department of Labor enforcement actions continue to rise. In August

of last year, a prominent national bank paid $7.2 million to settle a class action lawsuit over the bank's unlawful compensation practices, failure to pay overtime, and failure to pay wages for meal and rest periods. As this example illustrates, mistaken pay practices, left uncorrected, can expose an employer to significant financial liability. Conducting a wage and hour audit is an important proactive step that can save thousands in litigation costs and penalties down the road. The attorneys at Barley Snyder can assist employers with such an audit.

Part II of this series will discuss the important differences between the federal FLSA's and Pennsylvania's white collar administrative, executive, outside sales, and computer professional exemptions.

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Deferred Action Application Process Implemented by DHS

By: Silas M. Ruiz-Steele

August 15, 2012 marked the beginning of the United States Department of Homeland Security's "deferred action" program. This program provides temporary relief from deportation, known as deferred action, to undocumented immigrants who were brought to the United States as children.
The program, which operates as a form of prosecutorial discretion, offers young people who are in the United States with no legal immigration status the opportunity to avoid deportation and to gain employment for an initial period of two years. The program is now available to individuals who:

(1) were under the age of 31 as of June 15, 2012;
(2) came to the United States before reaching their 16th birthday;
(3) have continuously resided in the United States since June 15, 2007;
(4) were physically present in the United States on June 15, 2012;
(5) entered the United States without official inspection before June 15, 2012, or had no lawful immigration status as of June 15, 2012;
(6) are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
(7) have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, or do not otherwise pose a threat to national security or public safety.

What Employer's Need to Know about Deferred Action for Childhood Arrivals (DACA)

Under the program guidelines, one of the primary challenges for DACA applicants is that they need to present evidence of their continuous residence and physical presence in the U.S. Eligible DACA applicant may turn to their employers for assistance in their search for documentation to establish these requirements. Such requests may put employers in a difficult situation. If the employer learns that, through a DACA-related request for information, that an employee lacks a valid work authorization, failure to act on that information could, under certain circumstances, expose the employer to potential liability for knowing employment of unauthorized workers. Similarly, an employer should take reasonable follow-up measures when it has constructive notice of an employee's possible lack of work authorization. Constructive knowledge may include situations where an employer fails to complete or improperly completes the Employment Eligibility Verification Form, I-9. Civil and criminal penalties for hiring undocumented

individuals can range from $250 up to $10,000 per individual for repeated violations. Our office can advise on the risks and potential consequences an employer must consider to avoid potential employer sanction penalties in face of DACA.

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2011-2012 U.S. Supreme Court Update: A Relatively Calm Term

By: David J. Freedman

During its 2011-2012 term, the United States Supreme Court issued momentous decisions regarding health care, immigration, and the death penalty. But the 2011-2012 term featured few significant labor and employment law cases, although those cases with likely long-term impact were all favorable to employers.

Perhaps the most important decision occurred in the case of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, in which the Supreme Court recognized, for the first time, that a ministerial exception shields religious employers from discrimination lawsuits brought by their ministers. In that case, a teacher at the Hosanna-Tabor Evangelical School alleged that the Church terminated her in violation of the Americans with Disabilities Act. The Church moved to dismiss the lawsuit, arguing the teacher was a member of the Evangelical Lutheran clergy and, therefore, allowing her to sue the Church would violate the First Amendment's prohibition on government regulation of religious activities. The Supreme Court sided with the Church, dismissed the case, and affirmed that there is a "ministerial exception" to Federal anti-discrimination laws. The Court also rejected the teacher's argument that she was not really a minister because her duties primarily involved teaching secular subjects. Instead, the Court noted that the Church classified the teacher as "called," which meant that she had to receive a Lutheran post-secondary education, take a number of courses in theology, and obtain the endorsement of the local Snyod district. Additionally, the teacher taught a religion class, led the students in daily prayer and devotional exercises, and led school-wide chapel service twice a year. Given these obviously religious duties, the Court deferred to the Church's classification of the teacher as a minister, which marks a major victory for religious institutions. Although the case does not provide a blanket immunity from all Federal anti-discrimination laws, it does provide an immunity for those institutions when they are sued by employees whom the institutions classify as ministers. Moreover, Federal courts will follow a religious institution's classifications regarding which Church employees are ministers, provided some factual basis supports those classifications.

In the case of Christopher v. SmithKline Beecham Corporation, the Supreme Court addressed the issue of the "outside sales exemption" to the Fair Labor Standards Act ("FLSA"), the Federal law that requires employers to pay an overtime wage premium when employees work more than 40 hours in a week. As most employers know, the FLSA exempts several classes of employees from its requirements, including any employee considered an "outside salesman," which the FLSA defines as "any employee . . . whose primary duty is . . . making sales. . . ." Christopher worked for SmithKline Beecham as a "pharmaceutical detailer," providing information to physicians about the company's products with the goal of getting physicians to sign non-binding agreements to prescribe these products. Christopher regularly worked 60 hours per week, but received no overtime pay because SmithKline Beecham classified him as an "outside salesman." Christopher sued for unpaid overtime, arguing that the outside sales exemption was inappropriate because his duties did not actually involve making sales, even though his duties were designed to lead to sales. Despite never initiating any enforcement actions regarding pharmaceutical detailers, the

United States Department of Labor ("DOL") sided with Christopher, arguing that his duties were merely promotional and did not involve making sales. The Court, however, rejected the DOL's argument, holding Christopher was an "outside salesman" based on the FLSA's broad definition of the term "sales." Moreover, the Court refused to give deference to the DOL's narrow interpretation of the exemption since that interpretation was not memorialized in any formal DOL regulation. This suggests that the Court might take a more active role in policing regulatory agencies, which could bode well for employer-sponsored challenges to agency requirements regarding "quickie elections," obligatory posters describing collective bargaining rights, and revised "persuader" reporting requirements.

Finally, in a case of significant importance to public employers, the Court held in Coleman v. Court of Appeals of Maryland that the Eleventh Amendment to the United States Constitution bars certain claims under the Family Medical Leave Act ("FMLA"). This immunity, though, only applies to suits filed against state-operated or state-affiliated employers and only affects the FMLA's "self-care" and "family care" provisions. That is, the entire FMLA still applies to non-state affiliated employers who have over 50 employees, and the FMLA's pregnancy and family care provisions apply to all FMLA employers, even state-operated or affiliated entities.

Although the 2011-2012 term yielded no major labor or employment law decisions, But in 2012-2013, the Supreme Court will have a rather active labor and employment docket in 2012-2013. Vance v. Ball State University will address employer responsibility for harassment by employees who have some supervisory authority but lack the power to hire, discipline, or terminate other employees. Employers who use "leads" or other similar quasi-supervisory employees will want to look out for that decision. In Genesis Healthcare Corp. v. Symczyk, the Court will address whether employers can defeat an FLSA collective action simply by offering full relief to the named plaintiff. And in U.S. Airways v. McCutchen, the Court will decide whether the Employee Retirement Income Security Act permits judges to override specific plan language in the interest of fairness to plan participants. Stay tuned to the Employment Law Newsletter and check your email inbox for Legal Alerts; we will continue to update you as major developments occur.

Services Spotlight

Employment Litigation Management Services

Barley Snyder's employment attorneys also work with our clients to manage and oversee litigation that may involve the use of local counsel in various states or nationwide. Our firm currently acts as employment counsel for a number of nationwide businesses covering a variety of industries, including, but not limited to, retail and manufacturing. Barley Snyder's litigation management services are ideal for companies that operate in a multi-state or national arena but do not have the in-house capability to manage such litigation.

In this litigation management role, Barley Snyder's employment attorneys operate as a gatekeeper for employment litigation, both at the administrative level and in state and federal court. When a company receives notice that a charge or complaint has been filed, the company forwards the matter to one of our gatekeeper lawyers. The lawyer in turn will review the matter, determine assignment of local counsel, if necessary, and monitor and oversee the handling of the matter by local counsel, or, depending on the jurisdiction where the charge or lawsuit is filed, Barley Snyder itself may be able to handle the matter. Our lawyers will also monitor the costs of the litigation and supply a client with a detailed budget regarding the services to be provided.

Barley Snyder offers its litigation management services at reduced rates. As part of this service, Barley Snyder also will provide a monthly status report for each state in which your company operates. Contact Jennifer Craighead for

more information about these services - jcraighead@barley.com or 717-399-1523.

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