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EMPLOYMENT LAW LETTER

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LABOR LAW

No access to employer's public spaces for nonemployee union organizers

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

On June 14, 2019, the National Labor Relations Board (NLRB) issued a decision overturning long-standing precedent in which it ruled that employers may deny nonemployee union representatives access to public spaces on their property (such as cafeterias or restaurants) for the purpose of soliciting employees or promoting union membership.

Facts

UPMC, a public hospital, has a cafeteria that's accessible to members of the public. One day, union representatives held a lunch meeting with a group of hospital employees at several tables in the cafeteria. During the meeting, the group discussed union campaign matters and displayed union fliers and pins.

In response to complaints, the hospital's security guard asked the union organizers to leave the cafeteria. When they refused to leave, the guard called 911. Six police officers arrived and escorted the union representatives from the cafeteria. The union filed unfair labor practice charges challenging the organizers' expulsion from the cafeteria, and an administrative law judge (ALJ) ruled in the union's favor.

On appeal, the NLRB reversed the ALJ's decision. The Board found the removal of the nonemployee union organizers was consistent with the hospital's past practice of removing other nonemployees who engaged in similar promotional activities. The NLRB determined that the hospital didn't violate the National Labor Relations Act (NLRA) when it expelled the union organizers.

What the law says

In reaching its decision, the Board concluded that union organizers' access to privately owned public spaces is governed by the U.S. Supreme Court's 1965 decision in *NLRB v. Babcock & Wilcox Co.* In that case, the Court created two exceptions to the general rule that employers have the right to exclude nonemployee union organizers from their premises:

(1) The "inaccessibility" exception, under which a union has no other reasonable means to communicate with employees; and

(2) The "discrimination" exception, under which the employer discriminates against the union by allowing solicitation by others, but not the union.

The NLRB also discussed a third exception for "public places" laid out in *Ameron Automotive Centers*, a 1982 case in which the Board ruled an employer could not exclude a nonemployee union organizer from patronizing areas that were open to the public. The Board overruled *Ameron*, rejecting the public space

AGENCY ACTION

NLRB reveals rulemaking plans. The National Labor Relations Board (NLRB) in May announced its rulemaking priorities, which include proceeding with its rulemaking on a standard for joint employment. The Board's agenda also includes plans for rulemaking in the following areas: representation-case procedures; standards for blocking charges, voluntary recognition, and the formation of bargaining relationships in the construction industry; the standard for determining whether students who perform services at private colleges or universities in connection with their studies should be considered employees; and standards for access to an employer's private property.

DHS, DOL joint rule makes more H-2B visas available. The U.S. Department of Homeland Security (DHS) and the Department of Labor (DOL) in May announced they had published a joint rule making available an additional 30,000 H-2B temporary nonagricultural worker visas for fiscal year 2019. The supplemental H-2B visas are available only to returning workers who received an H-2B visa or were otherwise granted H-2B status during one of the last three fiscal years. Availability is restricted by prioritizing only businesses that would suffer irreparable harm without the additional workers.

OSHA requests information on possible update to lockout/tagout standard. The Occupational Safety and Health Administration (OSHA) announced in May it was requesting information on a possible update to the Control of Hazardous Energy—Lockout/Tagout (LOTO) standard. Comments must be submitted by August 18, 2019. Comments and materials may be submitted electronically at www.regulations.gov or by fax or mail. OSHA is interested in comments on the use of control-circuit-type devices to isolate energy as well as the evolving technology for robotics. The current LOTO standard, published in 1989, requires that all sources of energy be controlled during servicing and maintenance of machines and equipment using an energy-isolating device. The standard specifies that control-circuit devices cannot be used as energy-isolating devices, but the agency recognizes recent technological advances may have improved the safety of control-circuit-type devices.

New OSHA rule revises safety, health standards. OSHA in May issued a final rule that revises 14 provisions in the record-keeping, general industry, maritime, and construction standards that the agency says may be confusing, outdated, or unnecessary. OSHA expects the revisions to increase understanding and compliance with the provisions, improve employee safety and health, and save employers an estimated $6.1 million per year. ✤

exception. *UPMC and its Subsidiary, UPMC Presbyterian Shadyside,* 368 NLRB No. 2 (June 14, 2019).

So what's the bottom line?

The bottom line is, an employer may prohibit nonemployee union organizers from accessing public areas at its facility for the purpose of soliciting employees to join the union or distributing union literature as long as:

(1) There is no evidence of the union's inaccessibility to employees; and

(2) The employer consistently applies its policy of excluding all nonemployees who engage in similar solicitation or promotional activities.

Employer takeaway

The *UPMC* decision is significant for employers, especially if parts of your property are open to the general public (e.g., if you're a hospital, restaurant, or hotel). In that situation, it's important to consistently enforce a no-solicitation policy and post it in the areas that are open to the public. But keep in mind that if you knowingly allow certain organizations (e.g., religious groups) to distribute fliers in your public spaces (e.g., a cafeteria), you may open the door to organizing and promotional activities by nonemployee union representatives.

To demonstrate uniform enforcement of a no-solicitation policy, you should document all incidents in which nonemployees have been asked to leave your premises because they violated the policy. Then, if you are accused by a union of discriminatorily enforcing a policy against solicitation, you can more easily defend yourself against the claim.

As always, when you're confronted with a situation in which nonemployee union representatives are soliciting your employees or engaging in other promotional activities on your property, you should consult with experienced legal counsel about your right to prevent such activities.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

ANDY'S IN-BOX

Is 'no comment' still the best policy for job references?

by Andy Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

While I've never conducted a formal poll, I strongly suspect that when it comes to job references for former employees, a great majority of Florida employers maintain a "no comment" or neutral reference policy, essentially disclosing no more than dates of employment, job held, and possibly final pay rate. If you were to ask those employers why they refuse to provide a substantive reference, either positive or negative, I strongly suspect fear of litigation would rank as the most frequently cited reason.

Is fear of litigation a legitimate concern?

Florida, like many states, has enacted a law protecting employers that want to provide substantive, truthful references. Under Florida Statutes § 768.095, an employer that discloses information about a current or former employee in response to a request from a prospective employer is immune from civil liability for the disclosure or its consequences unless the former employee can show by clear and convincing evidence that the information was knowingly false or violated his civil rights. So, as long as the information provided in an employment reference is true (or at least isn't *knowingly* false) and isn't disclosed in a discriminatory or retaliatory manner, an employer can take some level of comfort in the law's immunity protection.

Of course, the immunity provision doesn't mean a former employee can't sue in connection with a negative reference; it just means an employer may have a good defense to a legal claim and may prevail in any litigation at the end of the day. I say "may" because, as we all know, nothing is certain in litigation. And perhaps that's precisely the reason so many employers adopt a "no comment" or neutral reference policy—in the hope that they will avoid litigation altogether.

But "no comment" policies, or even neutral reference policies, have the potential of harming former employees who really need a substantive reference to secure a new job. Recognizing that reality, some employers choose to take the risk by providing a substantive positive reference, especially if the employee left her employment on good terms and doesn't seem like the litigious type. Other employers provide substantive positive references only in exchange for general releases executed by former employees.

Bottom line

One thing to keep in mind is that it's very important to direct supervisory and managerial employees to refer all incoming reference checks to HR, so that HR can provide the appropriate response (whether it's "no comment," a neutral reference, or a substantive reference). You generally don't want a supervisor or manager providing references because your company may be bound by what she says. And if a supervisor or manager provides a substantive negative reference, the former employee may sue the company for defamation (and possibly the supervisor or manager individually).

Again, depending on the facts, statutory immunity and truth may be valid defenses to such claims, but if supervisors and managers refrain from providing substantive references in the first place, you may be able to avoid litigation altogether.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like Andy to address, e-mail arodman@stearnsweaver.com or call him at 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

LEGISLATIVE UPDATE

Much ado about nothing: recap of 2019 Florida employment bills

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

Every year, we delve into what's happening during Florida's legislative session to give readers an idea of the proposed bills that could affect their relationships with workers. This year, we previewed the session and several bills involving potential changes to labor and employment law in our March issue (see "Preview of employment bills pending this legislative session" on pg. 1 of that issue).

The 2019 session has now concluded, so here's a recap of the bills affecting Florida's workplace laws that were enacted. Spoiler alert: Lawmakers didn't pass any bills that would change the state's labor and employment laws in a significant way.

What passed—or better yet, what didn't pass?

Our March preview of the legislative session highlighted three bills that would've drastically changed labor and employment law in Florida:

(1) **Senate Bill (SB) 474,** known as the Senator Helen Gordon Davis Fair Pay Protection Act, which would have expanded protections related to the prohibition on sex-based pay discrimination;

(2) **SB 483,** which would have prohibited employment discrimination based on sexual orientation or gender identity; and

(3) **SB 692,** which would have expanded protections for Florida employees' entitlement to family and medical leave.

Obviously, if any of those bills had passed, they would have had a significant impact on the way Florida employers do business. None of them did pass, though. In fact, lawmakers passed very few bills that will affect employers in a notable way.

One of the employment-related bills that was signed into law is the Florida Ban on Texting While Driving Law, which we covered in "Hang up and drive: Florida amends, toughens texting-while-driving law" on pg. 1 of our June issue.

Another employment-related bill, **SB 7012,** prohibits vaping in indoor workplaces. The new law implements the constitutional amendment banning the practice passed by Florida voters during the last election cycle.

House Bill (HB) 563 will also have some impact on Florida employers. HB 563 allows employees who leave their employment voluntarily because they are victims of domestic violence to obtain unemployment benefits under certain circumstances. A domestic violence victim seeking to obtain unemployment benefits must provide some proof that:

- She was a victim of domestic violence;
- She made a reasonable effort to remain employed, but staying on the job would pose a risk of future domestic violence or would be futile; and
- She reasonably believed she would be victimized by her abuser going to, coming from, or being at the workplace.

The new law provides that an employer will not be charged when a former employee qualifies for unemployment benefits because of the domestic violence provision.

What's next?

Employers need to take steps to comply with the new laws. You also should assess whether any other bills that were passed by Florida lawmakers this year might have a tangential effect on your workplace. For example, **HB 851** requires police officers, hotel employees, and massage parlor workers to receive training on how to recognize the signs of human trafficking. Reviewing your current policies in light of the bills passed this session is critical to ensuring that your HR practices are up to date.

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INDEPENDENT CONTRACTORS

DOL updates opinion on independent contractors for the gig economy

Under the Trump administration, the U.S. Department of Labor (DOL) has taken a decidedly industry-friendly approach to the independent contractor analysis. If there was any doubt before, that was made clear by its recent issuance of a whopping 10-page opinion letter examining the nature of the relationship between a virtual marketplace company (think Uber) and the "gig" workers they employ (e.g., Uber drivers).

In case you aren't familiar with the term, virtual marketplace company (VMC) refers to a rising tide of companies that offer technology—usually a phone app—that uses objective criteria to help consumers connect with the service providers they need.

Some experts are already saying the opinion letter creates a sort of road map for companies wanting to save money by relying heavily on the services of independent contractors. Let's take a look at what it says and what it could mean for you.

Some background

There has long been confusion and disagreement about exactly when it's proper to classify a worker as an independent contractor. The IRS has one test, the DOL has another, and the National Labor Relations Board (NLRB) has yet another. The agencies' interpretations and enforcement efforts can swing from one extreme to another depending on whether there's a Democrat or a Republican in the White House. Courts may disagree with the agencies about what factors to apply as well as how to weigh those factors in particular situations. Some states also have weighed in with their own laws.

In short, it's a mess.

As a general principle, employers are prohibited from classifying a worker as an independent contractor if the nature of the working relationship is, for all intents and purposes, that of "employer-employee." Here are some of the factors that may be considered in the analysis:

- Whether a company pays its supposed independent contractors on an hourly, weekly, or monthly basis (as opposed to a per-project fee);
- The extent to which it dictates when, where, and how workers perform the work;
- Whether it's the company or the worker who bears the risk of financial success or failure;
- Whether the services provided by independent contractors are integral to the company's success (in other words, whether they do what the company was formed to do);
- Whether the company provides training for the workers to perform those services; and

WORKPLACE TRENDS

Think you've made a hire? Maybe not. A survey from staffing firm Robert Half shows that more than a quarter of workers (28%) have backed out of a job offer after accepting the position. Why would a jobseeker do that? The survey says 44% of those changing their minds backed out after receiving a better offer from another company. For 27%, a counteroffer from their current employer led to the change of heart. In 19% of the cases, the jobseeker reported hearing bad things about the company after receiving the offer. The cities where jobseekers are more likely to renege are San Diego, San Francisco, Chicago, Houston, Austin, and Miami.

Survey finds youngest workers disillusioned, pessimistic. The 2019 Deloitte Millennial Survey, released in May, reports that today's continuous technological and societal disruption is making Millennials and Gen Zs disillusioned with traditional institutions, skeptical of business' motives, and pessimistic about economic and social progress. Despite global economic growth, expansion, and opportunity, the younger generations are wary about the world and their place in it, but they remain hopeful and lean on their values as both consumers and employees. The research notes that this "generation disrupted" is still ambitious. More than half want to earn high salaries and be wealthy, but their priorities have evolved or at least been delayed.

New grads landing jobs with better-than-expected pay, research shows. The Class of 2019 Report, published in May by recruitment software provider iCIMS, shows that recruiters expect to pay entry-level employees an average of $56,155 in 2019, while recent college graduates are expecting $47,562. The fourth annual report is based on a survey of 500 U.S. college seniors and 500 recruiters and HR professionals, along with data points from the iCIMS platform, which is drawn from a database of more than 75 million applications and 3 million jobs posted per year by more than 4,000 customers. The research also notes that the average student in the class of 2019 completed one internship, with 31% saying they didn't complete any internships. That contrasts with 70% of recruiters saying past work experience is more important than an entry-level applicant's college major.

Many military spouses feel discrimination in job hunt. A survey of more than 500 military spouses finds that nearly half (46%) have felt discriminated against in their job search because they are military spouses. The survey from Flexjobs and Blue Star Families reports that 91% of military spouses say being a military spouse has had a negative impact on their career. Also, 32% of military spouses have had to leave a job at least three times because of a military-related move. ✤

UNION ACTIVITY

Teamsters praise lifting of national security tariffs. Jim Hoffa, general president of the International Brotherhood of Teamsters, and Francois Laporte, president of Teamsters Canada, spoke out in May supporting the lifting of the U.S. steel and aluminum tariffs. "We stand in solidarity with our brothers and sisters in Canada and with the Steelworkers unions in both countries," Hoffa said. "As we all know, steel and aluminum are the backbone of North America's integrated economy, critical infrastructure, and mutual defense." Laporte also praised the action. "These tariffs put hundreds of our members out of work, primarily in auto parts factories in Ontario and at a steel mill in British Columbia," Laporte said. "We hope the laid-off workers will be promptly reinstated, and we are currently studying ways to help get our affected members' lives back on track as soon as possible."

SEIU struggles with its staff's union. The Service Employees International Union (SEIU) released a statement in May explaining its contract negotiations with the Office and Professional Employees International Union (OPEIU) Local 2, which represents the SEIU's unionized headquarters-based staff. "Our goal going into and throughout bargaining and mediation has always been to come to agreement by offering our OPEIU-represented staff the kind of benefits SEIU members fight for every day," SEIU spokeswoman Sahar Wali said. "For eight months, we worked in good faith and were hopeful that we would reach an agreement. Despite working for almost a year at the table with OPEIU Local 2 to deliver improvements to their contract and despite our additional offers in mediation to move that contract even further, OPEIU Local 2's bargaining committee has rejected a path to settlement." The statement said the SEIU had presented its last offer and expressed the hope that it would be ratified.

Hoffa criticizes proposed commercial driver pilot program. Teamsters General President Hoffa in May spoke out against a proposed federal pilot program that would allow drivers as young as 18 to transport goods via trucks in interstate commerce. "The decision by the Federal Motor Carrier Safety Administration (FMCSA) to propose a pilot program that would lower the commercial driver's license restriction from 21 to 18 is of grave concern to those who use the roadways as their workplace every day," Hoffa said. He said originally the FMCSA was told it could make the change "in a highly controlled manner using only veterans and other members of the military who had experience driving during their time in the service." Hoffa said that safeguard was a step toward counteracting "the enormous safety risks inherent with having teenagers running tractor trailers across long distances." ✤

- Whether the worker provides services on an ongoing (but not necessarily continuous) basis.

During the Obama administration, the DOL recast the independent contractor analysis in a slightly different, more employee-friendly light. While the factors remained more or less the same, the agency said it would apply those factors using an underlying assumption that most workers were likely to be employees rather than independent contractors.

Not long into the Trump administration, the new DOL leadership abandoned that philosophy. The opinion letter is the first substantial guidance from the agency that provides an indication of what that means for practical purposes.

What does it say?

The opinion letter examines the business model of an unidentified VMC to determine whether its independent contractors were properly classified. The DOL concluded the company didn't exercise enough control over the workers to be considered their employer. Instead, the relationships that developed between the company and the workers didn't fit any "traditional paradigm," with the company serving more as a referral service than an employer.

The DOL appeared to give no weight to the fact that the company's entire business model was built on the services performed by the independent contractors (in other words, without them, there would be no company).

Why it matters

Employees have loads of rights that independent contractors just don't have. They are entitled to be paid the minimum wage, overtime, and unemployment compensation. They may qualify for unpaid leave under the Family and Medical Leave Act (FMLA) and workers' compensation and Occupational Safety and Health Administration (OSHA) protections. Unlike independent contractors, employees can sue for violations of those and many other federal and state employment laws.

The potential liabilities for companies that get it wrong are huge. They rarely track hours worked by independent contractors, so they can't be sure (or prove) they're paying workers the minimum wage or any overtime they're owed. They don't offer health insurance, so they may owe substantial tax penalties under the Affordable Care Act (ACA). They don't pay employment taxes on independent contractors' pay or withhold taxes on their behalf, which could result in substantial unpaid back taxes and penalties. The list goes on and on.

Final thoughts

For companies with a business model using a large population of independent contractors, the new opinion letter may prove to be a true gift. In recent years, the individuals who provide services through those companies' technologies have sued, arguing they have been misclassified as independent contractors. And they recently started seeing some success in the form of class action settlements. If nothing else, the opinion letter may drive down the settlement value of those cases.

Other companies also may rely on its broad analysis and conclusions to:

(1) Claim it supports their classification of workers as independent contractors; or

(2) If necessary, design their independent contractor relationships around it.

One final note: Enthusiastic employers may want to consult with an attorney before going all in on the independent contractor model. This could all go out the window the next time there's a Democrat in the White House. ✤

DISCRIMINATION CLAIMS

Supreme Court ruling raises stakes in Title VII claims

If an employee files a timely Equal Employment Opportunity Commission (EEOC) charge, can she later raise new discrimination allegations after the filing deadline has passed? That's the issue addressed in a new decision from the U.S. Supreme Court. Spoiler alert: The answer is no, unless the employer—or more accurately, its attorney—doesn't notice.

To understand the Court's ruling, it's helpful to understand the EEOC's role in discrimination claims.

Refresher on EEOC process

Employees who want to sue their employer for discrimination under federal law must first file a complaint with the EEOC or, in some situations, a state agency that enforces state antidiscrimination laws. The intent is to give the appropriate agency a chance to investigate the allegations and facilitate a settlement of the charges without a lawsuit.

Generally, EEOC complaints—or charges—must be filed within 180 days after the discrimination occurred. Depending on the state, employees may have up to 300 days.

Employees who contact the EEOC to complain about discrimination or harassment are asked to fill out an intake questionnaire describing what happened and why they think it was a violation of federal law. The questionnaire is just an administrative form, not a formal discrimination charge. The actual charge still must be submitted before the applicable deadline.

Employees who fail to file their charge in a timely manner (or fail to file at all) may have their lawsuits dismissed for "failure to exhaust administrative remedies."

Facts of the case

In 2010, Lois Davis complained to her employer, Fort Bend County, that she was being sexually harassed. The county investigated her allegations, and the alleged harasser resigned. According to her EEOC charge, her supervisor then started retaliating against her.

Davis filed a timely EEOC charge alleging both sexual harassment and retaliation. While her charge was pending, she objected to being scheduled to work on a Sunday and offered to arrange for someone to work in her place. When her supervisor refused, she went to church anyway and was fired as a result.

Although Davis attempted to add a religious discrimination claim to her EEOC complaint by writing "religion" on the intake questionnaire, she didn't amend the formal charge. As a result, it appears the EEOC's investigation didn't extend to any religious discrimination claims or the circumstances surrounding her firing.

When Davis included religious discrimination allegations in her subsequent lawsuit, neither the county nor its lawyers apparently noticed. Five years later, the county finally raised the defense that she hadn't exhausted her administrative remedies on the religious discrimination claims.

Legal analysis

The technical legal issue was whether Davis' failure to amend her EEOC charge to include religious discrimination completely barred her from pursuing those claims in court. The county argued it did because exhaustion of administrative remedies is a jurisdictional prerequisite for Title VII claims. In its view, courts literally do not have jurisdiction over claims that aren't filed in a timely manner with the EEOC. Davis' religious discrimination claims were dismissed under that rationale, and she appealed all the way to the Supreme Court.

In a unanimous decision, the Court ruled that Davis' lawsuit should be allowed to continue. While it agreed on the general principle that employees must exhaust their administrative remedies or lose the right to pursue those claims in court, it disagreed that was a jurisdictional requirement. Instead, the Court reasoned that failure to exhaust administrative remedies is a defense employers can lose if they don't raise it in a timely manner.

Final thoughts

This case provides some important takeaways for employers:

(1) Careful selection of an employment attorney to defend you in discrimination and harassment cases is very important. It's usually better to go with a more experienced attorney or a law firm with a well-established labor and employment practice.

(2) The earlier in the process you retain an attorney, the less likely these types of mistakes will occur. An

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8-21 Scent-sational Legal Risks: How to Master Odor and Allergy ADA Accommodations

attorney who assisted you during the EEOC process may be more likely to notice when new claims pop up in the subsequent lawsuit.

(3) Finally, note that this decision may not apply under some state discrimination laws. In short, if the state agency has authority to actually adjudicate the employee's complaints (as opposed to just investigating and facilitating a resolution), then any allegations that were left out of that process likely will be dismissed from any subsequent lawsuit. ✤

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