

Employment Law Update

Carolinas ACG

March 15, 2024

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Topics

- Pregnant Workers Fairness Act (PWFA)
- EEOC Harassment Enforcement Guidance
- Independent Contractor Regulations
- FLSA Threshold Changes
- *Stericycle* NLRB Decision and Handbooks
- Case Update

Pregnant Workers Fairness Act

- Guarantees the affirmative right to receive reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions absent an “undue hardship” on the employer
- Cannot retaliate against employee who requests or uses accommodation
- Applies to employers with 15 or more employees
- No final regulations yet



Pregnant Workers Fairness Act

- What it means now – treat a request for an accommodation based on pregnancy at least the same way you would treat any other request under the ADA
 - Cannot require leave if other accommodation available
 - Examples of accommodations in the proposed regulations
- Can only request medical documentation if “reasonable”
 - If the need for accommodation is obvious, would advise against asking for doctor’s note until we have final regulations
 - Certain accommodations—never reasonable



Pregnant Workers Fairness Act

- Proposed Regulations:
 - Limitation does not even rise to the level of a disability
 - Does not require a specific level of severity
 - Can include seeking healthcare
 - Interactive process is required
 - Regulations presume that in most cases, a doctor's note will not be necessary – no need for verification or documentation



Pregnant Workers Fairness Act

- Employees are “qualified” even if they temporarily cannot perform an essential function but will be able to again after birth (40 weeks)
- Accommodation includes temporarily removing an essential function
 - Light duty
 - Perform other essential functions plus other duties assigned



EEOC Harassment Guidance

- Proposed guidance September 29, 2023
- Public comment closed on November 1, 2023
- First harassment guidance since from the EEOC since 1999
- Updates guidance based on legal decisions, changes in law, and technology



EEOC Harassment Guidance

- Broadens definition of sexual harassment:
 - Pregnancy, childbirth, and related medical conditions
 - Sexual orientation
 - Gender identity
- Recognized sexual harassment:
 - Intentional and repeated use of wrong pronouns
 - Denial of access to a bathroom or other sex-segregated facility



EEOC Harassment Guidance

- Context matters: may still be harassment/discrimination even if not discriminatory on its face
- Not required to accommodate religious expression that creates hostile work environment
- May establish harassment by conduct directed towards others
- Recognizing virtual harassment
 - Communications that occur on a work-related system are considered the “virtual work environment”
 - Acknowledges that comments made on personal time or devices that impact the workplace may also be harassment (social media)

EEOC Harassment Guidance

- Policies
 - Widely disseminated and comprehensible to all regardless of literacy skills or English proficiency
 - Define prohibited conduct
 - Require supervisors to report harassment when they become aware
 - Offer multiple avenues for reporting to allow reporting to someone other than harasser
 - Clearly identify, with contact information, points of contact for reports
 - Explain the complaint process, including anti-retaliation and confidentiality protections
- Complaint process must also be effective



Independent Contractor Regulations

- Proposed regulations issued October 13, 2022
- Final regulations issued January 10, 2024
- Effective March 11, 2024
- Replacing guidance issued in 2021
 - Too limited
 - Not consistent with prior decisions



Independent Contractor Regulations

- Labeling “independent contractor” not determinative
- Focus is on “economic realities”
- Employee = “economically dependent” on employer for work
- Independent contractor = “in business for themselves”
- Totality of the circumstances
- Six factors not exhaustive
- Remember your household plumber

Independent Contractor Regulations

- Opportunity for Profit and Loss Depending on Managerial Skill
 - Managerial skill = business acumen, judgment, initiative
- Investment by Worker and Potential Employer
 - Capital or entrepreneurial in nature
 - Support an “independent business and serve a business-like function”
 - Consider in relation to potential employer’s investment



Independent Contractor Regulations

- Degree of Permanence of Work Relationship
 - Indefinite, continuous, exclusive = employee
 - Definite, non-exclusive, project-based = independent contractor
- Work Integral Part of Employer's Business
 - Critical, necessary, central to operations = employee
- Skill and Initiative
 - Specialized skills that contribute to “business-like initiative”
- “Additional Factors”

Independent Contractor Regulations

- Nature and Degree of Control
 - Not just exercised control; includes reserved control
 - Includes economic control
 - More control = employee
- Relevant factors
 - Setting schedule
 - Supervising work (including technology)
 - Discipline
 - Control over prices and rates
 - Marketing
- Compliance with applicable law is NOT indicative of control
 - But will be if go beyond compliance



FLSA Salary Threshold

- Proposed rules published on September 8, 2023
- Public comment ended November 7, 2023
- Meant to account for wage growth since 2019
- No changes to “duties” test for exempt employees
- Year 1: transfer \$1.2 Billion from employers to employees through additional overtime or salary raises to keep exempt status
- 3.4 Million exempt workers would become eligible for overtime

FLSA Salary Threshold

- Salary threshold = 35th percentile of weekly earnings of full-time non-hourly workers in lowest-wage Census Region
 - \$35,568 annually to \$55,068 annually
- HCE threshold = 85th percentile of full-time nonhourly workers nationally
 - \$107,432 annually to \$143,988 annually
- Automatically updates every 3 years
- Reclassify as non-exempt or raise salaries

Stericycle and Handbooks

- Pendulum is swinging back
- Cannot have policies that can be read to “chill concerted activity”
- Can be a stand alone violation even if no employee adverse action
- NLRB may require a change to language and a posting for all employees



Stericycle and Handbooks

- New standard: “The employer’s intent in maintaining a rule is immaterial. Rather, if the employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable.”
- Interpretation from perspective of employee who is economically dependent and contemplating engaging in concerted activity



Stericycle and Handbooks

- Confidentiality Policies and Agreements
 - Make clear what information employees are required to keep confidential
 - Cannot have a policy that can be read to prohibit employees from sharing compensation or benefits information
- “Gossip” Policies
 - Cannot be read in way to prevent employees from discussing terms and conditions of their employment with each other
 - Discipline lack of work, not content of speech

Stericycle and Handbooks

- Social Media Policy Don't's:
 - Do not prohibit comments regarding the employer
 - Do not prohibit comments regarding customers unless other privacy law
 - Do not require employees to make clear that their comments are their own
- Social Media Policy Do's:
 - Prohibit employee commenting on behalf of Company
 - Prohibit use social media on working time unless business related
 - Don't use social media in a way that violates other policies



Stericycle and Handbooks

- Dress Code Policies
 - If you allow any logos other than the company logo, you have to allow a union logo
 - If you allow any language other than company branded shirts, you have to allow pro-union language
 - If you pick and choose you must always allow pro-union
 - Picking and choosing also opens you up to discrimination claims

Stericycle and Handbooks

- Dress Codes
 - Don't just consider t-shirts – consider anything that can be branded – hats, buttons, masks, etc.
 - Language such as “must be plain unless provided by the Company;” “must be plain except for company-logoed attire”
 - Consider gender-based language in dress codes



Stericycle and Handbooks

- Media Contact Policies

- You cannot prevent employees from talking to the media about your workplace or something that happens in your workplace
- You can prevent employees from speaking “on behalf of” the company
- You cannot require employees to forward all media requests to a certain person



Stericycle and Handbooks

- Rules of Conduct
 - Do not prohibit employees from complaining to guests, customers, clients, or the general public
 - Avoid words like “respectful, harmonious, cooperative”
 - Avoid restrictions on activities that would “harm the employer’s reputation”
 - Do not require “positivity” in the workplace or when discussing the employer to the public



Groff v. DeJoy (Supreme Court, 2023)

- Religious accommodation case
- Rural mail carrier in Pennsylvania
- Christian who requested not to work on Sundays
- Employer made other arrangements
- Employee subject to progressive discipline then resigned



Groff v. DeJoy (Supreme Court, 2023)

- Lower court found for Postal Service
 - More than “de minimis cost” to provide religious accommodation was an undue hardship
 - Imposed on coworkers, disrupted workflow, diminished morale
- Supreme Court reversed
 - “De minimis cost” is not the standard
 - Employer must show that granting the accommodation “would result in substantial increased costs in relation to the conduct of its particular business”
 - Consider relevant factors specific to situation



DuVall v. Novant Health (4th Cir. 2024)

- White male employed as Senior Vice President of Marketing and Communications since 2013
- Strong performance reviews
- No history of discipline
- Replaced by white woman and black woman
- Replacement was a worse performer
- Jury found in favor of plaintiff that terminated based on race, sex, or both
 - Fourth Circuit refused to overturn



DuVall v. Novant Health (4th Cir. 2024)

- Key Takeaways:
 - Reverse discrimination may be a claim
 - Document discipline and poor performance
 - Pay attention to performance reviews
 - Shifting or contradictory reasons for a termination are problematic
 - Acting contradictory to documentation is risky



Questions?

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