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Employment Law

**Finding Order in Chaos – Recent Developments in Labor and
Employment Litigation and Regulations**

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National Labor Relations Board Update: New Cases, New Rules and More Complications for Colleges and Universities

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Cemex, Inc. and New Rules for Union Representation Cases

- Covers cases where union claims majority status based on signed authorization cards and seeks voluntary recognition.
- Employer can still deny voluntary recognition but now must file its own petition with the NLRB within 14 days of request rather than wait for union to file. Failure to do so results in bargaining order.
- But if employer commits unfair labor practice that would require setting aside the election, the petition will be dismissed, and Board will order employer to recognize the union.

Significance of Ruling

- Effect of Cemex is to lower the standard for a bargaining order.
- Chilling effect on communications; will cause employers to be much more cautious in communicating with employees before an election.
- Organizing unions may seize on illegal policies and work rules to establish unfair labor practices under new Stericycle case.

NLRB's New Representation and Election Timelines

- When Union files RC Petition, Employer statement of position due on 7th rather than 8th day.
- Pre-election hearing will be scheduled to open on 8th day after Petition is filed.
- Hearing will only address the issue of whether a question of representation exists, not individual issues such as supervisory or confidential status. Such matters will be handled post-election.
- Post-hearing briefs are no longer a matter of right but RD discretion.
- Elections can be scheduled “the earliest date practicable.”
The old 20 business day waiting period no longer in effect

Consequences of New Rule

- Very limited time to consider position and prepare for hearing.
- Unclear whether some individuals are in or out of the unit; difficulty in dealing with purported supervisors.
- Elections will definitely be more quickly scheduled.
- Greater likelihood of union success, as campaign period shortened.
- Employers are well-advised to prepare in advance for potential petitions and think through what their position may be on key issues of unit composition.

Stericycle, Inc.: Employer Work Rules Under Scrutiny

- Change in how the Board will analyze a challenged employer rule or policy in terms of potential conflict with Section 7 of the NLRA.
- Section 7:
- 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....

Stericycle, Inc.: Employer Work Rules Under Scrutiny (cont.)

- In Stericycle, the Board overrules 2017 Boeing Co., decision that said that some rules are clearly legal or illegal and for others the Board will use a balancing test involving 1) the nature and extent of the potential impact on NLRA rights and 2) the legitimate justifications associated with the rule.
- New standard: Could the rule or policy have a reasonable tendency to chill employees from exercising their section 7 rights? This will be analyzed from “the perspective of an employee who is economically dependent on the employer and who contemplates engaging in protected concerted activity.”
- Employer can rebut by proving legitimate business interest and the inability to advance that interest with a more narrowly tailored rule.

Examples

- Many common rules or policies that were deemed legal now called into question.
- Examples:
 - Civility rules regarding social media
 - Non-disparagement rules and restrictions on use of internet and social media
 - Rules requiring confidentiality during workplace investigations
 - Rules prohibiting cell phones in work area
 - Rules prohibiting communications with media

Impact of Stericycle with Cemex

- Applies to both unionized and non-unionized employers.
- Unions will find policies that are suspect in employer handbooks and potentially use them to support unfair labor practice cases after demanding voluntary recognition.
- Can result in more bargaining orders.
- Employers are advised to take a close inventory of their employee handbooks and policies to be sure they can withstand scrutiny under this new standard.
- Employers are also advised to consider disclaimer language in their policies to make it clear that Section 7 rights are not restricted.

McClaren Mccomb: Severance Agreements Cannot Waive NLRA Rights

- Severance agreement in McLaren required employee to waive rights to making disparaging comments about employer or to disclose the terms of the agreement.
- Such an offer by an employer is an attempt to deter them from exercising their statutory rights at a time when they are most vulnerable.

Board View

- Such provisions are not unusual in severance or settlement agreements.
- Board believes that public statements by employees about their workplace are central to the exercise of their rights.
- Pledges of confidentiality bars the employee from providing information to the Board concerning the employer's unlawful interference with other employees' statutory rights.

General Counsel Clarifications

- NLRB General Counsel did clarify that some confidentiality provisions – carefully tailored to restrict the dissemination of proprietary or trade secret information for a period based on legitimate business justifications would be permissible.
- Also notes that severance agreements narrowly tailored to restrict the employee's right to pursue employment claims arising as of the date of the agreement would be permissible.

Joint Employer Rule: NLRB Final Rule Takes Effect February 26

- An entity may be considered a joint employer over a group of employees if the two employers “share or codetermine” one or more of the employees’ essential terms of employment whether directly or indirectly or to exercise the power.
- Possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether control is exercised.
- Some litigation to enjoin the rule.

Joint Employer Rule: NLRB Final Rule Takes Effect February 26 (cont.)

- Essential Terms are defined as:
 - Wages and benefits
 - Hours of work and scheduling
 - Assignment of duties to be performed
 - Supervision of the performance of these duties
 - Work rules and directions governing how duties are to be performed
 - Hiring and discharge matters
 - Safety and health

Consequences of Being Found to Be a Joint Employer

- Will be brought to the bargaining table when contractor is negotiating new CBA with its employees.
- Liable for unfair labor practices or contract violations of the contractor.
- Possibility of bargaining units with a mix of the contractor's employees and yours.

Tecnocap and Wendt Corporation: Limiting Management Rights

- Tecnocap: A past practice that existed under a Management Rights article does not survive the expiration of the CBA. In the period between contracts, the employer cannot rely on the expired Management Rights clause to take unilateral action.
- Wendt: A past practice from before the employees unionized can not justify taking the same actions after unionization while bargaining for a first contract unless the practice was so regular or frequent that employees could expect it to continue.

Consequences

- Board will be more apt to expect an employer to notify the union and give them the opportunity to bargain when it is contemplating a change than it previously had been.
- An employer may no longer rely on past practice and the union previously allowing unilateral action as a defense if the employer is changing working conditions going forward.

Student Employee Unionization

- Board 2016 decision in Columbia University remains law
- Trump-era attempt to ban student employee units fails
- Explosion of new units over past two years
 - More than 25 graduate student assistant bargaining units in the past two years and more pending
 - More than 20 undergraduate student employee units
 - Active litigation on student athletes as employees
- NLRB Region One decision in 2023 MIT case clarifies that students on fellowship with no service expectations are not employees

THANK YOU!

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Pregnant Workers Fairness Act

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Pregnant Workers Fairness Act (“PWFA”)

- Effective June 27, 2023
- Requires a covered entity to provide a reasonable accommodation to a qualified employee or applicant with a known limitation related to pregnancy, childbirth, or related medical conditions, absent undue hardship

Covered Employers

- Private and public sector employers with at least 15 employees
- Congress
- Federal agencies
- Employment agencies
- Labor organizations

Qualified Employee

- Someone who can do the essential functions of their job with or without a reasonable accommodation
- A worker who cannot do one or more tasks that are essential to the job can still be a “qualified employee” if their inability is temporary, that job task could be done in the near future, and the worker’s inability to do that job task can be reasonably accommodated

Reasonable Accommodation

- A modification or an adjustment to a job or to the work environment that will enable a qualified applicant or employee to participate in the application process or to perform the essential functions of their job

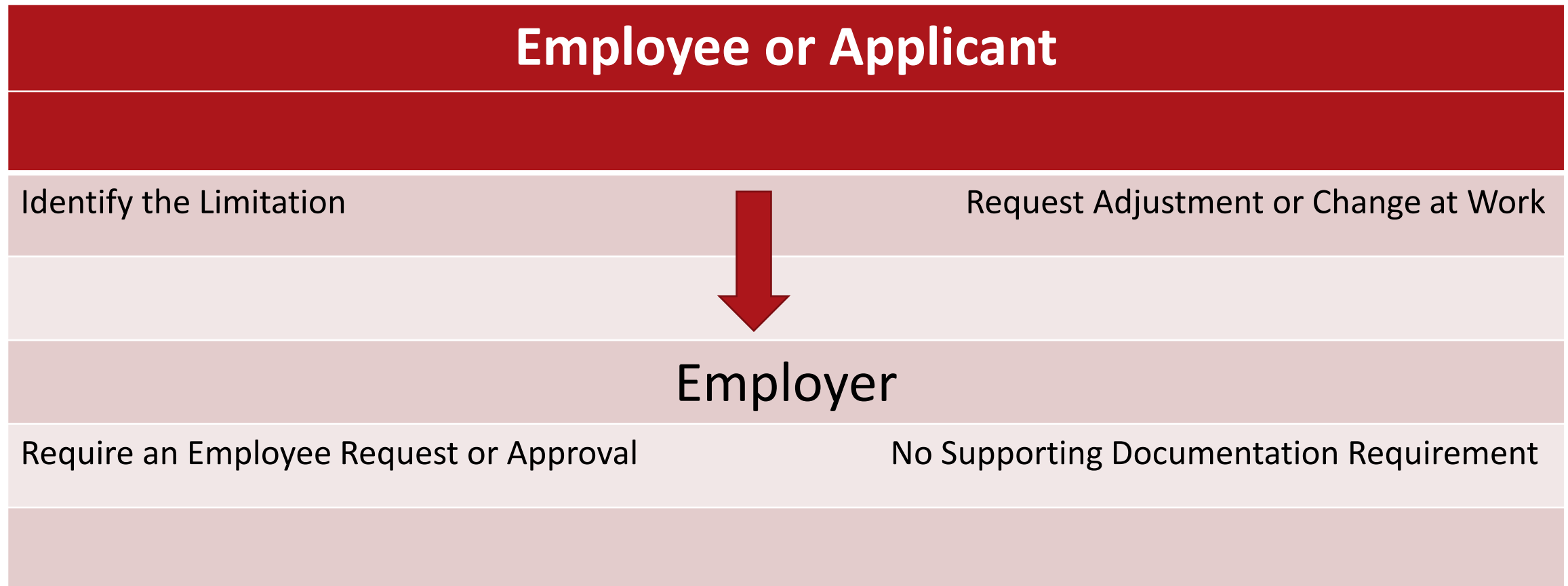
Reasonable Accommodation Examples

- Being able to sit, stand, or drink water
- Receiving closer parking
- Having flexible hours
- Receiving appropriately sized uniforms and safety apparel
- Receiving additional break time to use the bathroom, eat, and rest
- Taking leave or time off to recover from childbirth
- Being excused from strenuous activities and/or exposure to chemicals not safe for pregnancy

Interactive Process

- The interactive process is a discussion or two-way communication between an employer and an employee or applicant to identify a reasonable accommodation.

Interactive Process



Undue Hardship

- Compliance would create significant difficulty or expense for the employer in light of the employer's size, financial resources, nature and structure of its operations.

Related Laws

- TITLE VII • Protects pregnant workers from being treated worse, harassed, or fired by their employer because they are pregnant
- ADA • Prohibits disability discrimination, including a disability related to a pregnancy

Related Laws

- FMLA
- 12 weeks of unpaid job-protected leave in a 12-month period for the birth of a child, for prenatal care and incapacity related to pregnancy, for their own serious health condition following the birth of a child, or to care for a spouse who is incapacitated due to pregnancy or childbirth
- PUMP Act
- Effective December 29, 2022
- Requires employers with more than 50 employees to provide mothers, for up to one year after birth, with 1) a reasonable amount of break time, and 2) a place to express milk that is shielded from view and free from intrusion

Proposed Title IX Regulation

- Expand coverage to potential, presumed, or past pregnancy as well as related conditions and recovery from related conditions
- Recognize lactation as a pregnancy-related condition
- Limit medical clearance requirements
- Establish requirements concerning the notification of student's rights; the modification of policies, practices, and procedures; and monitoring of barriers to reporting sex discrimination

Uptick in Cases



U.S. Customs and Border Protection

- The EEOC's Office of Federal Operations certified a class complaint of potentially hundreds of U.S. Customs and Border Protection employees and permitted any pregnant CBP employee who was required to enter "temporary light duty" since July 2016 to join the class

Apartment Corp.

- EEOC initiated a lawsuit when an employee saw her job posted online less than a week after she informed her supervisor that she was pregnant
- When she confronted her supervisor about the ad, the supervisor said that the employee would not be able to perform the job “in her condition” and fired her even though she intended to remain in the job

Problems



Problem 1

- You work in the General Counsel's Office of a large commercial airline company and get asked to join a last-minute meeting about the latest challenge bubbling up in human resources. Your company has a long-standing practice of forcing pregnant pilots to take unpaid leave weeks or months before their due date. You're also aware that human resources has heard that some managers have completely ignored pregnant pilots' requests to be temporarily reassigned to positions on the ground even though these positions have been given to pilots with other medical conditions.
- How would you address this situation?

Problem 2

- One of your largest clients is a national retail chain with a workforce primarily comprised of sales associates. You receive a call about a store manager who shared that he couldn't keep the store running with the constant revolving door of sales associates. When asked a few follow-up questions, the store manager ultimately shared that he fired a sales associate last week when she disclosed her pregnancy. The store manager also complained that the sales associate asked to return to her job today, but he wouldn't let her because he didn't think it was safe for a pregnant person to work as a sales associate.
- What advice would you provide to the store manager?

Problem 3

- You work in the General Counsel's Office of a regional home health service with a zero-tolerance time and attendance policy for the company's home health aides. You learn that a manager is considering firing a home health aid who is experiencing a high-risk pregnancy that has caused her to miss work and arrive late recently. While the home health aid has requested leave due to the medical conditions associated with her pregnancy, the manager told her that the time and attendance policy prohibits all leaves of absences.
- Do you have any concerns about this company's time and attendance policy, or treatment of the home health aide?

PWFA Prohibitions

- Requiring an employee or applicant to accept an accommodation without an interactive process
- Denying a job to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Requiring an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working
- Retaliation

Questions ?

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EEOC Updates to Inform Institutional Compliance Priorities

- Strategic Enforcement Plan for Fiscal Years 2024-2028
- Proposed Enforcement Guidance on Harassment in the Workplace
- “Capstone Guidance:” Final (?) updates to Technical Q&A - *What you Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*

Strategic Enforcement Plan: 2024-2028

- Consulting the Crystal Ball:
- <https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028>
 - Published Sept. 2023; follows publication of Strategic Plan for Fiscal Years 2022-2026. EEOC advises the two should be read together.
 - Helps to prioritize compliance initiatives.

SEP: Enforcement Priorities

A Few Highlights . . .

- Preventing and Remediating Systemic Harassment
 - Including sexual harassment and harassment based on race, disability, age, national origin, religion, color, sex (including pregnancy, childbirth, or related medical conditions, gender identity, and sexual orientation) or a combination or intersection of any of these.
- Expand Access to Legal System
 - Review of claims by workers who have historically been underserved and/or may be unaware of legal rights.
- Pregnancy, Childbirth, and Related Medical Conditions
 - Includes enforcement of the new Pregnant Workers Fairness Act (PWFA) and other EEO laws

SEP: Enforcement Priority Highlights

- Underrepresentation of Women and Workers of Color in Certain Industries / Sectors
 - References science, technology, engineering, and mathematics fields, among others.
- Prioritize Technology-Related Discrimination
 - Recognizes increasing use of AI and machine learning in hiring and employment decisions.
- Releases, NDAs, Non-Disparagement Agreements
 - Review of “overly broad” agreements that restrict the ability to obtain remedies
- Advancing Equal Pay
 - Continued review of allegations of disparity in pay based on protected categories.

Responding to Workplace Harassment

PROPOSED Enforcement Guidance on Harassment in the Workplace

SUBJECT:	PROPOSED Enforcement Guidance on Harassment in the Workplace
PURPOSE:	This transmittal issues for public input the Commission's proposed guidance on harassment in the workplace under EEOC-enforced laws.
<p>When it is issued in final, the PROPOSED sub-regulatory document will supersede <i>Compliance Manual Section 615: Harassment</i> (1987); <i>Policy Guidance on Current Issues of Sexual Harassment</i> (1990); <i>Policy Guidance on Employer Liability under Title VII for Sexual Favoritism</i> (1990); <i>Enforcement Guidance on Harris v. Forklift Sys., Inc.</i> (1994); and <i>Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors</i> (1999). It is intended to communicate the Commission's position on important legal issues.</p>	
EFFECTIVE DATE:	N/A – Proposal for public input.
EXPIRATION DATE:	This transmittal will remain available for public input for a period of 30 days after its publication.
ORIGINATOR:	Office of Legal Counsel

- Published Oct. 2, 2023, <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>
- 144-page document offers comprehensive window into EEOC approach to review of harassment claims
- Timely for issues currently impacting college campuses

Ensuring Your Institution Can Assert the *Faragher-Ellerth* Affirmative Defense

- **Part IV** of the Proposed Enforcement Guidance
 - Proactive measures to demonstrate an employer took reasonable care to prevent harassment
- EEOC will review whether employer can demonstrate:
 - a. Policy against harassment
 - b. Process for addressing complaints
 - c. Provided training; and
 - d. Implemented oversight to monitor adherence to policy

Checklist for Effective Anti-Harassment Policies and Procedures

Step 1: Identify the employment policies and practices that have been instituted to prevent harassment and respond to harassment complaints.

Step 2: For each, consider whether the policy:

- defines prohibited conduct;
- is widely disseminated;
- is comprehensible to employees, including those with limited literacy skills or limited proficiency in English;
- requires supervisors to report harassment;
- identifies how to make reports with contact information;
- offers multiple avenues for reporting so employees can contact someone other than their harasser;
- explains the complaint process

Checklist for Effective Anti-Harassment Policies and Procedures

Step 3: Review the relevant complaint process to ensure that, at minimum, it includes the following:

- a mechanism for prompt and effective investigations and corrective action;

Note: For internal investigation, the EEOC offers that employers need not institute a process that provides for a “trial-type” investigation, but that investigations should be conducted by an impartial party who is free from the influence of the alleged harasser.

- Investigators should seek information about the conduct from all parties involved.
 - Inform both complainant and alleged harasser of findings and corrective action, subject to privacy laws.
- adequate confidentiality and anti-retaliation protections

Checklist for Effective Anti-Harassment Policies and Procedures

Step 4: Assess the effectiveness of the training programs on the pertinent policies. How frequently is training offered? How does the institution record and track training and attendance?

The training should include the following minimum elements:

- Explain policy and complaint process, including any adr process, confidentiality, anti-retaliation;
- Describe and provide examples of harassment and conduct that if left unchecked, might rise to the level of prohibited harassment;
- Provide information about employees' rights if they experience, observe, become aware of, or report conduct they believe may be prohibited;
- Has the institution created manager/supervisor specific training with the following elements:
 - information about obligations to prevent, identify, stop, report, and correct harassment;
 - actions that can be taken to minimize the risk of harassment;
 - clear instructions for addressing and reporting harassment that is observed, reported to them, or that they otherwise become aware of.

Checklist for Effective Anti-Harassment Policies and Procedures

Step 5: Assess whether corrective actions are being taken under the relevant policies.

- Are complaints timely reviewed? What strategies may help to improve review times?
- Do reports result in corrective action, including assessment of actions that can be taken to improve campus climate?
 - EEOC Proposed Enforcement Guidance: If an investigation is unable to determine whether allegations of harassment violated policy, employers “may wish to consider preventive measures such as counseling, training, monitoring, or issuing general workforce reminders about the employer’s anti-harassment policies.”

Step 6: Review record-keeping and retention policies; regular assessment of patterns.

- What is the retention policy?
- Is there a process to evaluate any patterns / identify and address issues of systemic harassment?
- What on and off campus resources may help to address patterns when they are identified?

A Capstone Update: EEOC's Technical Q&A

- May 15, 2023: EEOC published its latest update to the Technical Q&A: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*
- Six days after expiration of public health emergency; reminds employers of ongoing obligations under ADA, Rehabilitation Act, and other laws, regardless of status of PHE

Technical Q&A: Takeaways

- Blanket reversals of accommodations put in place during the Public Health Emergency are impermissible
- Must consider accommodation for symptoms of Long COVID
- Promptly address COVID-19 related harassment of applicants or employees
- Continued obligation to review vaccination exemption requests for health or religious reasons



Questions?

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