EMPLOYMENT LAW UPDATE

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EMPLOYMENT LAW 2017

I. Equal Employment Opportunity Cases

A. Disability Discrimination

Wheatley v. Factory Card and Party Outlet, 826 F.3d 412 (7th Cir. 2016) (To determine whether an employee is a qualified individual under ADA, court applies a two-step test asking first whether employee satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, and licenses, and if he does, then court considers whether or not the employee can perform the essential functions of the position, with or without reasonable accommodation.)

Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016) (In determining whether function is essential, courts consider several factors, including what functions the employer thinks are essential, written job descriptions, how much time an employee spends on the job performing the function, the consequences of not having the employee perform the function, and whether other current employees in similar jobs perform the function. Basic life support certification was essential function of employee's positions as lead technician in the blood gas laboratory and respiratory therapist, for purposes of determining whether employee was a qualified individual with a disability under the ADA for her disability discrimination claim against employer; job descriptions included certification requirement to ensure safety of critically ill patients, therapists were expected to perform basic life support independently when necessary, and all other therapists had obtained updated certifications.)

Camp v. Bi-Lo, LLC, 662 Fed. Appx. 357 (6th Cir. 2016) (Genuine issues of material fact, including whether ability to lift more than 35 pounds was an "essential function" of employee's grocery store clerk job, since employee had performed his job for years with his back impairment without incident or complaint from his employer, and whether employee's disability could have been reasonably accommodated by employer precluded summary judgment on claims that he was discriminated against on the basis of his disability and unlawfully dismissed in violation of Americans with Disabilities Act.)

Boileau v. Capital Bank Financial Corp., 646 Fed. Appx. 436 (6th Cir. 2016) (Employee who could not attend work regularly was not qualified or capable of performing essential functions of her job with or without reasonable accommodation under ADA.)

Waggoner v. Carlex Glass America, LLC, ___ Fed. Appx. ___, 2017 WL 991075 (6th Cir. 2017) (Discharged bi-polar employee's failure to accommodate claim failed because employee did not make it clear that he was requesting transfer to a different department as an accommodation for his disability. Although an employee need not use magic words, employer is not required to speculate "as to the extent of the employee's disability or the employee's need or desire for an accommodation.")

Maat v. County of Ottawa, Michigan, 657 Fed. Appx. 404 (6th Cir. 2016) (Former court recorder who suffered from blood clots in her lungs and brain, and who was unable to perform her job duties, was not entitled to accommodation in the form of extended full-time leave from employment with state district court and county, under Michigan's Persons with Disabilities Civil Rights Act (PWDCRA); while the PWDCRA sought to encourage employment of persons with disabilities, it did not prohibit an employer from refusing to accommodate an employee whose disability was directly related to the employee's ability to perform the duties of her job, and court recorder was unable to perform her job duties, given that she was unable to be present in the courthouse. Additional period of full-time leave of indefinite duration, requested by former court recorder who suffered from blood clots in her lungs and brain, following a prior, lengthy medical leave from her employment with state district court and county, was not a reasonable accommodation, and thus court recorder was not an otherwise qualified individual able to perform her job under the Americans with Disabilities Act (ADA) and the Rehabilitation Act; given that court recorder's medical condition had only worsened after her prior medical leave, an extension to her leave would have been a reasonable accommodation only if its duration had been definite, and though court recorder's leave request contained a specific end date, she did not demonstrate a certain or credibly proven end to leave, as her physician indicated that her condition did not seem to be getting better, and that she would need to undergo various treatments without any clear prospect of recovery.)

Cotuna v. Walmart Stores, Inc., ___ F. Supp. 3d ___, 2016 WL 5661572 (E.D. Mich. 2016) (Hood, C. J.) (Employee who suffered from degenerative disc disease sought accommodation in the form of additional leave. Judge Hood concluded that request for additional leave was unreasonable where employee had already been on leave for 16 months, failed to provide medical documentation why additional leave was necessary or to provide assurance that he would be able to return to work.)

B. Medical Tests/Inquiries

Pena v City of Flushing, 651 Fed. Appx. 415 (6th Cir. 2016) (Following a medical leave of absence for "stress" and other "work-related distractions," the employer ordered the plaintiff to undergo a medical examination as a condition for returning to work. The employee refused to undergo the fitness for duty examination on the grounds that he did not believe examination was related to his job duties. The court rejected this argument, and held that employers may "requir[e] mental and physical exams as a precondition to returning to work." The court concluded that "an examination ordered for valid reasons can neither count as an adverse job action nor prove discrimination.")

Medical Records

Tadlock v Marshall County HMA, LLC, 603 Fed Appx 693 (CA 10, 2015). Plaintiff filed her EEOC Charges claiming she was discriminated and retaliated against on the basis of her disability. The EEOC issued a Notice of Right to Sue and Plaintiff filed suit. Defendant

Hospital contended that plaintiff had not properly pled disability discrimination on the basis of her disc and nerve disease and rather had based her EEOC charge on her diabetes and therefore had failed to exhaust her administrative remedies as it related to her disc and nerve disease. The district court agreed. The Court of Appeals found that plaintiff had established her prima facie claim and reversed and remanded and held that the definition of disability under the ADA does not require the EEOC to analyze the cause of the disability, but rather to determine whether it "substantially limits a major life activity." The Court further found the medical records had raised an issue of fact as to her disc and nerve disease.

C. Sex Discrimination

Chavez v Credit Nation Auto Sales, LLC, 641 Fed Appx 883 (CA 11, 2016). The district court's grant of summary judgment in favor of the defendant-employer was reversed in part because the plaintiff proffered sufficient evidence to permit a rational fact finder to infer her employer's discriminatory intent. In her complaint, the plaintiff alleged that she worked as an auto mechanic for the defendant and was only subjected to an adverse employment action after she announced her gender transition. The defendant contended that the plaintiff was terminated for "[s]leeping while on the clock on company time." However, the plaintiff offered ample evidence suggesting that the defendant subjected her to heightened scrutiny after learning about her gender transition plans and was simply looking for a legitimate work-related reason to terminate her. The court held that, considering all the evidence in the light most favorable to the plaintiff, triable issues of fact existed as to whether gender bias was "a motivating factor" in the defendant's decision to terminate her.

Schleicher v Preferred Solutions, Inc., 831 F3d 746 (CA 6, 2016). Summary judgment in favor of defendant-employer was properly granted because the plaintiff failed to show that gender bias was a motivating factor in the defendant's decision drop the male plaintiff's compensation to match that of a female co-worker. The court held that the defendant-employer did not violate the EPA because it did not lower the male employee's compensation to cure an EPA violation. The two coworkers were paid differently because the female employee chose a different pay option than the male employee. The court held that the male employee was paid more than the female employee because of a "factor other than sex."

Steele v Pelmor Labs Inc, 642 Fed Appx 129 (CA 3, 2016). "Under 42 U.S.C.S. §2000e-2(a), a company has a right to make business judgments on employee status, particularly when a decision involves subjective factors deemed essential to certain positions." "Because an employee has an ultimate burden to prove intentional sex discrimination under 42 U.S.C.S. §2000e-2(a), his or her 'gut feeling' cannot substitute for actual evidence." "[T]o demonstrate pretext, an employee must show that the qualifications of a person actually promoted are so much lower than those of his or her competitors that a reasonable factfinder can disbelieve a claim that the employer is honestly seeking the best qualified

candidate. In the absence of such a significant degree of difference in qualifications that may arouse a suspicion of sex discrimination, a court defers to the employer's hiring decisions, as Title VII is not intended to diminish traditional management prerogatives."

Pregnancy

Young v United Parcel Service, 135 S Ct 1338 (2015). A plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act, which requires employers to treat "women affected by pregnancy...the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work," may make out a prima facie case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work. "The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination."

D. Race/National Origin Discrimination

Presley v Ohio Dept of Rehab & Corr, 2017 US App LEXIS 313, (CA 6, 2017). Summary judgment properly granted in favor of the defendant-employer because the former correctional facility nurse failed to show that she was denied a promotion due to her race. The court held that even though the white nurse who was promoted over the plaintiff was considered to be similarly situated, the plaintiff could not show that her qualifications were so significantly better than the promoted nurse that it would be unreasonable to pass the plaintiff over for the promotion. Additionally, the employee could not point to any irregularities in the promotion process to shoe that the employer's stated reasons for failing to promote the plaintiff were pretext for unlawful discriminatory animus.

Jackson v Trinity Health-Mich, 2016 US App LEXIS 15143 (CA 6, 2016). Summary judgment properly granted to the defendant-hospital on the plaintiff 's racial-discrimination claims. The plaintiff, an African- American former manager, claimed that she was terminated as a result of racial animus. However, the hospital provided evidence establishing that the plaintiff was discharged due to her poor communication skills and dictatorial management style. Despite the fact that the plaintiff had been replaced by a white woman, she could not establish, with direct or circumstantial evidence, that the stated reasons for her discharge were a pretext for discriminatory animus.

Tennial v UPS, 840 F3d 292 (CA 6, 2016). Summary judgment properly granted in favor of the defendant-employer because the African-American employee failed to make the required showing that the employer's stated reason for his demotion, that he consistently failed to meet performance goals, was pretext for unlawful discriminatory animus.

Henry v Abbott Labs, 651 Fed Appx 494 (CA 6, 2016). Plaintiff, an African-American customer relations employee, has a triable race discrimination claim because he presented sufficient evidence that every other employee with performance scores similar to his during the past 10 years had been promoted except the plaintiff. In addition, a similarly-situated Caucasian comparator had been promoted instead of the plaintiff. The employer argued that the plaintiff was not qualified for the promotion because she failed the required assessment test. However, the court held that failing to promote the plaintiff despite her record of above-average performance, coupled with the evidence that a similarly-situated comparator had been promoted instead of the plaintiff, created a genuine issue of material fact regarding whether the employer's proffered reason was pretext for discrimination.

Coffman v US Steel Corp, 2016 US Dist LEXIS 59701 (ED MI, 2016). A triable race case was raised with allegations applying the cat's paw analysis. Plaintiff a Caucasian woman asserted claims against an African-American woman, an intermediate supervisor accused of acting on discriminatory animus to cause the direct supervisor to take action against the plaintiff. The court held that a reasonable jury could find that the proffered reason for the plaintiff 's discharge, that she made certain mistakes multiple times, was pretext for discrimination because there was evidence that Caucasian employees were not disciplined for making the same mistakes and the plaintiff was the only employee disciplined for common mistakes.

Crane v Mary Free Bed Rehab Hosp, 634 Fed Appx 518 (CA 6, 2015). Summary judgment properly granted because the plaintiff, an African-American part-time nursing supervisor, failed to present evidence that she was subjected to an adverse employment action. "Not every action taken by an employer that potentially affects an employee rises to the level of an adverse employment action. Instead, a plaintiff must point to a materially adverse change in the terms or conditions of her employment. Examples of a materially adverse change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or other indices that might be unique to a particular situation. At a minimum, the change in employment conditions must be more than an inconvenience or an alteration of job responsibilities."

E. Age Discrimination

Richardson v Wal-Mart Stores, Inc, 836 F3d 698, 703 (CA 6, 2016). Where a manager made statements that the plaintiff was too old to work and questioning when the plaintiff was going to quit or leave, those statements were not direct evidence of age discrimination because the manager was not involved in the decision to terminate the employee. The manager had been transferred to a different store four months before the termination

decision. Further, the plaintiff did not present any evidence that the decision maker did not honestly believe that the plaintiff's discipline history justified the termination decision. Upon a closer review of the disciplines, the decision maker might not have found them to be appropriate, but there is no requirement that an employer's pre-termination investigation be perfect. The decision maker reasonably relied on the disciplines in deciding to discharge the plaintiff.

Thomas v Heartland Employment Services, 797 F3d 527 (CA 8, 2015). Evidence that Hagen, a supervisor who made ageist comments, played a role in the discharge decision created a triable age discrimination claim. Although the employer claimed that Hagen played no role in the decision, a regional human resources manager testified that Hagen was an "indirect supervisor" with authority to contribute to a discharge decision, and a decision maker said that "they"—i.e., a group that might have included Hagen—made the decision and that it was "their" decision to terminate the plaintiff. A jury could construe these statements as evidence that Hagen was involved. The following comments by Hagen, all of which occurred within a two month time span but did not directly reference the adverse decision, could be "direct evidence" of discrimination: referencing the plaintiff as an "old short blond girl," saying older people didn't work as fast and were not as productive as younger employees, commenting about having "fresh blood, younger employees," and telling a client that he "likes to keep himself surrounded with young people."

Goudeau v National Oilwell Varco, LP, 793 F3d 470 (CA 5, 2015). Decisionmaker's ageist comments, combined with allegations that the employer never showed the plaintiff the numerous written disciplinary warnings in his file, created a triable age discrimination claim. "We have recognized...that when an employer opts to have a disciplinary system that involves warnings, failure to follow that system may give rise to inferences of pretext." The ageist comments included calling older workers "old farts," telling the plaintiff he wore "old people's clothes," saying the smoking area was "where the old people meet," and threatening to fire two age-protected employees after asking about their age.

F. Religious Discrimination/Accommodation

Summers v Whitis, 2016 U.S. Dist. LEXIS 173222 (SD Ind, Dec. 15, 2016). A deputy county clerk refused to process a same-sex couple's paperwork seeking a marriage license. The deputy clerk requested a religious accommodation, but was terminated for insubordination. The former deputy clerk's subsequent religious discrimination lawsuit was dismissed. The court held that the former deputy clerk's religious convictions did not excuse her from performing the ministerial duties of her job, including processing marriage licenses.

Guessous v Fairview Prop Invs, LLC, 828 F3d 208 (CA 4, 2016). Where a muslim employee was subjected to numerous disparaging remarks regarding her religion, race and national origin, the district court's grant of summary disposition to the employer on the employee's discrimination and hostile work environment claims was reversed. The employer stated that it had been engaged in a year-long evaluation of the need for the employee, and had finally decided to terminate her because it did not have enough work to justify keeping her.

There was, however, no evidence of such an evaluation, and the termination decision appears to have been made shortly after the employee's conversation with her supervisor about the supervisor's disparaging remarks. Further, despite the fact that all of the alleged disparaging remarks were outside of the Title VII statute of limitations period, the decision to take work away from her and to terminate her were a part of the harassment such that the claim survived based on the continuing-violation doctrine.

Yeager v FirstEnergy Generation Corporation, 777 F3d 362 (CA 6, 2015). Employers are not liable for refusing to accommodate a religious belief that would require them to violate or ignore a federal statute. Summary judgment was therefore proper for an employer who claimed his religion prohibited him from producing a Social Security number.

G. Retaliation

Brandon v Sage Corp, 808 F3d 266 (CA 5, 2015). The employer truck driving school was properly granted summary judgment on a Title VII retaliation claim by a former school director who resigned after being threatened by the regional director with a 50 percent pay cut for hiring a transgender individual as a driving instructor. The trial court properly found that threat was not an adverse employment action because the regional director was outside the director's chain of command and lacked final decision-making authority. For those same reasons, the court was persuaded the court that no reasonable employee would be deterred from engaging in protected activity based on that threat. A reasonable employee in her position would have waited to receive confirmation on whether the threat was official or would have followed school's grievance process.

Yazdin v Conmet Endoscopic Technologies, Inc, 793 F3d 634 (CA 6, 2015). The following two allegations constituted "direct evidence" of retaliation: (a) management referenced the following statement by plaintiff as an example of the plaintiff 's unwillingness to accept and apply constructive coaching: "you don't like the way I write. You don't like the way I talk. I guess you don't like my race, either"; and (b) that a manager decided to fire the plaintiff immediately after a phone call during which the plaintiff said that he was going to file a lawsuit, file charges, and was experiencing a "hostile work environment."
The plaintiff also created a circumstantial case with evidence that the employer's explanation for discharge— insubordination—was pretextual. At the summary judgment stage, courts cannot accept a conclusory claim that the plaintiff was "insubordinate" where the insubordination might have consisted of overt or subtle resistance to perceived discrimination. "Indeed, there may be some instances when the allegedly insubordinate act may be a response to a sort of unspoken, subliminal discrimination in the workplace." While some examples of the plaintiff 's alleged insubordination were probably unprotected—such as when the plaintiff called his manager a "bad individual" who makes "inappropriate business decisions,"—the plaintiff made other comments in the same exchange—such as threatening to sue or file a complaint—that arguably constitute protected opposition activity. Moreover, although the employer had critiqued the plaintiff's communication style before he engaged in protected activity, it was unclear whether the alleged communications issues would have resulted in termination from employment. Summary judgment reversed.

Jacobs v North Carolina Office of the Courts, 780 F3d 562 (CA 4, 2015). A fact question existed concerning the decision maker's claim that she did not know of the plaintiff 's accommodation request (the protected activity). The plaintiff had previously sent the decision maker an email requesting accommodation, and one could presume that the plaintiff 's supervisors, who did know of the request, have discussed the issue with the Decision maker during various pre-termination meetings.

H. Whistleblowers' Protection Act

Pace v Edel-Harrelson, 309 Mich App 256 (2015). The WPA protects employees who report violations of law that are planned, but not yet perpetrated. "[W]e reject defendant's suggestion that, where an employee has a good faith and reasonable belief that a violation of the law has either already occurred or is being actively planned, the report of that belief is insufficient to trigger the protections of the WPA.... Requiring that a reporter wait until she is certain that the violation is complete is also inconsistent with the intent of the WPA, i.e., the protection of the public."

I. Harassment

Sex

Smith v Rock-Tenn Servs, 813 F3d 298 (CA 6, 2016). Where a male co-worker pinched and/or slapped a male employee's buttocks and grinded his pelvis into the employee's backside, the jury's conclusion that such conduct was not mere horseplay was not so unreasonable as to entitle the defendant employer to judgment as a matter of law. Further, the fact that the co-worker only engaged in such conduct with male employees was direct comparative evidence sufficient to establish an inference of discrimination based on sex. Finally, defendant did not take prompt and remedial action where defendant's total inaction for ten days, where defendant knew that the male-employee had touched plaintiff, and had told the male-employee that further complaints would result in termination, was unreasonable.

Nichols v Tri-Nat'l Logistics, Inc, 809 F3d 981 (CA 8, 2016). Where a female truck driver was subjected to a male co-driver's sexual advances while on the road and during a mandatory 34-hour rest period at the co-driver's home, the district court erred by not considering the conduct that occurred during the rest period. The rest period was mandatory and the law did not require the plaintiff to choose between performing her job and removing herself from the harassment. Further, because the employer waited seven days to arrange for a different co-driver for the plaintiff, there was a genuine issue of material fact as to whether the employer took appropriate remedial action.

Race/National Origin

Cole v Bd of Trs, 838 F3d 888 (CA 7, 2016). Where an African-American employee at a university found a hangman's noose in his newly-assigned workspace, the dismissal of his

claim for hostile work environment harassment was upheld because no reasonable inference could be drawn that any complained-of incidents were connected to his race besides the noose. One incident could be sufficient, but there was no evidence that the noose was left specifically for him to find. The Court of Appeals ultimately found that the employee provided no evidence to support liability on the part of the employer because there was no indication that a supervisor was involved or the university failed to take appropriate corrective action. When the employee reported the noose, he also said he thought it was a joke. Therefore, the university leaving the investigation to the police was appropriate.

Tolbert v Smith, 790 F3d 427 (CA 2, 2015). The plaintiff 's hostile environment claim was properly dismissed where only two allegedly racist comments were made in his presence, one of which was ambiguous and did not necessarily reference race. There was no evidence that the allegedly unpleasant conditions the plaintiff complained about, such as putting too many pupils in the plaintiff's class and denying his request for a lump sum budget, had anything to do with race.

Boyer-Liberto v Fontainebleau Corp, 786 F3d 264 (CA 4, 2015), en banc. A black cocktail server who was fired after complaining that a white supervisor called her a "porch monkey" two times in one day has triable racial harassment and retaliation claims. A single workplace usage of an "odious epithet" can be "severe" enough to trigger Title VII protection, particularly where the comments were made by a person who arguably had the power to get the plaintiff fired.

Al-Kazaz v Unitherm Food Systems, Inc, 594 Fed Appx 460 (CA 10, 2015). Three isolated comments—calling the plaintiff "sand nigger," "camel jockey" and suggesting that "ragheads" should be killed—made by different co-workers were highly inappropriate but were not severe or pervasive enough to sustain a racial harassment claim. Title VII is not a general civility code.

Religious

Huri v Office of the Chief Judge of the Circuit Court of Cook County, ___ F3d ___; 2015 US App LEXIS 18296 (CA 7, 2015). The plaintiff stated a plausible religious-based hostile work environment claim by alleging that her employer screamed at her, shunned and implicitly criticized non-Christians, and conducted prayer circles at work.

Employer Liability

Stewart v Rise, Inc, 791 F3d 849 (CA 8, 2015). The plaintiff raised a triable question whether her employer knew of the alleged harassment, even though she did not complain in writing or specifically tell her employer that she thought the averse conduct was based on sex. Complaints need not come in writing or reference a prohibited animus to be protected. That is particularly true where some of the alleged conduct was clearly sex-based.

Pryor v United Air Lines, 791 F3d 488 (CA 4, 2015). A black employee who received an anonymous, racist death threat in her mailbox has a triable racial harassment claim. Employers are not strictly liable for harassing conduct and are only required to respond appropriately. However, the employer in this case failed to contact police, install security cameras as requested, take fingerprints, provide additional security, or follow the employer's own policies for responding to harassment allegations. The employer did not even get back with the plaintiff to explain what it was doing in response to her complaint. The employer's failure to properly respond the first time arguably led to a second round of racist death threats, which were toward all black employees at the same location.

Foster v University of Maryland-Eastern Shore, 787 F3d 243 (CA 4, 2015). "[E]mployers have an affirmative duty to prevent sexual harassment, and will be liable if they 'anticipated or reasonably should have anticipated' that a particular employee would sexually harass a particular coworker and yet 'failed to take action reasonably calculated to prevent such harassment.'" The employer could be liable under this standard because other employees had complained about the harasser's harassment.

II. DOL's New Overtime Pay Exemption Regulations

In May 2016, the DOL published changes to the white collar exemption regulations at 29 CFR Part 541. Those regulations were to go into effect on December 1, 2016, but in late November 2016 they were enjoined by a Texas federal court. The DOL appealed that ruling to the Fifth Circuit Court of Appeals. Briefing was initially to be completed by early February 2017, but due to the outcome of the intervening election, the DOL asked for an extension. At this time, the DOL's reply brief is due in early May 2017.

Under the now enjoined regulations:

1. The minimum salary level for an exempt executive, administrative or professional employee would increase from $23,660 to $47,476 per year effective December 1, 2016, and thereafter increase every three years beginning on January 1, 2020, to the 40th percentile average salary in the lowest census region (which is currently the South);

2. The total annual compensation amount for the highly compensated employee exception would increase from $100,000 to $134,004, and thereafter increase every three years, beginning on January 1, 2020, to the national 90th percentile of salaried workers; and

3. Commissions, non-discretionary bonuses and other incentive payments can be used to satisfy up to 10% of the applicable salary level amount.

It has yet to be determined if the appeal will continue to be pursued by the DOL, whether the DOL under President Trump will withdraw the regulations and propose a new version, whether Congress will intervene, or some combination of these options will occur.

III. PROPOSED LEGISLATION

A. State Legislature, bill working through committee to require employers to give one hour of sick time for every 30 hours worked for both part-time and full-time.

B. House passed Bill this week allowing private employers to give compensatory time off in lieu of overtime. Sent to the Senate where it is expected to be a battle, not pass.

C Also a trend across country, some states and some cities passing laws forbidding employers from asking salary history of applicants. (has been proposed in Congress, currently in committee)

D. Also trending across the country "ban the box" laws, prohibiting employers from asking about criminal history, at least until post offer pre-employment. Would need to legitimate job purpose to consider criminal history in hiring process.

IV. NLRB

1. NLRB putting considerable effort into reminding employers the NLRA applies to Non-union employers also.

2. Takes position the following violate the NLRA:

a. Telling employees not to discuss investigation with co-workers

b. prohibitions against negative comments about fellow team members,

c. promise to represent the employer in a positive and professional manner in the community

d. prohibition against engaging in negativity or gossip

e. mandatory arbitration agreements

3. Social Media - focus is on policies and employer monitoring employee use of social media inside and outside work.

TAKE AWAYS

The new administration is expected to be more employer friendly but is also unpredictable. Thus far the DOL and EEOC seem to be rolling along taking the employee friendly positions they had under the previous administrations, but it remains to be seen how that will play out in the long run.

The purpose of these seminar materials is to present information on the topics presented. The brevity of this document prevents comprehensive treatment of all legal issues, and the information contained herein should not be taken as legal advice. Because of the changing nature of employment law, and these areas in particular, legal counsel should be consulted before any particular action is undertaken or a decision is made that may lead to a challenge or a lawsuit of these laws. Advice for specific matters should be sought directly from legal counsel.