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EMPLOYER'S MOTIVE, NOT CONFIRMED KNOWLEDGE OF ACCOMMODATION NEED, IS BASIS OF RELIGIOUS ACCOMMODATION VIOLATION

Federal anti-discrimination laws ("Title VII") prohibit an employer from refusing to hire a candidate to avoid accommodating a suspected, but unconfirmed religious practice, according to a recent United States Supreme Court decision.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, Samantha Elauf applied and interviewed for an open position with a Tulsa, Oklahoma Abercrombie & Fitch store. Based on the assistant manager's rating, Elauf qualified to be hired. The assistant manager, however, was concerned that Elauf's headscarf would run afoul of Abercrombie's "Look Policy," which prohibited "caps" as too casual or informal. Elauf and the store manager did not discuss the headscarf or whether wearing it reflected a religious practice. Neither did they discuss the Look Policy or whether the situation warranted an accommodation. The assistant manager sought guidance from the store manager and then the district manager, inquiring whether the headscarf was a forbidden "cap" and informing them that she believed Elauf wore the headscarf because of her faith. The district manager confirmed the headscarf (and any other headwear whether religious or otherwise) would violate the Look Policy and directed the assistant manager not to hire Elauf.

Elauf, who is Muslim and wears the headscarf for religious reasons, filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which sued Abercrombie for violating Title VII. The EEOC claimed Abercrombie suspected Elauf wore the headscarf for religious reasons and unlawfully refused to hire her to avoid accommodating her religious practice. The district court agreed, granting summary judgment to the EEOC and awarding $20,000 to Elauf, who had since found a better paying job.

On appeal, the federal Court of Appeals for the Tenth Circuit (covering, among other states, Oklahoma and Colorado) reversed, concluding an employer is not liable for failing to provide a religious accommodation until the applicant notifies the employer – i.e., the employer has actual notice – of the need for the accommodation. The Tenth Circuit awarded summary judgment to Abercrombie, and the EEOC sought review.

The United States Supreme Court rejected the Tenth Circuit's holding. Citing Title VII's prohibition on taking action "because of" religion, the Court enunciated a "straightforward" rule: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." The Court distinguished an employer's motive from knowledge, finding the employer's motive to be the central inquiry for a discrimination claim. Thus, to proceed on a claim, "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." Here, the EEOC had met this standard.

The Court further recognized that Title VII demands more than "mere neutrality" in considering religious practices. Rather, it requires "otherwise-neutral policies to give way to the need for an accommodation." Here, although Abercrombie's Look Policy was facially neutral, Title VII required Abercrombie to affirmatively provide an accommodation for Elauf's religious practices.

The decision left open several important issues, including: (1) whether there is a knowledge component of the motive requirement since an employer cannot be motivated by something it does not know or suspect and (2) the interplay of an employer's undue hardship defense. On the latter point, all accommodations (whether of religious practices or otherwise) are subject to a reasonableness standard and an employer's undue hardship defense, neither of which are abrogated by this decision.

Still, at a time when employers are emphasizing diversity and inclusion in the workplace, the decision provides a timely reminder of the interplay of religion and workplace practices. Maintaining a workplace

that is not only legally compliant but also inclusive requires intentional planning, typically including implementation of appropriate policies or practices and, most importantly, manager training to ensure consistent application of those policies and practices.

UPDATE ON RECENT AND ANTICIPATED FEDERAL REGULATORY DEVELOPMENTS

Federal white collar exemptions: According to the Department of Labor's ("DOL") most recent Semiannual Regulatory Agenda, proposed rules revising the regulations implementing the federal Fair Labor Standards Act ("FLSA") are expected this month. In March 2014, President Obama instructed the Secretary of Labor to modernize and streamline existing overtime regulations for the so-called white collar – executive, administrative, and professional – exemptions. The regulations have been revised only twice in the past 40 years, most recently in 2004 to increase the salary threshold to $455 per week ($23,660 annualized) and remove a minimum timing requirement associated with exempt duties. Two key changes are widely anticipated: (1) an increase in the salary requirement to about $40,000 annually and (2) a shift in focus to the amount of time spent on exempt duties (and away from the position's primary duty). For California employees, particularly those in the high-tech sector, it is unlikely that such changes would have much, if any, impact on current practices given California's more stringent approach to exemptions. However, significant changes could be in store for employees outside of California. Any changes to the regulations require compliance with the federal Administrative Procedure Act's rulemaking process, including notice, public comment and review periods. Thus, even if published in June 2015, it is unlikely the regulations would be effective before 2016.

Use of technology, including smartphones, by employees outside work hours: The DOL's Wage and Hour Division will be seeking information from the public on how the proliferation of portable electronic devices is impacting workers, including hours worked, tracked, and paid. In the Semiannual Regulatory Agenda, this topic is listed in the "pre-rule" stage with the request for information slated for publication in August 2015. It remains to be seen what, if any, regulatory action may follow.

Federal contractor reporting requirements: Pursuant to Obama's Fair Pay and Safe Workplaces Executive Order, the DOL issued guidance and the Federal Acquisition Regulatory Council published a revised regulation addressing new reporting requirements for federal contractors. The guidance and the regulation require potential federal contractors whose estimated value of supplies or services exceeds $500,000 to disclose any labor law violations in the prior three years to be considered for a contract. Violations subject to reporting include administrative rulings, civil judgments, and arbitration awards or decisions rendered against the contractor for violations of specified federal employment-related laws and their state equivalents. According to the DOL guidance, "notices or findings – whether final or subject to appeal or further review – issued by an enforcement agency following an investigation" must also be reported. The reporting obligations extend to the potential contractor's subcontractors, subject to a further $500,000 value threshold and other limited exceptions. After being awarded a contract, the contractor must update its disclosures every six months for the duration of the contract. The requirement poses practical challenges, particularly for companies with large or geographically distributed workforces, of tracking and managing information to ensure compliance. But, the biggest uproar from the industry appears to reflect blacklisting fears – that one contracting officer's determination may effectively bar future contracts. The comment periods on the regulation and guidance continue through late July 2015.

We will continue to monitor these pending regulatory matters and report on further developments as they arise.

NEWS BITES

Employee's California Wage And Hour Class Action Continues, Texas Forum Selection Clause Unenforceable For Public Policy Reasons

In *Verdugo v. AlliantGroup, L.P.*, a California appeals court disregarded a forum selection clause requiring a California employee to pursue her wage and hour claims in Texas under Texas law, finding the clause violated California public policy. The plaintiff had signed an employment agreement selecting Harris County, Texas as the exclusive forum for resolution of employment disputes and designating Texas law as the governing law. When the plaintiff brought a class action in California for unpaid overtime and other Labor Code violations, the employer sought to enforce the contract. The trial court stayed the California action to allow the matter to proceed in Texas. The appellate court disagreed and lifted the stay, finding the clause unenforceable as against public policy. The court concluded the Labor Code afforded California employees certain unwaivable rights. Forcing the plaintiff to litigate her claims in Texas, where the choice-of-law clause would require application of Texas law (unless the Texas court were to decide to disregard it), had the potential to diminish the employee's unwaivable substantive rights. The defendant had failed to prove – or even stipulate – that California law would be enforced, so the Court refused to enforce the forum selection clause.

Joint Employers Potentially Liable for Involvement in Co-Joint Employer's Worker Misclassification, But No Private Right of Action

California employers may be responsible for their involvement in a co-joint employer's willful misclassification of employees, but the associated civil penalties are only recoverable through an enforcement action or Private Attorney General Act ("PAGA") claim. In *Noe v. Superior Court*, Anschutz Entertainment Group (AEG) owned several entertainment venues, contracting with Levy Premium Foodservice for concessions at the venues. Levy engaged Canvas Corporation to staff the concessions. Several former concession workers hired by Canvas filed a wage and hour action against Canvas, Levy and AEG as joint employers, contending each was responsible for willfully misclassifying them and seeking penalties under Labor Code Section 226.8, among other claims and remedies. The court recognized that the statute extended liability beyond the employer who committed the willful misclassification: "a joint employer who knowingly acquiesces in a co-joint employer's decision to wilfully misclassify their joint employees has necessarily 'involved' itself in that misclassification decision" and may be liable under the Section 226.8. The court further determined that the statute did not create a private right of action, such that the vendors' individual claims to recover the civil penalty were dismissed. Rather, the civil penalty may be enforced only by the Labor Commissioner or by an individual through a PAGA claim.

New York City Passes Ban-the-Box Ordinance

Joining San Francisco and other jurisdictions, the New York City Council recently passed legislation restricting when employers may inquire into applicants' criminal histories and how employers may use such information in making employment decisions. Prior to passage, the New York City Human Rights Law already provided some restrictions on use of an applicant's or employee's criminal history in making employment decisions, including the requirement that employers apply a multi-factor analysis to determine whether a sufficient relationship between the offense and the position existed to warrant the adverse action.

The recent ordinance goes further. First, it prohibits employers with four or more employees from inquiring – verbally, in writing, or through searching public information – about an applicant's pending arrest or criminal conviction record until after a conditional employment offer has been made. Second, employers may not state in job advertisements that an applicant's arrest or conviction history will impact employment. Third, before taking any adverse action due to criminal history, employers must provide the applicant: a copy of the inquiry, a written analysis with supporting documentation setting forth the reasoning for the action, and at least three business days (while holding the position open) to respond to the analysis. The New York City Commission on Human Rights is responsible for issuing a form or guidance for the notice and written analysis required by the ordinance.

Persons aggrieved under the ordinance have a private right of action with remedies to include attorneys' fees. The ordinance includes limited exceptions for

law-enforcement jobs and for searches required by law as part of the application process. Mayor Bill de Blasio, who has expressed support for the ordinance, is expected to sign it shortly, and the ordinance will take effect 120 days thereafter.

OSHA Guidance On Restroom Access For Transgender Employees, Broader Model Employment Policy

The federal Occupational Safety and Health Administration (OSHA) released A Guide to Restroom Access for Transgender Workers earlier this month. Federal and state law requires employers to provide all workers reasonable access to restroom facilities. The guidance does not change those requirements, but identifies model practices that emphasize respect for an employee's gender identity and providing options so that all employees may select an approach to restrooms with which they feel safe. The guidance also provides links to a host of resources related to transgender employees in the workforce, including the Transgender Law Center's model employment policy. With the increasing presence (or, perhaps, awareness) of transgender employees in the workplace, these materials come as welcome thought pieces on how to plan for and respectfully address issues that may impact transgender workers and the workplace, including, by way of example, how to address a workplace gender transition.

Ruby Tuesday Settles Female-Only Job Claim For $100K

Restaurant chain Ruby Tuesday, Inc. will pay $100,000 and take preventative action to resolve an EEOC sex discrimination action, after the company reportedly denied two male servers a summer job assignment at a resort in Utah. According to the EEOC, Ruby Tuesday internally announced the temporary summer positions, which included company-sponsored housing and a greater pay opportunity. However, the posting indicated only female candidates would be considered, reportedly due to concerns about coed housing. The EEOC asserts the restaurant violated federal anti-discrimination law when it selected women for the summer jobs, preventing the male candidates from transferring into the positions. Through the settlement, Ruby Tuesday must train an estimated 1,600 managers at 49 different sites across 9 states, report its efforts to the EEOC, and post reminders about this settlement on its website and at restaurants.

Reminder: California Paid Sick Leave Requirements Effective July 1, 2015

AB 1522 (Healthy Workplaces, Healthy Families Act of 2014) becomes effective July 1, 2015. Under the Act, starting July 1, 2015, employers are required to provide paid sick leave to employees or afford them paid time off under another policy that meets the minimum requirements of the Act. For further information on the paid sick leave requirements, see our summaries in the September 2014 FEB and January 2015 FEB.

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