Southeast
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EXECUTIVE ORDERS

EOs support unions, establish minimum wage for federal contractors

AL | FL | GA | LA | MS

by Martin J. Regimbal, The Kullman Firm

President Joe Biden recently signed two Executive Orders (EOs) with substantial implications for nonunion employers as well as those employing workers on federal contracts and subcontracts. Let's take a closer look.

Union organizing

On April 26, President Biden signed an EO establishing the White House Task Force on Worker Organizing and Empowerment. It requires the task force to create recommendations for actions "to promote worker organizing and collective bargaining in the public and private sectors, and to increase union density." Another goal is to increase worker power in marginalized communities, hard-to-organize industries, and changing industries.

Vice President Kamala Harris will chair the task force, and Marty Walsh, secretary of the U.S. Department of Labor (DOL), will serve as vice chair.

$15 minimum wage

On April 27, President Biden signed an EO requiring federal contractors and subcontractors to pay certain covered workers at least $15 an hour. The minimum wage for tipped workers was increased to $10.50. Critically, if tipped workers don't receive enough tips for their total wages to equal $15 hourly, employers are required to increase their wages to make up the difference.

The increased minimum wages must be paid beginning January 30, 2022, and are thereafter set to go up yearly on January 1 in an amount determined by the DOL secretary.

The EO applies to a number of federal contracts, including:

- Procurement contracts;
- Contracts for services, concessions, or construction;
- Contracts covered by the Service Contract Act (SCA); or
- Contracts involving federal property or lands related to offering services for federal employees, their dependents, or the general public.

For the order to apply, workers' wages under the relevant contract or subcontract must be governed by the Fair Labor Standards Act (FLSA), the SCA, or the Davis-Bacon Act.

Of note, the increased wage requirements don't apply to all employees but only to those working in connection with the contract. Also, the EO applies only to new contracts, contract-like instruments, extensions and renewals of existing contracts, and exercises of option contracts entered into or occurring on or after January 30, 2022.

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Justifying independent contractor status just got harder
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It appears the wage EO will effectively place the onus on federal agencies to ensure new federal contracts comply with the new wage levels. What's unclear, however, is how the obligation will extend to subcontractors, including those holding subcontracts currently in existence but not up for extension or renewal before January 30, 2022. The labor secretary is charged with issuing regulations related to the order by November 24, 2021, which may provide some guidance on the issues unaddressed by the order's language.

Takeaway

The White House Task Force on Worker Organizing and Empowerment portends what will be a major focus during the Biden Presidency. Already, the U.S. House of Representatives has passed the Protecting the Right to Organize (PRO) Act, which would:

- Eliminate state right-to-work laws;
- Bring back some of the Obama era's quickie election rules;
- Allow microunits for bargaining purposes; and
- Increase the number of mail-in ballot elections.

While the PRO Act's fate is uncertain in the Senate, it's clear the White House task force will bring much pressure to bear on Democratic senators for passage.

As for increasing the minimum wage for certain employees of federal contractors, it's clearly a step toward raising the rate to $15 for all employees covered by the FLSA. Although employers without federal contracts don't have to prepare for that potential eventuality just yet, federal contractors with certain covered employees will have to start planning budgets now and decide if they're also going to pay noncovered employees $15 per hour or deal with the potential morale issues that might result.

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COMMUNICABLE DISEASES

3 things to consider before requiring vaccine passports at workplace

AL | **FL** | **GA** | **LA** | **MS**

by Glenn Rissman, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

COVID-19 vaccine passports seem to be the hot-button issue of the day. Most of the media coverage and remarks from politicians have focused on companies requiring customers, guests, or students to have proof of vaccination before returning to school or entering the business. But what about employers? Can you require a new worker to present proof of vaccination as a condition of employment or provide a hiring preference to applicants who have been vaccinated?

What EEOC has said

The Equal Employment Opportunity Commission (EEOC) has made it clear that employers, with some exceptions, can require employees to be vaccinated for COVID-19. You need to make an accommodation for employees who have a disability or raise objections on the grounds of a sincerely held religious belief or practice.

The EEOC also has stated that requiring an employee to show proof of a COVID-19 vaccination isn't a disability-related inquiry. The agency, however, hasn't squarely addressed the issue of vaccines or proof of vaccination during the hiring process.

Key factors

Logically, it would seem that if you can make COVID-19 vaccinations mandatory for employees, you also can require applicants to provide proof of vaccination as a condition of employment. I largely agree, but here are three factors you should consider before you require applicants to provide proof of vaccination or make getting the shots a hiring preference.

Florida governor's ban on vaccine passports. Governor Ron DeSantis' Executive Order 21-18 prohibits businesses from requiring patrons or customers to provide any documentation certifying a COVID-19 vaccination. As currently written, the order doesn't apply to employment, but that could change.

Florida employers will need to monitor any changes to the order or legislation addressing vaccine passports. State lawmakers are considering a related statute.

Disparate impact. Federal and state antidiscrimination laws can make it unlawful to apply a neutral rule or policy that has a disproportionate impact on members of protected classes, such as minorities and women. Such neutral rules will be lawful if they're job-related and consistent with business necessity.

Employers implementing a hiring preference for those who have been vaccinated should monitor what impact, if any, the requirement has on protected groups.

Privacy and confidentiality. If you retain proof of a new hire's vaccination record, you should treat the data as confidential medical information and follow the requirements of the Americans with Disabilities Act (ADA). Also, be sure to let applicants know you simply need proof of the vaccination and not information about any underlying health conditions.

Bottom line

You may wish to take a wait-and-see approach on vaccine passports or vaccine hiring preferences. The government may issue guidance in the near future. Like everything else with COVID-19, there's still a lot of uncertainty.

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SUPERVISORY ISSUES

'Cruella' at work: how to eradicate toxic managers from your business

AL | FL | GA | LA | MS

by Marylin G. Moran, FordHarrison LLP

Disney's newest movie, Cruella, tells the story of Cruella de Vil, the puppy-stealing psychopath who uses the animals' fur for her over-the-top sartorial splendor. She's deranged and unapologetically wicked, the villain you love to hate—she's Cruella!

As a child, I was terrified of the evil Cruella but enjoyed watching her get her comeuppance by 101 Dalmatians' satisfying end. As I got older, however, I learned first-hand that working for a Cruella-type manager wasn't child's play and could take a terrible toll on workplace morale, retention, and productivity. As an HR professional, it's up to you to help rid your business of the Cruellas in your ranks, and I'm here to tell you how to do it.

Step one: Identify toxic behavior

First things first: Before taking action, you must identify the toxic managers in your workplace. Luckily, like the black-and-white spotted Cruella with her clown-like makeup and bicolored hair, toxic people don't usually fly under the radar and are easy to spot.

Examples of toxic performers include managers who rule through fear, micromanage, refuse to consider others' ideas (or take credit for them), never apologize, lack empathy when an employee is struggling at work or has a personal issue, belittle others, and gossip about workers behind their backs.

The best way to know if a manager is engaging in conduct that fits one or more of the above descriptions is to have an open-door policy and company culture that invites employees to bring their concerns to HR. Obviously, if multiple employees from a particular department have complained about the same manager, that's a red flag indicating something may be amiss and needs your attention.

Employee complaints are often chalked up to personality conflicts and quickly dismissed. If otherwise capable employees are having trouble with the same supervisor, however, something other than a personality conflict is going on. As a result, when you investigate an employee's complaint about a toxic manager, you should try to talk to at least one or two coworkers in the same department to determine whether they're having similar experiences.

Another effective way to uncover a toxic manager in your midst is to conduct employee exit interviews. An employee who is fed up with a manager's disrespectful treatment may resign without giving a reason for leaving other than to "pursue another opportunity." Taking the time to ask departing employees some questions about their work environment and seeking constructive feedback about their managers can offer insight into potential problems and allow you to address them before they mushroom out of control.

Step two: Address the behavior head-on

Once you've identified the toxic manager, the second step is to take appropriate action to address the behavior. Specifically, you'll need to document the behavior and confront the individual about the issues. You'll also need to give the supervisor a chance to respond to the allegations and discuss strategies for changing an aggressive management style to a more effective leadership model.

In some instances, you may need to refer the supervisor to anger management counseling, job coaching, or conflict avoidance training to help him learn new leadership strategies. Alternatively, if the loss of trust and confidence in his ability to lead others effectively is significant, you may need to demote or move him to another role or separate him from your organization altogether. How to respond will depend on:

- The particular behavior at issue;
- His willingness and ability to change; and
- The impact his previous conduct has had on employees.

There's no one-size-fits-all method for dealing with toxic managers, but one thing is certain: You must be proactive in addressing the unacceptable conduct head-on and following up with the manager and the employees in the department to determine whether the workplace climate has improved.

Step three: Use policies, training to prevent toxic behavior

The third and final step is to ensure you have the proper tools in place to prevent a toxic work culture from taking root again:

- Be sure your harassment policy identifies bullying, yelling, and other unacceptable behaviors as being among the types of conduct your organization will not tolerate;
- Train managers on your policies, and emphasize the importance of treating employees with compassion and respect; and
- Let employees know they can bring concerns about their managers (or coworkers) to HR's attention without fear of retaliation.

Essentially, all employees at every level should understand toxic behavior has no place in your company's culture and will be addressed promptly rather than swept under the rug and ignored.

Bottom line

By following the three steps, you will be better able to identify toxic managers, address and correct their behavior, and prevent future Cruellas from wreaking havoc at your company.

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PERFORMANCE STANDARDS

5th Circuit delivers win to UPS on discrimination, hostile environment claims

AL | FL | GA | **LA** | **MS**

by Michael Foley, Jones Walker LLP

A recent decision from the U.S. 5th Circuit Court of Appeals (which covers Louisiana and Mississippi employers) demonstrates how objectively documenting an employee's poor performance can dispose of discrimination claims before a costly trial.

Facts

Fredricka Wright, who was born in March 1977, interviewed with United Parcel Service (UPS) for a part-time unloader position in August 2017. After completing two days of training, she became an official UPS employee. Less than two months later, the company terminated her for poor performance.

Wright then filed charges of sex and age discrimination and hostile work environment with the Equal Employment Opportunity Commission (EEOC). She subsequently filed a lawsuit asserting the same claims in a Louisiana federal court. With regard to the discrimination charges, she alleged the following:

- Although UPS customarily starts new employees in unloading and then quickly moves them to loading, it kept her in unloading, where she was required to unload boxes back-to-back without assistance.

- She complained to supervisors about being kept in unloading past the customary 10 days.
- Older and younger men were allowed to do lighter duty and less physical work.

Wright also claimed UPS failed to give consideration to her age and physical condition. Plus, the supervisors assigned her physically demanding work so she would voluntarily resign.

UPS denied Wright's discrimination-based allegations, arguing her employment ended because of unsatisfactory performance evident during her 30-working-day probationary period.

As for the hostile work environment claim, UPS asserted the behavior about which Wright complained, even if true, didn't rise to the level of an actionable (or legally pursuable) claim.

Evidence supports reason for termination

Once Wright filed a lawsuit, she had the opportunity to engage in discovery (or pretrial fact-finding) to identify evidence to support her allegations, and UPS was able to question her and other fact witnesses to challenge the charges. Wright, however, didn't identify evidence that she was replaced by a younger male employee, which was a necessary element of her discrimination claim. In fact, she admitted in her deposition she didn't know who was hired to replace her.

Nor was Wright able to show other similarly situated part-time unloaders with performance issues who were either male or younger were treated differently. Though she testified about two male employees she claimed were given lighter work duties, she admitted in her deposition she had no knowledge about whether the workers, unlike her, had physical restrictions that affected their assignments.

Wright's supervisor, moreover, contradicted her claim she was terminated because of her sex or age. Asked whether he thought she had done a "good job overall," the supervisor offered a specific, objective example of her poor job performance—namely, her "flow rate was down a lot." He further explained that "if you're not keeping up with your flow rate[,] everything slows down."

The testimony was consistent with a posttermination letter in which the supervisor explained he had to counsel Wright "about her performance being on time" and noted "other employees [were] trying to take up slack" because her packages were "not being unloaded in a timely manner." *Wright v. United Parcel Service Inc.*, No. 20-30249 (5th Cir., Jan. 22, 2021).

Takeaway

Both the lower court and the appellate court agreed UPS demonstrated Wright's employment was terminated for poor performance and the discharge wasn't a pretext (or cover-up) for unlawful discrimination. In reaching the decision, the courts focused in part on an objective criterion (i.e., her flow rate in unloading packages) that evidenced her poor performance compared with coworkers.

Wright's case teaches the importance of documenting performance issues and, when possible, tying the matters to objective criteria.

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DISABILITY DISCRIMINATION

Dust off your interactive process hats as more remote workers are recalled

AL | FL | GA | LA | MS

by Elitsa V. Yotkova, Stearns Weaver Miller

With more workers being invited back into the workplace as the COVID-19 pandemic appears to be subsiding, you can expect an uptick in requests for disability accommodations to continue working remotely in some capacity, even when the asserted disability isn't coronavirus-related. If the past is any indication of the future (and in this case, I think it is), managers and HR pros would be wise to dust off their interactive process hats.

What got us here

With the COVID vaccine becoming widely available, I suspect management will sound the "all clear" in the next few months and ask employees to return to the office. I also suspect you'll see pushback from employees with disabilities who will continue to request "work from home" as a reasonable accommodation. If you have any doubt, consider this:

> Last month, the [Equal Employment Opportunity Commission (EEOC)] published its annual statistics for charges of discrimination filed in 2020. The report shows a notable drop (7%) in total charges of discrimination filed in 2020 as compared to 2019. And yet, the number of charges filed on the basis of disability as a protected class actually increased slightly from last year (24,324 charges in 2020, up from 24,238 in 2019). This increase of 86 more charges on the basis of disability in 2020 over 2019 is significant, given the overall decline in total charges filed across the various protected classes.

You also should stand ready to manage requests from employees who don't wish to be vaccinated because of a sincerely held religious belief and therefore ask to continue remote work arrangements for some time.

Best practices

Consider each accommodation request on a case-by-case basis, and engage in the interactive process with the employee. Remember, if an employee in a protected class is able to perform the essential job functions with or without a reasonable accommodation, you may satisfy the duty to accommodate by providing any reasonable accommodation, so long as it doesn't place an undue hardship on your business.

You need not grant the specific accommodation requested by the individual. Before a decision can be made, however, you and the employee must engage in the interactive process.

Working from home may be one of a number of possible reasonable accommodations, depending on the individual circumstances. Other accommodations may include (without limitation):

- Changing an employee's work days or hours;
- Moving her work station or reporting location at her request;
- Staggering employee schedules; or
- Implementing other physical or logistical measures within the workplace.

Bottom line

If you determine continuing a previous remote work arrangement constitutes an undue burden, you must be able to articulate and prove the specific reasons if put to the test. When in doubt, consult legal counsel.

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DRUG USE

What employers need to know about Alabama's new medical marijuana law

AL | FL | GA | LA | MS

by Albert L. Vreeland, Lehr Middlebrooks Vreeland & Thompson P.C.

Governor Kay Ivey recently signed Alabama's new medical marijuana law, joining more than 30 other states to permit physician-prescribed use of the drug for certain medical conditions. Although the legislation decriminalizes prescribed use under state law, it remains illegal under federal law.

Highlights of new legislation

The new legislation has prompted many Alabama businesses to consider whether to revise their own policies for off-duty marijuana use and allow the medical exemptions. Although you can accommodate prescribed use, you aren't required to do so under the new law.

In fact, the law has several provisions specifically protecting employers' existing rights to prohibit drug use:

- You aren't required to permit marijuana use at all or accommodate an employee's medical marijuana use (including altering the individual's job duties);
- Employer-provided health insurance coverage isn't required to cover prescription marijuana's costs;
- You may take an adverse job action (e.g., refuse to hire, fire, or discipline) against an employee who uses marijuana, even with a prescription and regardless of the lack of impairment on the job; and
- You can adopt a policy requiring employees to notify you that they possess a medical cannabis card.

You may maintain your drug testing policy, including any drug-free-workplace program and U.S. Department of Transportation (DOT)-compliant testing programs. The new state law doesn't alter the workers' compensation premium discount for businesses with drug-free programs or your right to deny benefits based on a positive test.

No jobless benefits, either

An employee who is terminated for using medical cannabis or refusing to submit to or cooperate with a drug test is legally and conclusively presumed to have been discharged for misconduct. Therefore, the individual is disqualified from receiving unemployment benefits.

The new law specifically states it doesn't create a basis for filing a lawsuit over an employer's adverse action against an employee for using physician-prescribed

marijuana. The measure went into effect with the governor's signing.

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COMPENSATION

Wheels on the bus: If they're going round and round, must you pay?

AL | FL | GA | **LA** | **MS**

by Jennifer D. Sims, The Kullman Firm

Not everyone gets to park outside their office's front door and be at their desk within two minutes of turning off their ignition. In fact, in a recent case from the 5th Circuit, the workers were required to ride a bus to the jobsite, and on occasion, they would have to get to their park-and-ride site hours before their shift began so they could arrive in a timely manner. Was the employer required to pay them for that time since riding the bus was mandatory? What about the fact that the wait was protracted? Let's take a look!

Facts

In a suit against their employer, a group of employees argued time they spent riding buses to and from their jobsite was compensable under the Fair Labor Standards Act (FLSA).

The employer disagreed, contending the time was strictly commute time and involved no actual work connected to their construction jobs, meaning they weren't entitled to be paid for the time spent commuting.

Decision

Under long-established U.S. Supreme Court precedent, work-related activities that take place before and after hours are compensable only if they are "an integral part of" and "essential to the principal activities of the employees." When a task is integral and indispensable, it is generally compensable.

As an illustration, the Supreme Court has held that changing clothing and showering at a battery factory (to remove battery fluid) and sharpening knives at a meatpacking facility were integral and indispensable, even though the activities fell outside regular work hours.

On the contrary, the Court has held the time poultry plant employees spent "waiting to don protective gear" wasn't integral and indispensable because it was "two steps removed from the productive activity on the assembly line." Similarly, it found the time employees spent going through security screenings was noncompensable because the employer "did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment."

While commuting to work is necessary for any job, FLSA coverage is tied to the employee's "principal activity"—the work the "employee is employed to perform." That's why "normal travel from home to work is not" compensable "worktime." Travel time becomes compensable, however, if it is intertwined with the employee's principal activities, "such as travel from job site to job site during the workday."

Employers must also pay for time spent traveling to and from work if the employee is doing actual work while traveling. But when no work is performed, federal courts have routinely held commute time, even time spent on an employer-mandated transportation system, is not compensable.

Further, the 5th Circuit has previously held the mandatory nature of a transportation scheme doesn't necessarily render the commute time compensable. Indeed, whether commute time is compensable doesn't depend on the logistics of the travel scheme but instead on whether work is done during the travel.

As recognized by the court, the "line Congress chose to draw was whether the commute time involved work—work specific to what the employee is employed to do." With that principle in mind, the 5th Circuit found "commuting is only compensable when the commute is connected to the employees' specific work obligations."

Accordingly, the 5th Circuit affirmed the district court's dismissal of all of the employees' claims. *Bennett v. Mcdermott International, Inc.*, 19-30763, 2021 WL 1533646 (5th Cir., April 16, 2021).

Takeaway

Generally speaking, you don't have an obligation to pay an employee for the time he spends commuting, although this case highlights an important point. You have undoubtedly been forced to implement different policies and practices over the past year. If you are requiring your employees to perform prework tasks that are arguably integral and indispensable to the work they are employed to perform, you may have an obligation to pay them for the time they spend performing such tasks.

Don't let the wheels of the FLSA bus drive you off a cliff. Check your company's practices and ensure you are properly paying nonexempt employees for the compensable time they are working.

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WORKPLACE CULTURE

Diversity initiatives, religious freedom, and LGBTQ+ rights can coexist at work

AL | FL | GA | LA | MS

by Johanna G. Zelman, Dawn Siler-Nixon, and Melissa M. Castillo, FordHarrison LLP

Maintaining a diverse workforce is increasingly necessary for companies to be competitive and successful in the global marketplace. But what happens when diversity, equity, and inclusion (DEI) initiatives collide head-on with your obligation to accommodate an employee's religious beliefs? Employers are facing such dilemmas with increasing frequency as they build and strengthen their efforts toward a diverse and equitable workplace.

Title VII's protections come into play

In the wake of the U.S. Supreme Court's *Bostock v. Clayton County* decision recognizing that LGBTQ+ employees are protected by Title VII of the Civil Rights Act of 1964, employers are increasingly finding themselves in the difficult position of having to weigh often diametrically opposed rights: religious freedom versus LGBTQ+ rights. How do you choose? It's simple: You don't.

The rights (one employee's "sincerely held religious beliefs" versus another worker's gender identity/transgender status and sexual orientation) are both protected by Title VII and other state and local laws:

- For LGBTQ+ employees, Title VII prohibits discrimination and harassment based on gender identity/transgender status and sexual orientation.
- The law also requires employers to reasonably accommodate their employees' religious observances, practices, and beliefs unless doing so would be an "undue hardship" (which isn't a high bar to clear).

An "undue hardship" is defined as any accommodation that would impose more than a *de minimus* or trivial cost on the employer's operations (a much lower standard than used for disability accommodations, even though similar terms are used). As a result, in many situations, you could deny religious accommodations because of the difficulty or expense. But that isn't the solution.

Although some religions strongly oppose LGBTQ+ initiatives as being contrary to their faith, employers can satisfy both groups while building bridges and expanding knowledge in the process. When you address the situations correctly, religious and LGBTQ+ employees can not only coexist but also thrive in an inclusive and diverse workplace.

Courts have strived to find some balance

Thankfully, employers aren't left to operate in a vacuum. Courts have considered similar issues over the last few decades, most finding that even diversity initiatives can be subject to religious accommodation.

For example, a Christian employee refused to sign an antidiscrimination policy that required employees "to fully recognize, respect and *value the differences*." The employee claimed since Christianity considers some behavior to be sinful, he couldn't "value" it, so the employer fired him. But a federal district court in Colorado found the employer could have accommodated the individual without suffering any undue hardship by making a minor revision to the policy's language, i.e., by requiring employees to "fully recognize, respect and *value that there are differences* among all of us."

In another example, a former barista in New Jersey sued a coffee chain claiming she was wrongfully terminated after refusing to wear a "PRIDE" T-shirt because of her religious beliefs. Also, currently pending before the U.S. District Court for the Eastern District of Arkansas is a case filed by the Equal Employment Opportunity Commission (EEOC) against a grocery store on behalf of an employee who refused to wear a rainbow-colored heart emblem endorsing LGBTQ+ values. The matter is set for trial in March 2022.

Some courts have upheld LGBTQ+ rights

In *EEOC v. Harris Funeral Homes* (a decision also addressed by *Bostock*, albeit on other grounds), a funeral home terminated the employment of its transgender funeral director. The 6th Circuit rejected the employer's reliance on religious beliefs as a defense to the employee's Title VII discrimination claim.

More recently, a federal district court found an employer didn't violate Title VII by not accommodating an employee who opposed the employer's practice of displaying a Pride flag during Pride month. The court noted merely expecting the employee to attend work in the same location that a Pride flag was displayed didn't amount to asking him to adhere to a conflicting employment requirement.

What employers should do

Despite the hurdles, you shouldn't shy away from your diversity initiatives. Instead, consider each accommodation request independently, understanding the unique facts of the specific situation and knowing

no "one-size-fits-all" response will achieve the balance needed for a harmonious and cohesive workforce.

When an employee requests a religious accommodation, you must consider it but aren't required to provide the specific solution requested, or even the employee's ideal accommodation, so long as the one you select is "reasonable." Furthermore, you are never required to grant an accommodation that would eliminate one of the employee's essential functions.

For example, an employee's request to avoid actively participating in LGBTQ+ inclusion initiatives during Pride Month may be reasonable. But transferring an employee to a role that doesn't require interaction with coworkers because of their LGBTQ+ status is not.

Faced with a clash between your DEI initiatives and an employee's request for religious accommodation, you should carefully consider whether both can be accomplished. You may need to resort to inventive solutions to accommodate the needs of all employees.

Bottom line for employers

Don't be dissuaded from promoting DEI efforts in your workplace or supporting both LGBTQ+ and religious workers, vendors, and customers. Developing a training program that demystifies different groups' underlying tenets and culture, whether LGBTQ+ or religious, will go a long way toward increasing understanding and bridging the perceptual chasm that will only get wider unless you continue to make efforts to bring people together.

Your initiatives to create and promote a diverse workforce will give employees a sense of belonging and interconnection and ultimately improve their morale and performance. And yes, that includes accommodating employees' sincerely held religious beliefs that run contrary to your DEI efforts. Even when a religious employee's requested accommodation isn't reasonable or is an "undue hardship," those of you who make the effort to explore the underlying concern, address the issue, and champion inclusivity for all will be rewarded with employee loyalty and longevity and a benefit to the bottom line.

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WAGE AND HOUR LAW

11th Circuit: Doesn't take much interstate commerce to trigger FLSA coverage

AL | **FL** | **GA** | LA | MS

by Jeff Slanker, Sniffen and Spellman, PA

The 11th Circuit (which has appellate jurisdiction over federal trial courts in Alabama, Florida, and Georgia) recently issued an important decision about when an employee is covered by the Fair Labor Standards Act (FLSA). Specifically, the court looked at whether the Act protects an employee who makes three to five phone calls per week to out-of-state customers and vendors.

Background

The FLSA is a federal wage and hour statute that sets various requirements for how employers must pay employees. Most notably, the law requires you to pay employees at least the minimum wage for each hour worked and overtime pay of 1.5 times their normal hourly rate for any hours worked over 40 in a workweek.

Whether the FLSA covers the employer or the employee's employment generally can be established either on an employerwide basis or a per-employee basis. Both coverage standards require either the employer or the employee to be engaged in interstate commerce.

Facts

All County Environmental Services, Inc., a pest control business, had only one location in South Florida, where Wendy St. Elien worked as an administrative assistant. She filed suit, alleging the company failed to pay her overtime. To prove she was covered under the FLSA's "individual coverage" standard, she had to show she engaged in interstate commerce in her employment.

St. Elien made between three and five phone calls per week to out-of-state customers and vendors. Specifically, she called out-of-state customers who had homes in Florida for permission to access their properties in the state for pest control services. She called the out-of-state vendors to discuss billing and payment on items purchased from their local stores.

The 11th Circuit examined the FLSA's text and found the term "commerce" does indeed include out-of-state communication. Therefore, St. Elien was engaged in commerce as the term is used in the law, and her employment was covered by the Act. *Wendy St. Elien v. All County Environmental Services, Inc., et al.* (Case No. 20-11619, March 18, 2021).

Takeaway

The 11th Circuit's ruling shows the FLSA can be read broadly to cover different types of employees. You should be extremely cautious in determining employee coverage under the Act. Consider consulting with legal counsel before deciding whether an employee is covered and thus entitled to its protections, including overtime pay.

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HOSTILE WORK ENVIRONMENT

Allegations of rude, dismissive treatment not enough to support harassment claim

AL | FL | GA | **LA** | **MS**

by Jennifer Kogos, Jones Walker LLP

The U.S. Supreme Court's Bostock decision extended the protections against discrimination and harassment under Title VII to gay and transgender persons. The landmark 2020 ruling, however, in no way lowered the legal standard required to prove sexual harassment, the 5th Circuit recently decided. The ruling makes clear that simple rude treatment, without more, isn't enough to establish a Title VII violation.

Experienced female police officer unimpressed with female rookie

Windcrest Police Department hired Brandy Newbury in March 2016. As a new officer, she was in a probationary period during her first year of work. Probationary officers work with and receive training from a field training officer (FTO) for about 14 weeks. In addition to working with her FTO, Newbury worked closely with Officer Blanca Jaime. The two women did not hit it off:

- Almost immediately, they argued over proper grammar in an incident report, provoking Jaime to question Newbury's education and yell at her in front of colleagues.
- Next, Jaime and another officer filmed Newbury on their phones while confronting her about being in the field without her FTO.
- Newbury also claimed Jaime generally treated her rudely and dismissively, including giving her a dirty look and refusing to shake her hand.

Newbury first complained about Jaime's treatment of her within a month after starting work. Three months later, she lodged a sexual harassment complaint in writing. The city hired a law firm to investigate the allegations. The investigation concluded Jaime had been rude but that the sex discrimination or harassment allegations were unsubstantiated.

Six months later, Newbury resigned, filed a complaint with the Equal Employment Opportunity Commission (EEOC), and received a right-to-sue letter. She then filed suit in a federal district court in Texas, alleging sexual harassment, constructive discharge, sex discrimination, and retaliation in violation of Title VII and Texas law. She also made claims for violation of her right to privacy and intentional infliction of emotional distress.

The district court granted the city's request for summary judgment and dismissed all of the claims without a trial. Newbury appealed the dismissal of her Title VII and privacy claims to the 5th Circuit.

Allegations of rude treatment don't establish same-sex harassment

The 5th Circuit first reviewed Newbury's allegations that Jaime sexually harassed her in violation of Title VII, which forbids sexual harassment in the workplace as a form of sex discrimination. Newbury didn't allege Jaime made unwelcome advances of a sexual nature toward her. Rather, she alleged sexual harassment in the form of a hostile work environment based on her sex, female.

In same-sex sexual harassment cases, courts conduct a two-step inquiry. First, they consider whether the alleged conduct was sex discrimination, i.e., based on sex. Next, they evaluate whether the conduct meets the standard for a hostile work environment claim.

An employee can take three paths to prove the alleged conduct is sex discrimination:

- The harasser is homosexual and was motivated by sexual desire;
- The harassment was framed in such sex-specific and derogatory terms to make it clear the harasser was motivated by general hostility to the presence of a particular gender in the workplace; or
- The alleged victim can offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

The 5th Circuit agreed with the district court that Newbury couldn't prove Jaime's conduct was sex discrimination. She never alleged Jaime was motivated by sexual desire. Nor did she allege explicit sexual animus, i.e., hostility toward women in general.

Instead, Newbury took the third path, arguing Jaime (1) was rude to her because she is a woman and (2) also treated women worse than she treated men. The rookie officer presented only two pieces of evidence in support.

First, Newbury alleged Jaime was rude to both her and another female officer.

Second, Newbury pointed to the fact that a male employee stated Jaime treated men better than she treated Newbury. The same male employee, however, also said Jaime had been rude to him. Further, other employees said Jaime treated some female employees "cordially."

Faced with the body of evidence, the 5th Circuit concluded all Newbury could prove was that Jaime was rude to some colleagues and not others. The record didn't support the allegation that the rudeness was motivated by sex.

Newbury argued that under the recent *Bostock* opinion (i.e., Title VII protects gay and transgender individuals), sex need not be the sole or even the main reason for the action taken against her. The 5th Circuit disagreed and interpreted the Court's opinion as prohibiting an employer from taking adverse action against employees because of their sexual orientation or transgender status, which is necessarily tied to sex even if sex wasn't the sole motivating factor for the action.

According to the 5th Circuit, the *Bostock* opinion in no way altered the already existing legal standard for establishing sexual harassment. Ultimately, the appeals court determined the district court had properly dismissed Newbury's sexual harassment claim.

Officer's constructive discharge, sex discrimination claims also fail

The 5th Circuit also agreed with the district court that Newbury's resignation didn't meet the legal standard for a constructive discharge. She claimed Jaime's alleged harassment was calculated to cause her to resign. The court determined the examples of alleged harassment she provided (namely, two confrontations and general rudeness) fell far short of the required standard of proof.

In addition to sexual harassment, Newbury alleged sex discrimination. To prove the claim, she had to show she was (1) qualified for the job, (2) subjected to an adverse employment action, and (3) replaced by a man or treated less favorably than other similarly situated male police officers.

Again, because Newbury's resignation didn't meet the legal test to be considered a constructive discharge, she couldn't show she suffered an adverse employment action. She also failed to show similarly situated men were treated differently. Rather, the record indicated Jaime was polite to some women and rude to some men. Thus, the 5th Circuit agreed the dismissal of Newbury's sex discrimination claim was proper.

Newbury couldn't establish retaliation

The 5th Circuit next reviewed the district court's dismissal of Newbury's claim she was retaliated against for having filed a written sexual harassment claim against Jaime. The city acknowledged Newbury engaged in protected activity by filing the complaint. Because she resigned and didn't establish a constructive discharge, however, there was no adverse employment action.

To prove a retaliation claim, an employee must show she participated in an activity protected by Title VII, the employer took an adverse action against her, and a causal connection exists between the protected activity and the adverse action. Because Newbury failed to establish an adverse action, the 5th Circuit again concluded her retaliation claim was properly dismissed.

No violation of privacy with alleged phantom body cam recording

Newbury's final claim on appeal was that the city violated her privacy by secretly activating her police body camera when she was off-duty and filmed her inside her apartment. An individual may sue a municipality that violates her constitutional rights, including her right to privacy, "under color of any statute, ordinance, regulation, custom, or usage" under 42 U.S.C § 1983.

The city offered testimony from the camera manufacturer explaining remote recording is impossible. Newbury also admitted she has never seen recorded footage from the body camera from inside her home.

Finally, Newbury didn't provide any evidence the city had a policy or practice of recording employees off-duty, even if she was recorded remotely. Therefore, the 5th Circuit also agreed with the district court's dismissal of her Section 1983 claim. *Newbury v. City of Windcrest, Texas*, No. 20-50067 (5th Cir., 03/22/21).

Rude behavior may be bad for business but doesn't violate Title VII

Rude treatment of subordinates or coworkers isn't ideal workplace behavior and should never be tolerated. Without more, however, it isn't a Title VII violation. To constitute a violation, the conduct must be tied to an animus against a particular gender, sexual orientation, or transgender status because of the individual's gender. Crass behavior by someone who is rude to all, or an "equal opportunity harasser," doesn't violate the law.

On the other hand, supervisors who treat employees poorly and rack up complaints of rude treatment should be counseled on their behavior and management style. You should strive for an atmosphere of constructive coaching and teaching from supervisors, not belittling or criticism.

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HIRING

Pandemic sparks change in what employers seek in new college grads

AL | FL | GA | LA | MS

As college students head back to campus this fall—or maybe prepare for an online-only semester—they are likely looking ahead to graduation and life after college. Employers also are looking ahead and wondering what these students will bring to the workplace as they launch their careers. Employers have long valued employees who can hit the ground running, but the COVID-19 pandemic has refined many employers' ideas about what they're looking for in new college grads.

Most highly sought qualities

PeopleScout, a recruitment process outsourcing company, released results of a survey in April showing the pandemic has affected what employers look for in job candidates. In fact, 71% of the hiring managers responding to the survey said the pandemic has had an impact.

And what are employers looking for in candidates? The overwhelming majority of the hiring managers responding to the survey (94%) said they want candidates capable of working independently. Also, 68% of the hiring managers said they have a hard time finding qualified candidates.

Virtual and internal hiring

The pandemic also has affected the hiring process. When work went virtual during the height of the COVID-19 outbreak, recruiting and hiring did as well. Virtual and automated interviews became the norm, and that trend is likely to continue at least in a limited way postpandemic, according to research from LinkedIn.

A LinkedIn Talent Blog post from October 2020 says 81% of talent professionals agreed virtual recruiting will continue after the pandemic, and 70% said virtual recruiting will become the new standard.

The LinkedIn research also showed a shift toward more internal mobility. Instead of always looking to hire new people, employers are expected to ramp up their internal mobility programs. Companies are expected to catalog employees' current skills and tie internal job opportunities to their learning and development resources.

The research found that one out of two talent professionals expected their recruiting budgets to decrease, but two out of three expected their learning and development budgets to either increase or stay the same.

That change will cause recruiters to prioritize job candidates' potential and transferable skills over their pedigree and technical capacity to do specific work, the LinkedIn post noted.

What employees want

As employers look to what they need from the new college graduates they recruit, they need to consider what those new employees want from their employers. Process management and automation company Nintex in January released its Workplace 2021 Study, which surveyed 1,000 American workers at companies with 501 to 50,000 employees.

The Nintex survey found that 70% of respondents said their experiences working remotely during the pandemic have been better and more productive than they expected, and 51% said their work life would improve with the ability to permanently work remotely.

The study also found that 39% of employees said access to automation software that helps teams automate manual and repetitive tasks would improve their work life.

When asked what would improve their work, generational differences are evident: 55% of Gen Z employees named software to help automate work, 50% of millennials wanted better hardware equipment for a home office, 56% of Gen X employees said more flexible work schedules, and 42% of baby boomers said a pay increase would make their work better.

The survey also found generational differences when employees were asked what would improve their work life: 60% of Gen Z, 63% of Millennials, and 56% of Gen X employees named a work-from-home allowance for faster Wi-Fi and home office equipment. Baby Boomers had a different idea. They said a raise would improve their work life.

The Nintex study also queried employees on why they like to work remotely. Flexibility and freedom were identified as the draws. ■

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