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EMPLOYMENT LAW DIGEST

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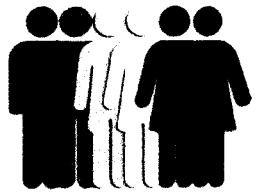
SAN ANTONIO'S NEW ORDINANCE: PROTECTING SEXUAL ORIENTATION AND GENDER IDENTITY



On September 5, 2013, the City of San Antonio passed Ordinance 2013-0q-05-0577, expanding its non-discrimination policies to prohibit discrimination based on a person's sexual orientation, gender identity, and veteran status. Of course, other laws already prohibited discrimination based on veteran status. The ordinance defines the newly protected categories, "sexual orientation" and "gender identity" as follows:

"Gender identity" is defined to mean a gender-related identity, appearance, expression or behavior of an individual, regardless of the individual's assigned sex at birth.

"Sexual orientation" is defined as an individual's real orientation or orientation perceived by another as heterosexual, homosexual, bisexual or asexual

The ordinance protects the new groups from discriminatory practices in City appointments, City employment, City contracting, housing and the advantages, facilities or services offered to the general public by a place of public accommodation.

What's Inside?

City Contracts: Unless exempted from the ordinance, all City contracts must now contain the following provision:

Non-Discrimination. As a party to this contract, [Contractor or Vendor] understands and agrees to comply with the Non-Discrimination Policy of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national

origin, sex, **sexual orientation, gender identity,** veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein. (emphasis added)

The few contracts excepted from this requirement include contracts exempted under SBEDA Ordinance No. 2010-06-17-0531; contracts for the city's sale of real property, and agreements with governmental entities.

Places of public accommodation: If you are wondering whether you are a place of "public accommodation," the ordinance defines the term to include every business within the city, whether wholesale or retail, which is open to the general public and offers, for compensation, any product, service or facility. The term place of public accommodation shall include, but not be limited to, all taverns, hotels, motels, apartment hotels, apartment houses (four (4) or more tenant units), restaurants or any place where food or beverages are sold, retail and wholesale establishments, hospitals, theaters, motion picture houses, museums, bowling alleys, golf courses and all public conveyances, as well as the stations or terminals thereof.

In addition to facing possible discrimination claims from individuals, the ordinance makes a violation in the provision of public accommodations and housing a Class C misdemeanor. ****

THIS IS MY STORY AND I'M STICKING TO IT

Have you ever received a discrimination charge or claim for unemployment benefits and did a really quick investigation to get the response out in time? Did you run out of time to make sure ALL the facts were accurate? A recent Fifth Circuit case shows the potential consequences of making erroneous statements in a response.

In the recent Fifth Circuit case, the company's reasons for selecting Miller, (age 53 and with 20years with the company) during its reduction in force (RIF) came under scrutiny. The back drop to the reduction in force was a company policy which stated the company would search "every corner of the earth" and exhaust "all opportunities to place the individual" before releasing the employee due to a RIF. Two younger employees (ages 34 and 46) with similar skills as Miller and who were also eligible for the RIF, were not terminated. After receiving notice that he had been terminated, Miller applied for fours jobs. He was not selected for any of them and he was told the reasons he was not selected were that he had a "needs improvement rating" in his file and "because he just would not be considered."

As you may guess, Miller filed a charge of age discrimination. The company responded

to his charge by pointing out its neutral reasons for selecting Miller: he held a non-essential position; his duties could be absorbed by others, and they had a budgetary shortfall. In addition, the company erroneously stated that Miller had not applied for any other jobs at the company.

Miller sued and won. The appellate court upheld the jury's decision based on circumstantial evidence. The court held that the jury could infer discrimination from the falsity of an explanation given by the company in the employer's response to the charge and the questionable reason relating to the "budgetary short fall" when Miller's position was not within the relevant department's budget.

What can you learn from this case?

1. Make sure all statements are truthful when responding to discrimination charges, unemployment claims or other type of claim. An opposing counsel may try to categorize mistakes when making inaccurate statements as being intentionally false and a cover-up in an effort to support a discrimination claim.
2. Carefully consider the reasons given for an employment action and whether the reason can withstand scrutiny. Does the reason make sense to an outsider? The budgetary shortfall explanation came under scrutiny because it was not logical to an outsider.

Have You Given the Required Notice to Your Employees Under the Affordable Care Act?

If you read our last newsletter you know employers were required to provide employees with notice relating to the Patient Protection and Affordable Care Act (Affordable Care Act) by October 1, 2013. For new employees, the Department of Labor considers the notice to be timely if provided within 14 days of an employee's start date.

If you have not yet provided the notice and are worried about fines and penalties, the DOL issued a statement that there is no fine or penalty under the law for failing to provide the notice. Of course, we recommend compliance; employees who fail to get notice may look for ways to bring claims.
http://www.dol.gov/ebsa/faqs/faq-noticeofcoverageoptions.html

The DOL provides model notices at: http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pd

Reasonable Accommodations and Retaliation

Disability and retaliation claims continue to generate litigation. Under the Americans With Disability Act (ADA) an employer is required to make reasonable accommodations for a known, qualifying disability and prohibits an employer from retaliating against an employee for making such a request. The recent Fifth Circuit case, *Feist v. State of Louisiana,* involves both issues.

Feist, a lawyer, sued her employer for violations of the ADA alleging her employer failed to provide reasonable accommodations and wrongfully terminated her in retaliation for seeking accommodations. Feist was disabled due to osteoporosis of the knee. She requested a handicap parking spot; the request was denied. Five months later, Feist was terminated for substandard work.

The employer argued it did not have to provide a handicap parking spot because the parking situation did not limit her ability to perform the essential functions of her job. The Fifth Circuit disagreed and said that the employer might have to make the accommodation. The court pointed out that the types of reasonable accommodation an employer may need to make include: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. The court held that the reserved on-site parking requested by Feist might make her workplace "readily accessible to and usable" and, therefore, might have been a potentially reasonable accommodation. The EEOC guidance explicitly provides that "providing reserved parking spaces" may constitute reasonable accommodation under some circumstances. The court also pointed out that there are the three categories of reasonable accommodations, including modifications or adjustments to:

> (I) A job application process that enables a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (i)The work environment ... that enables an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (ii)That enables a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. 29 C.F.R. § 1630.2(o)(1)

The court sent the issue regarding whether the employer was required to provide the accommodation back to the trial court to be decided.

The employer, however, was the victor regarding the retaliatory termination claim. The employer won because it was able to show (1) it had a legitimate reason for terminating Feist and (2) its treatment of Feist was consistent with its treatment of her colleagues, another employee had been terminated under similar circumstances. The employer showed that Feist's substandard work included not disclosing information that would have helped settle one case and she failed to act timely in another case causing the entry of a $500,000 judgment against her employer (ouch!).

This case is a good reminder of what we repeatedly stress: consistent application of policy and consistent treatment of employees are best practices and they are great evidence against claims of discrimination and retaliation. ****

Electronic Fund Transfer Act And Regulation E— Paying Employees on Card Accounts

On September 12, 2013, the Consumer Financial Protection Bureau (CFPB) issued a memo regarding the application of the Electronic Fund Transfer Act (EFTA) and Regulation E, which implements the ETA, to payroll card accounts. Payroll card accounts are accounts established to pay the salary, wages, or other employee compensation on a recurring basis.

The memo emphasizes that employers cannot mandate that employees receive wages only on a payroll card of the employer's choosing or require that its employees receive their wages by electronic transfer to a payroll card account at a particular institution. An employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. An employer may also give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash. If you want to read the bulletin:

http://files.consumerfinance.gov/f/201309 cfpb payroll-card-bulletin.pdf

CRIMINAL BACKGROUND CHECKS

In a prior newsletter we addressed the EEOC's 2012 Enforcement Guidance, titled Consideration of Arrest and Conviction Records in Employment. Since its implementation, nine states have sent the EEOC a letter urging the EEOC to reconsider its positions. The EEOC rejected their plea and has gone on a rampage suing employers.

Much attention is being given to a Maryland court's recent decision tossing out the EEOC's discrimination lawsuit against an employer for its use of criminal and credit checks in the hiring process. *Equal Employment Opportunity Commission v. Freeman,* Case No. RWT 09cv2573 (D. Md. Aug. 9, 2013). The EEOC alleged the employer implemented a hiring policy that, though facially neutral, has a discriminatory effect on African-American and male applicants.

The Maryland court's decision articulates the dilemma employers have faced since the EEOC started its onslaught against employers using background checks. The court recognized that the case it was handling "is only one of a series of actions recently brought by the EEOC against employers who rely on criminal background and/or credit history checks in making hiring decisions" and referred to two more class action lawsuits filed by the EEOC in the last few months. The court recognized that:

> *Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States. As Freeman [the defendant] points out, even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions.*

The court clearly noted the irony that "even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions."

The court looked closely at the employer's background check policy and procedures. The employer, Freeman articulated five goals for its background checks: "(1) avoid exposure to negligent hiring/retention lawsuits; (2) increase the security of Defendant's assets and employees; (3) reduce liability from inconsistent hiring or screening practices; (4) proactively reduce the risk of employee-related loss; and (5) mitigate the likelihood of an adverse incident occurring on company property that could jeopardize customer or employee confidence." Freeman tailored the background check to the job. Freeman used a multi-step evaluation process to review the information obtained and determine whether an applicant was qualified to begin work, including:

- *considering whether the applicant was truthful about his or her criminal conviction (an applicant who failed to disclose a conviction, seriously misrepresented the circumstances of a criminal offense, or made any other materially dishonest statement on the application, was automatically disqualified),*
- *only considering the existence of any criminal convictions within the past seven years,*
- *evaluating whether the criminal conduct underlying a particular, convictions that were of particular concern to Freeman, crimes that would generally disqualify an applicant, included those involving violence, destruction of private property, sexual misconduct, felony drug convictions, or job-related misdemeanors,*
- *the decision not to hire an applicant because of a conviction was reviewed and approved by human resources or vice president of benefits and compliance*
- *an applicant with credit histories with specific criteria in them were excluded from employment for a credit-sensitive position*

Freeman conducted the background checks after making its hiring decision and then carefully applied criteria so as to tailor the results to the particular job sought, using a multi-step evaluation process. The employer said its use of background checks were necessary to evaluate "the trustworthiness, reliability and effectiveness of prospective employees."

The EEOC lost the lawsuit because it could not show the particular employment practice that resulted in the disparate impact against African-Americans. The court rejected the EEOC's attempt to merely allege that the policy of conducting criminal and credit background checks, as a whole, produces a disparate impact on protected classes. Rather, the court held that the EEOC must show the specific criteria or procedures that caused the disparate impact. Because the EEOC was not able to isolate and identify the discrete element in the hiring process that produces the discriminatory outcome it lost.

If you use background checks, tailoring the background check to the job and having a multi-step evaluation process will make claims of disparate impact attacking your policy more difficult to win.

Here's the Maryland case:
http://www.mdd.uscourts.gov/Opinions/Opinions/EE0C%20v.%20Freema n%20%5B09-

THE NLRB IS

BACK IN ACTION

On July 30, 2013, the United States Senate confirmed all five nominees of the President to the National Labor Relations Board. This is the first time in over a decade that the Board has had five members and the confirmation ends the controversy regarding whether the current Board has constitutional authority to act.

With three of the five confirmed Board members being democrats who have a record of supporting unions, the Board's aggressive pro-union agenda is expected to continue. ****

UNION

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If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.

E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.