UPDATE ON EMPLOYMENT LAW

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by
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LEGISLATIVE AND ADMINISTRATIVE ACTION

**Nevada becomes latest state to exceed federal minimum wage -- with a health insurance twist.** Nevada has mandated a new minimum hourly wage of $8.25. (The federal minimum wage is $7.25.) However, employers who provide health insurance benefits may continue to pay covered employees the $7.25 hourly rate. Also, employees who receive less than $12.37 per hour and do not receive health benefits must be paid time and a half overtime pay for working more than eight hours a day, as opposed to over 40 hours in a week.

**Minnesota enacts Affirmative Action preference for veterans in all hiring.** Minnesota has passed a law allowing all employers, public and private, to give veterans preference in hiring and promotion over all other applicants. Employers may also give preference to the spouses of disabled veterans. In public sector employment, the law has doubled the veterans Preference Points and also allows non-competitive hiring of disabled veterans. "Veterans Points" or "Veterans Preferences" are the oldest and most widely used form of Affirmative Action. Most efforts are in the public sector. Minnesota has now given private employers a legal foundation to extend a preference and not be liable for discrimination charges by other applicants who claim that they were more qualified.

**Congress Questioning E-Verify.** A number of Congress members have petitioned the Immigration Service to review the E-Verify program. They are concerned with numerous false reports, which have denied jobs to U.S. citizens without any effective way to appeal or challenge the process. The request is to create a speedy and effective method to challenge a false report, instead of the harmed person being continually labeled as ineligible for employment, with no recourse. The Congress members claim that
85,000 U.S. citizens were wrongly labeled as "illegal aliens" and were denied employment or lost their jobs just in the past year. This is "a seriously flawed program that deprives citizens of the ability to challenge a final declaration of ineligibility to hold employment."

**TRENDS**

*Asking for applicants' private access codes. Illegal? Or soon to be illegal? Social Network On-Line Protection Act.* Some employers have asked job applicants for the personal passwords to their private social media sites (Facebook, personal email, etc.) to use as part of the "reference" check process. This may be sprung during the interview, with an immediate viewing before the applicant has a chance to delete or clean up any information. A refusal ends the hiring process.

Employers, for some time, have looked at applicants' public social media presence as a form of "self-reference" and "reality check." These are one's open public expression, and there is no expectation of privacy. Anyone in the world can look.

Private sites, however, are intended to be just that. Only those selected can interact. People may have highly personal content they would never share with their family, much less an employer. Invading these private areas without express permission is a violation of the laws. It can result in civil liability and criminal penalties. *Knop v. Hawaii Airlines* (9th Cir., 2009). The employers in question are ostensibly avoiding this liability by "asking" for the person's "permission" to access the private site and examine the contents.

Senators Richard Blumenthal (D-Conn) and Charles Schumar (D-NY) have now started inquiries into this practice. They have asked federal agencies and the Attorney General to investigate whether this practice violates federal laws. Rep. Elliott Engel (D-NY) has gone further and introduced HR 5050, the Social Network On-Line Protection Act to prohibit this practice.

No one is sure about how many employers have made this demand. In fact, extensive searches by the press, SHRM and several Internet providers have turned up very few instances. So perhaps this is only a miniscule situation which has no major impact. However, anything with "shock value" musters headlines. Headlines generate legislative attention, especially in an election year. Many miniscule issues have generated major legislative action. (Rep. Engle announced his new bill on his Facebook page.)

**LITIGATION**

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing
conclusions. So a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

Supreme Court

Supreme Court to consider who is a "supervisor" under Title VII. The U.S. Supreme Court has requested the U.S. Solicitor General to file an advisory brief on the issue of who is a "supervisor" for purposes of vicarious liability in harassment cases. Vicarious liability means the acts or non-actions of the supervisor are seen as the actions of the employer and can create automatic liability (unlike the acts of lower level employees). According to most lower courts, the definition is different under Title VII than under other labor laws. One does not need authority to hire or fire; a "supervisor" is anyone with functional authority to direct others daily work. Lead workers, often co-union members who are clearly not management under the labor laws, can still be considered "supervisors" for Title VII. The court is hearing the appeal of the 7th Circuit ruling in Vance v. Ball State University, a racial harassment case. The case revolves around whether one of the alleged harassers was a supervisor or just a co-worker with a bit more responsibility than others. The decision may have a major liability impact for all employers.

Fair Labor Standards Act

Minimum wage in Samoa is only $4.41 per hour, but hospital still did not pay it. There are special FLSA rules for U.S. Territories such as Guam and Samoa. The minimum wage is a lot less: $4.41 per hour. The American Samoa Medical Center Authority has agreed to settle a case with the Department of Labor. It will pay over $600,000 to 481 employees to compensate for less than minimum wage, not paying for working through meal breaks and before and after regular hours. (In September 2012, the Samoa minimum wage will increase by 50¢ per hour.)

Benefits

Transgender wife cannot be denied health insurance. Mrs. Radtke was born male in Wisconsin; she later moved to Minnesota and had a sex change operation. She obtained a Minnesota court order changing her name and gender, and a Wisconsin order to change her birth certificate to female. She then married Mr. Radtke, who applied for health insurance for her under his union's health plan. The plan denied coverage. It stated since Mrs. Radtke was male at birth "he" could not be a valid spouse under the plan and could not be validly married because the plan or state does not recognize same sex marriages.
The Radtkes sued. The court ordered the plan to insure Mrs. Radtke. Minnesota permits a person to legally have a sex change operation and legally change their gender. Once a court grants a legal gender change, the person is entitled to all full rights of that gender, including marriage and all related insurance coverage. Mrs. Radtke's rights were to be determined at the time of marriage, not at the time of birth. An insurance company may not impose its own interpretation of state law in order to deny coverage. Radtke v. Drivers & Helpers Union Local #638 Health Welfare Fund (D. Minn., 2012).

**Discrimination**

**Age**

*Law firm settles case, pays $547,000 and will not force out older partners.* A law firm's policy required partners to give up their partnership interest and either retire or become "of counsel" at lower pay at age 70. One 70-year-old partner decided to not go quietly. He sued for age discrimination and the EEOC undertook the case. The EEOC rejected the defense that partners are "owners" and are not "employees" under the employment laws. The EEOC states that, "There is no reason why attorneys who are capable of continuing to practice at 70 should be forced to retire or otherwise dissuaded from continuing to work in their chosen profession just because of their age." In addition to restoring the older partner to full status and paying him $547,000, the law firm has changed its policy and has agreed to train all partners about discrimination law. EEOC v. Kelly, Drye & Warren (S.D. NY, 2012).

*"Healthy" is not a euphemism for age.* A demoted HR manager claimed that the company's memos and programs promoting a "healthier workforce" was code for getting rid of older workers and having a "younger workforce." She alleged this was intended to dissuade older workers from continuing employment. The court found this argument insufficient and a stretched interpretation. The healthy workplace effort was aimed at reducing health care costs and reducing absenteeism across all age levels of employees. It was a "facially neutral practice." The plaintiff presented no evidence of any adverse impact of this policy on older workers. Other than her subjective interpretation of the "healthy workforce" emphasis, she had no direct evidence of an age-related motive in her own demotion. Crowell v. Walmart Stores, Inc. (S.D. NY, 2012).

*Older reporter had a good case but blew it.* In Sanders v. Gray Television Group, Inc. (6th Cir., 2012), the court affirmed summary judgment against the plaintiff in an age discrimination case. A 62-year old was the TV station's highest paid reporter, receiving choice assignments and the best shifts. He was noted for his expertise on health and medical news issues. A new manager came and allegedly started making statements that Sanders was "old" and "old school" and asked repeatedly about his "retirement plans." The new manager abruptly changed Sanders' shift so he had to start at 4:00 a.m. and also
removed him from most health and medical news assignments, giving them to younger reporters. Sanders complained to upper management that he was being forced out due to his age and in violation of his eight-year contract. One day the new manager assigned others to cover a major news event but put Sanders on a "web producer" slot, where he would be inside and have no presence on the news shows. Sanders blew up and refused. He and the manager got into a yelling match. Sanders walked off the job, telling two coworkers he was "going to quit." He later had his wife call to apologize and say he was coming back to the office. However, the company stated that it was accepting the resignation, and the employment was therefore over. Sanders sued. The court ruled that his evidence of age-related comments and adverse treatment may well have made a good case. However, he abandoned that case when he abandoned the job. He could not sue for discharge when he peremptorily resigned and did not wait for the new manager to actually make a discharge decision.

**Gender**

*Male employee denied child care leave has case.* A male employee was denied time off to provide care for his two grade-school-age children when his wife was unavailable. He was told he would have to schedule such leave weeks in advance, with documentation. This was not practical for the situation, and even when he did this, it was denied. The employer stated that the leave requests were for regular day care and after school care and not for a serious health condition, therefore, it did not qualify under the FMLA. The employee had never made his leave requests under the FMLA. The employee sued under Title VII, sex discrimination, not under the FMLA. The court found ample evidence of sex discrimination. Female employees were routinely given time off for similar after school, snow day, no school or many other sorts of routine non-medical child care needs. Supervisors allowed female employees "open ended" arrangements with only minimal advance notice and no documentation required. The court also found ample evidence of retaliation. After the employee complained about the sex discrimination, managers were allegedly instructed to deny all his future leave requests of any nature. *Ehrhardt v. LaHood and Department of Transportation* (E.D. NY, 2012).

**Religion**

*Baptist professor subjected to harassment for unpopular beliefs.* Universities take pride in the tradition of "academic freedom" and "free speech" and "open debate of ideas" and "diversity of thought." However, it does not always seem to work that way. An Adjunct Professor of Social Work alleged that she was harassed because she declined to give open support to the campus Lesbian, Gay, Bisexual, Transgender (LGBT) Organization. She said that under her Baptist faith, non-heterosexual orientations were morally wrong, and she could not support them. She did not express antagonism or discrimination, or even opposition to the LGBT Organization's right to be a part of the campus, only that she
could not support it. She was then allegedly subjected to harassment by the other faculty members. Her bid for Assistant Professor was denied. The committee was composed of LGBT supporters, some of whom refused to attend her interview for the position. They recommended an allegedly less qualified candidate and also stated that she was "not a good fit" for the Department. The court found sufficient evidence of these alleged actions to allow the case to continue to trial under Title VII, religious discrimination and 42 U.S. Code 1983, Equal Protection. The §1983 case was against both the University and five named faculty members personally. *Gadling-Cole v. West Chester University* (E.D., Penn., 2012).

**Catholic school teacher fired for artificial insemination may pursue case.** A non-Catholic teacher in a Catholic school revealed she had fertility treatments and then became pregnant due to artificial insemination. The school considered this form of pregnancy against its moral values and fired her. She sued for pregnancy discrimination and breach of contract. The court rejected the "immorality" defense. The teacher was not an "ecclesiastic employee" with religious duties. Therefore, the First Amendment prohibition against the court's interfering with church decisions on theological bases did not apply. As a non-Catholic, the teacher was forbidden from engaging in any theological activities, prayer or religious discussions with students. She was purely a standard academic teacher. Thus, the standard employment laws applied and she could maintain her pregnancy discrimination case. *Dias v. Archdiocese of Cincinnati* (S.D. OH, 2012).