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Labor & Employment News

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The Pessimist's Guide to Employment Litigation

by Jennifer S. Greenlief

{Ed. Note: A longer version of this article appeared in the August 2012 edition of *For The Defense*, which can be seen in full here. We present the following abbreviated version of this article that takes a look at a few recent trends in employment law.}

Protected Class Member By Proxy - Associational Discrimination

Over the past few years, the number of claims pursued based on the theory of associational discrimination has increased dramatically. In these claims, plaintiffs allege that their employers have discriminated against them on the basis that they associate with a member of a recognized protected class, not that they themselves are members of any protected class.

Notes from the Chair & Executive Editor

This past June our Regional SuperVision conference garnered our highest yet attendance and rave reviews for the presentations that discussed an employee's life in one day, as well as for our keynote speaker, Congresswoman Shelley Moore Capito. On the heels of that success, we are now finishing plans for our SuperVision conference in Winston-Salem, North Carolina on Thursday, September 20, 2012. Speakers throughout the firm will convene at WinMock Conference Center in Bermuda Run, North Carolina to discuss many of the hot-button issues employers are facing and how employers can meet their daily HR challenges. Although space is limited, we would love to see you there and urge you to reserve a spot today by visiting www.spilmanlaw.com/events/supervision.

Our third quarter edition of SuperVision Today spotlights one of our attorneys from Winston-Salem who has appeared several times in this publication, Erin Jones Adams. We also digest an article written by Jennifer Greenlief that appeared in the DRI's national publication For The Defense in their Employment and Labor Law edition. Carrie Harris of Roanoke takes a look at employers' obligations under USERRA. Eric Kinder examines the practical implications of a recent United States Supreme Court decision under the Fair Labor Standards Act, and the newest addition to our team, Lindsay Griffin Smith, discusses one of the latest trends of

Read the full article on our website.

USERRA: Employer Responsibilities to those Returning from Active Military Service

by Carrie M. Harris

As the U.S. involvement in conflicts around the world continues to draw down, hundreds of thousands of veterans are returning to the civilian work force. In fact, more than 100,000 troops are estimated to return to the workforce in the next three years.

Many of these service members were employed in the private sector prior to their military service. The Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 et seq., protects individuals who leave their employment, voluntarily or involuntarily, to serve in the military by imposing various obligations on employers with respect to those returning from military service. While USERRA has been in force since 1995, with the recent influx of veterans returning to the workforce, it is important for employers to understand their obligations under USERRA.

Read the full article on our website.

Expanding Waistlines, Expanding Definitions: Obesity as a Disability?

by Lindsay Griffin Smith

The Centers for Disease Control has ranked West Virginia as having the third highest percentage of obese adults in the United States, and the percentage of obese adults in Virginia, North Carolina and Pennsylvania rival that of West Virginia. Such a high percentage of overweight adults renders the possibility that obesity could become a protected class, and thus could become an issue to all employers. Since the 2008 Amendment to the Americans with Disabilities Act ("ADA"), the Equal Employment Opportunity Commission ("EEOC") and courts have expanded the legal definition of when obesity constitutes a "disability;" employees no longer have to establish that a physiological disorder caused their obesity - now obesity alone can be an impairment sufficient to categorize an employee as disabled. The EEOC has discarded its portion of the Compliance disability law -- whether obesity alone is a disability.

Eric W. Iskra
Chair, Labor & Employment Group

Eric E. Kinder
Editor, SuperVision Today

TO THE DEFENSE: The United States Supreme Court gives employers two interesting defenses in Fair Labor Standards Act cases.

by Eric E. Kinder

The United States Supreme Court has recently armed employers with two new defenses while settling an issue that may otherwise have been of fairly limited direct interest to most employers. The Court resolved a recent circuit split - the issue was largely resolved until 2009 - regarding whether pharmaceutical representatives qualified as outside salesmen under the Fair Labor Standards Act. In deciding that such representatives were outside salesmen and exempt from overtime, the Supreme Court offered a practical defense and issued a rebuke against the United States Department of Labor ("DOL") for overreaching.

Historically, sales representatives in the pharmaceutical industry, or detailers as they are known in the field, were treated as outside sales people who were exempt from overtime. This position had always been subject to some criticism because detailers do not fit into the mold of classic sales people in that they do not actually sell the products they represent; they merely get non-binding commitments from physicians to prescribe their product. The actual sale does not occur until the pharmacist fills the prescription.

That changed when the Second Circuit held that detailers were not exempt and needed to be paid overtime. *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010). The Second Circuit based its decision, in part, on an uninvited amicus brief filed by the DOL in which the agency - for the first time - took the position that detailers were not exempt. As the Novartis case was making its way through the courts, a similar case proceeded through the Ninth Circuit. But there the circuit court refused to defer to the DOL's position and found the detailers to be exempt. The Supreme Court agreed to hear the appeal to resolve this disagreement among circuits.

Read the full article on our website.

Guidelines that define disability, making it possible for courts to find that obese employees, not only severely or morbidly obese employees, can qualify as a protected class under the ADA, and at least one state court has followed suit. Because the ADA makes it easier for obese employees to establish that they are disabled, employers in all states should re-evaluate their hiring, firing and accommodation polices.

Read more on our website.

Labor & Employment Team Member

Erin Jones Adams

Erin is a senior attorney in the firm's Winston-Salem, N.C. office. She regularly represents and provides strategic advice and counseling to clients dealing with a full array of employment issues, including equal employment opportunity practices and policies, wage payment and collection, affirmative action plans, employee complaints, enforcement of non-competes, and engagement of H-2A and H-2B workers. Erin conducts internal audits of employment practices, and she represents employers in administrative proceedings and investigations by the Equal Employment Opportunity Commission and the Department of Labor. Erin is admitted to practice in North Carolina. She received her undergraduate degree from Salem College and her law degree from West Virginia University.

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