LABOR AND EMPLOYMENT LAW UPDATE

RELIGION IN THE WORKPLACE

A supervisor starts each employee meeting with a prayer. A Muslim employee is called "Osama" by co-workers. An employee refuses to work overtime on a Saturday in observance of the Sabbath. A client complains that he is offended by a graphic anti-abortion pin worn by an employee. A Sikh employee dons a beard despite a published and strictly enforced no-facial hair policy. An employee protests the hiring of a gay worker with religious postings portraying homosexuality as evil.

These are only a few examples of the types of troublesome situations regularly faced by employers with religiously diverse workforces. With America embroiled in military and cultural wars, the situations can become particularly explosive. Employers must therefore be ever cognizant of their legal responsibilities with respect to religion in the workplace.

DISCRIMINATION PROHIBITION. Title VII of the Civil Rights Act of 1964 protects persons from discrimination in employment on the basis of religion. This protection extends to bona fide religious membership, beliefs, observances and practices. Unless the employer is an exempted religious institution, it is unlawful under Title VII to make membership in approved religions or participation in religious activities (such as prayer) a condition of employment. It is also unlawful for an employee to be subjected to harassing comments (such as "Osama") which are disparaging of his or her religious views.

DUTY TO ACCOMMODATE: Where a religious observance or practice conflicts with an employment requirement, an employer must generally offer a reasonable accommodation to the employee. This duty extends to religious expressions and to requests for time off from work for religious observances. Modest religious expressions, such as pendants, should thus be allowed by employers. Where overtime work can easily be scheduled for a day other than the Sabbath, Title VII requires the employer to make such an accommodation.

NO DUTY TO ACCOMMODATE: An employer is relieved of the duty to accommodate, however, if it is unable to offer any reasonable accommodation to an employee without undue hardship. An undue hardship means "more than a *de minimus* cost." A retail employer which is open for business on Saturdays thus can generally show that excusing an employee from working on Saturdays is an undue hardship. An employer is also generally not required to lose business or relax employee discipline to accommodate patent religious expressions (such as a graphic anti-abortion pin or facial hair). An employer likewise cannot be expected to violate other discrimination laws or its diversity policies (such as those which prohibit discrimination based upon sexual orientation) merely to accommodate the religious views of one or more of its employees.

THE PRICE OF POORLY WRITTEN SEPARATION AGREEMENTS

Under appropriate circumstances, a separation agreement between an employer and a terminated employee can be an effective means of avoiding costly litigation. The May 3, 2005 decision of the Eighth Circuit in *Thomforde v. IBM*, however, shows that the peace bought by an employer in a separation agreement can be fleeting if the agreement is not carefully drafted.

OWBPA: *Thomforde* presented the issue of whether a General Release and Covenant Not to Sue executed by a former employee and honored by the employer satisfied the requirements of the Older Workers Benefit Protection Act ("OWBPA"). Enacted in 1990, the OWBPA provides that a person may not waive a claim under the Age Discrimination in Employment Act ("ADEA") unless the waiver is "knowing and voluntary." The Act prescribes minimum standards which must be satisfied for a waiver to be considered "knowing and voluntary"

THE PROBLEM: The General Release and Covenant Not to Sue in *Thormforde* contained an internal inconsistency which had not been explained to the former employee prior to its execution. Some terms released IBM from all ADEA claims while others purported to preserve the right of the employee to sue under the Act. IBM argued, to no avail, that the latter language was intended only to allow a challenge to the validity of the waiver itself. The Eighth Circuit found that the document was not "written in a manner calculated to be understood", as required by the OWBPA. The Court thus allowed the employee to pursue his ADEA claims against IBM.

THE LESSON: A separation agreement which is internally inconsistent or drafted in such a way that only a lawyer can understand its terms will not pass muster under the OWBPA. Even though the OWBPA requires that an employee be advised in writing to consult an attorney before executing an agreement, not all employees heed such sage advice. It is thus imperative that employers use agreements which make sense and are easy to read. As demonstrated by the *Thormforde* opinion, the price of a poorly written separation agreement can be costly litigation under the ADEA.

INSIDER THREAT STUDY

A May 2005 report by the U.S. Secret Service and Carnegie Mellon University notes that 29% of all cyber attacks against companies are committed by current or former contractors and employees. http://www.secretservice.gov/ntac/its_report_050516.pdf

DISCLAIMER

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