LABOR AND EMPLOYMENT LAW UPDATE

NATIONAL ORIGIN AND CITIZENSHIP DISCRIMINATION IN THE WORKPLACE

Recent events have revealed strong and often militant opposing viewpoints on the question of immigration reform. Some wish to relax the barriers to legal immigration; others support stricter policing of immigration laws and our borders.

In diverse workforces, the immigration debate presents a challenge to employers. Employee conversations regarding immigration reform present a danger of ethnic slurs. Supervisors may be consciously or unconsciously allowing their opinions to influence decision making. As long as the debate is at the forefront of the American conscience, employers must be especially diligent in ensuring that laws prohibiting discrimination based upon national origin and citizenship are being heeded.

NATIONAL ORIGIN: Under discrimination laws, the term "national origin" is not limited to a person's place of birth. The term includes the ancestry, heritage or background of an individual. A mixed heritage can also qualify as a protected "national origin."

CITIZENSHIP: The employment of aliens who are not eligible to work in the U.S. is prohibited by the Immigration Reform and Control Act of 1986. Non-citizens who are eligible to work in the U.S., however, are entitled to certain legal safeguards under discrimination laws.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (TITLE VII): Title VII applies to employers with 15 or more employees and protects persons (including non-citizens) from national origin discrimination.

EEOC guidelines make clear that the Act's protection extends to the following:

(1) Marriage or association with a person of a specific national origin;

(2) Membership in, or association with, an organization identified with or seeking to promote the interests of national groups;

(3) Attendance at, or participation in, schools, churches, temples, or mosques generally used by persons of a particular national origin; and

(4) Use of an individual's or spouse's name that is associated with a particular national origin.

Cases interpreting Title VII agree that harassment of an employee on the basis of his or her national origin is prohibited by the Act.

CIVIL RIGHTS ACT OF 1866 (SECTION 1981): This Act bars discrimination based upon race or color and is applicable to all employers regardless of size. The U.S. Supreme Court has construed the Act broadly to include persons of Arabic and Jewish heritage. Some lower courts have held that Section 1981 outlaws discrimination against Hispanics, Asians and non-citizens.

IRCA: The Immigration Reform and Control Act of 1986 applies to employers with 4 or more employees. The Act makes it illegal to discriminate on the basis of national origin and citizenship.

RECOMMENDATIONS: At the very least, employers should have in place policies and procedures which address national origin discrimination and harassment. It is also recommended that employees undergo national origin discrimination and harassment training.

THE FMLA: WHAT YOU DO OR SAY CAN BE HELD AGAINST YOU

Eligibility for leave under the Family and Medical Leave Act ("FMLA") depends upon a number of considerations. These considerations include the number of employees employed by the employer, the number of employees employed within a 75-mile radius, length of employment, hours of service, basis for leave, and prior FMLA leave. The April 18, 2006 opinion of the Fifth Circuit in *Minard v. ITC Deltacom Communications, Inc.* confirms that an employer's words and actions can also be a consideration in determining eligibility for FMLA leave.

RELEVANT FACTS: An employee requested FMLA leave to undergo surgery for a serious medical condition. The request was granted by the employer. During the leave period, the employer determined that the employee had not been eligible for FMLA leave because it employed less than 50 employees within a 75-radius of the employee's worksite. Upon the expiration of the leave period, the employer terminated the employee.

EQUITABLE ESTOPPEL: In denying summary judgment to the employer, the Fifth Circuit cited the doctrine of equitable estoppel. In this regard, the court opined:

> . . . an employer who without intent to deceive makes a definite but erroneous representation to his employee that she is an "eligible employee" and entitled to leave under the FMLA, and has reason to believe that the employee will rely upon it, may be estopped to assert a defense of non-coverage, if the employee reasonably relies on that representation and takes action thereon to her detriment.

COURT'S HOLDING: The employer argued strenuously that the employee did not rely upon its representations because she would have undergone surgery even if she had been denied FMLA leave. The employee, however, demonstrated that there were alternatives to surgery which she would have pursued had FMLA leave had been denied. Based upon this evidence, the Fifth Circuit found that there was a genuine issue of material fact which warranted the case going to trial.

LESSONS LEARNED: In *Minard,* the employer probably would have acted lawfully if it had denied the employee's initial request for FMLA leave. By acting precipitously without knowing all the facts, the employer eliminated this option. All requests for FMLA leave should thus be thoroughly and promptly investigated **before** an answer is provided to an employee. If the employer learns that it made a mistake in approving FMLA leave, *Minard* shows that the mistake is difficult to undo.

DISCLAIMER

This paper is not intended to provide legal advice in general or with respect to any particular factual scenario. Any such advice should be obtained directly from retained legal counsel.

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