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Societal Challenges Intersecting with the Retail Workplace

This issue of *Take 5* encapsulates the incredible breadth of societal changes and challenges facing the entire retail workplace. The topics addressed below reflect a microcosm of the many issues currently facing our overall society, covering growing political activism in the workplace, increasing expectations to accommodate religious beliefs, otherwise outrageous employee speech that may very well enjoy protection under the law, and the ever-increasing requirements for criminal background checks enacted piecemeal by states and cities. These extremely topical subjects often tap into broader emotionally charged concerns encountered by retailers.

For the latest news and insights concerning employment, labor, and workforce management issues and trends impacting retailers, subscribe to Epstein Becker Green's Retail Labor and Employment Law Blog.

We also address the ever-timely issue of wage and hour classification, in this case, focusing on the classification of assistant store managers.

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1. Managing Employees' Political and Social Activism in the Workplace

By Laura C. Monaco and Asa F. Smith

In this increasingly polarized and highly charged political environment, an employer may face challenges in determining how to maintain a professional atmosphere and further its business interests without infringing on its employees' rights to express their views on a wide range of political and social issues. There are, however, some best practices that employers can follow in navigating the potential minefield of managing their employees' political and social activism in the workplace.

Know—and Train Managers About—Applicable Laws

Employers should be aware that regulating their employees' political speech and activity can implicate legal liability concerns in several respects. As we have explained previously, the General Counsel of the National Labor Relations Board ("NLRB" or "Board") has issued a "Guidance Memorandum" concluding that employee action to "improve their lot as employees through channels outside the immediate employee-employer relationship" is protected concerted activity under Section 7 of the National Labor Relations Act ("NLRA"), so long as it has a direct connection to the employees' working conditions. In some circumstances, therefore, an employer could face an unfair labor practice ("ULP") charge if it punishes employees who skip work to attend a pro-immigration rally—but takes no action against other employees who call out on a sunny summer Friday to head to the beach.

Moreover, although there is no federal law that prohibits discrimination against private-sector employees based on their political activity or affiliation, many states (including California and New York) and the District of Columbia do have such laws. Several states also have laws that protect employees from discrimination or harassment based upon their lawful off-duty conduct, which would extend to their off-duty political activity or social activism. In California, for example, an employer cannot discriminate or retaliate against employees because of their off-duty lawful political activities. Similar legal protections exist in several other states, including Colorado, Louisiana, and New York.

An employer must, therefore, train supervisors and managers on what they can—and cannot—do when employees engage in political activity that may impact the workplace. The employer must also ensure that such training addresses any applicable state-specific limitations and requirements.

Apply Work Rules in a Neutral, Consistent Manner

Employees' political or social activism may be exhibited in a variety of ways that impact the workplace, such as through unexcused absences (so that an employee can attend a protest or rally, for example), dress code infractions (when employees wear all red, instead of the required black attire), or violations of the cell phone use policy (by employees who use their phones to tweet in support of social causes while on the work floor during a work shift). The best way for employers to manage these issues, and to remain legally compliant, is to apply work rules and policies consistently.

For example, if an employer regularly applies its attendance policies to discipline employees for unexcused absences, the employer need not refrain from disciplining an employee who skipped work to attend a political rally. Similarly, an employer that consistently prohibits its

employees from using their cell phones to access social media during their work shift does not have to allow those employees to tweet in support of a political cause on work time. If, however, that employer sometimes lets its employees off the hook for unexcused absences, or occasionally allows employees to use their cell phones to surf Facebook while on the work floor, it should be wary of applying its work rules to penalize employees who are absent or using their cell phones during work time to support a political or social cause.

The safest course for employers is to apply their work rules neutrally and avoid penalizing groups of employees based on the "message" of the political or social cause that those employees choose to support. An employer that declines to discipline an employee for taking an unscheduled day off to attend a pro-choice rally, for example, may trigger a discrimination claim if it then disciplines a different employee for taking an unscheduled day to attend a pro-life event. Understanding that the line between political speech and protected comments related to terms and conditions of employment may sometimes be hard to draw, employers can help ensure that employees' discussions about politics don't get out of hand by neutrally enforcing work rules and policies that prohibit fighting, bullying, or harassment, and that prohibit employees from engaging in conduct that is loud or distracting or that otherwise impinges upon productivity.

Conclusion

Our tumultuous political and social environment does not show any signs of cooling down in the near future. Therefore, an employer needs to be prepared to address and manage its employees' political and social activism to protect and further its business interests while ensuring that its employees' rights and morale do not suffer.

2. Religious Accommodation: Handling Unusual Requests

By Nancy L. Gunzenhauser and Gregory D. Green

Retail employers are faced with many challenges when confronted with managing reasonable accommodation requests from employees based on their religious beliefs and practices.

Title VII of the Civil Rights Act of 1964 ("Title VII") requires employers to reasonably accommodate an employee's sincere religious beliefs or practices so long as such accommodation would not result in undue hardship on the employer. While Title VII does not protect an employee's mere personal preferences, federal law defines "religion" broadly to encompass theistic beliefs that are uncommon as well as non-theistic moral or ethical beliefs.

The law provides no set list of accommodations available to employees, and, as a result, employers may be faced with—and need to consider and perhaps agree to—unusual requests. Two recent cases address areas of contention surrounding religious accommodation, which have potential relevance for retail employers: objections to identification procedures and scheduling policies.

Objection to Identification Procedures: Mark of the Beast

A West Virginia jury held Consolidated Coal Company and its parent CONSOL Energy ("CONSOL") liable for discrimination for their denial of an employee's request to use an

alternative means of clocking in and out of work when the employer adopted a "biometric hand scanner" system, which led to the employee's forced retirement after 38 years of service.[1] The employee, an Evangelical Christian, objected to using the new time and attendance system because of his beliefs about the relationship between hand-scanning technology, the "Mark of the Beast," and the Antichrist discussed in the New Testament's Book of Revelation. CONSOL refused to allow the employee to use another method to clock in and out of work, despite having established a bypass method for employees who were physically incapable of scanning their hands. The employee received an award of $586,860 in lost wages and benefits and compensatory damages. On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed, finding that the employer's bypass method constituted sufficient evidence that it had an alternative clocking-in method that could have been given to the employee as a reasonable accommodation.

Scheduling Policies

Retail employers often face requests for shift or schedule changes to accommodate an employee's religious practices, such as a worship schedule or day of rest. A recent decision of the U.S. District Court for the District of Colorado reaffirmed that Title VII does not require employers to provide the employee's preferred accommodations when other reasonable options are available. In such circumstances, employers may rely upon business requirements establishing scheduling or past precedent to appropriately respond to such requests.

In *Wimbish v. Nextel West Corp.,*[2] the plaintiff, Satya Wimbish, began employment at a Sprint store. While in this job, she requested a schedule that gave her Wednesday evenings and Sundays off to accommodate her church-going schedule. Initially, Sprint was able to accommodate her shift request. Later, Wimbish transferred to a job in Sprint's "eChat" group, which required consecutive days off for business continuity. Her new schedule provided Wimbish with Tuesdays and Wednesdays off, but not Sunday. The company refused Wimbish's request to give her a schedule that split her days off. Instead, it offered (i) to permit her to swap schedules temporarily or permanently with other employees, (ii) a starting time two hours later on Sundays, and (iii) to allow her to use paid time off ("PTO") to cover situations in which she was unable to begin work on time on Sunday. Thereafter, Wimbish and her supervisors had ongoing discussions for several months regarding her use of PTO and shift changes. When business conditions improved, they offered her Wednesdays off as an "exception," for which she would need to complete monthly paperwork. She did not accept the offer, because, although she was told that she could have the split shift "until further notice," the company would not promise that the change would be permanent. Ultimately, Wimbish resigned in alleged frustration over the paperwork requirement (which took only two minutes) and sued.

In granting summary judgment for Nextel West, the trial court found that the company had met its obligation to offer Wimbish reasonable accommodation of her religious observances. Although employees may push for a specifically desired accommodation, the case supports

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[1] *EEOC v. CONSOL Energy, Inc.,* 2016 WL 538478 (N.D. W. Va. Feb. 9. 2016).

[2] 2016 WL 1222920 (D. Colo. Mar. 29, 2016).

the principle that employers are required only to provide one that is reasonable, not preferred.

Conclusion

As employers are faced with religious accommodation requests, they should remain mindful that each request should be considered on a case-by-case basis. While employers may be able to show that certain requests pose an undue hardship, they should engage in discussions with the employee to consider whether any accommodation (even if it is not the one suggested) could be offered.

3. Second Circuit Agrees with NLRB That Employee's Vulgar Facebook Tirade Against Manager Is Protected Concerted Activity

By John M. O'Connor and Alexander J. Franchilli

Employers troubled by an employee who publicly airs work-related complaints in vulgar and offensive social media posts must, surprisingly, think twice before taking disciplinary action. In *National Labor Relations Board v. Pier Sixty, LLC,*[3] the Second Circuit recently enforced an order of the NLRB holding that an employee's profanity-laced Facebook post was protected by the NLRA, even though it was "dominated by vulgar attacks on [the employee's supervisor] and his family." As the reasoning of the Second Circuit and the Board makes clear, employers must carefully examine and consider the attendant circumstances before taking disciplinary action because such employee social media posts may, in fact, be a form of "protected concerted activity" relating to employees' terms and conditions of employment and, as such, be protected under the NLRA.

Protection for Online Concerted Activity

Section 7 of the NLRA guarantees that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection . . . ."[4] In turn, Section 8 of the NLRA prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [Section 7] . . . ."[5] The protections afforded by the NLRA have been held to include employees' social media posts relating to their broadly defined terms and conditions of employment, including, but not limited to, matters deemed by the NLRB to constitute labor disputes, and union activity.[6] Notably, the NLRA protects and ensures such rights and protections to all employees (other than supervisors and managers who are not employees under the NLRA), including employees who are not represented by unions or covered by collective bargaining agreements.

While the NLRA generally prohibits employers from disciplining/terminating an employee due to his or her union-related activity or other concerted activity concerning his or her terms and conditions of employment, the NLRA's protections as to concerted activity are not

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[3] 855 F.3d 115 (2d Cir. 2017).
[4] 29 U.S.C. § 157.
[5] 29 U.S.C. § 158(a)(1).
[6] *See Three D, LLC v. NLRB*, 629 F. App'x 33, 36 (2d Cir. 2015).

unlimited. Specifically, an employee engaged in concerted activity may lose the protection of the NLRA if his or her conduct is "opprobrious."[7]

The "Outer Bounds" of Protected Speech

The charging party employee in *Pier Sixty,* a server employed by the respondent catering company, was angered by the harsh tone in which his supervisor directed him to "stop chitchatting" with other servers and to "spread out, move, move" during his shift. While on break, the employee accessed his Facebook account and posted the following:

> Bob [the supervisor] is such a NASTY MOTHERF*CKER don't know how to talk to people!!!!!! F*ck his mother and his entire f*cking family!!!! What a LOSER!!!! Vote YES for the UNION.

After the employee was terminated, he filed a ULP charge with the NLRB's Regional Office, which issued a ULP Complaint and presented the case before an administrative law judge ("ALJ"). After a hearing, the ALJ found that the posts were protected concerted activity relating to the employee's terms and conditions of employment. The employer appealed the ALJ's findings to the Board in Washington, DC, which agreed that the post was both concerted and protected activity. The employer sought review by the Second Circuit of the Board's order.

Although articulating that the employee's conduct "sits at the outer-bounds of protected, union-related comments," the Second Circuit concluded that this Facebook post was protected by the NLRA because, despite being "dominated" by obscene insults aimed at the employee's supervisor and the supervisor's mother, it encouraged employees to vote for the union in an approaching election.

In reaching this decision, the Second Circuit examined the "totality of the circumstances" underlying the social media post and was swayed by three factors. First, the Facebook post was made just two days before a very tense union election and, despite the predominance of the "vulgar attack on [the supervisor] and his family," it referenced workplace concerns (i.e., "management's allegedly disrespectful treatment of employees and the upcoming union election"). In this regard, the court reasoned that the employee's outburst "was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election." Second, the court examined how the employer handled similar transgressions in the past, finding that Pier Sixty had not disciplined, much less terminated, other employees who used profanity in the workplace. The court was influenced by the fact that Pier Sixty "consistently tolerated profanity among its workers," which suggested that the company's decision to treat such profanity differently in this case was at least influenced by the employee's perceived support for the union in the then-pending election. Third, the court considered the forum in which the employee chose to convey his message, recognizing that online forums, such as Facebook, are "a key medium of communication among coworkers and a tool for organization in the modern era." Based on these three factors, the court concluded that the employee's Facebook post, although vulgar and inappropriate, was "not so egregious as to lose the NLRA's protection," and it enforced the Board's order.

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[7] *NLRB v. Starbucks Corp.,* 679 F.3d 70, 79 (2d Cir. 2012).

Conclusion

Both the Board's order and the Second Circuit's decision in *Pier Sixty* provide important guidance for employers that face employee postings on Facebook, Twitter, and other social media sites concerning work-related matters. The lesson that *Pier Sixty* provides employers is that discipline decisions cannot be made solely based on the language in an employee's social media post, no matter how abhorrent or vile it may be. Rather, employers must evaluate the circumstances in which a social media post was made by an employee and start with the understanding that the Board and the courts provide employees with wide latitude in their use of social media with respect to employment-related concerns. Employers must look beyond the inappropriate language used and consider factors such as the timing of the post (i.e., whether it was close to election), the circumstances in which it was made (i.e., whether it was provoked by some anti-union animus in the workplace), the content of the post (i.e., whether it relates, even in some extraneous way, to union activity), and how the employer has handled similar misconduct in the past.

4. Increasing Criminal Background Check Requirements Pose Challenges for National Retailers

By Amy B. Messigian and Katrina J. Walasik

Retailers operating in multiple states and communities face growing challenges in complying with (i) the increasing and varying number of state and local "ban the box" laws and (ii) laws limiting employers' use of applicants' criminal background information. According to a May report from the National Employment Law Project, 27 states and more than 150 municipalities and counties now regulate criminal background checks in some form. Expect the numbers to go up. Just this past year, three states—Connecticut, Vermont, and California—expanded existing laws or regulations pertaining to criminal background checks by private employers. Municipalities also continue to enter the fray.

New State Laws/Regulations

- As of January 1, 2017, Connecticut law prohibits asking about criminal history on job applications and prohibits employers from, among other things, denying employment solely on the basis of "erased records." Further, pardoned and/or rehabilitated convictions cannot form the sole basis of a discharge.

- Effective July 1, 2017, employers in Vermont will be prohibited from requesting criminal record information on an initial application. If criminal information is subsequently uncovered by the employer, the applicant must be given an opportunity to respond.

- California adopted new regulations that govern the use of criminal history in employment decisions and largely follow the Equal Employment Opportunity Commission's 2012 Enforcement Guidance. The regulations, which become effective July 1, 2017, prohibit employers from considering non-felony convictions for possession of marijuana that are more than two years old and prohibit employers from considering criminal history at all if doing so will result in an adverse impact on individuals within a protected class. The regulations further require employers to notify applicants before taking an adverse action and to provide them a reasonable

opportunity to present evidence that the information is factually inaccurate. As of January 1, 2017, California employers are also prohibited from considering juvenile convictions when making a hiring decision.

Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island already prohibit, with limited exceptions, private employers from inquiring about criminal background information in an employment application. In most circumstances, a conditional job offer or first interview of a candidate must be conducted before any such inquiries may be made.

New City Ordinances

Many cities and counties have established their own limitations on pre-employment criminal history inquiries by employers, thereby creating an even more complicated web of compliance requirements for employers. For example:

- **Austin, Texas**: Under a city ordinance passed last year, private employers with at least 15 employees whose primary work location is within the city are prohibited from inquiring about criminal convictions until a conditional offer of employment has been made.

- **Los Angeles, California:** As we previously wrote about in detail, Los Angeles passed an ordinance prohibiting employers from inquiring about job seekers' criminal convictions until a conditional offer of employment has been made. Even then, an employer that wants to rescind an offer after reviewing criminal history information can do so only after engaging in the "Fair Chance Process." The ordinance requires employers to include a notice in all job postings stating that they will consider all qualified applicants regardless of their criminal histories. The ordinance carries significant monetary penalties for non-compliance, which the city will begin imposing on private employers starting July 1, 2017.

- **Portland, Oregon:** In 2016, Portland added private employers to a preexisting city ordinance barring criminal history inquiries until after a conditional job offer has been made.

Currently, Baltimore, Buffalo, Chicago, Columbia (Missouri), the District of Columbia, Montgomery County (Maryland), New York City, Philadelphia, Prince George's County (Maryland), Rochester, San Francisco, and Seattle also have ban-the-box laws that apply to private employers.

Conclusion

As the number of new statutes and ordinances shows, there is an increasing trend towards both the adoption and expansion of laws limiting employers' ability to obtain and use applicants' criminal background information. Generally, ban-the-box ordinances and similar laws are triggered by where the employee works, not necessarily where the employer is headquartered or has stores. The home of a telecommuting employee, for example, will likely be the employee's job location for purposes of ban-the-box and related laws, not the employer's headquarters or brick-and-mortar locations. Employers must, therefore, remain up to date on legislation in not only all the cities where they have retail and warehousing operations but also the locations where remote and field employees are based.

5. Correctly Classifying Assistant Store Managers to Avoid Wage and Hour Misclassification Claims

By Jeffrey H. Ruzal, Shira M. Blank, and Christopher Lech

Many retail employers incorrectly assume that simply because an employee has the word "manager" in his or her job title, he or she may be classified as exempt from federal and state overtime rules and regulations. The misclassification of assistant store managers in the retail industry is pervasive, and the potential consequences can be costly. Employees misclassified as exempt may be entitled to back overtime wages and an amount equal to the unpaid back overtime wages in liquidated damages" for a two- or three-year period, depending on whether the violation is found to be "willful," as well as the employee's reasonable attorney's fees. In order to avoid such claims, retail employers must review the type of work that assistant store managers are performing to determine whether the employees qualify for the exemption.

When Can Assistant Store Managers Be Classified as Exempt?

Assistant store managers may be exempt from overtime requirements pursuant to the executive exemption if:

(i) they are compensated on a salary basis of over $455 per week (i.e., the "salary threshold");

(ii) their primary duty is management of the enterprise;

(iii) they customarily and regularly direct the work of two or more other employees or their equivalent, e.g., four part-time employees; and

(iv) they have the authority to hire or fire other employees, or their suggestions and recommendations on personnel decisions are given particular weight.[8]

In their planning, retail employers should take note that Labor Secretary Alexander Acosta is on record as supporting raising the salary threshold to around $33,000. Employers that operate in California and New York also need to be mindful that the salary threshold in those states is higher than the federal $455 minimum.

Determining whether an assistant store manager is properly classified as exempt pursuant to the executive exemption can be particularly challenging because assistant managers oftentimes perform both exempt and non-exempt tasks. For instance, while assistant store managers may be involved in overseeing and disciplining employees, they may also be performing such tasks as assisting customers, performing price checks, operating cash registers, stocking shelves, and cleaning and erecting display stands, which are non-exempt tasks. The key question is whether the assistant manager is performing managerial functions as his or her "primary duty," which, although not quantified by federal regulations or interpretive guidance, is usually interpreted to mean the majority of the employee's work time.

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[8] 29 C.F.R. § 541.100(a)(1)-(4)).

Avoiding Misclassification

Employers should routinely conduct self-audits of each individual in their workforce who is classified as exempt. If an assistant manager does not regularly supervise at least two full-time employees, or their equivalent, and does not have the ability to hire, fire, promote, or discipline employees, or if the assistant manager's recommendations are not given particular weight, it is likely that the individual is misclassified.

Employers should immediately address any misclassifications they find. Typically, this means either enhancing the job duties of the position so that it satisfies the primary duties requirement of the executive exemption or reclassifying the position as non-exempt. If reclassifying, the employer must ensure that the newly non-exempt employee records all of his or her work time and is paid for all hours worked, which usually requires paying the employees for hours over 40 each week at time-and-one-half the regular rate of pay. If the assistant store manager has a schedule that changes from week to week, retail employers may wish to consider classifying the employee as a salaried, non-exempt employee paid under the fluctuating workweek method. Under this classification, employees are paid a set weekly salary regardless of number of hours worked (up to 40), and then one-half time for overtime hours.

Employers must also be mindful that certain states, such as Alaska, California, Colorado, and Nevada, require the payment of daily overtime.

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