EMPLOYMENT LAWSCENE ALERT: WHAT THE MIDTERM ELECTION RESULTS MEAN FOR LABOR AND EMPLOYMENT LAW

In the midterm elections on Tuesday, November 4, 2014, the Republican Party gained a majority in the U.S. Senate. Now with control of both the House and the Senate, it is likely that the GOP will introduce legislation in an attempt to stop many of the current administration's employment agendas. Although President Obama maintains veto power, the Republican Party could curtail certain efforts that are currently being made.

Areas for employers to watch for potential changes include the NLRB and other federal administrative agencies. As this blog has covered recently, the NLRB has been aggressive in its enforcement of the National Labor Relations Act, and the penalties for violators have been stiff. There is currently proposed legislation to alter the composition of the NLRB from five members to six, three being from each major political party.

Increased congressional hearings that will scrutinize the Obama administration's labor and employment agenda are also likely. A target of these hearings may be the EEOC, which has also been pursuing an aggressive agenda of discrimination cases that some consider to be an attempt to expand the reach of Title VII.

Control by the Republicans of both the House and Senate could lead to budget cuts for federal agencies that enforce labor and employment laws as well. While this would not change the laws themselves, it would restrict the agencies' ability to enforce them.

Republicans will also have the ability to block or hold up nominations for various posts in the administration related to labor and employment law. There is speculation that Secretary of Labor Thomas Perez could be nominated to take over for U.S. Attorney General Eric Holder when he resigns. If that happens, the Republicans will have a larger, and likely more employer-friendly, say in who takes over as Secretary of Labor.

EMPLOYMENT LAWSCENE ALERT: NLRB DECISION INCREASES EMPLOYER RISK IN UNFAIR LABOR PRACTICE LITIGATION

In a move that could significantly increase the risk associated with unfair labor practice

litigation for employers, the National Labor Relations Board ("NLRB") issued a decision on October 24, 2014 that stated it has authority to order expanded remedies for violations of the National Labor Relations Act ("NLRA") that are "egregious and pervasive."

In HTH Corporation, 361 NLRB No. 65 (2014), the NLRB recognized violations by a Hawaii hotel chain for repeated violations of the NLRA, including unlawfully terminating an employee for engaging in protected activity, eliminating contributions to unionized employees' retirement plans, maintaining an unlawful anti-solicitation policy, bargaining in bad faith, and failing to comply with NLRB orders.

The NLRB ordered, among various other remedies, the employer to reimburse both the NLRB General Counsel and the union for several years of litigation expenses, including counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, per diems, and other reasonable expenses. In addition to expenses, the employer must comply with increased posting requirements. Typically, employers who are found in violation of the NLRA must post, for 60 days, a notice informing employees of their rights under the NLRA and a statement that the employer will not violate those rights. In HTH, because of the egregious and pervasive conduct, the NLRB required the employer to post the standard notice and an Explanation of Rights, outlining employees' core rights under the NLRA and giving specific examples of violations, for three years. In addition, the company will be required to give all new hires in that three year period copies of the notice and the Explanation of Rights. The NLRB is also requiring the company to publish the notice and the Explanation of Rights in two local publications twice a week for eight weeks.

And, although the NLRB did not exercise its right to do so in this particular case, it did note that front pay is an available remedy under the NLRA as part of a make-whole remedy. Front pay is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. The NLRB did not specify how front pay would be calculated in the event that reinstatement was not awarded and left that question for a later decision.

This decision underscores the NLRB's recent aggressive enforcement agenda and the NLRB's willingness to deal the unions a winning hand in unfair labor litigation. The NLRB is active in enforcing the NLRA and will continue to use its broad discretionary powers to do so. This decision is likely to increase unfair labor practice charges being filed, as now unions have additional incentive to pursue such claims because they can recover their costs, and employers will be pressured to settle such charges to avoid the risk of liability for the union's costs and fees.

EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL DETERMINES THAT MCDONALD'S IS A JOINT EMPLOYER WITH ITS FRANCHISEES

In a decision that could have far reaching implications for industries that rely on the franchisor/franchisee business model, the NLRB's General Counsel, Richard Griffin, Jr., determined that 43 unfair labor practices charges against McDonald's, USA, LLC may move forward under a "joint employer" theory finding that McDonald's should be held liable along with its independently owned franchisees based upon allegations that the franchisees violated worker's rights in responding to workplace protests. The NLRB General Counsel's decision to move forward against McDonald's not only attempts to extend liability under the National Labor Relations Act to franchisors for acts of its franchisees, but it may also open the door for unions to more easily organize multiple independently owned franchise locations operating under agreement with a single franchisor.

The "joint employer" theory is a legal concept that treats two allegedly separate employers as one. The "joint employer" theory does not depend upon the existence of a single integrated enterprise, but, rather, assumes in the first instance that companies are "what they appear to be" – independent legal entities that have merely chosen to handle jointly… important aspects of their employer-employee relationship. Typically, a joint employer relationship is found between two companies where the non-employing company actively and significantly exerts control over the same employees on those matters governing the essential terms and conditions of employment such as hiring, firing, discipline, supervisions, and direction.

The NLRB General Counsel's decision to target McDonald's as a joint employer comes in unison with big labor's recent efforts to protest wage and benefits levels for fast food workers. These recent protests over wages and benefits is big labor's attempt to attack the franchisor/franchisee business model by deeming independently owned stores to have the deep pockets of its franchisors – ignoring the economic realities of the franchisor/franchisee business model. For example, the SEIU has staged protests at different fast food establishments across the country demanding wages as high as $15/hour for all fast food workers based upon the fallacy that that such wages are appropriate given the corporate franchisor's finances. Wage demands of this type ignores the economics of operating an independent and locally-owned franchise where wages and benefits are often set based upon local market conditions as well as a franchisee's own profit and loss rather than upon the finances of its franchisor.

The NLRB General Counsel's decision to move forward with complaints that attempts to now treat McDonald's as a joint employer with its franchisees provides ammunition to big labor to further its war over wages and benefits against fast food franchisees by blurring the line between a small independently and locally-operated franchisee and its affiliated large corporate franchisor. In addition, with the NLRB willing to make clear that a corporate franchisor can now be held liable for unfair labor practices as a joint employer with its franchisees, it is only logical that the NLRB's next step will be to permit unions to organize fast food establishments based upon petitioned collective bargaining units that consist of multiple franchisee locations of a single franchisor even though the locations are independently owned and operated by different independent owners.

The NLRB General Counsel's decision to treat McDonald's as a joint employer does not currently have the effect of law. Once the NLRB issues the complaints, these cases will have to proceed through the adjudicative process leading up to a hearing before an administrative law judge before the cases might reach the full National Labor Relations Board for a decision.

Given the political make-up of current NLRB members, political ideologies will definitely pave the way for the NLRB's General Counsel's viewpoint on joint employer liability to prevail against McDonald's before the NLRB despite three decades of legal precedent that would hold otherwise. Needless to say, the battle will not end at the NLRB, as it would be expected that this issue will most likely wind-up before the U.S. Supreme Court who will make the ultimate decision on this important issue.

At this point, the NLRB will try to achieve settlement with McDonald's before proceeding to hearing with these cases. It would be expected that McDonald's will oppose any attempts to settle these cases and try to move these cases beyond the NLRB and into the courts where strong legal precedent has mostly rejected the joint employer theory for businesses set up under the franchisor/franchisee business model. It is in the federal court system where McDonald's has the best opportunity to defeat the NLRB's new approach against the fast food and other industries that rely on the franchisor/franchisee business model.

We will keep you informed of these cases before the NLRB as they develop.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES UPDATED ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION

On July 14, 2014, the U.S. Equal Employment Opportunities Commission ("EEOC") issued

updated enforcement guidance regarding the Pregnancy Discrimination Act ("PDA") and the Americans with Disabilities Act ("ADA") as they apply to pregnant workers. The EEOC's guidance discusses a number of issues related to pregnancy discrimination and other pregnancy related issues and provides insight into the agency's interpretation of those issues and employers' obligations under the PDA and ADA relative to pregnant employees. The EEOC also issued a question and answer sheet about the EEOC's enforcement guidance and pregnancy related issues and a fact sheet for small businesses.

Among a number of other issues, the EEOC's guidance discusses:

•The PDA's coverage as it relates to current pregnancy, past pregnancy, and a woman's potential to become pregnant or intended pregnancy.
•Discrimination based on lactation and breastfeeding and other medical conditions related to pregnancy or child birth.
•When employers may be required to provide light duty for pregnant employees.
•The prohibition against forcing an employee to take leave because she is pregnant and other issues related to parental leave.
•When employers may have to provide reasonable accommodations to employees with pregnancy-related impairments.
•Other legal requirements affecting pregnant workers, such as the Family and Medical Leave Act and Section 4207 of the Patient Protection and Affordable Care Act (requiring employers to provide "reasonable break time" for breastfeeding employees to express breast milk).
•The EEOC's proffered best practices for employers in handling pregnancy-related matters in the workplace.

The EEOC's updated guidance provides a clear indication of the EEOC's position and interpretation relative to the PDA and ADA as they relate to pregnancy discrimination and other pregnancy related issues in the workplace. While this guidance may provide some insight into the agency's position and likely enforcement efforts, employers should remember that it is merely guidance and does not have the force and effect of law.

One of the more controversial elements of the EEOC's new guidance arises from the EEOC's position that employers' failure to treat pregnant employees the same as non-pregnant employees similar in their ability or inability to work is a violation of the PDA. This becomes problematic for employers who have traditionally reserved light duty positions for workers with restrictions resulting from an on-the-job injury while not providing light duty to employees who have similar temporary restrictions. The EEOC takes the position that the PDA requires employers who offer light duty work to employees who have restrictions resulting from injury on the job to offer that same light duty work to a pregnant employee with the same restrictions.

In light of this new guidance, employers should reevaluate their practices and policies related

to pregnancy and pregnancy-related issues, especially with regard to requests for accommodation, and more carefully consider each and every employment action and decision involving pregnancy in the workplace.

EMPLOYMENT LAWSCENE ALERT: IS YOUR BUSINESS EXPOSED TO LIABILITY FOR YOUR COMPANY'S LEASED EMPLOYEES/TEMPORARY WORKERS?

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT UNANIMOUSLY REJECTS PRESIDENT'S NLRB APPOINTMENTS

Earlier this year, we alerted employers when the U.S. Supreme Court heard oral arguments in *National Labor Relations Board v. Noel Canning*, a case involving the President's appointment of three members to the National Labor Relations Board ("NLRB") without U.S. Senate approval while the U.S. Senate was on break.

Today, Thursday, June 26, 2014, the U.S. Supreme Court unanimously held that the President exceeded his authority in appointing those three members to the NLRB while the U.S. Senate was on an extended holiday break. Although the Supreme Court ultimately found that the President does indeed have the power under the U.S. Constitution to make "recess appointments" during breaks *between formal sessions* of the Senate and also during breaks in *the midst of a formal session*, the Senate breaks during which the President made his appointments to the NLRB were not considered to be in a formal "recess" within the meaning of the Constitution.

The Supreme Court's decision in *Noel Canning* opens the door for both employers and unions to call into question hundreds of decisions issued by the NLRB in recent years. This could force the NLRB to revisit certain of its decisions and may force the Board to issue new decisions in those matters. We will continue to keep you informed of the latest developments and effects of the Supreme Court's decision in *Noel Canning*.

EMPLOYMENT LAWSCENE ALERT: WILL EMPLOYEES SOON BE PERMITTED TO USE COMPANY E-MAIL FOR UNION ORGANIZING ACTIVITIES?

Recent activity by the National Labor Relations Board ("NLRB") suggests that the Board may overturn a 2007 landmark decision in which it held that employees have no statutory right to use their employers' electronic communications systems for non-business purposes, including union organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection (also known as "Section 7 rights"). *See* 29 U.S.C. § 157. The Board's 2007 landmark decision is known as the "*Register Guard* decision".

On April 30, 2014, the NLRB issued a Notice and Invitation to File Briefs in the matter of *Purple Communications, Inc.*, inviting parties and other interested individuals and organizations to answer the question of whether the Board should reconsider or overrule its 2007 decision in *Register Guard*. The NLRB invites briefing and evidence to address the following questions:

- Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system or other electronic communications systems for Section 7 activity?
- If the Board overrules *Register Guard*, what standards, restrictions, and factors should be applied to employee access to employers' electronic communications systems?
- To what extent and how should the impact on the employer affect the issue?
- Do employees' personal electronic devices, social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' rights under the NLRA to communicate about work-related matters?
- Are there any other technological issues regarding email or other electronic communications systems or any relevant technological changes that have occurred since the Board's 2007 *Register Guard* decision that should be taken into account?

If the NLRB overrules its *Register Guard* decision, employees may be permitted to use employers' email and communications systems for Section 7 activity, including union organizing activities.

Employers should pay close attention to the Board's decision in *Purple Communications, Inc.*, as it could have a significant impact on employers' policies and practices regarding employees' personal use of company communications systems. We will keep you informed when the Board issues its decision.

EMPLOYMENT LAWSCENE ALERT: MUST EMPLOYERS OFFER TELECOMMUTING AS A "REASONABLE ACCOMMODATION"?

A number of courts have traditionally held that attendance is an essential function of most jobs and, on that basis, have found that telecommuting, or working from home, as an accommodation is not reasonable. Recently, however, the United States Court of Appeals for the Sixth Circuit departed from this traditional notion and held that an employee's request for telecommuting as an accommodation was reasonable and that her physical presence at work was not an essential function of her job. This recent decision by the Sixth Circuit may present a problem for some employers and may be a signal that other federal courts, such as the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, may now be willing to recognize that allowing an employee to work from home may be a reasonable accommodation.

At issue in *EEOC v. Ford Motor Company* was whether a telecommuting arrangement could be a reasonable accommodation for an employee in a resale steel buyer position suffering from irritable bowel syndrome ("IBS"). The employee had formally requested that she be permitted to telecommute on an as-needed basis as an accommodation for her disability. Ford did maintain a telecommuting policy that authorized employees to telecommute up to four days per week, but specifically provided that telecommuting was not appropriate for all jobs, employees, work environments or managers. Ford ultimately determined that the employee's position was not suitable to telecommuting and denied her request.

In defending against the EEOC's claim, it was Ford's position that the employee was not "otherwise qualified" because physical presence at the workplace was an essential job function and that the employee's inability to demonstrate regular attendance made her unable to perform an essential function of her job and, therefore, she was not a "qualified" individual under the ADA and did not fall within the statute's protections.

The Sixth Circuit rejected Ford's argument and, for the following reasons, found that Ford could not show that the employee's physical presence at work was essential to performing her job:

- The assumption that attendance at the workplace is essential for most jobs no longer applies due to technological advances that allow employees to perform a number of tasks remotely;
- Because of those technological advances, positions that require a great deal of teamwork are not inherently unsuitable to telecommuting arrangements;

- The EEOC offered evidence that cast doubt on the importance of face-to-face interactions in the employee's position;
- The employee could still conduct on-site visits to suppliers' places of business if she worked partially or even primarily from her home rather than the employer's facilities; and
- The employer permitted other resale buyers to telecommute, albeit on a more limited basis.

The Sixth Circuit emphasized that determining whether physical presence is essential to a particular job is a highly fact-specific question and that it considered several factors to guide its inquiry, including the following: written job descriptions, the business judgment of the employer, the amount of time spent performing the function, and the work experience of past and present employees in the same or similar positions.

What Does This Decision Mean for Employers?

Although this decision comes out of the Sixth Circuit, it has opened the door for the EEOC to take an aggressive approach on the issue of whether physical presence in the workplace is truly essential to performing a specific job. The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, represents a significant departure from the traditional majority viewpoint that regular attendance at the workplace is usually an essential function of the job. For example, in 1995 in *Vande Zande v. Wisconsin Department of Administration*, the Seventh Circuit stated:

"Most jobs in organizations public or private involve teamwork under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home. This is the majority view . . . . But we think the majority view is correct. An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt to this as to any generalization about so complex and varied activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."

The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, may be a signal to other courts that technology has advanced such that the courts need to re-consider this traditional viewpoint.

With the federal courts and the EEOC beginning to embrace the concept that physical presence at the employer's place of business is not an essential job function, this may be the beginning of a slippery slope toward requiring employers to consider telecommuting as an accommodation. The question most employers will have is whether such an accommodation is reasonable, particularly because many employers, like Yahoo! CEO Marissa Mayer, are

committed to the philosophy that in-person, face-to-face communication, and interaction fosters the type of collaboration, innovation, and production that is essential to a successful business.

Employers should keep a close eye on how other federal courts address the issue of telecommuting as a reasonable accommodation.

EMPLOYMENT LAWSCENE ALERT: HAVE YOU DONE YOUR HR SPRING CLEANING?

Spring is finally here! Like household cleaning, it is also important to do spring cleaning in the workplace. Spring is a great time for employers to audit their human resources policies and procedures to account for recent changes in state and/or federal law and to find and correct potential problems before they turn into costly claims or lawsuits.

Failing to regularly review your personnel policies and procedures could create litigation risks for your business. The key areas of focus for your workplace spring cleaning should include:

- Reviewing and revising employee handbooks and other individual policies as needed;
- Reviewing and revising your personnel practices and procedures regarding:
    - Avoiding discrimination, harassment, and retaliation in all aspects of employment;
    - Approving and managing leaves of absence;
    - Accommodating disabilities or religious needs;
    - Wage and hour issues; and
    - Disciplinary practices and investigations.
- Identifying any important changes in federal and state law, determining how any changes will affect your policies and procedures, and revising those policies and procedures accordingly.
- Conducting training and re-training for key personnel on important human resources policies such as harassment.

Reviewing your personnel policies and procedures annually and ensuring your employees have the proper training to implement and enforce your policies and procedures is a springtime best practice for employers.

If you would like additional resources to assist you in conducting your human resources audit or are looking for someone to conduct informational training for your employees or supervisors, please contact us.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN PASSES SOCIAL MEDIA PROTECTION ACT – HOW WILL IT AFFECT YOUR EMPLOYMENT PRACTICES?

On April 8, 2014, Governor Scott Walker signed into law the Wisconsin Social Media Protection Act (the "Act"). 2013 Wisconsin Act 208. The new law, which went into effect on April 10, 2014, Wis. Stat. § 995.55, prohibits employers from requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's "Personal Internet account," defined as an "Internet-based account that is created and used by an individual exclusively for purposes of personal communications."

Specifically, under the new law, employers may not:

- Request or require an employee or applicant for employment to disclose access information for a Personal Internet account or otherwise grant access to or allow observation of that account as a condition of employment;
- Discharge or otherwise discriminate against an employee for:
    - Exercising his or her right to refuse to disclose access information, grant access to, or allow observation of his or her Personal Internet account;
    - Opposing a practice prohibited under the Act;
    - Filing a complaint or attempting to enforce any right under the Act; or
    - Testifying or assisting in any action or proceeding to enforce any right under the Act.
    - Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's Personal Internet account.

The Act does, however, permit an employer to do any of the following:

- Request or require an employee to disclose access information to allow the employer to gain access to an account, service, or electronic communications device that the employer supplied or paid for (in whole or in part) in connection with the employee's employment or used for the employer's business purposes;
- Discharge or discipline an employee for transferring the employer's proprietary or confidential or financial information to the employee's Personal Internet account without the employer's authorization;
- Conducting an investigation or requiring an employee to cooperate in an investigation if an employer has reasonable cause to believe that there has been:
    - Any alleged unauthorized transfer of confidential, proprietary, or financial

information to the employee's Personal Internet account; or
    - Any other allege employment-related misconduct, violation of the law, or violation of the employer's work rules, as specified in an employee handbook, if the misconduct is related to activity on the employee's Personal Internet account.

(Although an employer can require an employee to grant access to or allow observation of the employee's Personal Internet accounts for this purpose, the employer may not require the employee to disclose access information for that account.)

- Restrict or prohibit an employee's access to certain internet sites while using an electronic communication device supplied or paid for in whole or in part by the employer or while using the employer's network or other resources;
- Comply with a duty to:
    - Screen applicants prior to hiring; or
    - Monitor or retain employee communications as required by state or federal laws, rules, and regulations or the rules of a self-regulatory organization.
    - View, access, or use information about an employee or applicant for employment that can be obtained without access information or is available in the public domain; and
    - Request or require an employee to disclose his or her personal e-mail address.

An employee or applicant who believes he or she was discharged or otherwise discriminated against in violation of the Act may file a complaint with the Department of Workforce Development in the same manner as other employment discrimination complaints are filed and processed with the Department.

Employers should review and revise their policies and practices to ensure that they are in compliance with the Act. For more information about the Wisconsin Social Media Protection Act or if you have questions about whether your practices comply with the new law, please contact us.