EMPLOYMENT LAWSCENE ALERT: SUPREME COURT HEARS ORAL ARGUMENTS ON THE EEOC'S DUTY TO CONCILIATE

On Tuesday, January 13, 2015, the United States Supreme Court heard oral arguments in *Mach Mining LLC v. EEOC*, 13-1019, the outcome of which will have a significant effect on the EEOC conciliation process and a case we have posted on this blog previously. The dispute revolves around whether — and to what extent — courts can enforce the EEOC's obligation under Title VII to conciliate before filing a lawsuit.

The EEOC initially filed a Title VII gender discrimination complaint against Mach Mining in 2011 for allegedly failing to hire or refusing to hire women because of their gender. The EEOC claims that it filed suit after trying to reach a prelitigation settlement through its conciliation process. Mach Mining disagreed and asserted as an affirmative defense in its answer to the complaint that the EEOC had failed to conciliate in good faith as required by the statute.

The Seventh Circuit Court of Appeals created a circuit split when it ruled that employers cannot allege as a defense that the EEOC didn't work hard enough to reconcile disputes before filing suit. All other circuit courts have held that the adequacy of conciliation is subject to court review, although the standard of review varies between courts. According to the Seventh Circuit, the failure-to-conciliate defense went against the statutory prohibition on using what was said and done in conciliation as evidence in future proceedings.

During oral arguments, Mach Mining's attorney suggested that courts be able to conduct a "modest inquiry" into whether the EEOC attempted to resolve a claim of discrimination through conciliation and, if determined that the EEOC had not done so, to require it to conciliate. The EEOC, on the other hand, does not want the courts to have any ability to review its pre-suit conciliation efforts. Chief Justice Roberts, however, voiced his concern that he was "troubled by the idea that the government can do something that [the courts] can't even look at whether they've complied with the law." Justice Beyer echoed Chief Justice Roberts' concerns by saying that "everything just about" is subject to judicial review. Justice Scalia called the EEOC's request that its conciliation efforts be exempted from judicial review as "extraordinary."

The main concern over any judicial inquiry into the EEOC's pre-suit conciliation efforts is the level of inquiry a court should undertake. This is where the appellate circuit courts differ. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith.

Justices Kagan and Ginsberg's questions seemed to belie a belief that Congress has not put an onerous requirement on what was required of the EEOC in conciliation. Justice Sotomayor stated that she didn't "know how you make something that's designated by Congress as informal into a formal proceeding." Justice Kennedy stated that Title VII's requirement that the EEOC try to eliminate allegedly unlawful employment practices "by informal methods of conference, conciliation, and persuasion" were "very difficult words" for Mach Mining's position. Mach Mining responded by stating that "informal" did not mean that the EEOC could do whatever it wanted.

Although the Court continued to ask the parties to give them a rule that would be acceptable to them, neither came up with an answer the Justices seemed satisfied with. The EEOC initially argued that it should only be required to show that an attempt to conciliate had been made. Justice Scalia, however, honed in on the fact that the EEOC is obligated to try to obtain an agreement that is acceptable to it but, in order to try to obtain an agreement, you have to tell the other side what you want. Similarly, Chief Justice Roberts did not like the "just trust us" approach. The EEOC eventually conceded that the Court could require it to say that it informed the employer of what it objected to and that they had communicated about the issue.

Mach Mining argued that the Court should require that the EEOC reach out to the employer and, if the employer responded that it wanted to conciliate, that the EEOC should have to tell the employer what would be an acceptable offer, which they could legally obtain in court, and how they had arrived at that number. Justice Kennedy stated that this would be akin to enforcing the good faith bargaining of contracts and labor law, which he referred to as "a morass." Justice Kagan called this inquiry "intrusive."

The decision in this case will have a large impact on how the EEOC conciliates cases prior to litigation and how employers will need to approach such conciliation efforts. If the Court rules in the EEOC's favor, it would likely mean that the EEOC could become even more aggressive with its charge to the courthouse with high profile cases, as a lack of good faith or reasonableness would not create a barrier to the EEOC's efforts to litigate a case that an employer might be more than willing to conciliate on fair and reasonable terms — if only given an opportunity.

EMPLOYMENT LAWSCENE ALERT: OSHA IMPLEMENTS NEW REPORTING REQUIREMENTS

New Occupational Safety and Health Administration (OSHA) reporting requirements went into

effect on January 1, 2015. These new rules require all employers, even those who are exempt from routinely keeping OSHA injury and illness records due to company size or industry, to report all work-related fatalities, hospitalizations, amputations, and losses of an eye to OSHA.

Employers must report work-related fatalities within 8 hours of finding out about them. Employers will also now be required to report all amputations, partial amputations, losses of an eye, and any inpatient hospitalization of an employee due to workplace injuries to OSHA within 24 hours of the incident. Previously, employers only had to report hospitalizations if they involved three or more employees, which was rare. Employers do not have to report a hospitalization if it is only for diagnostic testing or observation. OSHA's new reporting requirements will dramatically increase the number of incidents that have to be reported to OSHA.

For example, employers will now be required to report all work-related amputations as OSHA broadly defines "amputations" to include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; and amputations of body parts that have since been reattached.

Employers will have three options by which to comply with their reporting requirement to OSHA. First, employers may make a report by telephone to the nearest OSHA area office. Second, employers may make a report by telephone to the 24-hour OSHA hotline at 1-800-321-OSHA (6742). Lastly, employers can report online through OSHA's website (www.osha.gov), which is expected to be operational by mid-January. It is OSHA's plan to publish all reports of injuries on its website.

Because there is likely to be additional reporting to OSHA, OSHA will have additional enforcement opportunities, which means additional inspections for employers. Because OSHA enforcement inspections typically result in citations, this could have a significant impact on the companies that face these inspections due to on-the-job injuries.

Employers should make sure that they are aware of their new reporting duties and are complying properly. More importantly, employers should make sure that they have safe work practices and procedures, have proper safety policies, provide adequate safety training, and ensure that all workplace safety rules are strictly enforced. Preventing workplace injuries should be every employer's goal.

EMPLOYMENT LAWSCENE ALERT: SUCCESSFUL EMPLOYERS RECOGNIZE THE IMPORTANCE OF HAVING WELL-TRAINED SUPERVISORS

Employers in today's society are faced with a variety of workplace challenges, from complying with complex and often confusing employment laws to effectively managing a diverse workforce comprised of individuals from a broad spectrum of society. Let's face it: managing your workforce, making the right employment decisions with regard to hiring, promotions, and terminations; and complying with the numerous, complicated, and sometimes overlapping federal, state, and local employment laws is no easy task. It is even more difficult in these uncertain economic times as employers struggle to maintain their workforce amidst declining revenue and increased costs. The numerous recent changes in employment laws, like the NLRB decisions on union organizing and elections, and proposed changes, such as updates to the FLSA Overtime Exemption, that are certain to take place, will not make things any easier for employers. Successful employers realize that the success of their business to comply with these numerous and complex challenges is dependent upon well-trained supervisors.

A supervisor has several key roles that are essential to the success of the workplace. One of the most critical roles of the supervisor is to carry forward the mission and the vision of the company. This requires the supervisor to embrace and foster the values of the company and to instill those values in the workforce. A supervisor must also possess the technical skills to support the organization, the management skills to achieve the objectives and goals of the company, and the people skills to effectively lead and communicate with employees to enable them to achieve the goals of their job. Supervisors must also direct employees, instruct them, and ensure that they follow organizational policies and procedures. Moreover, supervisors must make important decisions with regard to hiring, job assignments, job performance and evaluation, promotions, pay increases, accommodations, discipline, and termination, all while complying with a myriad of state and federal laws.

Given these very large and demanding responsibilities, individuals placed in a supervisory position soon begin to realize that they have not been given the skills and tools necessary to handle all the dynamic challenges of the job. Successful employers, however, recognize this shortfall and provide their supervisors either inside or outside training to help these individuals become good and successful supervisors.

What defines a good and successful supervisor? A good supervisor is a leader and a motivator who promotes teamwork, teaches safe and efficient work practices, and consistently communicates and enforces work rules and policies. A good supervisor understands his or her role within your organization and the importance of communicating the vision and mission of the company to employees. A good supervisor also demonstrates a loyalty to the values of your company and values the people that contribute to the success of your organization – your employees! Many employers rightly recognize that it is their employees who represent their most important asset and who, in most cases, make the difference between a successful company and an unsuccessful company. Employers also recognize that the best way to achieve value from their employees is to have good and well-trained supervisors who are committed to maximizing the productivity from each and every employee. Well-motivated employees are more productive than less-motivated employees. This is a simple truism but one that is often neglected by employers. Employees who are not motivated in their jobs have lower morale, lower productivity, and diminished loyalty to the organization. Consequently, employees who are not motivated in their jobs usually become disinterested and unsatisfied in their jobs, which, in turn, leads to increased employee turnover and higher operating costs and lower profit margins for the employer. Supervisors are the individuals who have the most influence and effect upon an employee's motivation.

Well-trained supervisors have the ability to enhance an employee's motivation and the overall morale of your workforce. Well-trained supervisors understand that by (i) treating employees fairly; (ii) valuing and appreciating employees' efforts and contributions to the company; (iii) recognizing their work; and (iv) assigning job tasks that match an employee's skills with the employee's interest in the job will increase employees' motivation and interest in their jobs. A good and productive employee is often times determined by a well-trained supervisor who understands that he or she must be a leader, a communicator, a teacher, and a motivator; sometimes all at the same time. These functions are what define a good supervisor.

Many readers, after reading this article, may think that they don't need to actively train their supervisors as their business is successful or profitable. However, being profitable or successful does not mean that you have good supervisors committed to the values of your company or that your employees are motivated or satisfied in their jobs. Also, giving an individual a "supervisor" job title does not make them automatically equipped to handle the various and demanding responsibilities of the job. To determine the level of your supervisors' understanding of their own role in your company, you should ask each of your supervisors the following three questions:

(1) How do you define your role as a supervisor in our company?

(2) What characteristics or traits do you believe you possess that makes you an effective supervisor?

(3) What is the most important skill you possess as a supervisor?

Depending on their answers, you may want to consider whether providing your supervisors training on the fundamentals of good supervision makes good business sense.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE FIFTH SIN — "ENGAGING IN COMPLEXITY FOR COMPLEXITY'S SAKE"

There is a great quote from Oliver Wendall Holmes on complexity: "*I would not give a fig for the simplicity this side of complexity, but I would give my life for the simplicity on the other side of complexity".*

Of course, there is the other great quote about complexity with its author of unknown origin: "*Keep it simple stupid.*"

But when it comes to planning, particularly tax-based planning, in my experience, advisors of all kinds—lawyers, accountants, financial advisors—violate the tenants of simplicity and engage in some of the most complex, indecipherable planning known to mankind. I have seen plans that use charitable planning techniques to transition business ownership for clients that have no charitable inclinations. I have seen complex buy-sell plans and operating

agreements created for clients that just want to pass the business on to the children. I have seen all types of acronym planning that, upon further review, is akin to killing an ant with a sledgehammer—GRATs, BDITs, IDGTs, FLPs, DAPTs and the like.

Just to be clear, the planning techniques behind each of these acronyms are wonderful, useful and powerful planning techniques when implemented in the right situation with the right client. I have implemented many of them myself. But for some clients, it is more than what they need to get where they want to go.

The question might be what is the problem? Even if a simpler solution might accomplish the same client goal, at the end of the day, the solution still accomplished the goal. In my experience, there is a reason that someone as brilliant as Oliver Wendall Holmes valued simplicity to the point of figuratively giving his life to get it—the lack of understanding leads to fear, and fear leads to inaction. Taking a step back, why did I become involved in these cases in the first place, when the plan (generally a costly plan) had been created by a former advisor? Simply put, the clients had no idea what they had, why they had it or what to do with it. Stated another way, it was the advisor's plan, not the clients'.

So my suggested process: determine first what the client wants and then determine the possible ways to get there. Then recommend and implement the solution that gets the client the best result in the simplest way. The plan should not be about the advisor's ego, but if it is, remember what Oliver Wendall Holmes is really saying—true brilliance lies not in complexity, but rather simplicity.

EMPLOYMENT LAWSCENE ALERT: NLRB ISSUES NEW RULES FOR UNION ELECTIONS

On Monday, December 15, 2014, the National Labor Relations Board (NLRB) issued rules that will speed up the union election process. Although the rules do not take effect until April 14, 2015, employers should be aware of them and start preparing for the changes now.

Under the current rules, representation petitions are filed seeking to have the NLRB conduct an election to determine if employees wish to be represented by a union for the purposes of collective bargaining with their employer. The Board then investigates these petitions to determine if an election should be conducted and will direct the election, if appropriate. There is currently a 25-day minimum period of time between the filing of a petition and the date of an election. Parties must agree prior to the election on the voting unit and other issues. If the parties do not agree, the 25-day minimum can be extended in order to hold a

pre-election hearing and, if necessary, a post-election hearing. Currently, that date as to when the pre- and post-election hearings are held can vary by Region. Also, under current rules, parties are not required to identify all specific issues in dispute, and litigation on voter eligibility and inclusion can occur prior to the determination of whether an election should be held.

Under the new NLRB rules, the road to a representation election will be substantially different and quicker. There will no longer be a minimum time frame between the date of the petition and the date of the election. This means that since representation elections will happen more quickly and with a shortened time frame to an election; and employers will be severely limited in their ability to properly and effectively communicate with their employees about the pros and cons of union representation. While the NLRB did not specify any date certain as to when an election must be conducted, under the new expedited election rules, it is anticipated that an election will now occur between 10 and 21 days after the filing of a petition as compared with the current 38 to 45 day time frame.

Now petitions can be filed and transmitted between the parties electronically. With the filing of a representation petition, the petitioning union must also file a letter of position and evidence that employees support the petition (the "showing of interest"). Upon receipt, an employer must post and distribute to employees an NLRB notice about the petition and the potential for an election to follow.

The regional director will now set a pre-election hearing eight (8) days after a petition is filed. The purpose of the pre-election hearing is limited in scope and is designed to determine whether there is a "question of representation." Employers will be required to file a letter of position prior to the pre-election hearing identifying all issues that the employer wishes to litigate before the election. In addition, employers must also provide a list of the names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, and any other employees that it seeks to add to the unit based upon a community of interests. Based upon the evidence presented at the hearing, the regional director will decide whether an election should be held and which, if any, voter eligibility questions should be litigated prior to the election.

If an election is directed, the regional director will ordinarily transmit the notice of election at the same time as the direction of election and will specify in the direction of election the election details, such as the date, time, place and type of election and the payroll period for eligibility. An election date will be set for the earliest date practicable. Now there is a new *Excelsior* list requirement as an employer, within two (2) days after a direction of election is issued (as opposed to seven (7) days under the previous rules), must provide a list of employees eligible to vote that now must include employees' personal phone numbers and email addresses, if available.

The NLRB regional office will then conduct the election and, if necessary, hold a post-election hearing to resolve any challenges to voters' eligibility and objections to the conduct of the election or conduct affecting the results of the election. While objections to voter eligibility

had been a pre-election issue, it will now be held off until after the election in the event that the objection becomes moot. However, any issues not raised in the employer's position statement will most likely be considered waived by the NLRB. The post-election hearing will be scheduled 14 days after the filings of objections.

Although there is already a pending legal challenge to the new NLRB rule, a suit filed by the U.S. Chamber of Commerce and several trade associations, and there are likely to be others, employers should prepare for these rules to be enforced as the NLRB's new rules are game changers for employers. Employers will have less time to effectively communicate with their employees and employees will have less time formulate their true desires as to whether union representation serves their best interests.

Importantly, employers should not wait until an election petition is filed to address workplace issues that may lead to a representation petition being filed. Employers will need to be proactive in informing their employees about their stance on union-related issues and making sure that employees feel that their concerns are being heard and addressed by the employer. Employers should also train supervisors to be aware of issues that could lead to employees' desire to unionize. If an employer anticipates or suspects that any type of union organizing activities is occurring within its workplace, delaying a response is no longer a viable option. Now, employers will be required to immediately begin the process of drafting communications to employees upon any indication of organizing activities and devise a sound and lawful strategy as to how it will confront any attempt to organize well before a petition is filed. Waiting to act until a petition is filed may be too late!

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Tax and Wealth Advisor Alert—"The Seven Deadly Sins of Succession Planning Series"
- Employment LawScene Alert—"Successful Employers Recognize the Importance of Having Well-Trained Supervisors"
- Article—"A Family Matter: Protecting an Elderly Parent with Dementia from Financial Abuse"
- Dean Laing Featured in the 2014 *Wisconsin Super Lawyers* Edition
- Welcome Our New Attorneys
- Congrats to Our 2015 Best Lawyers
- Best Lawyers
- *Super Lawyers* Business Edition
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TAX AND WEALTH ADVISOR ALERT: DIVORCE DOES NOT ALWAYS REVOKE YOUR EX-SPOUSE AS BENEFICIARY

Most states, including Wisconsin, have a statute that automatically revokes as beneficiary a divorced spouse once the divorce is final. *See, e.g.,* Wis. Stat. § 854.15. This means that, unless your will, trust, IRA, 401(k), life insurance, etc., provides otherwise, once a divorce decree is final, an individual's ex-spouse and the ex-spouse's relatives receive nothing under your estate plan, even if they are the named beneficiary. Instead, the funds or property will transfer to the next of kin.

However, this may not be the result for any benefits provided as part of an employee benefit plan. In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the United States Supreme Court held that a Washington statute similar to Wisconsin's § 854.15 was preempted by ERISA, the Employee Retirement Income Security Act. Instead of applying the statute and awarding Mr. Egelhoff's life insurance proceeds to his children, the proceeds went to his ex-wife, whom he failed to remove from his beneficiary designation form. The same rule has since been applied in Illinois, *see Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003), and would also apply in Wisconsin.

Often times, the law works for us in helpful ways, automatically. But many times it unfortunately does not. The lesson to be learned from the Egelhoffs is that it is imperative to update your estate plan after major life events such as divorce, marriage, large purchases, or the death of loved ones. And in-between these events, an update about every five years is wise.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE FOURTH SIN — "ASSUMING THE ESTATE PLAN IS THE SUCCESSION PLAN"

The fourth sin is when the business owner makes the assumption that because the estate planning documents are complete, the succession plan is complete. An estate plan is a strategy for a person to take care of the people he or she cares about. The strategy

incorporates two things: getting the right property to the right people at the right time and making sure the right people are making decisions when the client cannot. A succession plan is a plan designed to maximize the value of a business to take care of the people the business owner cares about: first the owner and the owner's spouse, then the children and finally, future generations.

A properly designed estate plan should be a part of the overall succession plan. It should be the implementation of how all of the client's property (including the business) will take care of the people the business owner cares about when the business owner cannot. But it is not the entire succession plan. The entire succession plan also addresses leadership of the business, the retirement income needs of the business owner and the family dynamics of the potential solutions. An estate plan might do those things, but often does not, blindly focusing on taxes and equalization by leaving all of the property equally to the children, with no thought on which, if any, of the children should be running the show. Business owners should have the estate plan drafted as a part of a successful, multi-faceted succession plan; doing these steps in a separate piecemeal fashion often leads to suboptimal results.

EMPLOYMENT LAWSCENE ALERT: NLRB DECIDES THAT WORKERS CAN USE THEIR EMPLOYERS EMAIL — EVEN FOR UNION ORGANIZING

On December 11, 2014, in *Purple Communications, Inc.*, the NLRB overturned its 2007 *Register Guard* decision and held that employees have the right to use their employers' email systems for nonbusiness purposes, including communicating about union organizing. The NLRB emphasized the importance of email as a critical means of communication for employees, especially in today's workplace culture, and noted that some personal use of an employer email system is common and often accepted by employers. Because communication among employees is a foundation for the exercise of Section 7 rights, the NLRB held that employers who have chosen to give employees access to their email systems must now permit those employees to use those systems for statutorily protected communications on nonworking time. Employers are permitted to monitor employees' email use to ensure that it is being used properly. Employers will not be engaged in unlawful surveillance of Section 7 activity unless they do something "out of the ordinary," such as increasing monitoring during an organizational campaign or focusing monitoring effects on protected conduct or union activists.

In an attempt to balance the employees' Section 7 rights to communication with the legitimate interests of employers, this decision only applies to workers who have already been given access to their employers' email systems; employers are not required to provide access to employees. Businesses may also be able to justify a complete ban on non-work use of email if they can point to special circumstances that make such a prohibition necessary to maintain production or discipline. It will be the employer's burden to show what the interest at issue is and demonstrate how that interest supports any email use restrictions the company has implemented. The decision did not address email access by non-employees or any other type of electronic communication systems.

Employers should review their computer use and e-mail policies in light of this decision. Employers should determine which employees should or need to have access to their computer and e-mail systems and whether there is any business justification to impose a complete ban on non-work use of email.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES SECURITY CHECK TIME DOESN'T NEED TO BE PAID TIME

On December 9, 2014, the Supreme Court of the United States issued its decision in *Integrity Staffing Solutions, Inc. v. Busk et al.*, ruling that time spent waiting to undergo and undergoing security screenings after work each day is not compensable time under the Fair Labor Standards Act ("FLSA"). This case involved a collective claim by employees of a temporary staffing agency who worked at Amazon warehouses in Nevada retrieving products from shelves and packaging those products for delivery. These employees were required to pass through a security check after the end of their shift to make sure that they had not pilfered any product from the warehouse. At times, employees were required to wait as long as 25 minutes in line before they could leave the premises.

In overruling the Ninth Circuit Court of Appeals, the Supreme Court held that the activity of waiting in a security line, after work, was not a "principal activity or activities which the employee is employed to perform" because they were hired to retrieve products from warehouse shelves and package them, not to go through security screenings. Pursuant to the Portal-to-Portal Act, an employer is not required to pay minimum wage or overtime compensation for activities which are preliminary or postliminary to an employee's principal activities. The U.S. Department of Labor deems that the term "principal activities" encompasses "all activities which are an integral part of the principal activity," including

those related activities which are “indispensable to its performance.”

The Court concluded that the security screenings were not “integral and indispensable” to the employees’ duties because it was not an intrinsic element of retrieving products from shelves and packaging them for shipment and could have been eliminated if the employer so desired. The Court found that the Ninth Circuit had erred in focusing on whether the employer required an activity because that was too broad of an interpretation and the focus under the FLSA and Portal-to-Portal Act is whether the activities are “integral and indispensable” to the productive work that the employee is employed to perform.

Employers should take note of this decision in determining what pre- and post-shift activities must be compensated. Time spent performing activities related to an employee’s duties, such as donning and doffing protective gear that is necessary for performing an employee’s job duties, should generally be compensated. However, not all activities, such as waiting at a security check and waiting in line to receive pay checks, are compensable.