EEOC OBTAINS VICTORY IN SEVENTH CIRCUIT IN PREVENTING JUDICIAL REVIEW OF PRE-SUIT CONCILIATION EFFORTS

In July, the Employment LawScene™ advised our readers that a federal district court granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit as to whether the EEOC's alleged failure to conciliate prior to commencing suit is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit. Title VII of the Civil Rights Act of 1964 requires the EEOC, prior to commencing suit against an employer, to "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The federal district court granted the EEOC's motion for an interlocutory appeal because the Seventh Circuit had not yet directly addressed the issue and because there was a split between other federal circuits as to the scope of a court's review of EEOC's pre-suit conciliation efforts.

In a somewhat surprising decision, the Seventh Circuit became the first federal circuit court of appeals in the country to explicitly reject an employer's ability to assert an implied affirmative defense that the EEOC failed to comply with its conciliation efforts prior to commencing suit. The Seventh Circuit's decision also breaks ranks with the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits who have all held that the EEOC's pre-suit conciliation efforts are subject to judicial review, despite the fact that these courts are divided as to the level of scrutiny to apply in reviewing the EEOC's conciliation efforts. 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. The Seventh Circuit, based upon the plain language of the statute, rejected the notion that the EEOC's pre-suit conciliation efforts are subject to any level of judicial review or scrutiny.

The Seventh Circuit reasoned that the language of Title VII, the lack of a meaningful standard for the courts to apply, and the overall statutory scheme that Congress set forth in Title VII precluded a court from reviewing the EEOC's pre-suit conciliation efforts and likewise precludes an employer from asserting an affirmative defense on that basis. The Seventh Circuit found the language of Title VII made clear that conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the conciliation efforts between the EEOC and an employer must remain confidential. The Seventh Circuit also found persuasive that there is no meaningful standard to apply is determining whether the EEOC's efforts to conciliate were sufficient. The Seventh Circuit even rejected applying a good faith standard because in applying such a standard, the court reasoned, a reviewing court could not help but to engage in a prohibited inquiry into the substantive reasonableness of particular settlement offers – not to mention using confidential and inadmissible materials as evidence.

In rejecting the application of a good faith review standard, the Seventh Circuit found compelling that Congress granted the EEOC the unreviewable discretion on the choice to settle or not to settle. Finally, the Seventh Circuit held that the broader statutory scheme of Title VII in protecting individuals from unlawful discrimination trumps an employer's interests in asserting an affirmative defense based on the EEOC's failure to conciliate because, according to the Seventh Circuit, "the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court."

At least in the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, the manner in which the EEOC conducts pre-suit conciliation efforts may very well change as its efforts, and whether such efforts were conducted in good faith, are no longer subject to challenge by an employer or review by a court. This lack of oversight gives the EEOC wide-latitude and considerable leverage in negotiations with an employer prior to commencing suit. The question will become whether the EEOC will use that leverage and its relatively large litigation budget to force employers into needless litigation. Employers, on the other hand, as always will have to weigh the cost/benefit of surrendering to the EEOC's attempt to extract a high monetary settlement through the conciliation process versus the high cost of litigating against the EEOC. Given the Seventh Circuit's decision precludes judicial review of the EEOC's conciliation efforts, there will be no watchdog over whether the EEOC's pre-suit settlement demands are made in good faith and commensurate with the merits of a particular case.

The Seventh Circuit's decision and the clear split that now exists between other federal circuits on this issue provides a basis for the Supreme Court of the United States to address this issue and resolve the dispute among the different circuit court of appeals. We will let our blog readers know if the U.S. Supreme Court decides to hear this case to resolve this important issue.

'TIS THE SEASON: TIPS FOR AVOIDING LIABILITY RELATED TO EMPLOYER-SPONSORED HOLIDAY PARTIES

It is that time of the year again – the holidays are upon us! Along with the holidays comes holiday parties, which can bring your employees closer together and boost morale. While a fair amount of planning goes into venue, food, and festivities, employers should also plan ahead to avoid potential legal liability that can be associated with a company-sponsored

party. The festive atmosphere combined with alcohol consumption can cause the potential for inappropriate behavior or claims relating to injuries suffered during or after the event.

In preparing for a company-sponsored holiday party, employers should take steps to:

1. Prevent Sexual Harassment. The best way to prevent sexual harassment is to educate your employees about your company's anti-harassment policy and ensure that employees understand that harassment involving any employee, whether within or outside the office, will not be tolerated. To set the tone of the party in advance, you may consider reminding employees that, while they are encouraged to have fun at the holiday party, it is still a company-sponsored event and, accordingly, all company policies and rules apply.

2. Reduce the Risk of Alcohol-Related Accidents. Employers may be subject to potential liability for injuries caused by employees who consume alcohol at employer-sponsored events. Negligence and Respondeat Superior, which holds employers liable for acts of employees undertaken in the course of their employment, are two examples. Some states, like Illinois, also have "dram shop" or "social host" liability laws, which hold the provider of alcoholic beverages to intoxicated individuals liable for injuries those individuals may cause while intoxicated. To avoid potential liability under these types of theories, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may also want to consider holding their holiday party at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated.

3. Minimize the Risk of Worker's Compensation Liability. Generally speaking, worker's compensation benefits may be available to employees who suffer a work-related injury or illness. In order to minimize the risk of liability for an employee injury or illness that occurs during an employer-sponsored event, employers should make it clear to employees that there is no business purpose for the event, that attendance at the holiday party is completely voluntary, and that they are not being compensated for their attendance at the event. Employers should also consider that injuries or illness associated with contaminants found in food or drinks may create legal exposure if their food and beverage providers are not properly licensed – using a third-party provider who is licensed may reduce your risk of liability because these licensed providers are typically subject to inspections and protected by their own insurance coverage.

4. Prevent Wage and Hour Claims by Non-Exempt Employees. To avoid any confusion as to whether time spent at a company-sponsored holiday party is compensable time under federal and state wage and hour laws, employers should be sure that participation in the holiday party is completely voluntary, that the party is held outside working hours, and that employees are not performing any work during the party or are not under the impression that they are performing work functions at the party that could be considered compensable under

applicable law.

If you have any questions about any of the information provided in this article or would like further advice on how to avoid liability at your company-sponsored holiday party, please do not hesitate to contact us.

ENDA PASSES SENATE

On November 7, 2013, the U.S. Senate passed the Employment Non-discrimination Act ("ENDA") with a 64-32 vote. The bill would prohibit employers from discriminating against individuals based on the individual's sexual orientation or gender identity, similar to the way Title VII of the Civil Rights Act of 1964 prohibits other types of discrimination.

The bill now moves to the House of Representatives, where its passage is uncertain.

For more information about the Senate Bill (S.815), please **click here** to read our recent blog post regarding ENDA. Visit our blog for updates on ENDA and to find out whether it becomes law.

TENTH CIRCUIT SAYS EMPLOYEES MUST GIVE EXPRESS NOTICE OF RELIGION-WORK CONFLICT

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit found that the EEOC failed to establish a prima facie case of religious discrimination where the EEOC could not show that a prospective employee expressly informed the employer of a conflict between the applicant's religious beliefs and the employer's dress code and of the applicant's desire for a reasonable accommodation from that dress code.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, the Tenth Circuit reversed the lower court's grant of summary judgment in favor of the EEOC on the EEOC's claim that the employer failed to provide a reasonable religious accommodation for a prospective employee who wore a "hijab" (headscarf) for religious reasons. The employer, a national retail clothing company, maintains a "Look Policy" or dress code that is intended to promote and showcase the company's clothing brand. The policy requires employees to dress in clothing that is consistent with the kinds of clothing that the company sells in its stores and prohibits

employees from wearing black clothing and caps.

The employer rejected the prospective employee for employment after she wore a hijab to her job interview. The EEOC filed suit against the company, alleging that the company failed to provide the prospective employee a reasonable religious accommodation in violation of Title VII of the Civil Rights Act of 1964.

The Tenth Circuit recognized employers' obligation under Title VII to reasonably accommodate religious practices of an employee or prospective employee unless the employer demonstrates that the accommodation would pose an undue hardship on its business. The court found that, in this case, the EEOC had failed to establish one of the key elements of a Title VII religious accommodation claim – notice. The Tenth Circuit held that in order to succeed on such a claim, the employee or prospective employee must inform the employer that he or she engages in a religious practice that conflicts with the employer's policy and that the employee would, therefore, require an accommodation for that religious practice.

Because the prospective employee, in this case, did not inform the employer, prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the court found that the EEOC could not meet the requirements for a religious accommodation claim under Title VII.

As an employer, you should be aware of the general obligation under Title VII to reasonably accommodate religious practices of employees or prospective employees who inform you of a conflicting religious belief or practice and the need for such an accommodation. Understand, however, that the reasonable accommodation obligation is implicated *only* when there is a conflict between an employee's religious practice and your neutral policy. If you are made aware of an employee's religious conflict, you should take steps to obtain additional information that would allow you to determine whether an accommodation can be made available to that employee to eliminate the religious conflict without posing an undue hardship on your business. If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

WISCONSIN MAY "BAN THE BOX" ON EMPLOYMENT APPLICATIONS

A recent **Employment LawScene™ article** discussed the EEOC's recent heightened efforts to crack down on employers' use of criminal background checks in making hiring decisions.

As part of its efforts, the EEOC issued guidance to employers in April 2012, in which the EEOC endorsed the policy of removing questions regarding criminal conviction history from job applications as a best practice for employers.

Following the EEOC's lead, in what can only be described as a nationwide movement that has recently gained considerable momentum, 53 local jurisdictions and 8 states (including Minnesota) have enacted "ban-the-box" legislation that would prohibit employers from considering a job applicant's criminal conviction record before the applicant has been selected for an interview. Two other states, California and Illinois, have adopted "ban-the-box" policies through administrative directives rather than legislation. (Statistics courtesy of the National Employment Law Project).

Wisconsin could become the next state to "ban the box" on employment applications. On August 27, 2013, a bill that would prohibit employers from asking for information regarding an applicant's criminal conviction record before the applicant has been selected for an interview, was introduced to the Wisconsin legislature and referred to Committee. Wisconsin Assembly Bill 342 provides that requesting an applicant for employment to supply information regarding his or her conviction record on an application form or otherwise inquiring into or considering an applicant's conviction record before the applicant has been selected for an interview, constitutes employment discrimination under Wisconsin law. The bill would not, however, prohibit an employer from notifying applicants for employment that individuals with certain conviction records may be disqualified by law or the employer's policies from employment in particular job positions.

Understandably, a number of employers use criminal background checks to identify job applicants who might present a risk to the employer's business, its employees, and its customers or clients. Wisconsin employers should pay close attention to Assembly Bill 342 as it makes its way through the State legislature, as passage of this bill could result in a number of employers having to make significant changes to their hiring processes and job applications.

WILL WISCONSIN BE NEXT TO BAN EMPLOYERS FROM ACCESSING EMPLOYEE SOCIAL MEDIA ACCOUNTS?

Wisconsin may soon join fourteen other states that have adopted laws prohibiting employers from requesting usernames and passwords to access an employee's or job applicant's social

media accounts, including Facebook® and Twitter®.

On Tuesday, August 20, 2013, the Wisconsin Senate Committee on Judiciary and Labor held a public hearing to discuss a bipartisan bill that would prohibit employers from accessing and monitoring the personal internet accounts of employees and job applicants. The bill would make it unlawful for employers to ask employees and applicants for their personal social media account passwords and would permit employees and applicants to file a complaint against their employer for violations of this law with the Wisconsin Department of Workforce Development in the same manner as an employment discrimination complaint. Besides restricting access to employees' personal social media accounts, Senate Bill 223 would also make it unlawful for an employer to discharge or otherwise discriminate against any person for exercising the right to refuse a request for access to such accounts.

Although seen as a prohibition, Senate Bill 223 provides a number of protections for employers. The bill would not prohibit employers from accessing electronic communications devices, accounts, or services that the employer provides to its employee by virtue of the employment relationship or that are paid for by the employer and used for business purposes. Senate Bill 223 would also permit employers to restrict employees' access to certain internet sites and monitor, review, or access electronic data stored on the employer's own network and on devices provided by the employer. The bill would also afford employers certain protections to permit discipline or discharge of employees who transfer the employer's proprietary or confidential information or financial data to the employee's personal internet account without the employer's authorization. Finally, Senate Bill 223 provides employers with a shield to legal liability against claims that an employer should have known, or should have monitored, an employee's social media account in relation to claims for negligent hiring or negligent retention.

According to the National Conference of State Legislatures, similar laws have been introduced or are pending in at least 36 states. Eight states, including Arkansas, Colorado, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington, have enacted legislation so far in 2013.

A federal law prohibiting employers from requesting or requiring employees and applicants to provide usernames, passwords, or any other form of access to personal social media accounts, is also being pushed through Congress. The Social Networking Online Protection Act was initially introduced in April 2012, but never made it to the House or Senate. The Act was re-introduced and assigned to the Congressional committee on February 6, 2013. If the Act passes committee, it will be passed on and considered by Congress.

Stay Tuned . . .

Employers should stay tuned to both the state and federal legislation that could potentially

change the way employers conduct background checks for prospective employees and investigate allegations of misconduct regarding current employees. Please continue to check the Employment LawScene® for updates on these important anticipated changes in state and federal law.

EEOC CRACKS DOWN ON EMPLOYERS' USE OF CRIMINAL BACKGROUND CHECKS

Although having a criminal record in itself does not afford individuals protection under Title VII, it is the EEOC's position that the use of criminal records in making employment decisions has a disproportionate effect on certain racial and ethnic groups, which may have a discriminatory effect on those racial or ethnic groups who *are* afforded protections under Title VII.

In April of last year, the EEOC issued guidance to employers regarding the use of arrest or conviction records in making employment decisions. The EEOC makes clear in its guidelines that the law does not expressly prohibit the use of criminal background checks, however, urges employers to conduct an individualized assessment when utilizing criminal background information to consider the nature and gravity of the crime, the time elapsed since the conviction, and whether the circumstances of the arrest or conviction are substantially related to the nature or requirements of the particular job. Employers that disproportionately reject minority employment candidates as a result of criminal background checks may be subject to a discrimination claim based upon a disparate impact theory of discrimination.

Since the issuance of its criminal background check guidelines, the EEOC has stepped up its enforcement efforts and has begun to systematically crack-down on employers, alleging that employers' blanket policies regarding criminal background checks and arrest or conviction records constitute discriminatory hiring practices. In June 2013, the EEOC filed lawsuits against two large employers for their use of criminal background checks in making hiring decisions. The EEOC's district office in Charlotte, South Carolina filed suit against a large auto manufacturer alleging that it disproportionately screened out African Americans from jobs by implementing and utilizing a criminal conviction policy that denies facility access to employees and employees of contractors who have certain criminal convictions on their record. The EEOC's Chicago, Illinois office also filed a separate suit against a retailer alleging that its policy of conditioning all job offers on criminal background checks has a disproportionate impact on African-American applicants, and, therefore, is unlawful under Title VII.

The EEOC is not the only agency stepping up its enforcement efforts regarding employers' use of arrest and conviction records. A growing number of states and cities have recently enacted "Ban the Box" legislation that regulates the use of criminal background checks in employment decisions. The purpose of the "Ban the Box" laws is to prohibit covered employers from inquiring about a job applicant's criminal background and conviction record on a job application and delay background checks until later in the hiring process. Wisconsin has not yet enacted Ban the Box legislation.

So, what does this all mean for you?

The EEOC's guidance and the Ban the Box legislation trend can present challenges for employers who want to protect clients/customers and other employees from individuals with violent backgrounds or avoid placing people convicted of certain financial crimes in accounting positions or other positions where they are handling money. Certain employers, such as schools or health care providers, should also keep in mind the potential conflict between these laws and other legal requirements that prohibit the employer from employing individuals who have certain criminal convictions in these sensitive positions.

Employers must appropriately balance the EEOC's guiding principles with these practical considerations. Employers should carefully review their policies and practices regarding criminal background checks and the use of arrest and conviction records in making employment decisions to be sure that these policies do not contradict the EEOC's guidance or violate Title VII's prohibition against discrimination.

SUPREME COURT ADOPTS HEIGHTENED STANDARD FOR EMPLOYEE RETALIATION CLAIMS

Recently, the Supreme Court of the United States issued its decision in ***University of Texas Southwestern Medical Center v. Nassar***, which raises the bar for employees who file Title VII retaliation claims against their employers.

Title VII protects employees from discrimination based on race, sex or gender, religion, or national origin. Title VII also protects employees against certain forms of retaliation. Specifically, Title VII prohibits an employer from retaliating against an individual who has opposed, complained of, or participated in any complaint of unlawful employment practices by the employer. Retaliation can take many forms, including actions relating to terms and conditions of employment (*i.e.* hiring, firing, promotions, *etc.*), disciplinary actions and even

discriminatory acts that occur outside the workplace.

For an employee to prevail under Title VII for a claim of retaliation, the employee must show some causal link between an adverse employment action and the employee's protected activity. Although federal district courts have been divided on just what type of proof an employee must establish in order to succeed on a Title VII retaliation claim, the key inquiry has always been the employer's motivation. Some courts have allowed employees to prove retaliation claims by establishing that the employer's action or decision was motivated by the employee's complaint or other protected activity, even if the employer also had other lawful motives that caused the employer's action or decision. Other courts, however, have applied a more stringent standard that requires employees to prove that the employer would not have taken the challenged employment action "but for" the employee's complaint or engagement in other protected activity.

In *Nassar*, the Supreme Court clarified that in order to prove retaliation under Title VII, an employee must prove "but-for" causation – that the employee's complaint of unlawful employment practices was the "but-for" reason for the challenged employment action rather than just one of many reasons. Proving that a challenged employment action was motivated by discriminatory reasons, even if the employer's action was also motivated by other lawful reasons, is no longer sufficient to succeed with a retaliation claim.

What does the Court's decision mean for employers?

The Court's decision in *Nassar* is of particular significance because the number of retaliation claims filed by employees has significantly increased in recent years and has nearly doubled from 1997 to 2012, according to EEOC statistics. Requiring employees to prove "but-for" causation in a Title VII retaliation claim should make it easier for employers to succeed at the early stages of litigation and will hopefully curb the filing of frivolous claims that cost employers time and money to defend. That is not to say that employers no longer need to apply or enforce anti-retaliation policies. Documenting performance problems and adhering to consistent disciplinary and termination practices continues to be of critical importance for employers as evidence of legitimate and non-discriminatory reasons for any challenged employment action.

FIFTH CIRCUIT FINDS FIRING A WOMAN FOR EXPRESSING BREAST MILK IS SEX

DISCRIMINATION

The U.S. Court of Appeals for the Fifth Circuit recently held that firing a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII of the Civil Rights Act.

Title VII of the Civil Rights Act prohibits discrimination on the basis of sex, which, until Congress enacted the Pregnancy Discrimination Act ("PDA"), did not include discrimination on the basis of pregnancy. The PDA made clear that discrimination based on or because of sex includes discrimination based on or because of pregnancy, childbirth, or related medical conditions. In *EEOC v. Houston Funding II Limited*, the Fifth Circuit has now held that lactation is a "related medical condition" of pregnancy for purposes of the PDA.

In the *Houston Funding* case, a female employee filed a charge of sex discrimination with the EEOC when her employer, Houston Funding, fired her after she asked whether she could use a breast pump at work. The employee took a personal leave of absence to have a baby. Shortly after giving birth, the employee told Houston Funding that she would return to work once her physician released her to do so. While she was on leave, the employee had communicated to her supervisor that she was breastfeeding her child and asked whether she would be able to use her breast pump at work. When the employee's physician finally released her to return to work, the employee again mentioned that she was lactating and wanted to know whether she could use a back room to express breast milk. Houston Funding told the employee that they had filled her position and that she was being terminated for job abandonment because she had not contacted her supervisor during her leave and had not attempted to return to work. The employee responded by filing a sex discrimination claim with the EEOC.

The Fifth Circuit found that Houston Funding discriminated against the employee based on a related medical condition of the employee's pregnancy – in other words, because she was lactating and wanted to express breast milk at work. The Fifth Circuit's holding in *Houston Funding* means that courts are beginning to recognize that employment decisions based upon whether a woman is lactating may be considered discriminatory in violation of Title VII.

What Should Employers do to Avoid These Types of Claims?

Be sure to follow best practices and applicable employment laws. For example, federal law requires employers to provide reasonable break time and a private place (other than a restroom) for female employees to express breast milk after giving birth to a child. Additionally, Wisconsin law prevents employers from prohibiting a mother from breast-feeding her child, directing a mother to move to a different location to breast-feed her child, directing a mother to cover her child or breast while breast-feeding, or otherwise restricting a

mother from breast-feeding her child. You should be sure to update your policies accordingly to ensure that you are in compliance with federal and state law.

If you would like more information about this topic or if you need advice on how to draft your personnel policies to ensure compliance with applicable laws, please contact Sarah C. Matt.

RECENT LAWSUIT TESTS MINISTERIAL EXCEPTION

Generally, the "ministerial exception" allows religious employers to avoid liability for discrimination claims when making employment decisions concerning employees who qualify as "ministers." The exception is rooted in religious freedom principles found in the U.S. Constitution. Specifically, the First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this amendment is known more commonly as the "Establishment Clause" and the second part is commonly known as the "Free Exercise Clause." The U.S. Supreme Court has held that a church's selection of its leaders is grounded in the Free Exercise Clause. The Free Exercise Clause recognizes that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."

More than one year ago, the U.S. Supreme Court confirmed that claims involving the employment relationship between a religious institution and its ministers exempt employers from liability under Title VII pursuant to the "ministerial exception" founded upon an employer's First Amendment rights. In Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, the Supreme Court held that:

Generally, the "ministerial exception" allows religious employers to avoid liability for discrimination claims when making employment decisions concerning employees who qualify as "ministers." The exception is rooted in religious freedom principles found in the U.S. Constitution. Specifically, the First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this amendment is known more commonly as the "Establishment Clause" and the second part is commonly known as the "Free Exercise Clause." The U.S. Supreme Court has held that a church's selection of its leaders is grounded in the Free Exercise Clause. The Free Exercise Clause recognizes that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."

More than one year ago, the U.S. Supreme Court confirmed that claims involving the employment relationship between a religious institution and its ministers exempt employers from liability under Title VII pursuant to the "ministerial exception" founded upon an employer's First Amendment rights. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court held that:

"Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such an action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."

The Supreme Court in *Hosanna-Tabor* refused to adopt a rigid formula for deciding when an employee qualifies as a minister. So, one of the primary questions that remains after the Supreme Court's decision in *Hosanna-Tabor* has been how broadly the courts will interpret "minister" and which employees will be covered by the ministerial exception.

One of the first opportunities to test the Supreme Court's ruling in *Hosanna-Tabor* presented itself in *Dias v. Archdiocese of Cincinnati*, a case coming out of the U.S. District Court for the Southern District of Ohio. On June 4, 2013, a jury returned a verdict for Crista Dias, a former technology coordinator for two Catholic schools in the Cincinnati area. Dias filed a complaint against the Archdiocese alleging the Archdiocese terminated her for being pregnant and unmarried in violation of Title VII's ban on sex and pregnancy discrimination.

The Archdiocese moved to dismiss Dias' complaint by invoking the "ministerial exception," but the district court denied the motion. The court found that Dias was not a minister for purposes of the ministerial exception to Title VII because Dias taught computer classes and because she was a non-Catholic who was not permitted under church rules to teach religion to her elementary school students. If the Ohio Archdiocese appeals the jury's verdict, it will have an opportunity to pursue defense of the claim under the ministerial exception at the federal appellate court level, which will give the appellate court a chance to develop the standard for determining when an employee qualifies as a minister.

Religious-based employers should closely follow the developing case law of the ministerial exception for guidance as to which employees will be considered "ministers" within the meaning of the exception.