ADA WEBSITE COMPLIANCE CASES MOVE FORWARD; SENATORS URGE REGULATORY ACTION

As we discussed in a recent article, class action lawyers have been sending demand letters and filing lawsuits claiming that websites belonging to businesses and organizations are “places of public accommodation” and are in violation of the Americans with Disabilities Act (ADA) because they are not accessible to people with visual and hearing impairments.

On January 29, 2016, several consolidated cases in the Western District of Pennsylvania moved forward after a scheduling conference. While claims against some of the defendants have resolved through settlement, claims against the National Basketball Association and Toys “R” Us, among others, are moving forward rapidly, with the parties scheduled to complete depositions in March 2016, and with trial scheduled for May 2, 2016.

Meanwhile, nine Senators from across the country, all Democrats, have sent a joint letter to the Office of Management and Budget urging it to complete its review of the proposed regulations regarding accessibility standards for websites and to impose strict ADA compliance regulations for companies. While the Senators commended the Department of Justice’s prosecution of various institutions for having websites that are allegedly not compliant with the ADA, they stated their concern that companies were “exploiting the lack of regulatory clarity” by maintaining non-accessible websites, which the Senators believe to be in violation of the ADA.

These developments show that the issue of whether your company’s website complies with the ADA is not going to go away soon. Plaintiffs’ lawyers representing visual and hearing impaired groups will likely continue to broaden the scope of who they sue for alleged ADA violations. If you receive a letter demanding action or requesting a settlement, it is important to know your rights before agreeing to anything.

If you have any questions, please contact Attorney Erica N. Reib of O’Neil Cannon at 414-276-5000 for more information.

EMPLOYMENT LAWSCENE ALERT: IRS DELAYS

AFFORDABLE CARE ACT REPORTING

On December 28, 2015, the IRS extended the deadlines for insurers, self-insuring employers, other coverage providers, and applicable large employers to file reports regarding health care information required by the Affordable Care Act. The information required to be reported relates to whether and what health insurance was offered to full-time employees to determine whether the employer met its shared responsibility requirements under the Affordable Care Act and whether employees are eligible for the premium tax credit. For each month, applicable large employers must report certain information, including, but not limited to, how many employees they had, whether the employees were offered health coverage, and the cost of that coverage. The IRS determined that covered entities needed additional time to "adapt and implement systems and procedures to gather, analyze, and report this information." The applicable forms must now be furnished to individuals by March 31, 2016 and to the IRS by May 31, 2016 (or June 30, 2016, if filing electronically). If these forms have already been prepared, the IRS is ready to receive them in January 2016 and encourages providers to file them now instead of waiting for the new due dates.

EMPLOYMENT LAWSCENE ALERT: SEVENTH CIRCUIT RULES THAT EEOC MUST TRY TO RESOLVE DISPUTES THROUGH CONCILIATION BEFORE FILING SUIT

On December 17, 2015, the Seventh Circuit held in *EEOC v. CVS Pharmacy Inc.* that the EEOC was required to first attempt to resolve its dispute with CVS through conciliation before bringing suit over whether CVS's language in its severance agreements constituted a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII. The EEOC alleged that CVS's standard severance agreement was overly broad, misleading, and intended to deter terminated employees from filing charges with the EEOC even though the agreement provided a carve-out recognizing the employee's right to "participate with any appropriate federal, state or local government agency enforcing discrimination laws."

We have previously blogged about this specific case here and other attempts by the EEOC to broaden their enforcement powers by skirting its conciliation duties here, here, and here.

In February 2014, the EEOC filed suit in federal district court in Illinois alleging that CVS's severance agreements constituted a "pattern or practice" in violation of Section 707(a) of

Title VII by interfering with an employee's full enjoyment of the rights afforded by Title VII. In granting CVS's motion to dismiss the complaint, the district court determined that the EEOC was first required to conciliate its claim before bringing a civil suit—a prerequisite that the EEOC claimed it did not have to meet because "pattern or practice" claims brought under Section 707(a) authorizes the agency to bring such actions without following the pre-suit procedures in Section 706—including conciliation. The district court granted CVS summary judgment dismissing the EEOC's suit finding that the agency was required to conciliate its claims before filing its civil suit. In dismissing the EEOC's suit, the district court also questioned whether or not an employer's decision to offer a severance agreement could be the basis for a "pattern or practice" discrimination suit without any allegation that the employer had actually engaged in retaliatory or discriminatory employment practices—an allegation that was missing from the EEOC's complaint.

On appeal, the Seventh Circuit rejected the EEOC's position that Section 707(a) relieved it from any obligation to follow the pre-suit procedures found in Section 706. In addition, the Seventh Circuit held that the prohibition against "pattern or practice" discrimination found in Section 707(a) did not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes but, rather, simply permits the EEOC to pursue multiple violations of Title VII. Because several circuits, including the Seventh Circuit, have found that conditioning benefits on a promise not to file charges with the EEOC is not, in itself, retaliation under Title VII, the court found that simply offering the severance agreement was not discrimination, and therefore, the EEOC failed to state a claim under Title VII. The Seventh Circuit's holding is in line with the recent Supreme Court decision in *Mach Mining, LLC v. EEOC*, which found that the EEOC can only resort to litigation when informal methods of dispute resolution fail because conciliation is a "key component of the statutory scheme" of Title VII.

Although this case was decided in the employer's favor regarding the waivers contained in its severance agreement, it is still recommended that employers include explicit and express provisions in their severance agreements that make clear: (i) that even though a severance agreement may provide that an employee may waive his or her right to sue in any court or agency, an employee should still be permitted by the express language of the agreement to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws. Until the U.S. Supreme Court ultimately rules on the issues presented in the CVS case, employers should expect that the EEOC will continue to be aggressive on these issues regarding whether the use of covenants not to sue under Title VII violate an employee's rights to the full enjoyment of protections afforded by Title VII. Including the above recommended carve-out language in severance agreements places an employer on defensible ground against any EEOC attack regarding the lawfulness of covenants not to sue used in severance agreements. For now, the Seventh Circuit's recent decision is an important victory for employers in Illinois, Indiana, and Wisconsin with regard to their ability to effectively use severance agreements to protect themselves from future suits by terminated employees without fear that such agreements may be considered retaliatory by the EEOC.

IS YOUR COMPANY'S WEBSITE COMPLIANT WITH THE AMERICANS WITH DISABILITIES ACT (ADA)?

Recently, class action lawyers around the country have filed lawsuits against businesses and organizations (even the National Basketball Association) alleging that their websites are not compliant with the ADA. Attorneys on behalf of vision or hearing impaired individuals are alleging that websites available for use by the public must conform to certain standards of accessibility. These claims are based on the ADA's general prohibition that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment… of any place of public accommodation…." Although initially thought to cover only physical locations, plaintiffs' lawyers have argued that the changing technology landscape has modified the definition of "places of public accommodation" over the last twenty years or so. Courts around the country have disagreed as to whether websites constitute a "place of public accommodation," but litigation under the statute continues.

Part of this recent push may come from the Department of Justice's changed stance on accessibility standards for websites. In 2010, the DOJ stated that covered entities could comply with the ADA's requirements regarding websites by providing an accessible alternative, such as a staffed telephone line. However, in June 2015, the DOJ filed statements of interests in at least two lawsuits in support of claims that the defendants needed to make their websites immediately accessible. The DOJ was expected to issue proposed rules in spring 2016, but now it seems as though the DOJ will not complete rulemaking until 2017 or 2018.

If you own a business, you will want to speak with your website developer about these issues. Moreover, if your company has been the target of a letter or lawsuit threatening legal action based on your website, you should contact an attorney to discuss your options before agreeing to any settlement demands.

If you have any questions, please contact Attorney Erica N. Reib at O'Neil Cannon at 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: OSHA PENALTIES TO DRAMATICALLY INCREASE IN 2016

In early November, President Obama signed the Bipartisan Budget Act of 2015. One item that should be of particular note to employers is that, under the Act, OSHA penalties will rise significantly.

Because OSHA penalties have been consistent for over two decades, once the Act goes into place on July 1, 2016, there is an immediate "catch-up" provision that will adjust the penalties as much as 150%. However, OSHA is also required to adjust the penalties on January 15 every year based on the Consumer Price Index ("CPI"). Because the CPI has increased 82% since the OSHA penalties were set in 1990, there is a possibility that the fines could be raised by that amount. The below chart shows the current penalty amounts and the amounts that they may be increased to:

Type of Violation	**Current Maximum Penalty**	**Adjusted Maximum (150%)**	**Adjusted Maximum (182%)**
Willful Violation	$70,000	$105,000	$127,400
Serious Violation	$7,000	$10,500	$12,740
Other-The-Serious Violation	$7,000	$10,500	$12,740
De Minimis Violation	$7,000	$10,500	$12,740
Failure to Abate Violation	$7,000	$10,500	$12,740
Repeat Violation	$70,000	$105,000	$127,400

These new fines will go into place August 1, 2016. Therefore, employers must keep a keen eye on safety now more than ever because OSHA has increased enforcement and now will increase its monetary penalties.

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TWENTY ATTORNEYS ELECTED TO THE WISCONSIN SUPER LAWYERS LISTS

O'Neil Cannon is proud to announce that the following sixteen attorneys were selected for inclusion on the Super Lawyers list, which is limited to 5% of all Wisconsin attorneys, as published in the December 2015 Edition of *Milwaukee Magazine and the* Wisconsin *Super Lawyers Magazine*:

- Douglas P. Dehler
- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Joseph E. Gumina
- Dean P. Laing
- Gregory W. Lyons
- Gregory S. Mager
- Patrick G. McBride
- Joseph D. Newbold
- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby

In addition, the following four attorneys were selected for inclusion on the Super Lawyers "Rising Stars" list, which "recognize[s] the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less:"

- Melissa S. Blair
- Megan O. Harried
- Erica N. Reib
- Timothy M. Van de Kamp

The Firm is proud to further announce that Dean Laing, Seth Dizard, and Peter Faust were selected by Super Lawyers as "Top 50 Attorneys" in Wisconsin and "Top 25 Attorneys" in the Milwaukee Area. Dean is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected to The Top 50 list for all 10 years.

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process is multi-phased and includes independent research, peer nominations, and peer evaluations. As part of its process, Super Lawyers surveyed more than 15,000 attorneys and judges in Wisconsin, looking for the best attorneys in the State.

The New Jersey Supreme Court recently upheld the findings of a Special Master who made the following determinations about Super Lawyers:

> "[T]he selection procedures employed by [Super Lawyers] are very sophisticated, comprehensive and complex.
>
> It is absolutely clear… that [Super Lawyers does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

EMPLOYMENT LAWSCENE ALERT: NLRB ADOPTS NEW TEST FOR JOINT EMPLOYER STATUS

On Thursday, August 27, 2015, the National Labor Relations Board (NLRB) announced an updated test for determining joint-employer status under the National Labor Relations Act (NLRA), changing decades of precedent and significantly expanding the definition of who can be considered a joint-employer. A split Board decided it was necessary to "revisit and revise" the standard in order to keep up with "changing workplace conditions" in the current economic climate.

In the case at issue, Leadpoint Business Services, Inc. (Leadpoint), a staffing agency, provided workers to Browning-Ferris Industries of California (BFI) at a recycling plant owned by BFI to perform a variety of tasks. The temporary services agreement between the companies stated that Leadpoint was the sole employer and denied any joint-employer relationship. It also gave each company-specific aspects of the employment relationship that each was to control. The union wanted to include the Leadpoint employees in a bargaining unit it represented. A regional director determined that the staffing firm was their sole employer and that BFI, therefore, had no obligation to collectively bargain with Leadpoint employees. The union challenged that decision, and the NLRB deemed the two companies joint-employers under its new standard.

Under the previous standard, an entity needed not only to possess the authority to control the terms and conditions of an employee's employment but had to actually exercise direct, immediate control to be considered an employer. The NLRB claimed that the requirement of direct, immediate control had been added to the joint-employer test over the past thirty years and was not based on prior case law, in common law, or in the text of the NLRA, and unnecessarily narrowed the definition of joint-employer under the NLRA.

The new standard states that two or more entities will be deemed joint-employers if they are both employers within the meaning of common law and "share or codetermine matters governing essential terms and conditions of employment." It is no longer necessary that joint-employers actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately. Under the new standard, the fact that an entity simply has the ability, even if unused, to control the terms and conditions of employment or possesses indirect control through an intermediary will suffice to establish a joint-employer relationship. The NLRB will consider the existence, extent, and object of the control. The NLRB will broadly define 'essential terms and conditions of employment' and include such things as hiring, firing, discipline, supervision, direction, wages, hours, scheduling, seniority, assignment of work, and determination of the manner and method of work performance.

This decision will have a major impact on employers, particularly those who use staffing or subcontracting agreements or contingent employee arrangements. Employers who had previously worked under the impression that their lack of direct control meant that they were not joint-employers could now be subjected to joint bargaining obligations and joint liability for unfair labor practices and breaches of collective bargaining agreements. If found to be a joint-employer, companies will need to collectively bargain with respect to the terms and conditions which it possesses the authority to control. The new standard also takes away much of the certainty with which businesses had interacted with each other.

Companies need to look at their business relationships and see who they could be considered joint-employers with, including vendors, service providers, and other entities with which the company may have indirect control over employees. This decision could also have an impact on how other federal agencies, such as OSHA and the EEOC, look at their joint-employer standards. Employers must keep an eye on any changes in order to avoid unexpected legal pitfalls.

EMPLOYMENT LAWSCENE ALERT: MAKING SURE YOUR WELLNESS PROGRAM COMPLIES WITH THE LAW

Litigation against employers by the EEOC regarding the implementation of wellness programs is ongoing in federal court, but no instructive decisions have been issued by the courts. Employers wishing to implement a wellness program but stay out of litigation may feel like they have little guidance on the issue, but there are some instructions out there on how to avoid, at the very least, disability discrimination lawsuits brought by the EEOC.

In April 2015, the EEOC published proposed interpretive guidance on how employers can run wellness programs without running afoul of the Americans with Disabilities Act (ADA). The EEOC's guidance is an attempt to balance the ADA's goal of limiting employer access to medical information and the Affordable Care Act's goal promoting wellness programs. The proposed rule does not touch on how wellness programs may be affected by any other laws prohibiting discrimination, such as Title VII, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act (GINA).

As a brief review, the ADA prohibits discrimination against individuals with disabilities and restricts the medical information employers may obtain from employees and applicants. Wellness programs are generally programs and activities that promote a healthier lifestyle or prevent disease, which in turn attempts to improve employee health and reduce healthcare costs. Wellness programs may also incorporate health risk assessments and biometric screenings that measure an employee's health risk factors. Incentives are usually offered for either participation (participatory wellness programs) or for achieving certain health goals (health-contingent wellness programs). Incentives are both financial and in-kind incentives, such as time-off awards, prizes, and other items of value. These wellness programs, however, must comply with the ADA, among other employment laws.

The focus of the EEOC's attack upon employers' wellness programs has been on whether such programs are voluntary. The ADA generally restricts employers from obtaining medical information from employees through disability-related inquiries or medical examinations. However, the ADA and GINA do permit employers to conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program. Voluntary is defined as neither requiring participation or penalizing employees who do not participate. The main effect of the EEOC's proposed regulations is the extent to which incentives affect the voluntary nature of wellness programs.

In its guidance, the EEOC has decided that it will allow certain incentives related to wellness programs, while limiting others to prevent economic coercion that could render the program involuntary. This can be achieved, according to the proposed rule, by allowing an employer to offer incentives up to a maximum of 30% of the total cost of employee-only coverage to promote participation. Under the proposed rule, employers are not allowed to require participation or deny coverage to or take an adverse employment action against any employee who does not participate. Employers would be further required to provide a notice that clearly explains what medical information will be obtained, who will receive the medical information, how the medical information will be used, the restrictions on its disclosure, and the methods the covered entity will employ to prevent improper disclosure of the medical information. The proposed rule also allows disclosure of medical information obtained by the wellness program to employers only in aggregate form, except as needed to administer an employer's health plan.

Finally, wellness programs must provide reasonable accommodations to employees with disabilities so that such employees have the ability to participate in wellness programs and earn the incentives offered by the employer. This is in line with the employer's duty to accommodate under the ADA.

Despite the EEOC's guidance, there remain unanswered questions. For example, the incentive language allows for up to 30% of the cost of employee-only coverage, but there is no guidance on whether incentives can be offered to encourage other family members who are covered under the insurance to participate in wellness programs. It is also expected that separate guidance on how GINA and wellness programs can coexist will be forthcoming.

Although the notice and comment period on the proposed rule has ended, the final rule is not likely to be issued until the fall. Employers should keep apprised of this rule making to make sure that their wellness programs do not find the attention of the EEOC.

EMPLOYMENT LAWSCENE ALERT: DOL MEMO STATES THAT MOST WORKERS ARE EMPLOYEES UNDER THE FLSA

Today, July 15, 2015, the U.S. Department of Labor (DOL) issued a memo regarding the classification of workers as either employees or independent contractors, which stated that most workers qualify as employees under the Fair Labor Standards Act (FLSA). The DOL noted that the FLSA has an expansive definition of employment and that workers who are misclassified may miss out on many protections that they should be given, including minimum wage, overtime, unemployment compensation, and workers' compensation.

Under the FLSA, a worker is an independent contractor if he is genuinely in business for himself; if a worker is economically dependent on the employer, however, the worker is an employee. To determine if the worker is economically dependent on the employer, the DOL looks at the six-factor economic realities test, which must be applied consistently with the broad scope of the FLSA. These factors are 1) the extent to which the work performed is an integral part of the employer's business; 2) the worker's opportunity for profit or loss depending on his or her managerial skill; 3) the extent of the relative investments of the employer and the worker; 4) whether the work performed requires special skills and initiative; 5) the permanency of the relationship; and 6) the degree of control exercised or retained by the employer. None of the six-factors is determinative; instead, the DOL states that they are indicators of the broader concept of economic dependence, which is the ultimate determination. Importantly, neither an employee's job title or an agreement between the worker and the employer factor into the analysis of whether a worker is an employee or an independent contractor. It is the reality of the working relationship that is determinative of an individual's employee or independent contractor status.

The DOL's conclusion is that most workers are employees under the FLSA and are thus entitled to all of the protections afforded employees. Therefore, employers need to be proactive and regularly revisit and reassess their use and classification of independent contractors to avoid liability for misclassification. If an individual is being treated like an employee, he or she needs to be classified as an employee. Employers who do otherwise are likely to find themselves facing litigation.

EMPLOYMENT LAWSCENE ALERT: TRANSGENDER EMPLOYEES AND BATHROOMS—WHAT SHOULD AN EMPLOYER DO?

A few weeks ago, we posted a blog about the protection of transgender employees under Title VII. Since then, Caitlyn Jenner has graced the cover of Vanity Fair, the EEOC has further solidified its position on the matter, and OSHA has weighed in on the issue.

One matter that has come up in many of the transgender discrimination lawsuits that have been filed to date is the use of bathrooms. This is the situation in the most recent lawsuit by the EEOC. It alleges that a Minnesota company discriminated against a transgender employee by not letting her use the women's restroom and subjecting her to a hostile work environment.

Likely in response to these issues, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued "A Guide to Restroom Access for Transgender Workers." OSHA requires, among other things, that employees are provided with sanitary and available restrooms. It is estimated that 700,000 adults in the United States are transgender, and OSHA stated that restricting employees to restrooms that do not conform with their gender identities or by requiring them to use a segregated gender-neutral or other specific restrooms singles transgender employees out and potentially makes them fear for their safety. Therefore, OSHA recommends that all employees should be permitted to use the facilities that correspond to their gender identity, and each employee should determine the most appropriate and safe option for him or herself. OSHA proposed two other optional solutions: 1) single occupancy, gender-neutral facilities for all employees; or 2) use of multiple-occupant, gender neutral restrooms with lockable single occupant stalls for all employees. Further, OSHA's best practices recommend that employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to appropriate facilities.

Based on the EEOC's current litigation trend and OSHA's best practices recommendation, employers should permit all employees to use the facilities that correspond with their gender identity. For now, the stance of the federal government is that employees should have unrestricted access and use of restrooms according to their full-time gender identity. Employers will need to deal with these situations on a case-by-case basis to find solutions that are safe, convenient, and respectful.