



Employee & Labor Relations

June 16, 2011

The following employment and labor report has been provided by N.G.A.'s labor counsel Jay Krupin and Kara Maciel of the firm Epstein, Becker, and Green as a member service for N.G.A.'s membership.

Final EEOC Regulations Take Effect Regarding the ADA Amendments Act

The Equal Employment Opportunity Commission ("EEOC") has issued final regulations ("Regulations") for the ADA Amendments Act of 2008 ("ADAAA"), which took effect on May 24, 2011. The Regulations stress that the definition of "disability" is to be resolved in favor of broad coverage to make it easier for an individual seeking protection under the Americans with Disabilities Act ("ADA" or "Act") to establish that he or she has a disability.

Notably, the Regulations keep the ADA's definition of the term "disability" as (1) a physical or mental impairment that substantially limits one or more major life activities ("actual disability"), (2) a record of such an impairment, or (3) being regarded as having such an impairment ("regarded as disabled"). The Regulations, however, simplify the determination of who has a "disability" and interprets the definition's terms more broadly. Specifically, with respect to actual disability, the Regulations provide an expanded and non-exhaustive list of what constitutes a "major life activity." For example, "the operation of a major bodily functions" such as "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" are considered major life activities. Additionally, the Regulations set forth the following rules of construction in determining whether an impairment "substantially limits" a major life activity and, thus, constitutes a disability:

1. The term "substantially limits" is to be construed broadly;
2. A significant or severe restriction is not required, and constitutes a disability if it substantially limits the abilities of the individual as compared to the general population;
3. Extensive analysis is not required;
4. An individualized assessment is required;
5. Scientific, medical, or statistical analysis is not required;
6. No consideration should be given for mitigating measures (e.g., prosthetic devices, medication, etc.), except for ordinary eye glasses or contact lenses;
7. Impairments that are episodic or in remission are disabilities if they substantially limit a major

life activity when active;

8. One substantial limitation is sufficient; and
9. The effects of an impairment lasting fewer than six months can be substantially limiting.

With respect to "regarded as" disabled, the Regulations focus on how the individual is treated due to an actual or perceived impairment rather than on the employer's belief regarding the impairment. Additionally, an individual who only asserts a "regarded as" disabled claim is not entitled to reasonable accommodations.

Due to the ADAAA and the Regulations, most ADA claims will now focus on whether the applicant or employee is qualified for the job, whether a reasonable accommodation was offered, whether the employer engaged in the interactive process to discuss possible accommodations in good faith, and whether any employer action was caused by an individual's disability, record of disability, or being regarded as disabled. Accordingly, all grocers should be implementing the following practices to ensure compliance with the new Regulations:

1. Review all job descriptions to assure that they accurately and fully capture all "essential functions" of the job;
2. Train supervisors on the new broad coverage of the ADA;
3. Always engage in the interactive process when an accommodation is requested and fully document your organization's efforts in the interactive process;
4. Review language in any policies and employee handbook to make certain they are consistent with the new Regulations; and
5. Review your employment applications and any pre-hire inquiries that might elicit information about an applicant's disability, and determine if they are appropriate.

U.S. Supreme Court Clarifies the Cat's Paw Doctrine

In *Staub v. Proctor Hospital*, the U.S. Supreme Court ruled that an employer could face liability for employment discrimination based on the nondiscriminatory actions of a decision maker who was influenced by the discriminatory animus of lower-level supervisor(s).

In *Staub*, Mr. Staub was a military reservist who claimed that his immediate supervisor was hostile to his military obligations. According to Mr. Staub, the supervisor fabricated a disciplinary incident due to his hostility and reported it to the Vice President of Human Resources ("VP"). The VP ultimately fired Mr. Staub based upon the supervisor's report.

The Supreme Court reversed the Seventh Circuit Court of Appeals' finding that a discrimination case "could not succeed unless the lower-level supervisor exercised such 'singular influence' over the decision maker that the decision to terminate was the product of 'blind reliance'" (e.g., the decision maker was simply the cat's paw of the lower level supervisor).

According to the Supreme Court, as long as the biased supervisor "designed and intended to produce the adverse action" and caused the adverse employment decision, the employer may face liability notwithstanding an independent investigation. The Court noted, without articulating specific guidelines,

that traditional principles of proximate causation may, in some instances, shield employers from liability "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be liable."

This decision is particularly important for employers because it will make it more difficult to succeed on a case pre-trial where more than one person participated in a decision and at least one of them had allegedly discriminatory motives that infected the decision-making. Accordingly, the independent investigation and the documentation supporting any discipline and termination will be especially important to justify a legitimate adverse employment action.

NLRB's Campaign Against Facebook Firings

On May 9, 2011, the National Labor Relations Board ("NLRB") filed an unfair labor practice complaint against Hispanics United of Buffalo, Inc. ("Hispanics United"), a nonunionized, nonprofit organization, alleging that it unlawfully terminated five employees for posting harassing comments about a co-worker on Facebook. In this case, an employee of Hispanics United posted to her Facebook page a coworker's statement that the organization's employees did not do enough to help their clients. Four other employees responded to this post by defending their job performance and criticizing working conditions at Hispanic United, including workload and staffing issues. After learning of the Facebook postings, Hispanics United discharged all five employees, claiming their comments harassed the employee mentioned in the initial posting.

According to the NLRB's complaint, Hispanics United's termination of the five employees violated federal labor law by interfering with their right to engage in concerted activity for their mutual aid or protection. The NLRB claims that the Facebook postings were protected concerted activity because they involved conversations between the employees regarding the terms and conditions of their employment. The complaint is scheduled for a hearing before an NLRB administrative law judge on June 22, 2011.

Notably, the Hispanics United complaint is the NLRB's third attack on workplace social media issues within eight months, and employers can expect the Board to continue to be active in this area. With social media at the forefront of the NLRB's agenda, you must tread carefully when confronted with these workplace issues. Specifically, grocers should consult with counsel before considering any disciplinary action against employees for their social media activities. Additionally, grocers should evaluate any social media policies to make certain that the provisions cannot be interpreted to limit employees' ability to communicate about the terms and conditions of their employment.

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