[employment law quarterly] ELQ

workplace & family law | cleveland | columbus | zrlaw.com

Volume XIX, Issue i

Akron United: The Rubber City Passes New Law to Combat Discrimination

By Emilie M. Carver*

On March 20, 2017, the City of Akron joined a growing list of Ohio cities with non-discrimination ordinances when Mayor Dan Horrigan signed Ordinance Number 82-2017 into law. The new law protects Akron residents and visitors against discrimination in employment, housing, and public accommodations, and creates the Akron Civil Rights Commission to hear complaints and enforce the new law. The Mayor and City Council "wish to affirm the dignity and worth of all people and provide certainty to the residents and visitors of Akron that unlawful discrimination will not be tolerated in this City."

The new ordinance is structured similarly to Ohio's statewide anti-discrimination law, but includes protected classes not covered by state (or federal) law. Akron's ordinance, like Ohio law, prohibits discrimination based on a person's age, race, color, religion, national origin, ancestry, disability, sex, and military status, but adds protections for creed, marital status, familial status, gender identity or expression, and sexual orientation. Akron's law follows the trend set by Cincinnati, Cleveland, Columbus, Dayton, Toledo, and Youngstown, among other Ohio cities.

With respect to employment discrimination, Akron's law applies to employers that regularly employ four or more individuals. Similar to Ohio law, Akron's law also applies to "any person acting on behalf of an employer, directly or indirectly." Attorneys representing employees may argue the law provides for individual supervisor liability.

The ordinance also establishes the Akron Civil Rights Commission, whose five members will be appointed by the Mayor and confirmed by the Akron City Council. The Commission will "aim to include a diverse set of members from classes of individuals protected from discrimination" by the new ordinance. Commission members must be residents of the City of Akron.

The Akron Civil Rights Commission will hear and investigate complaints brought by individuals who believe they have been discriminated against. A party must file a complaint with the Akron Civil Rights Commission within one year of the alleged discriminatory practice. The new ordinance does not limit the right to file complaints with other agencies, including the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission. Notably, the Akron Civil Rights Commission is empowered to order some substantial remedies for discrimination: hiring, reinstatement, upgrading or promotion; back pay; compliance reporting; notice posting; damages for injury, humiliation, and embarrassment; costs; attorney fees; and civil penalties to the Akron Civil Rights Commission of up to $1,000.00 for each violation.

***Emilie M. Carver** practices in all areas of employment and labor law. If you have questions regarding Akron's new non-discrimination ordinance, please contact Emilie (emc@zrlaw.com) at (216) 696-4441.

The Saga Continues: Sixth Circuit Rules Employment-Related Class Action Waivers In Arbitration Agreements Are Unenforceable

By Helena Oroz*

The U.S. Court of Appeals for the Sixth Circuit recently issued a much-anticipated decision that cracked the current class action waiver circuit court split even wider. In *NLRB v. Alternative Entertainment, Inc.*, the Sixth Circuit held that an arbitration provision requiring employees to arbitrate individually all employment-related claims is unenforceable because it violates the National Labor Relations Act's ("NLRA") guaranteed right to collective action. 858 F. 3d 393 (6th Cir. 2017).

The case began, as so many do, with an employee's termination. A field technician for Alternative Entertainment, Inc. ("AEI") voiced his concerns about AEI's changes to its compensation structure to coworkers, a manager, AEI's Chief Financial Officer, and even the company's president, repeatedly referring to technicians collectively. Two days after the employee spoke with the CFO and emailed the president, the company terminated his employment because the "relationship [was] not working out."

The employee filed charges with the National Labor Relations Board ("NLRB"). An Administrative Law Judge determined that the company violated the NLRA, and the NLRB adopted that decision and filed an application to enforce the order. And that, in short, is how an employee literally makes a federal case out of discontent with compensation practices.

Specifically at issue in the case was AEI's "Open Door Policy and Arbitration Program." AEI's arbitration program required employees to resolve employment-related disputes exclusively through binding arbitration. The company's arbitration agreement contained a provision stating that the parties agreed that "a claim may not be arbitrated as a class action…and that a claim may not otherwise be consolidated or joined with the claims of others." The NLRB concluded that this provision violated the NLRA because it prevented employees from taking any concerted legal action.

In reviewing the NLRB's decision, the Sixth Circuit considered the compatibility of the Federal Arbitration Act ("FAA"), which governs the enforceability of arbitration agreements, and the NLRA, which protects the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," commonly referred to as "Section 7 rights." The Court determined that the statutes do not conflict because of the FAA's savings clause. The FAA's savings clause provides that arbitration agreements are as enforceable as other contracts, but likewise are not any more enforceable than any other contracts "at law or in equity." In other words, the Court reasoned that the FAA's savings clause does not require enforcement of any arbitration agreement with illegal provisions. In this case, the arbitration agreement at issue included provisions that prohibited collective and class action suits – illegal under the NLRA as interfering with employees' Section 7 rights.

In so holding, the Sixth Circuit agreed with the Seventh and Ninth Circuits' previous holdings on the issue and completely disagreed with the Fifth Circuit's previous holdings that arbitration provisions mandating individual arbitration of employment-related claims are enforceable. Now it is up to the U.S. Supreme Court to decide how the saga ends. Before the Sixth Circuit even had issued this decision, the Supreme Court had already granted writs of certiorari this past January in *Morris v. Ernst & Young, LLP* (9th Circuit, 2016), *Lewis v. Epic Systems Corp.* (7th Circuit, 2016), and *Murphy Oil USA, Inc. v. NLRB* (5th Circuit, 2015) and consolidated the three cases. The consolidated cases are currently in the briefing stage, so it remains unclear when the Supreme Court will actually issue a decision to resolve this ongoing circuit split.

In the meantime, if you are an employer with an arbitration program, keep tabs on these developments – and perhaps prepare for a change to your program pending the Supreme Court's decision. Another take away, beyond the immediate scope of this article? Don't rush to terminate an employee you find annoying because he or she is complaining about compensation changes or other terms and conditions of employment, especially on behalf of a group. It's a good way to start the NLRB ball rolling and end up in federal court.

***Helena Oroz**, an OSBA Certified Specialist in Labor and Employment Law, is a member of the firm's Labor and Employment Groups and has extensive experience with arbitration agreements. If you have questions regarding your arbitration program, contact Helena at hot@zrlaw.com or (216) 696-4441.

More Data, More Problems? EEO-1 Now Requires Reporting of Summary Pay and Hours Worked Data

By Lisa A. Kainec*

If you thought the Equal Employment Opportunity Commission ("EEOC") was all up in your business before, 2017 won't bring you any relief. Beginning with 2017 data, the EEOC has created additional reporting requirements for employers required to submit an Employer Information Report, or EEO-1.

Specifically, certain employers must now submit summary pay and hours worked data for their workforce. Starting with the 2017 report, due March 31, 2018:

- Private employers and federal contractors/subcontractors with 100 or more employees will submit summary pay data.
- Federal contractors/subcontractors with 50 to 99 employees will continue to report the same job category and demographic data as required in previous years (no summary pay data).
- Private employers with 99 or fewer employees and federal contractors/subcontractors with 49 or fewer employees are not required to submit an EEO-1 report.

Until now, the EEO-1 required all reporting employers to categorize employees by job and demographics. Employers first categorize their employees into ten job categories, which remain the same (Executive/Senior Level Officials and Managers; First/Mid-Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; and Service Workers). Next, employers report the number of employees within each job classification by sex and ethnicity or race (White; Black or African American; Native Hawaiian or Pacific Islander; Asian; Native American or Alaska Native; or Two or More Races).

Now, applicable employers also must report summary pay data. The revised EEO-1 contains twelve pay bands into which the employer must categorize employees. Employers should pull employee pay data from Box 1 of employee Forms W-2 to prepare the revised EEO-1 but should not report individual pay or salaries. Instead, employers will mark the number of employees in a pay band that fall within a particular job category and demographic. For example, an employer may report five Native Hawaiian men in pay band 10 ($128,960 – $163,799) in the Executive/Senior Level Officials and Managers job category. See the new EEO-1 here: https://www.eeoc.gov/employers/eeo1survey/2016_new_survey_2.cfm.

In addition, applicable large employers must count and report hours worked for employees. Employers will report the total number of hours worked for all employees in a particular pay band and may count hours based on records required under the Fair Labor Standards Act ("FLSA"). For FLSA non-exempt employees, employers should report based on the hours those employees worked. For FLSA exempt employees, employers may: 1) report 20 hours per week for each part-time employee and 40 hours per week for each full-time employee; or 2) report the actual number of hours worked by each exempt employee. For example, four employees in a particular ethnicity and pay band (e.g., Black/African American in pay band 11) could work the following hours: 2,080; 2,500; 1,660; and 1,040. In that case, the employer would report 7,280 hours worked in the year in the Black/African American and pay band 11 column/row. See this portion of the new EEO-1 here: https://www.eeoc.gov/employers/eeo1survey/2016_new_survey_3.cfm.

Since applicable employers now must submit cumulative information for a given year (e.g., hours worked), the EEOC also changed the reporting deadline. Previously, the EEOC required employers to submit their EEO-1 report by September 30th in a given year. Now, the deadline is March 31st. Therefore, applicable employers must submit the next EEO-1 report, which reflects 2017 data, by March 31, 2018 (and will submit 2018 data by March 31, 2019, etc.).

The EEOC also modified the "workforce snapshot period" – the three-month window during which employers choose one pay period to identify and count employees for EEO-1 reporting purposes. Previously, the "workforce snapshot period" was July 1 to September 30. Under the revised EEO-1 report, that "workforce snapshot period" is from October 1 to December 31. Once the employer identifies the individuals on which it will report, it reports their information, including summary pay and hours worked data, for the calendar year.

While employers have some time to adjust to the new reporting requirements, they should begin developing and identifying processes for gathering the newly required data now.

***Lisa A. Kainec**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment and labor law. If you have questions about the EEO-1 or its new reporting requirements, contact Lisa (lak@zrlaw.com) at 216.696.4441.

Top Five Handbook Policies for Employers to Review in 2017

By Brad E. Bennett*

Federal and state legal developments over the past couple of years have brought changes that impact workplace policies and procedures. While President Trump has indicated that federal employment regulations will be pulled back under his administration, employers should make sure their handbooks are up to date in order to comply with current federal and state laws. Here are five policy provisions to review based upon federal and state developments over the past couple years.

1. Whistleblower Provisions

Employers should make sure their handbook provisions do not inadvertently discourage employees from reporting potential legal violations to the employer or to government agencies. The Equal Employment Opportunity Commission ("EEOC") has been targeting any policy that may be interpreted as curbing an employee's right to go to the EEOC—or any other agency—to report violations of the law. Reviewing language throughout a handbook in order to address this issue is encouraged. Further, ensuring that a strong anti-retaliation policy or provision is contained in the handbook will prove to be invaluable.

2. Background Checks

Public employers also should take a close look at their background check policies and procedures to make sure they align with Ohio's "ban-the-box" law that went into effect in March of 2016. The law prohibits Ohio public employers from asking about criminal convictions in the initial application.

The EEOC also has previously issued an Enforcement Guidance regarding the use of criminal background checks in employment. The EEOC Guidance, which is applicable to both public and private sector employers, should also be taken into consideration when revising background check policies and procedures. The EEOC Guidance states that policies which exclude applicants with any criminal conviction from employment are considered discriminatory. Instead, the EEOC requires employers to determine whether specific criminal conviction exclusions are "job related and consistent with business necessity." To make such a determination, the EEOC utilizes a three-factor test utilized by the Eighth Circuit Court of Appeals in *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975) (the "*Green* factors"). Based upon the *Green* factors, the EEOC will review whether the employer considered the following in denying employment based upon a criminal conviction:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

Therefore, employers are encouraged to review their background check policy and procedure in light of Ohio's "ban-the-box" law and the EEOC Guidance.

3. Drug Testing Policies

As of September 2016, medical marijuana is legal in Ohio. However, nothing in the new law interferes with an employer's right to prohibit the use, possession or distribution of marijuana in the workplace. Because marijuana is still listed on Schedule I of the Federal Controlled Substance Act, it is also still illegal under federal law. Therefore, Ohio's medical marijuana law specifically authorizes employers, through a drug-free workplace policy, to treat medical marijuana's presence in an employee's system as a violation of the policy. It is advisable for employers to make it clear in their drug-free workplace policies that detection of the presence of medical marijuana in an employee's system through a drug test will violate the policy.

4. Weapons Ban Policies

Effective March of 2017, Ohio's new concealed carry law prohibits both public and private employers from having or enforcing policies that restrict valid concealed carry holders (as well as covered active military members) from transporting or storing their firearms and ammunition in their personal vehicles. While nothing in the new law requires employers to allow concealed carry holders to bring their weapons into employer buildings or employer owned or operated vehicles, it does permit concealed carry holders and covered active military members to store their personal firearms and ammunition in their personal vehicles as long as the vehicle is in a location where it is otherwise permitted to be (e.g. a parking lot).

As a result, weapons policies, vehicle usage policies, and other applicable policies should be reviewed and revised in order to ensure continued compliance with Ohio law in this area.

5. Workplace Accommodations and Light Duty Policies

By now, employers are well aware of their obligation to provide a "reasonable accommodation" to a qualified employee or applicant with a disability under Ohio and Federal law. As such,

most employers already have a "disability accommodation" policy. However, an employee or applicant with a disability is not the only area where employers must provide a reasonable accommodation.

Title VII of the Civil Rights Act ("Title VII") also requires employers to provide reasonable accommodations for an employee's religious practices. In 2015, the requirement to provide religious accommodations was brought to the forefront when the U.S. Supreme Court found that Abercrombie & Fitch failed to inquire whether a reasonable accommodation to its dress code policy could be provided when it rejected a Muslim applicant who wore a hijab to the job interview. *See EEOC v. Abercrombie & Fitch*, 135 S.Ct. 2028 (2015).

In the case of *Young v. UPS*, 135 S.Ct. 1338 (2015), the U.S. Supreme Court also held that employer light duty policies that are limited to only workplace injuries and which cannot be utilized by pregnant employees violate the Pregnancy Discrimination Act and Title VII. The U.S. Supreme Court made it clear that polices must treat "women affected by pregnancy… the same for all employment-related purposes… as other persons not so affected but similar in their ability or inability to work." As a result, light duty policies and accommodation policies should address female employees who, due to pregnancy, are limited in their ability to work.

Based upon the U.S. Supreme Court's duel opinions regarding religious accommodations and accommodating pregnancy-related limitations, employers should take a second look at both their light duty and workplace accommodations policies and procedures. Employers should spell out in their handbooks not only the legal basis for accommodations but also the employer's intention to comply with them when they are reasonable.

So, there you have it — the top five handbook policies to review for 2017 (thus far). Of course, don't forget the value of supplying employee and management training once your handbook policies are revised. Managers also should be trained regarding their obligations when confronted with a request for an accommodation or for light duty under the law and under the handbook policy.

***Brad E. Bennett**, an OSBA Certified Specialist in Labor and Employment Law, is a member of the firm's Labor and Employment Groups and practices out of the firm's Columbus, Ohio office. If you have questions regarding your company's handbook policies, contact Brad at beb@zrlaw.com or (614) 224-4411.

Z&R SHORTS

Please join Z&R in welcoming Sean Kelly to its Employment and Labor Groups.

Sean Kelly joined Zashin & Rich in 2017. He represents public and private sector employers in all aspects of labor and employment law and employee benefits disputes. Sean has extensive litigation experience before state federal courts and administrative agencies. His representative cases include complex occupational safety and health, workplace intentional tort, employment discrimination, and whistleblower matters. Sean also has experience handling disputes arising under the Employer Retirement Income Security Act of 1974 (ERISA) and state insurance law. Sean has appeared before the Supreme Court of Ohio, and has set Ohio precedent in the area of workers' compensation. In addition to his litigation practice, Sean counsels employers in EEO, OSHA, employee benefits, executive compensation, wages and hours, and other compliance matters. He brings over a decade of experience in highly specialized industry sectors including aviation, maritime, health care, and oil and gas production. His practice includes helping employers properly address inspections by government agencies including OSHA, NIOSH, and the FAA.

Upcoming Speaking Engagements

Monday, August 21, 2017

Patrick M. Watts presents *"Creating Fair Labor Standard Act (FLSA) Compliance Strategies That Work"* at the National Business Institute's seminar on Advanced Employment Law held at the Hilton Garden Inn Akron in Akron, Ohio.

Wednesday–Friday, September 13–15, 2017

Patrick M. Watts and **Lisa A. Kainec** present *"Medical Marijuana and the Heroin Epidemic: Impact on the Workplace"* at the Ohio Society for Human Resource Management seminar held at Kalahari Resorts in Sandusky, Ohio.

Monday, October 2, 2017

Jonathan J. Downes presents *"Labor and Employment Law Challenges"* at the Ohio Association Chiefs of Police New Chiefs' Workshop held at the Crowne Plaza Columbus North-Worthington in Columbus, Ohio.

Tuesday, October 24, 2017

Lisa A. Kainec presents *"Employment Law Hot Topics and Legislative Update"* at the Medina Society for Human Resource Management seminar held at Weymouth Country Club in Medina, Ohio.

Substance Over Form: Employers Need the Right Evidence to Combat Disability Discrimination Claims

By David P. Frantz*

Even though a stock clerk could not fulfill his job's lifting requirements, a court concluded that he was qualified for the job. In *Camp v. Bi-Lo, LLC*, 662 Fed. Appx. 357 (6th Cir. 2016), a grocery store discharged a stock clerk when the clerk's doctor did not clear him to lift 60 pounds, which was a "frequent" requirement of his job. The clerk sued, claiming the store discriminated against him on the basis of his disability in violation of the Americans with Disabilities Act ("ADA").

At issue in *Camp* was whether the stock clerk was qualified for his position, given his inability to lift 60 pounds and the employer's contention that this was an essential job function. When determining whether a particular job function is essential, courts consider a number of factors: 1) the employer's judgment; 2) the written job description; 3) the amount of time the employee spends performing the function; 4) the consequences of not requiring the employee to perform the function; 5) the work experience of previous employees who held the position; and 6) the current work experiences of employees in similar jobs.

The court in *Camp* rejected the employer's reliance on the stock clerk job description. The employer created the job description more than thirty years after the clerk started working for the company. In addition, the clerk's immediate supervisor testified that heaving lifting was not an essential job function. The court found that a supervisor's testimony may rebut claimed essential functions detailed in a job description.

Further, the employer submitted nothing more than the job description to prove two facts: 1) that heavy lifting took up a significant percentage of the clerk's job; and 2) the clerk's inability to lift more than 35 pounds caused an actual burden. In contrast, everyone who worked with the clerk testified that heavy lifting was a small and non-important part of the job. The court also concluded that any consequences resulting from the clerk's disability were *de minimis*, as the clerk and his co-workers had an arrangement alleviating the clerk from having to lift the heaviest items. Those co-workers also testified that such an arrangement would have minimal effect on store operations. Finally, the court considered that the clerk fulfilled his job duties for years with his disability and the help of co-workers.

The *Camp* case teaches employers several important lessons. Disability discrimination cases are fact-specific. It is imperative that employers engage in an interactive process with individual employees to determine if any reasonable accommodations exist. In addition, employers should fully evaluate whether a job function is truly essential and should not simply rely on an old written job description. Employers also should ensure that management and supervisors have the same understanding regarding a job's essential functions.

***David P. Frantz** practices in all areas of employment and labor law. If you have questions about this decision, disability discrimination, or reasonable accommodations, please contact David (dpf@zrlaw.com) at 216.696.4441.