

ISB 2014 Annual Meeting Employment and Labor Law Update

ISB Employment and
Labor Law Section
Wednesday, September 24, 2014

Presented by:

- Kara Heikkila
Hawley Troxell Ennis & Hawley LLP
- Colleen D. Zahn, Deputy Attorney General
Idaho Attorney General's Office
Civil Litigation Division

With Thanks to
Kimberly Evans Ross
and Brad Williams,
our co-presenters at the
July 18, 2014 presentation.

Overview

- A Review of Federal Agency Trends and Significant Cases
 - Equal Employment Opportunity Commission
 - National Labor Relations Board
 - Department of Labor
 - Office of Federal Contract Compliance Programs
- Panel Discussion
 - Recent Federal Employment Decisions



EEOC Responsibilities, Enforcement, and Updates

Brad Williams
July 2014

Moffatt Thomas Barrett Rock & Fields, Chtd.



THE NLRB AND SOCIAL MEDIA IN THE WORKPLACE

Kimberly Evans Ross

July 2014

Moffatt Thomas Barrett Rock & Fields, Chtd.

WELCOME TO THE NLRB

THE NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 151-169

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices.

National Labor Relations Board

- The Board has five Members and “primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.”



Mark Gaston Pearce, Chairman
Nancy J. Schiffer
Kent Y. Hirozawa
Philip A. Miscimarra
Harry I. Johnson, III

Employee Rights Under the NLRA

Union Activity

Employees have the right to attempt to form a union where none currently exists, or to decertify a union that has lost the support of employees. Examples of employee rights include:

- Forming, or attempting to form, a union in your workplace;
- Joining a union whether the union is recognized by your employer or not;
- Assisting a union in organizing your fellow employees;
- Refusing to do any or all of these things;
- To be fairly represented by a union.

Employee Rights Under the NLRA

Non-Union Activity

Employees who are not represented by a union also have rights under Section 7 of the NLRA.

- Prohibits employers from restraining employees from conducting “concerted activity”
- For their “mutual aid & protection”

Three Questions the NLRB Considers

- Is the activity concerted?
 - Generally requires 2 or more employees acting together, but just 1 can act if s/he involves a co-worker before acting or acts on behalf of others.
- Is the activity for “mutual aid and protection” of employees?
 - Actions must improve pay, hours, safety, workload, etc. of more than just the employee, otherwise it’s a personal gripe.
- Is the activity carried out in a way that causes it to lose protection?
 - Cannot engage in reckless or malicious behavior (i.e. sabotaging equipment, threatening violence, spreading lies about a product, revealing trade secrets, etc.).

COMMON SOCIAL MEDIA POLICIES

- Limit use of the internet for work related purposes only
- Prohibit use of work email addresses for personal social networking account
- Prohibit accessing unlawful materials on the internet

COMMON SOCIAL MEDIA POLICIES

- Reserve the right to monitor all company electronic resources use
- Caution managers about “friending” subordinates and the use of privacy controls
- Require consent to interception of e-mails (annually)

NLRB LIMITS POLICY OPTIONS

Social media policies prohibited by the NLRB:

- “directing” or “recommending” that employees not discuss workplace investigations of complaints with each other
- prohibiting social media postings that disparage or defame the company or coworkers

NLRB LIMITS POLICY OPTIONS, CONT'D

- advising against “friending” co-workers
- requiring employees to obtain permission to post information regarding the company
- prohibiting employee from using company logos or disclosing company affiliation
- blanket prohibition of disclosure of personal information about other employees

NLRB LIMITS POLICY OPTIONS, CONT'D

- blanket prohibitions on the release of confidential or non-public company information
- blanket prohibition on posting photos and videos of other employees
- completely banning access to social media at work (including break times)

For more information or questions,
please contact:

Kimberly D. Evans Ross

Moffatt Thomas Barrett Rock & Fields, Chtd.

900 Pier View Dr.

Idaho Falls, ID 83405

kde@moffatt.com

Tel. (208) 522-6700

Fax (208) 522-5111

Moffatt Thomas Barrett Rock & Fields, Chtd.

RECENT DEVELOPMENTS IN DOL'S WAGE AND HOUR DIVISION

Colleen D. Zahn
Deputy Attorney General
Civil Litigation Division
208-334-4157
colleen.zahn@ag.idaho.gov

The Opinions and Statements
Contained Herein Are Solely
Those of the Presenter and Not
Those of the Idaho Attorney
General or the Office of the
Attorney General.

U.S. Department of Labor

- Wage and Hour Division (WHD) administers Family Medical Leave Act and Fair Labor Standards Act, among others
- No local WHD office, but northern panhandle served by Seattle office
- Remainder of state served by Portland office

New WHD Administrator

- David Weil confirmed on April 28
 - Boston University business professor
 - Advocated “targeted enforcement” strategy, with industry specific “strike forces” to investigate employers seen as problematic
 - Such as hotels/motels, restaurants, bars, logistics companies, grocery stores, retail, health care, residential construction and janitorial services
 - Encouraged discontinuing scheduled investigations in favor of unannounced visits

FMLA Developments

- Notice of Proposed Rulemaking to Revise Definition of “Spouse” under FMLA
 - Move from “state of residence” rule to “place of celebration”
- Expected increase in on site FMLA audits
 - Focus on systemic FMLA issues
 - Broad document requests covering 2 year period
 - Employee interviews concerning process

FLSA Developments

- Extended minimum wage protections to domestic and companionship service workers (Eff. 1/1/15)
 - Multiple new fact sheets and administrator interpretations

FLSA Developments Cont'd

- White House direction to revamp overtime rules for white collar workers
 - Update and simplify exemption definitions for administrative, executive, professional and outside sales
 - Raise amount for salary basis test

FLSA Developments Cont'd

- Expected notice of proposed rulemaking to establish standards regarding application of Executive Order 13658
 - Executive Order raised minimum wage for federal contractors to \$10.10/hour

OFCCP RESPONSIBILITIES, ENFORCEMENT, AND UPDATES

Presented by:

Kara Heikkila

kheikkila@hawleytroxell.com

OFCCP

Federal contractor compliance – agency with oversight of an Executive Order and two statutes prohibiting discrimination and requiring affirmative action by employers doing business with the federal government

JURISDICTION

- Prohibits employment discrimination on the basis of race, sex, color, religion, national origin, disability or veterans' status:
 - Executive Order 11246
 - Rehabilitation Act
 - Vietnam Era Veteran's Readjustment Assistance Act ("VEVRAA")
 - Overlap with EEOC – antidiscrimination provisions, but not affirmative action obligations

THRESHOLD COVERAGE

- \$ thresholds that vary by Executive Order or statute
- Minimum employee numbers trigger affirmative action compliance
- Applies to prime contractor as well as subcontractors

ENFORCEMENT

- Audits of contractors – hiring, job testing, reasonable accommodation, terminations, compensation
- Compliance investigations
- Enforcement actions

SUBSTANTIAL CHANGES 2014

- Rules applicable to Veterans and the Disabled
- Framework unchanged since 1970s
- Unemployment rates for Veterans and Disabled higher than overall rates
- Goal of new rules to improve employment opportunities for Veterans and the Disabled

CHANGES TO RULES

- Outreach and recruitment effort assessments
- Hiring benchmarks and goals
- Solicitation of Disability and Veteran status on a pre-employment offer basis
- Changes to OFCCP audit procedures and processes

SIGNIFICANT CASE DEVELOPMENT

- *OFCCP v. Florida Hospital of Orlando*
- History of jurisdictional dispute (TRICARE providers)
- DOL issued a directive May 7, 2014, which placed a 5-year moratorium on affirmative action compliance investigations of TRICARE providers
- Jurisdiction remains case by case

A DISCUSSION OF RECENT FEDERAL EMPLOYMENT DECISIONS

Moderator:

Colleen D. Zahn

Deputy Attorney General

Civil Litigation Division

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Court Decisions

- **Escriba v. Foster Poultry Farms, 743 F.3d 1236 (9th Cir., Feb. 25, 2014)**
 - Employee requested 2 weeks vacation to care for ailing father – request was approved
 - Employee later asked if she could get additional 1-2 weeks unpaid leave – request denied
 - Supervisors questioned whether wanted FMLA – employee said no
 - Fired for failure to return to work or call in after 2 weeks vacation
 - Alleged employer could not let her decline FMLA

Court Decisions

- **Escriba v. Foster Poultry Farms, 743 F.3d 1236 (9th Cir., Feb. 25, 2014)**
 - An employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection.
 - “The employer could find itself open to liability for forcing FMLA leave on the unwilling employee.”

Court Decisions

- **In re Perez, 749 F.3d 849 (9th Cir., April 18, 2014)**
 - US DOL sued Washington State, alleging violations of FLSA overtime and recordkeeping provisions
 - Proof of violations based on statements by 400 employees, 350 of which were obtained after suit filed
 - Washington sought discovery of information and details concerning “affected employees”

Court Decisions

- **In re Perez, 749 F.3d 849 (9th Cir., April 18, 2014)**
 - DOL produced unredacted statements of 150 consenting witnesses and redacted statements for the remaining 250
 - DOL asserted “informant’s privilege”
 - Washington moved to compel responses
 - DOL moved for protective order
 - Washington argued not seeking identities of informants, but instead information for all affected employees
 - DOL asserted only information it had was for informants

Court Decisions

- **In re Perez, 749 F.3d 849 (9th Cir., April 18, 2014)**
 - Ninth Circuit issued Writ of Mandate
 - Held informant's privilege protected identity of all witnesses, including 350 who came forward after Complaint filed
 - Most information about witnesses was revealed, and information was not "essential" to Washington's defense

Court Decisions

- **In re Perez, 749 F.3d 849 (9th Cir., April 18, 2014)**
 - Burden-shifting scheme of *Anderson v. Mt. Clemens Pottery Co.* was key to analysis
 - DOL need only present “fairly representative testimony” from sample of employees to establish amount and extent of improperly compensated work
 - Sample would be 150 disclosed employees

Court Decisions

- **Sandifer v. United States Steel Corp., No. No. 12-417**
(U.S., January 27, 2014)
 - Held time spent donning and doffing protective gear was not compensable under FLSA
 - Turned on enforceability of CBA provision that time spent changing clothes not compensable
 - “Clothes” included pants, coats, etc. that served both a protective and a comfort function
 - Petitioner’s definition would render section meaningless, except for costumes

Court Decisions

- **Sandifer v. United States Steel Corp., No. No. 12-417**
(U.S., January 27, 2014)
 - Question is whether time at issue can, *on the whole*, be fairly characterized as time spent changing clothes or washing
 - If majority of time devoted to donning equipment or non-clothing items, then no even if some time spent changing clothes

QUESTIONS?

Thanks for Your Attention!