



**RELIGIOUS FREEDOM EXECUTIVE ORDER
 MAY AFFECT WORKPLACE RULES**



Edward H. Trent

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On May 4, 2017, President Trump issued an Executive Order “Promoting Free Speech and Religious Liberty.” The basis of the Order was to emphasize the administrative branch’s obligations to uphold and defend “Americans’ first freedom” of “the fundamental right to religious liberty” that “protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.” Contrary to the Obama Administration’s Commission on Civil Rights,

this Executive Order instructs federal agencies to follow the federal Religious Freedom Restoration Act - which prohibits any infringement on religious liberty absent a compelling governmental interest and requires the use of the least restrictive means available - and reconsider rules that restrict religious freedom.

The Order specifically focuses on two issues. First, the Order addresses the Department of the Treasury and directs that the Department not take “adverse action” against “any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective.” Second, the Order directs the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services to “consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate” (known as the

“contraception mandate”). Such a modification would likely affect religious orders such as the Little Sisters of the Poor and closely held corporations with religious objections to the mandate such as Hobby Lobby.

The Order, however, does not expressly affect existing federal rules prohibiting government contractors from discrimination based on sexual orientation and gender identity, and does not specifically address agencies such as the Equal Employment Opportunity Commission (EEOC) which has sought to expand current law by redefining discrimination “because of sex” to include sexual orientation and gender identity issues. The President upheld the Executive Order on government contractors in January.

The May 4 Executive Order places no requirements on the agencies regarding the timing or scope of their reviews, so the actual effect of the Order remains uncertain.

The conflict between religious belief/speech and expanding protections based on sexual orientation and gender identity is not addressed in this Order. How federal agencies such as the EEOC and the courts will balance these issues under existing law remains to be seen, but there is nothing in this Order that appears to affect the EEOC’s drawing of its line in favor of LGBT (lesbian, gay, bi-sexual, transgender) protections over religious freedom. So, while the left decried the Order as allowing unfettered discrimination and the right decried the Order as not doing enough to protect religious free exercise, the Order is the administration’s first “toe in the water” of the ongoing debate in society, the law, and the workplace on human sexuality and religious teaching on this issue.

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Howard B. Jackson

“[T]he data shows that the quicker the election, the higher the union win rate.”

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that the length of time from the filing of the petition to the election date has been reduced dramatically, from around

DATA SHOWS NLRB QUICKIE ELECTION RULES NOT CHANGING MUCH

The bottom-line results from the National Labor Relations Board (NLRB) “quickie” or “ambush” election rule indicate that the rule has indeed sped up election dates. Even so, overall election results have not changed much. NLRB data shows that unions won elections about 66% of the time before the quickie election rule went into effect in 2015, and have won at about that same rate afterward. The data does show

39 days during the year before the rules took effect to about 24 days the following year. Also, the data shows that the quicker the election, the higher the union win rate. For example, when the election was held within two weeks or less of the filing of the petition, unions won 82% of the time.

The new election rules have not reversed the decline of unions. The number of workers who selected representation via an NLRB election was the lowest in four years, according to the published data. While that is encouraging, employers who may be targets for organizing activity would be wise to engage in preventive measures and advance preparations in view of the increasingly shortened election periods.

REFUSAL TO EXTEND LEAVE FOUND NOT TO VIOLATE ADA



Mary C. Moffatt

“A recent federal appeals court ruling gives employers some encouragement ...”

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to recognize exceptions to the normal separation policies in order to extend a leave to accommodate a disability.

A recent federal appeals court ruling gives employers some encouragement that there is some end to this process. *Delgado-Echevarria v. AstraZeneca Pharm., LP*, No. 15-2232 (C.A. 1, 5/2/17). The First Circuit noted that granting a leave to an employee with a disability is often a reasonable accommodation under the Americans with Disabilities Act (ADA). However, the court said that the ADA does not require an employer to grant indefinite leave and hold a job

open if an employee has no estimate of when he or she will be able to work again.

In this case, the plaintiff had already been out on leave for about five months, and after further inquiry the plaintiff’s physician said her symptoms would not clear up for another twelve months and she might be able to return to work then. The court found that the plaintiff failed to meet her burden of showing a twelve-month leave extension would be reasonable. Specifically, the plaintiff presented no evidence that the additional leave would “likely enable” her to return to work. Further, an additional twelve-month leave, on top of the five months already taken, could not meet the “facially reasonable accommodation” test, according to the court. The court noted that other courts, confronted with similar issues, have found that even shorter extensions were not reasonable.

Editor’s Note: Although the employer won this particular case, these types of cases are controversial and advice of counsel is recommended. Employers would be wise to write administrative separation policies with provisions allowing for exceptions for reasonable accommodations if the employee makes a timely request prior to the expiration of the leave. Further, it is also helpful to write a “reminder” letter to employees indicating their leave is about to expire and they will be separated unless they make a timely request for reasonable accommodation that would not result in an undue hardship to the employer.

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Karen G. Crutchfield

"[A] supervisor murdered an employee while they attended a wedding hundreds of miles away from their worksite."

from their worksite. The mother of the deceased employee sued Home Depot alleging it knew of the supervisor's history of verbal abuse and should have terminated him long before. This case raises issues pertaining to supervisors using their authority to harm co-workers far away from work.

EMPLOYERS SUED FOR NEGLIGENCE WHERE EMPLOYEE COMMITS VIOLENT ACT ELSEWHERE

Employers are well familiar with the concept that they may be sued for negligence for maintaining the employment of a sexual or other type harasser, particularly where another employee is adversely affected in the workplace. However, Employer's may not realize that they may be found negligent for an employee's violent acts toward others outside the workplace. One case involves a recent Seventh U.S. Circuit Court of Appeals ruling in the Anicich v. Home Depot case, in which a supervisor murdered an employee while they attended a wedding hundreds of miles away

A recent lawsuit in Florida attempts to expand this concept, where the employer of the gunman that engaged in the shooting rampage at a nightclub in Orlando, FL (Clon v. G.4S PLC, S.D. Fla. No. 2: 17-cv-14100, complaint filed 3/22/17) has been sued for failing to take action once it became aware of it's employee/security guard's threatening behaviors and terrorist sympathies. The lawsuit claims that the gunman told coworkers at his employment site that he associated with terrorists and /or would have a terrorist organization engage in violent acts, so that the employer should have moved to revoke the employee's security guards' firearm license and taken other steps.

This development presents another concern to employers receiving information alleging violent tendencies on the part of one or more of its employees. In both of these cases, the employer is alleged to have turned a "blind eye" toward it's employee's bad behavior and taken no action to prevent harm to co-workers and/or the public. These cases illustrate that there is no "bright line" rule outlining an employer's duty to protect others from an employee known to have violent tendencies or a pattern of harassing or threatening behaviors.

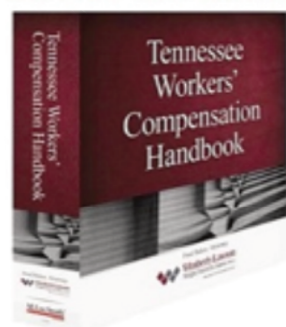


KNOW YOUR ATTORNEY - DAVID J. OTTEN

DAVID J. OTTEN joined Wimberly Lawson Wright Daves & Jones in October of 2016, and works out of the firm's Knoxville, Tennessee office. He was born and raised in Memphis, Tennessee, but moved to Knoxville in 2005 to attend The University of Tennessee, where he earned his Bachelor of Arts in Psychology in 2009. David attended the University of Tennessee College of Law in Knoxville, Tennessee, graduating cum laude in 2012. While in law school, David was an Editor on *Transactions: The Tennessee Journal of Business Law* and completed the College of Law's Concentration in Business Transactions. In addition to having a case synopsis published in *Transactions*, David practiced in the College of Law's Small Business Clinic, where he assisted clients with

formation of both for-profit and non-profit corporations, intellectual property issues, as well as tax planning and contract negotiation. David was admitted to the Tennessee Bar in 2012, and has practiced Insurance Defense, specializing in workers' compensation matters. David is currently a member of the Knoxville Bar Association and the Tennessee Bar Association. He lives in Knoxville with his wife Kelsie, and enjoys reading, woodworking, biking, UT Football, and spending time with his family and friends.

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Fredrick R. Baker is a Member in the Cookeville, Tennessee, office of Wimberly Lawson Wright Daves & Jones, PLLC, which he joined in 2001. His law practice includes an emphasis in workers' compensation and employment discrimination, as well as ADA and FMLA compliance. Fred is on the Advisory Board for the *Tennessee Workers' Comp Reporter*. He received his Bachelor of Arts degree in Philosophy, *summa cum laude*, from Transylvania University and his law degree, *magna cum laude*, from the University of Tennessee.

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LABOR SECRETARY FINALLY CONFIRMED



Carol R. Merchant

"The current situation at the DOL is somewhat critical ..."

The last Cabinet position was filled with the confirmation of Alexander Acosta as Secretary of the Department of Labor (DOL) on April 27, 2017. Acosta is considered much more of a moderate than the previous candidate and was not opposed by organized labor. Unfortunately, much of the work at the DOL needs to be done by under-secretaries that still must be nominated and confirmed.

The current situation at the DOL is somewhat critical with

a number of time-sensitive decisions that must be made and implemented, including the salary test for overtime rules and the fiduciary rule, along with various budget and reorganization issues. It is likely that very little can be done on the reduction of regulatory burdens without a deputy secretary, solicitor and assistant secretaries. Other issues that are likely to be postponed into the future include examining the DOL's definition of joint employer and independent contractor relationships.

During confirmation hearings, Secretary Acosta signaled the move to a revised overtime pay rule that would increase salary from the current \$23,660.00 per year to somewhere between that level and the \$47,476.00 level in the court-enjoined Obama Administration rule. Many expect the salary level to end up around \$33,000.00.

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