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Briefly

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DEFENSE BASED ON TITLE VII'S CHARGE FILING REQUIREMENT MUST BE ASSERTED TIMELY OR WILL BE FORFEITED

Kelly A. Campbell

"After several years of litigation, the employer asserted for the first time that the complaint should be dismissed … since the employee had not first filed a charge with the EEOC alleging religion-based discrimination."

The Equal Employment Opportunity Commission is the federal agency authorized to investigate allegations of discrimination in employment raised under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Generally, employees who wish to pursue a claim under Title VII must first file a charge with the EEOC, as Title VII directs that a "charge … shall be filed." The EEOC will then investigate the allegations, engage in conciliatory actions, and either pursue the action on behalf of the complaining employee or issue a "right-to-sue" notice giving the complaining employee the right to file a lawsuit against his/her employer.

What happens if the complaining employee fails to follow this procedure, and files suit in federal court on claims not included in a charge with the EEOC? Is "Title VII's charge-filing precondition to suit a 'jurisdictional' requirement that can be raised at any stage of a proceeding; or is it a procedural prescription mandatory if timely raised, but subject to forfeiture if tardily asserted?" That is the specific issue addressed by the U.S. Supreme Court in the case of *Fort Bend County, Texas v. Davis.*

In the *Davis* case, the employee filed a charge with the EEOC alleging sexual harassment and retaliation. The employee later attempted to supplement her EEOC charge by handwriting "religion" on an intake questionnaire, but the formal charge document was not amended. A lawsuit was then filed by the employee alleging discrimination based on religion and retaliation for reporting sexual harassment. After several years of litigation, the employer asserted for the first time that the complaint should be dismissed on the basis that the federal court did not have jurisdiction over the religious discrimination claim since the employee had not first filed a charge with the EEOC alleging religion-based discrimination. The District Court agreed, but the Court of Appeals for the 5th Circuit reversed, holding that the charge filing requirement was not jurisdictional, and that the employer had forfeited this defense as it had waited too long to raise the objection.

On appeal to the U.S. Supreme Court, the 5th Circuit ruling was affirmed. The Supreme Court held that Title VII's charge-filing requirement is not jurisdictional, but instead is a non-jurisdictional mandatory claim-processing rule. The Court explained that "the word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." The Court further discussed the distinction between "jurisdictional prescriptions and non-jurisdictional claim-processing rules," explaining that an objection based on a mandatory claim-processing rule may be forfeited "if the party asserting the rule waits too long to raise the point." The Court also indicated that it was up to the legislature to specify a requirement as jurisdictional, and if Congress did not, then "courts should treat the restriction as non-jurisdictional in character."

As Title VII's charge-filing requirement is not jurisdictional, it must be raised in a timely manner as a defense to a claim, or else the employer will be deemed to have waived the procedural defect. However, if raised in a timely manner, an objection based on the employee's failure to exhaust administrative remedies may result in a dismissal of a complaint.

Lesson: Employers should carefully review and compare an employee's charge with any subsequent complaint filed in federal court, to identify and assert potential procedural defenses as soon as possible, or else run the risk of forfeiture of such defenses.

MARIJUANA LAW UPDATE

Jerome D. Pinn

"[W]hile marijuana use is still illegal under federal law, 33 states have now legalized medical marijuana use, and 10 states … have also legalized recreational use."

Starting on January 1, 2020, most Nevada employers will no longer be allowed to drug test potential new hires for marijuana use. Although many states have legalized medical and recreational marijuana use, Nevada is the first state to ban pre-employment drug testing for the substance. The Nevada law will make it unlawful for Nevada employers to refuse to hire job candidates who test positive for marijuana for most jobs. However, there are some exceptions. Employers will be able to screen and refuse to hire applicants for jobs as drivers, firefighters, emergency medical technicians and other safety-sensitive jobs (jobs which "could adversely affect the safety of others") if they test positive for marijuana.

Employers with business operations in Nevada should review and revise their pre-employment drug testing policies before the new law takes effect. Nevada employers that drug test applicants will need to remove marijuana from the list of substances that will be tested.

Nevada is the first state to pass a law like this, but it very likely won't be the last. In April, New York City passed a similar local law that will also take effect in January 2020.

As of today, while marijuana use is still illegal under federal law, thirty-three states have now legalized medical marijuana use, and ten states (Maine, Vermont, Massachusetts, Michigan, Colorado, Washington, Oregon, Nevada, California and Alaska) have also legalized recreational use. Illinois will be the 11th state to legalize recreational use, after its legislature recently passed a legalization measure.

As a result of these recent developments, more employers, including in states where marijuana use has yet not been decriminalized, are deciding not to test every job applicant for marijuana use. Employers with multi-state operations that have blanket drug policies prohibiting marijuana usage may need to revise those policies in light of the legal liberalization of marijuana use around the country, including specifically in the employment realm.

DOL OPINION LETTER - FMLA LEAVE IS MANDATORY

Jerome D. Pinn

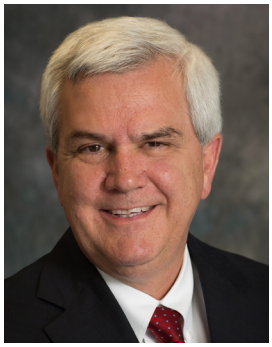
On March 14, 2019, the U.S. Department of Labor (DOL) issued an opinion letter on the issue of whether an employer can *require* an employee who is absent from work (for a reason that qualifies for FMLA leave) to use FMLA leave - even if the employee didn't ask to use it or doesn't want to use it. DOL opinion letters from a decade ago stated that employers could do so. More recently, however, some courts held that employees could *decline* to use FMLA leave in certain situations so as to retain their paid time off for use in the future.

The DOL's March 14 opinion letter states that an employer can designate an employee's absences as FMLA leave even if the employee doesn't want to use FMLA leave and is willing to take unpaid time off. This time, unlike previously, the DOL also declared that an employer must designate FMLA-qualifying time off as FMLA leave, even if it was willing not to do so as a favor to the employee. Scenarios where this may occur include where an employee has scheduled surgery for later in the year, or an employee plans to give birth later in the year, and they want to save their FMLA leave for that purpose rather than using it for some other FMLA-qualifying reason in the near term.

The DOL opined that although an employer must designate an employee's FMLA-qualifying time off from work as FMLA leave, it does not need to require the employee to use his/her accrued paid time off/vacation while on FMLA leave. If both employer and employee agree, an employee's paid time can be reserved for later usage. The employer and employee cannot agree, however, to have the employee use their FMLA-qualifying paid time off without having that count towards their 12 weeks of FMLA leave. So, the DOL opinion, if followed, removes some flexibility for employers and employees who are willing to structure things to benefit the employee's situation. In that regard, the opinion is not entirely employer-friendly. It suggests that an employer can never allow employees to be absent for an FMLA-qualifying reason without designating their absence as FMLA leave.

Although the March 14 opinion letter sets forth the DOL's views, it is not necessarily the final word. It's possible that courts may disagree and allow employees and willing employers to not designate all FMLA-qualifying absences as such. Sometimes, it's not even clear whether an absence qualifies for FMLA leave, although in a borderline case it's doubtful the DOL would actually sue an employer for not requiring employees to use FMLA leave. In any event, the DOL opinion letter is a clear signal that employers may have much less leeway in allowing employees to choose the timing or usage of their FMLA leave of absence, leaving both employers and employees more restricted for the change.

DOL FINDS GIG WORKERS TO BE INDEPENDENT CONTRACTORS



Howard B. Jackson

"This [DOL opinion] letter makes changes from the Obama-era DOL, which considered most gig workers to be employees."

In an opinion letter issued by the U.S. Department of Labor (DOL) on April 29, 2019, DOL finds that workers getting jobs through smart phone apps and websites such as Angie's List are independent contractors and not employees of those platforms. The opinion indicates that such service providers are not working for the virtual marketplace, but working for consumers through the marketplace. Gig companies like Uber and even traditional employers outside of the gig economy can use this opinion letter as a potential defense when they have relationships with independent contractors or others they do not treat as employees.

The opinion letter states that it is based on long-standing Supreme Court precedent, utilizing a six-factor test. Factors include permanency of the worker's relationship to the gig company, the amount of skill or judgment required for the worker's services, control the company exercises over service providers, and how much the service providers' work is tied to the primary purpose of the company. In discussing the control issue, the letter indicates that the company did not set a work quota, a firm schedule, or dictate how to perform the selected services, as service providers had the ability to set their own schedule. They could also take jobs through competitor platforms. The letter also indicated that the work a service provider performs is not integrated into the company's business, because once a client and a service provider are connected, the company's operation is effectively terminated.

It should be noted that this opinion letter is not a law or regulation, and only covers how the current administration will interpret the law. This letter makes changes from the Obama-era DOL, which considered most gig workers to be employees.

As the economy evolves it continues to present questions regarding employee versus independent contractor status. The dividing line is not always clear. It is wise to analyze this subject carefully because the consequences of getting it wrong can be substantial.

UAW LOSES UNION VOTE AT VOLKSWAGEN - AGAIN

Howard B. Jackson

In a nationally watched union election at Volkswagen in Chattanooga, Tennessee, which concluded on June 14, 2019, the UAW lost another secret ballot union election by a vote of 838-776, a margin of 62 votes. The last plant-wide election was held in 2014, which the union lost by 86 votes.

The history of the situation in Chattanooga is very interesting. First, the UAW has been unable to organize foreign-owned auto plants in the South, including previous losses at Nissan plants in Mississippi and Tennessee. Following its loss at Volkswagen at Chattanooga in 2014, the union successfully organized a smaller voting unit at Volkswagen, comprised of just maintenance employees. However, the election results were contested and the union never negotiated a collective bargaining agreement. Ironically, the election win among the maintenance employees proved problematic for the union, as it delayed its plant-wide election this year because the smaller maintenance unit still existed. The union thus abandoned that smaller unit and the election proceeded plant-wide in Chattanooga.

During the current campaign, Volkswagen stated that it was neutral, and it should be noted that Chattanooga is the only Volkswagen production facility in the world not represented by a union. Nevertheless, there was widespread public advertising and campaigning among the community with television and radio ads being purchased by the UAW, the Center for VW Facts, a pro-union advocacy group, and an anti-union group known as Southern Momentum.

Although Volkswagen itself was publicly neutral, Tennessee Gov. Bill Lee (R) told workers during a visit to Volkswagen that they were fortunate to be in a state "that has the work environment that we have." At the time of the last plant-wide vote back in 2014, allegedly Sen. Bob Corker (R) said the company assured him that the facility would be awarded more work if workers voted not to unionize. In other words, there was publicity by politicians in Tennessee seeing a lack of unions as a selling point for attracting business. Tennessee is a state that is only approximately 6% unionized.

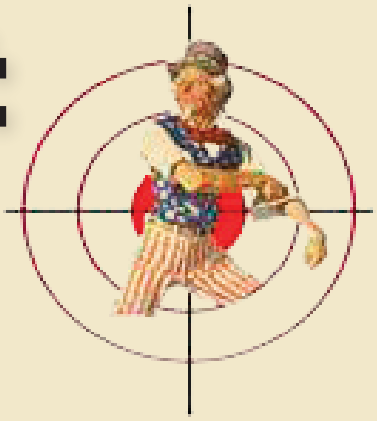
This is probably not the last chapter in the UAW's efforts to organize large auto industry companies in the south. Given the close vote at Volkswagen one would not be surprised if the UAW made another effort there in the next few years.

A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

The 2019 Wimberly Lawson Labor and Employment Law Update Conference

TARGET: *OUT OF RANGE*



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