



## The EEOC and Work/Family Balance

In our last newsletter, we discussed the growing trend in “Family Responsibility” discrimination claims. On May 23, 2007, the Equal Employment Opportunity Commission (EEOC) issued a new Enforcement Guidance, titled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities,” addressing discrimination and Work/Family Balance in the Workplace. In doing so, the EEOC identifies various ways in which employers may discriminate against employees and job applicants. Employers should take notice of the EEOC’s decision to issue guidelines on this issue, and in turn, should expect to see an increase in the EEOC’s attention to this area.

While no additional protected class of individuals has been created, the EEOC identifies ways in which an employer may discriminate against those already in a protected class when it comes to family responsibility issues. For instance, employers should be mindful of conversations regarding a female applicant’s family caregiver responsibilities and then hiring an applicant who does not have such responsibilities. The EEOC also points out an employer who reduces a working mother’s job responsibilities after her return from maternity leave could be guilty of discrimination. While the working mother would be required to establish that such a reduction constitutes an “adverse employment action,” this may be accomplished if her salary or wages are reduced or if her chances of promotion are hindered.

The EEOC also points out that male employees can be victims of discrimination with respect to caregiving responsibilities, especially when it comes to requests for childcare leave. Specifically, the guidelines mention that any leave specifically provided to women, and not to men, must be limited to the time that a woman is incapacitated by pregnancy or childbirth.

In addition to discrimination claims under Title VII, claims can also arise under the Americans with Disabilities Act (ADA), which prohibits discriminatory treatment due to a relationship with a disabled individual. An employer should be mindful not to take into consideration the responsibilities placed on a parent with a disabled child when evaluating job performance or attendance.

These new EEOC guidelines do not create new laws. However, courts routinely look to the guidelines for assistance in the interpretation and application of the various anti-discrimination statutes enforced by the EEOC. Additionally, these guidelines provide insight as to how the EEOC will view evidence in an investigation that may fall into this category.

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### *Inside This Edition*

- 1 The EEOC and Work/Family Balance
- 2 Think the National Labor Relations Act Does Not Apply to You? Think Again.
- 3 The Danger of the Employee Who Will Not Go Away
- 4 Increase in Federal Minimum Wage

## Think the National Labor Relations Act Does Not Apply to You? Think Again.

Many employers with non-unionized workforces mistakenly believe that the National Labor Relations Act (NLRA) does not apply to them. However, the NLRA applies to the majority of private employers. Specifically, it protects employees' rights to engage in protected concerted activities, usually consisting of two or more employees acting together to improve working conditions, regardless of whether the workforce is unionized.

While it is not uncommon to hear that employers discourage employees from discussing and comparing compensation, the broad language of the NLRA allows it to be applied in situations where two or more employees discuss pay or other work-related issues with each other, even though the workforce is not unionized. Recently, the National Labor Relations Board (NLRB), which enforces the NLRA, has prevailed in claims against employers who attempt to prevent employees from discussing and comparing wages and other terms and conditions of their employment.

In *Cintas Corp. v. NLRB*, a federal court agreed with the NLRB that merely publishing an overly broad confidentiality policy applying to any information concerning the company and its employees in a company handbook violates Section 8(a)(1), which deals with interference with an employee's rights under the NLRA. Even though Cintas Corp.'s policy did not specifically prohibit a protected activity under the NLRA, the court reasoned that only a reasonable interpretation of the policy needs to indicate that a protected activity could fall under the confidentiality provision. The court dismissed the arguments that no employee actually construed the limitation in that manner or that no employee had been disciplined for protected activity. **The mere fact that the policy could be read to prevent employees from discussing their wages or other work conditions was sufficient, in the court's mind, to create a chilling effect that violated the NLRA.**

In *Medical General Operations, Inc. v. NLRB*, another federal court agreed that **an employer can violate the NLRA when it prevents employees from sending emails discussing union business.** In this case, the employer had a policy that emails were not to be used for non-business matters, but employees routinely sent messages for personal, social, or charitable purposes, without suffering disciplinary action. While this ruling specifically addressed employees discussing union activities, it could also be applied to employees who discuss work conditions, including compensation, with one another.



## The Danger of the Employee Who Will Not Go Away

Unfortunately, every employer deals with one, at some point-- the problem employee who will not go away. Terminating such an employee is not always easy. An employer is wise to expect the problem employee to find a way to be aggravating, even after his or her employment has been terminated. The employee may assert claims of wrongful discharge or discrimination or fight for unemployment benefits. Failing to handle the situation wisely can be costly, as one employer recently learned the hard way.

In a recent Texas case, a physician sued his former practice group after the group decided to terminate his employment contract for a variety of reasons. The physician responded by filing suit against the practice group for breach of contract, defamation and conversion, claiming that he was wrongfully terminated and that the group accused him of abusing alcohol and drugs and made false accusations about his administrative and medical abilities after he voiced concerns about the group's business practices. The group denied the allegations and admitted that it believed many of the allegations to be false. The physician responded by claiming that a member of the group should not have told colleagues that the physician was fired because of his drug problem. The physician claimed that he lost millions in income from the loss of his privileges at the hospital and from the damage to his reputation as a result of the statement made by the group.

The jury agreed with the physician and found that the group had not terminated him for cause, under the terms of his employment contract, and that a member of the group made a defamatory statement about the physician relating to drugs or alcohol. While the jury did not find that the group acted with malice, it still awarded damages to the physician in excess of \$6,000,000.00. Two days later, the court awarded an additional \$2,225,000.00 in attorneys' fees to the physician on the breach of contract claim.

To defend itself in this suit, the employer was relying on evidence regarding the reasons for the termination and the truth of any statements made. However, the trial court ruled that much of the evidence was not admissible, leaving the employer at a disadvantage trying to defend itself.

It is often said that "the truth is a complete defense." However, in the context of civil litigation, the truth must be admissible before it can be relied upon as a defense. The lesson to be learned: it is better to be discreet regarding the circumstances surrounding a termination. It is human nature to want to "set the record straight," especially when a former employee is trying to smear the employer. However, doing so in this matter allowed the employee to assert a claim of defamation, which proved to be very costly.

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## Increase in Federal Minimum Wage

We knew it was coming, and the legislation was signed by President Bush on May 25, 2007, makes it official. The federal minimum wage is increasing. The first increase, effective July 24, 2007, will raise the hourly wage from \$5.15 to \$5.85. Another increase will go into effect next summer, raising the wage to \$6.55. A third increase will occur one year later, raising the rate to \$7.25.

Many states have enacted laws establishing minimum wages at levels higher than that set forth under the Fair Labor Standards Act. Expect those states to also increase their minimum wages in response to this new federal legislation in an effort to stay ahead of the curve.



Chamblee & Ryan advises clients regarding employment matters on a daily basis in a variety of industries. The attorneys draft employment policies and handbooks and advise employers on employment decisions with respect to potential discrimination or claims of wrongful discrimination, ERISA plans, and wage and hour issues. Additionally, the attorneys train managers and supervisors regarding diversity issues and how to avoid or minimize discrimination and harassment claims. Chamblee & Ryan also represents clients in litigation regarding age, race, national origin, disability, sex discrimination and sexual harassment claims, retaliation, wrongful discharge, defamation charges, family leave issues, employee benefits, health and safety matters, and wage-hour disputes. In addition to representing employers in State and Federal Courts, the attorneys successfully defend employers on a routine basis before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, the Texas Workforce Commission, and various State agencies regarding employment matters across the country.

Chamblee & Ryan has consistently defended employers in the courtroom and in administrative hearings since its inception in 1998. The firm's attorneys spend a significant amount of time in the courtroom representing the interests of employers. For more information regarding the firm's recent defense verdicts, please see our website under "Results" at [www.chambleeryan.com](http://www.chambleeryan.com).

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