TOP 10 EMPLOYMENT LAW ISSUES IN THE OIL PATCH

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1. FLSA COMPLIANCE

Misclassification

- Exempt v. Non-exempt
- Independent Contractor v. Employee

Day Rate Pay Plans

Travel Time Issues

Off The Clock Claims

State Law Twists

1. FLSA (CONTINUED)

A partial solution for some oilfield employers is in the important decision of *Allen v. Coil Tubing Services, L.L.C.*, 755 F.3d 279 (5th Cir. 2014), which held the MCA exemption applicable to commercial vehicle drivers who did not themselves drive interstate.

2. SAME SEX HARASSMENT

EEOC v. Boh Bros., 731 F.3d 444 (5th Cir. 2013).

- Held sex stereotyping was a cognizable theory to support same sex harassment claims.
- Here, the EEOC prevailed by showing that the harasser was motivated to harass his subordinate because he perceived his subordinate to be effiminent and insufficiently mascaline.
- This holding opens up the door for a lot of new same sex harassment claims.

3. RETALIATION CLAIMS

- Despite *Nassar,* retaliation claims remain both plentiful and extremely dangerous.
- In 2014, the EEOC announced that for 2013, "[a]s in previous years, retaliation under all statutes was the most frequently cited basis for charges of discrimination, increasing in both actual numbers (38,539) and as a percentage of all charges (41.1 percent) from the previous year.
- *Boh Bros*. opens up a lot of new and dangerous retaliation claims arising out of what some folks previously thought of as "locker room type antics" or "horseplay."
- Employees who have engaged in protected activity should not be given "free passes," but a decision to terminate their employment should be fully vetted first because of the inherent danger of a retaliation claim.

4. ADA: THE INTERACTIVE PROCESS REQUIREMENT

- The wrong way:
  - *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606 (5th Cir. 2009), where employer terminated employee on questionable grounds shortly after the employee initiated the interactive process.
  - *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 709 (5th Cir. 1997), where the employer refused to return an employee to work unless he had a full duty medical release.
- The right way:
  - *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731 (5th Cir. 1999), where the employer made reasonable proposals in response to the employee's request for accommodation, and the employee walked off the job instead of continuing the process.

5. ADA: DIRECT THREAT

- The wrong way:
  - *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007), where the employer relied on far-fetched speculation in deeming an employee a direct threat.
  - *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996), where the employer was seemingly driven by customer concerns, rather than mehttp://www.loscucossignature.comdical evidence, to label the plaintiff a direct threat.

5. ADA: DIRECT THREAT

- The right way:
  - *Wurzel v. Whirlpool Corp*., No. 10–3629, 2012 WL 1449683 (6th Cir. Apr. 27, 2012), relying on current expert medical guidance in deeming the plaintiff a direct threat.
  - *Turco v. Hoechst Celanese Chemical Group, Inc.*, 101 F.3d 1090 (5th Cir. 1996), relying on clear and present danger posed by employee in deeming the plaintiff a direct threat.

6. NON-COMPETE AGREEMENTS

Trend towards broad enforcement, even in the oil patch, at least for for management level workers. For example:

- *Cameron Intern. Corp. v. Guillory*, __ S.W.3d __, 2014 WL 4776274 (Tex.App.-Houston [1st Dist.], Sept. 25, 2014, no pet.) (enforcing a Delaware choice of law clause to bar an ex-employee in Fort Collins, Colorado from working for competitor).

- *M-I LLC v. Stelly*, 733 F. Supp. 2d 759 (S.D. Tex. 2010) (finding enforceable a broad non-compete against plaintiff's former Manager of Sales for the Americas, who had been a high ranking executive in the company).

7. EEOC INVESTIGATIONS AND LITIGATION

The EEOC Has Focused On The Oil Patch, Big Time. For example:

- *EEOC v. Garrison Contractors, Inc.*, 9/30/2014, where the EEOC alleged that "Garrison Contractors Fired Its Only Female Oilfield Roustabout After Reporting Sexual Harassment, Federal Agency Charges." The suit was filed in the W.D. of Texas, Pecos Division.
- *EEOC v. Strad Oilfield Services*, 4/18/2014, where the company paid $65,000 in damages to resolve a disability discrimination charge filed with the EEOC. In addition, "In addition to paying $65,000, the conciliation agreement requires Strad to amend its equal opportunity policy to specifically address the rights and requirements of the ADA, provide professional ADA training annually to all of its employees and report all denied requests for accommodation and future complaints of disability discrimination to the EEOC."
- *EEOC v. Torqued-Up Energy Services, Inc.*,5/28/2013, where the EEOC alleged an employer fired an African-American employee for reporting racial discrimination and then interfered with his subsequent employment. The company ended up paying $150,000.00, and agreed to implement training, to settle the case, which was filed in Victoria, Texas.

8. TRAINING MANAGERS AND EMPLOYEES

- Great way to prevent problems with the EEOC and private lawsuits.
- Can also be a big help in making out defenses to harassment cases (*Ellerth/ Faragher*) and to punitive damages (*Kolstad*).
- But, there are unique challenges in training sometimes far-flung employees in the oil patch.

9. CONDUCTING ROBUST AND RELIABLE INVESTIGATIONS

Critical to winning *Ellerth/Faragher* defense to harassment claims (*see Boh Bros.*).

- As with training, conducting investigations in remote areas can be challenging.
- In particularly dangerous cases, it is worth it to hire a specialist from outside the company.
- Follow up is key in many respects, including in preventing retaliation.

10. BUILDING WINNING POLICIES AND PROCEDURES

- Current and comprehensive policies are the basics to proving the all-important *Kolstad* defense to punitive damages.

- Make sure you can prove to a judge and jury that the employee received the policies.

- Should require robust HR review of all termination recommendations, with possible elevation to legal in high risk cases. This is a big part of avoiding an indefensible termination decision.

BONUS NO. 1

Don't Forget About The NLRA

- Employees are protected by the National Labor Relations Act even if they are not represented by a union and even if they do not engage directly in union activities.

Examples of Protected Activity

- Employees' right to protest a poor manager
- Expressing group concerns and/or acting with the endorsement of other workers
- Actions regarding work hours, wages, terms of pay
- Certain social media statements

BONUS NO. 2

As oil prices drop, and RIFs commence in many companies, these are some key things to keep on your radar screen:

1. OWBPA compliance in group termination situations.

2. WARN act triggers, especially in rolling RIF situations.

3. Implementing RIFs in objective, neutral, and nondiscriminatory fashion, and documenting that process as it occurs in real time.

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