Labor & Employment Issues
In Focus

Pitta LLP
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TRUMP BOARD PROPOSES TO TURN EXCELSIOR RULE INSIDE OUT

On July 28, 2020, the National Labor Relations Board ("NLRB" or "Board") published a Notice of Proposed Rulemaking ("NPRM") proposing changes to its representation case procedures.(https://www.nlrb.gov/sites/default/files/attachments/pages/node-6397/2020-15596.pdf). Most notably, the Board proposed eliminating the requirement on employers to disclose personal email addresses and phone numbers to a union in advance of an election.

The Board's decision in *Excelsior Underwear*, 156 NLRB 1236 (1966), established a requirement that an employer must submit a list of eligible voters prior to an election, including the names and addresses of those voters. The Board announced two objectives it intended to advance: (1) ensuring the fair and free choice of bargaining representatives by maximizing the likelihood that all the voters will be exposed to the nonemployer party arguments concerning representation; and (2) facilitating the public interest in the expeditious resolution of questions of representation by enabling the parties on the ballot to avoid having to challenge voters based solely on lack of knowledge as to the voter's identity.

In 2014, the Board recognized that when *Excelsior Underwear* was decided, email communication did not exist and mail was the norm. Recognizing the substantial technological changes since, the Board updated its rules to accord with the twin goals of *Excelsior*, requiring disclosure of personal emails and phone numbers. The Board rejected the position that employee privacy concerns require the Board to refrain from expanding disclosure requirements. The Board members explained that a similar privacy argument was made with respect to home addresses in *Excelsior*, but the speculative harm did not outweigh need for identification information to ensure free and fair elections. Republican Members Miscimarra and Johnson dissented. But the Fifth Circuit later upheld the validity of the disclosure as a valid balancing of competing interests.

The current all-Republican Board noted that this change "continued to garner criticism," citing a 2017 opinion from dissenter Miscimarra. The NPRM states that the Board is inclined to believe that the required submission of email addresses and phone numbers "should be eliminated in light of technological developments since 2014 and ongoing privacy concerns." The Board principally contends that the 2014 amendments overemphasized the need for the disclosure and undervalued the privacy interests of employees, noting a growth in data breaches. The Board also contended that individuals have a greater privacy interest in their phone numbers and email addresses than their home addresses.

Comments to the NPRM must be submitted on or before Monday, September 28, 2020. Pitta LLP attorneys are available to assist in the drafting of any comments.

CITING SCOTUS IN BOSTOCK, TENTH CIRCUIT LEADS FEDERAL COURTS IN RECOGNIZING SEX PLUS AGE DISCRIMINATION CLAIMS

"Intersectional discrimination against older women is a form of discrimination based on sex stereotypes that Title VII was intended to prohibit." *Frappied v. Affinity Gaming Black Hawk, LLC,* No. 19-1063 (10th Cir. July 21, 2020). Also known as "sex-plus" discrimination, intersectional discrimination occurs when an employer treats an employee differently not because of her sex, but because of her sex and another characteristic such as age. Relying heavily on the U.S. Supreme Court's recent decision in *Bostock v. Clayton Cty., Ga.,* the U.S. Court of Appeals for the Tenth Circuit's holding, cited as the first such appellate decision recognizing intersectional discrimination, may presage a more liberal analysis of Title VII's pleading requirements.

Affinity purchased and assumed operations of a casino in November 2012, laying off 29 female employees over age 40 in January 2013, while advertising for 59 open positions. Eight female Plaintiffs sued alleging discrimination based on sex plus age in violation of Title VII and age alone in violation of the ADEA. The district court dismissed the action, holding no sex plus age claim exists at law and that Plaintiffs failed to properly allege or prove their remaining claims. A unanimous three member panel of the Tenth Circuit reversed all but dismissal of Plaintiffs' Title VII disparate treatment claim, remanding the sex-plus case disparate impact and ADEA claims to the district court for further proceedings in accordance with the appellate court's ground-breaking analysis.

Taking its cue from *Bostock* that "when determining whether a person is subjected to discrimination under Title VII our focus should be on individuals, not groups," the Tenth Circuit held that a female plaintiff asserting a sex plus claim need only show "that she would not have been terminated if she had been a man", even If the reason for termination was her sex plus another characteristic protected by Title VII or not, such as age. Citing *Bostock*, "if changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred." For example, (from SCOTUS dicta), if the employer's policy is to fire only female Yankee fans but not male Yankee fans, "it engages in prohibited discrimination became such terminations are based in part on sex," notwithstanding the employer's insistence that it just hates the Yankees.

The Court waived aside Affinity's argument that the age component of Plaintiffs' sex plus age Title VII claim should be treated exclusively under the ADEA, finding no exclusionary intent in either statute. On the contrary, after finding that Plaintiffs adequately alleged their sex plus age disparate impact claims, the Court continued to reverse the district court and find adequate allegations of both age based disparate impact and treatment under ADEA.

Employment lawyers awaiting the repercussions of *Bostock* on Title VII beyond LGBTQ rights now have at least one answer: In the Tenth Circuit, and soon elsewhere perhaps, an employee can bring separate claims for sex discrimination, sex-plus discrimination, and age discrimination, each with their own pleadings, proofs and relief.

MUST EMPLOYEES BE PAID FOR TIME SPENT
UNDERGOING COVID-19 SCREENING PROCEDURES?

As employers throughout the country, including New York, implement their reopening plans, many will require their employees to undergo daily COVID-19 temperature screenings and complete questionnaires regarding recent interactions and travel ("Screening Procedures"). Such measures were endorsed by the U.S. Equal Employment Opportunity Commission ("EEOC") in its recently updated guidance *What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*. While the EEOC suggests that employers may, during the pandemic, screen their employees for COVID-19 without fear of violating disability law, the guidance does not address wage and hour compliance. Our review of analogous wage-hour situations follows below.

Under federal law, *i.e.*, the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act, employers must pay employees for "the principal activity or activities which an employee is employed to perform," including tasks undertaken outside the employee's shift that are an *integral and indispensable part of the principal activities.* 29 U.S.C. § 254(a) (1) and 29 CFR § 790.8. The FLSA does not, however, require employers to pay employees for time spent on "activities which are preliminary or postliminary" to an employee's principal activities.

U.S. Supreme Court and recent state court decisions provide some guidance on whether courts may find that time spent waiting for and undergoing the Screening Procedures are compensable under the FLSA. Ultimately, the analysis is fact-dependent and courts will look to the following factors in making such a determination: (i) whether the activity is required and is for the employer's benefit; (ii) if undertaken to prepare for the performance of the principal activities; or (iii) if intended to protect the employee against unusual workplace dangers. Two often cited examples of activities found compensable are:

1. Time spent by lead-acid battery plant employees' showering and changing clothes on the employer's premises following exposure to toxic materials during their shifts (Steiner v. Mitchell , 350 U.S. 247, 256 (1956));

2. A slaughterhouse employee's knife sharpening, which if not undertaken could delay production and affect the appearance and quality of the product (Mitchell v. King Packing Co. , 350 U.S. 260, 262 (1956))

By contrast, in Integrity Staffing Solutions v. Busk, 547 U.S. 27 at 34 (2014), the Supreme Court held that approximately 25 minutes of post-shift security checks for Amazon warehouse workers was not compensable because it was neither a principal activity nor integral and indispensable to the retrieving or packaging of Amazon's products. However, earlier this year, the California Supreme Court held that an employer must pay employees for time spent waiting and undergoing required exit searches of their personal items and devices because such searches are highly controlled by and primarily benefit the employer (*i.e*., detecting and deterring theft). Frlekin v. Apple, Inc., 457 P.3d 526 (Cal. 2020). Other jurisdictions, including Pennsylvania and New Jersey, have

pending cases expected to address this issue, and with New York considered to be on the similar ideological footing with California, a New York Court may well agree with the rationale of Frlekin.

In the COVID-19 context, measuring employees' temperatures and requiring completed health questionnaires may be analogized to pre-shift donning and doffing of protective gear to protect against a heightened workplace danger. Conversely, since the risk of exposure to this life-threatening disease is not necessarily an ordinary risk for a non-health care industry employee, a court could find that the Screening Procedures primarily benefit the employees and the general public, leaving only some remote and incidental benefit to the employer. Ultimately, since no court has yet opined on this issue, employers wishing to avoid wage and hour liability exposure should proceed carefully with advice of counsel.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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