LINDQUIST + VENNUM

Hot Topics in Employment Law

Presented by
Nancy Brostrom Vollertsen

Lindquist & Vennum. PLLP

Regulatory and Legislative Developments to Watch in 2013

- High Priority Federal Legislation
  - Employee Free Choice Act – card check
  - Paycheck Fairness Act - pay equity
  - Employment Non-Discrimination Act - prohibiting discrimination based on sexual orientation and gender identity
- Regulatory activism
  - OFCCP Disability and Veteran Hiring Rules - regulations that would require federal contractors to move toward a 7 percent disabled workforce and hire more veterans, affecting employers with government contracts
  - DOL Right To Know Rule - regulations aimed at updating the Fair Labor Standards Act to require an employer to prepare a classification analysis explaining why a worker is classed as an employee or independent contractor and to provide that analysis to its employees and to the.
- State Laws
  - Right to Work laws
  - Protecting Workers' Social Media Passwords

Court Invalidates President's Recess Appointments to the NLRB

- *Noel Canning, A Division of the Noel Corporation, Petitioner v. National Labor Relations Board*, No. 12-1115, United States Court of Appeals for the District of Columbia

  Argued December 5, 2012; Decided January 25, 2013

Background

- D.C.Circuit invalidated President 's January 2012 appointments of three NLRB members. Court unanimously concluded that Board lacked authority to conclude an unfair labor practice occurred because three of the five members of the Board had not been validly appointed, resulting in the absence of a required quorum
- The appointments were invalid because the Senate was not in recess when the President made the appointments and because the vacancies that were filled did not happen "during the Recess of the Senate" as required by the Recess Appointments Clause (RAC) in Article II, § 2, cl. 3 of the United States Constitution.

Management's Perspective

- Provides a potential defense to every action taken by the currently constituted Board and to potential enforcement of dozens of precedent shattering decisions by the Board since January 2012.
- Throws into question the Board's rules with respect to "quickie elections" and postings and to actions the Board has or will institute with respect to interim relief under § 10 of the Act.
- The Board has stated its intent to ignore the Decision and pursue and/or continue litigation notwithstanding the implications of the Decision.
- It could be years before the United States Supreme Court addresses the merits of the issue, assuming the high court chooses to do so. Other circuit courts could disagree with the Decision and legislative or other political resolutions could affect the impact of the Decision.

NLRB Election Reforms

- Final rule adopted by NLRB which shortens the pre-election process and eliminated Board review of challenges in union election campaigns
- U.S. Chamber of Commerce filed suit to block the rule

NLRB: Employer's media, confidentiality policies unlawfully restricted employees' Section 7 rights

- Four work rules maintained by satellite TV provider DirecTV were unlawful ruled a three-member panel of the NLRB (*DirectTV U.S. DirecTV Holdings LLC*, January 25, 2013). The rules prohibiting employee contact with the media and communications with law enforcement agencies failed to distinguish between protected and unprotected conduct, and would reasonably be interpreted by employees as covering all such conduct. Moreover, the employer's attempts to clarify the scope of its rules failed to effectively repudiate its unlawful conduct.

Specific Policies

- Handbook provision stating "If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the security department … who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments," was also unlawful.

Specific Policies

- Handbook provision that expressly instructed that employees “Do not contact the media” was unlawful
- Corporate policy stating that “Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations” was also unlawful

Specific Policies

- Handbook provision instructed employees to “never discuss details about your job, company business or work projects with anyone outside the company” and to “never give out information about customers or DIRECTV employees.”
- Corporate policy stated “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record” also was unlawful.

FMLA

- DOL Administrator's Interpretation 2013-1
- Clarification of the definition of “son or daughter” under Section 101(12) of the Family and Medical Leave Act as it applies to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability.

FMLA Leave for Adult Child

- A parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:
- (1) has a disability as defined by the ADA;
- (2) is incapable of self-care due to that disability;
- (3) has a serious health condition; and
- (4) is in need of care due to the serious health condition

EEOC Strategic Enforcement Plan

- Six national priorities as its focus,
  - elimination of hiring and recruitment barriers
  - the protection of immigrants, migrant workers and other vulnerable employees
  - addressing workplace discrimination issues arising from the ADA Amendments Act, coverage under Title VII's sex discrimination provisions for LGBT individuals and accommodations for pregnancy
  - enforcement of equal pay laws,
  - maintaining workers' access to the legal system
  - prevention of harassment through "systemic enforcement and targeted outreach"

EEOC Guidance Regarding Employers' Use of Criminal Background Information

- Places the burden on the employer to show that the past criminal conduct in question poses an unacceptable risk for the particular position at issue. Failure to make that showing may result in Title VII liability.
- Protected persons who are denied employment because of a criminal background may have viable Title VII claims where:
  - Denial of employment was based solely on an arrest;
  - The employer used a blanket exclusion that screened out all persons who have ever been convicted of a crime;
  - The exclusion did not take into account the nature of the crime, the amount of time elapsed since it occurred, and the nature of the job;
  - The employer did not provide an opportunity for the excluded person to explain a criminal;
  - The employer has a reputation for excluding persons with criminal backgrounds; or
  - The employer has expressed stereotypical views concerning the criminality of certain racial or ethnic groups.

EEOC "Best Practices" for Employers

- Steps employers can take when considering arrest and conviction records in making employment decisions:
  - Develop written policy and procedures for screening applicants and employees regarding criminal conduct;
  - Train managers, hiring officials, and decision makers regarding implementation of the policies and procedures;
  - Limit inquiries regarding criminal records to those that are "job related for the position in question and consistent with business necessity"; and
  - Keep information regarding applicant and employee criminal records confidential.

Effect of the Guidance

- Not binding law
- More expansive than what is required under current law
- The standard that the EEOC will use when evaluating discrimination complaints based on the use of criminal history information in employment decisions
- Courts may use it in their analysis of these issues.
- Employers need to act prudently when deciding what course to follow.

Credit Checks in Hiring

- Recent dismissal of EEOC v. Kaplan case
  - EEOC alleged use of credit checks as a hiring tool can have a disparate impact on black and Latino job applicants
  - EEOC could not support theory – expert's "race rating" system was scientifically unsound
  - EEOC runs credit checks on own applicants(!)
  - Decision impacts EEOC's ability to sustain future claims

Social Media Developments of 2012

- Facebook "like" is not constitutionally protected speech, supporting firing of Sheriff's department employees who "liked" his opponent in election
- Twitter forced to turn over user's information and "tweets" in criminal charges against Occupy Wall Street protester.
- States passing restrictions on employer access to employee /applicant social media accounts – CA, DE, IL, MD, MI, NJ. Texas proposed
- Ownership of employee's social media accounts – confidential settlement of PhoneDog v. Kravitz allegedly allowed employee to keep account. Two similar pending cases
- Three NLRB Workplace Guidances

Employer's Use of Social Media

Nearly 90% of employers use social media in recruiting and hiring

- Should recruiters "Google" applicants or access candidates' Facebook accounts?
- Should an employer engage a third-party vendor to conduct Web-based social media "background checks" of candidates on its behalf?
- Should job applicants remove "personal" profiles from the publicly available Internet?

Legal Pitfalls

- Employers may try to filter out employment applicants for potentially violent, racist, sexual, and/or illegal activities, or demonstrations of "bad judgment" based on social media or Internet searches.
- Social media search, can disclose an applicant's protected categories (e.g., race, religion, age, or disability). Employers are generally forbidden from asking about these protected categories during hiring; a social media search which discloses them could lead to liability under Equal Employment Opportunity laws.
- Some employers are opting out of using social media in the recruiting and screening process .
- Some job candidates are opting out of using social media, fearing that something they say online could adversely impact their marketability.
- Other employers and job seekers feel that refraining from using social media would put them at a competitive disadvantage

Legal Pitfalls

- Employers' use of social media in hiring decisions blurs the line between personal life and work
- Deciding whether to hire someone based on lawful off-duty conduct can be illegal under state law, or lead to claims of refusal to hire based on a protected category.

Asking for Passwords

- State laws are increasingly protecting job applicants' right to refuse to disclose their social media information to prospective employers.
  - Maryland and Illinois have passed laws that prohibit potential employers from requesting that job applicants provide access to their social media accounts
  - Similar bills have been introduced in other states, and have been considered at the federal level as well.

Employer "Best Practices" Using Social Media

- Employers should develop a social media policy that covers hiring policies, including
  - what, if any, publicly available information can be used in making employment decisions and
  - who is allowed to conduct the company's social media searches
- Employers should train staff on how to effectively implement those policies

Limited Uses

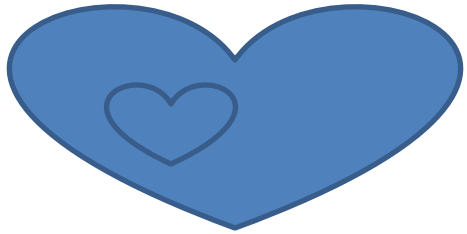
- Consider limiting social media searches to professional networks (e.g., LinkedIn) instead of more casual sites like Facebook
- Consider using outside third party, to decrease the likelihood of inadvertently letting social media content influence an employment decision in a way that could be considered inappropriate.

Other Employer Uses of Social Media

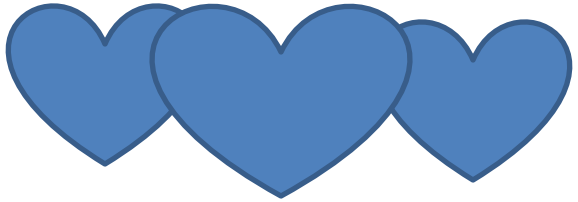
- Discovery of content posted to social media sites is allowed by courts, but they do not agree on a standard for obtaining access to the relevant posts without intruding too much on the user's privacy
  - A nurse whose coworkers complained that she was misusing FMLA leave when they spotted her photos on Facebook enjoying her Mexico vacation, and who subsequently lied to the employer that she used a wheelchair at the airport there and back, could not proceed with her FMLA claims based on her discharge (Lineberry v Richards, February 5, 2013. When her coworkers spotted her vacation photos on Facebook riding in a motorboat, lying on her side holding two beers in one hand, and holding her infant grandchildren, one in each arm, they were not amused, so they complained to their supervisor about what they thought was misuse of FMLA leave

Dealing with Office Romances

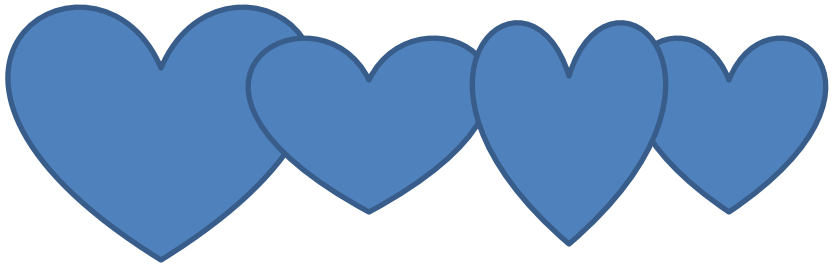
- Don't Forbid It, But Don't Ignore It
  - 59 percent had participated in an office romance,
  - 63 percent of those who had been involved in a relationship with a co-worker said they would do so again.
  - Unrealistic and ineffective for businesses to ban all intraoffice coupling
  - make more sense for employers to require that romantic relationships be disclosed, so the business can be prepared to handle any problems that arise as the relationship progresses or falls apart



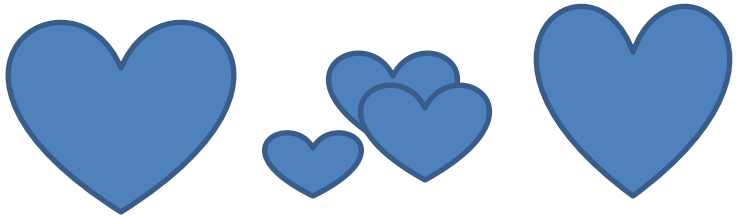
- **Consider a "Love Contract"**
  - The document should state that both parties have entered the relationship willingly and voluntarily, and should reaffirm that the employees understand the company's anti-harassment policy and know where to report any problems
  - Employer can accomplish same goals by meeting with the couple to reaffirm the company's anti-harassment policy and keeping a record of the meeting



- **Keep It Work-Appropriate**
  - Handbook should state that dating between co-workers will be tolerated provided it does not detract from the goals of the business
  - Should also clearly state that if it does spill over into work, the company reserves the right to take action against the employees
  - May also explicitly prohibit public displays of affection in the workplace
  - Remind staff that they should not have an expectation of privacy when using the company's computers, phones or email systems



- **Invest in Good Training**
  - Managers should be trained on how to deal with the thorny situations that can arise when colleagues embark on romantic relationships and when such relationships end, as well as on when flirtation can cross over into harassment
  - Training can also be an effective tool to get managers to consider the potential drawbacks before starting up their own office romances



- **Take Complaints Seriously**
  - If employees come forward with complaints, employers should not write off a complaint stemming from a failed romance as a mere lovers' squabble
  - Conducting a fair and through investigation of any complaint of sexual harassment or gender bias that arises from an office romance will help the employer defend itself if a lawsuit is filed

Contact Information

Nancy Brostrom Vollertsen

Lindquist & Vennum, P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
612-371-3540

nvollertsen@lindquist.com

Follow me on Twitter @nancyvollertsen

Visit the Employers Resource Center at

www.lindquist.com

to see current *Legal Alerts*

and

to order the NEW edition of

An Employer's Guide to Employment Law Issues in Minnesota