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EEOC Title VII Guidance, Captive Audience Meetings, Cemex, and Exempt Salary Threshold Challenges: May 2024 Labor and Employment Roundup

Client Bulletins

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EEOC Title VII Guidance Challenged

On May 21, the Texas attorney general sought a permanent injunction to block the U.S. Equal Employment Opportunity Commission's ("EEOC") enforcement guidance over gender identity and Title VII.

As we previously highlighted, the agency's guidance addresses issues involving workplace harassment. When the guidance was proposed, twenty states' Attorneys General—led by Jonathan Skrmetti of Tennessee—issued a letter which argued that the guidance "contravenes the [EEOC's] statutory authority" and that its "Title VII stance will unleash unconstitutional chaos in the Nation's workplaces". The letter asserts that the EEOC uses the Supreme Court's 2020 decision in *Bostock v. Clayton County* beyond what the Supreme Court considered.

Similar to the November 1, 2023 letter, the Texas complaint asserts that the guidance targets "employers with workplace policies based on biological sex rather than gender identity" and that the agency's guidance is improperly expanding *Bostock*. Texas asks the district court to issue a permanent injunction blocking the EEOC from "interpreting, applying, or enforcing Title VII in a way this court has declared contrary to law."

Despite the fact that agency guidance does not carry the force of law, contesting that guidance is not unheard of. In a motion before the U.S. District Court for the Northern District of Texas, the State claims that the EEOC's newest guidance flies in the face of a district court ruling that vacated the EEOC's June 2021 guidance. Texas argues that the 2024 guidance is "substantially the same as the 2021 guidance that this court ultimately vacated and set aside as unlawful."

In addition to Texas, Tennessee, joined by Alabama, Alaska, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Ohio, South Carolina, South Dakota, Utah, Virginia, and West Virginia also sued the EEOC over the guidance.

Captive Audience Meetings and *Cemex*

We recently reported on the United Auto Workers' ("UAW") failed organizing campaign at Mercedes-Benz' Vance, Alabama manufacturing plant. The UAW filed unfair labor practice ("ULP") charges before and after the vote, alleging that Mercedes engaged in unlawful conduct leading up to the election. The National Labor Relations Board ("NLRB" or "Board") has announced that the charges allege that Mercedes "disciplined employees for discussing unionization at work, prohibited distribution of union materials and paraphernalia, surveilled employees, discharged union supporters, forced employees to attend captive audience meetings, and made statements suggesting that union activity is futile."

These allegations, and the high-profile nature of the UAW's Mercedes campaign, render two issues ripe for review: the viability of captive audience meetings and the propriety of the Board's issuing bargaining orders that would render a union the election victor despite a crushing election defeat.

Congress passed the Taft-Hartley Act in 1947, which contains an explicit free speech proviso permitting captive audience meetings and providing that an employer's expression of views, arguments, or opinions about a union does not constitute an unfair labor practice where such expression "contains no threat of reprisal or force or promise of benefit." Captive audience meetings are mandatory meetings held by an employer, which are held during working hours and for which employees are paid, and at which the employer voices its perspective on unionization.

Nevertheless, several states—Connecticut, Minnesota, Maine, Oregon, New York, and Washington—passed laws that prohibit captive audience meetings. NLRB General Counsel Jennifer Abruzzo has also been outspoken in her initiative to have captive audience meetings deemed unlawful nationwide despite longstanding legality. Now, the legality of captive audience meetings is ripe for judicial consideration. Regardless of the outcome of the ULPs against Mercedes, the losing party is likely to appeal an administrative law judge decision, potentially up through the D.C. Circuit Court of Appeals and, perhaps, to the U.S. Supreme Court, which would have the opportunity to answer the question with finality.

In addition to captive audience meetings, the Board's authority to issue mandatory bargaining orders under *Cemex* could also be ripe for review. The U.S. Supreme Court concluded in *NLRB v. Gissel Packing*, 395 U.S. 575 (1969), bargaining orders are only warranted where the union at some point had majority support *and* unfair labor practices rendered a fair election highly unlikely or impossible. In practice, such orders are sparsely issued. The Board's *Cemex* decision greatly expands *Gissel* and challenges arising from the Mercedes campaign provides the opportunity to address whether *Cemex* went too far.

Challenging the DOL's Salary Threshold Increases for White Collar Exemption

Many employers have begun reviewing the exempt classifications since the Dep't of Labor ("DOL") issued its Final Rule increasing the salary threshold for employees exempt from overtime and minimum wage requirements under the Fair Labor Standards Act's ("FLSA"). Yesterday, business organizations filed a lawsuit against the DOL to temporarily enjoin (and permanently vacate) the Final Rule, arguing that it is arbitrary and capricious and exceeds the DOL's authority.

This lawsuit is the most recent activity that underscores the significant role that federal district courts in Texas play in deciding hot-button issues. The case against the DOL was brought in the Eastern District of Texas. The lawsuit challenging the EEOC guidance was brought in the Northern District of Texas. And the first two suits against the FTC's attempt to ban non-competes, which we previously addressed, were brought in the Northern and Eastern Districts of Texas.

We will continue to provide updates as the reviewing Courts rule on these potentially seismic shifts in the federal labor and employment landscape.

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