EMPLOYMENT LAW UPDATE 2015

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SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUPREME COURT REVIEW

HEALTH CARE / RELIGION

Burwell v. Hobby Lobby Stores, Inc.

(Decided June 30, 2014)

RELIGIOUS FREEDOM RESTORATION ACT

- The Religious Freedom Restoration Act prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person.

  (1) is in furtherance of a compelling governmental interest; and

  (2) is the least restrictive means of furthering that compelling governmental interest."

APPLICABLE REGULATIONS

- ACA regulations require specified employers' group health plans to furnish "preventive care and screenings" for women without "any cost sharing requirements."
- Religious employers, such as churches, are exempt from the contraceptive mandate.
- HHS also effectively exempted religious nonprofit organizations with religious objections to providing coverage for contraceptive services.

Burwell v. Hobby Lobby Stores, Inc.

Facts

- Owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.
- Owners sued HHS seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the objectionable contraceptives.

Burwell v. Hobby Lobby Stores, Inc.

Issue

- Whether the Religious Freedom Restoration Act allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law based on the religious objections of the corporation's owners.

Burwell v. Hobby Lobby Stores, Inc.

Ruling

- As applied to closely held corporations, the regulations promulgated by the HHS requiring employers to provide their female employees with no-cost access to contraception violates the Religious Freedom Restoration Act.

Burwell v. Hobby Lobby Stores, Inc.

Practical Impact

- According to the Court, "This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice."

WAGE AND HOUR

Integrity Staffing Solutions, Inc. v. Busk

(Decided December 8, 2014)

PORTAL – TO – PORTAL ACT

- The Portal-to-Portal Act exempts employers from FLSA liability for claims based on "activities which are preliminary to or postliminary to" the performance of the principal activities that an employee is employed to perform.

- E.g., do not pay employees to drive to work

- "Principal activities" includes all activities that are an "integral and indispensable part of the principal activities.

Integrity Staffing Solutions, Inc. v. Busk

Facts

- Company required its workers to undergo a search at the end of each shift.
- The search required employees to wait up to 25 minutes as employees were asked to remove their wallets, keys, and belts and pass through metal detectors.
- Two warehouse employees filed suit on behalf of workers claiming federal and state law wage and hour violations.

Integrity Staffing Solutions, Inc. v. Busk

Issue

- Whether time spent by warehouse workers in security screenings at the end of their work shifts is compensable time under the FLSA.

Integrity Staffing Solutions, Inc. v. Busk

Ruling

- Court held that such time was not compensable under the FLSA because the waiting time and security clearance time were not "integral and indispensable" to the employees' principal work activities.

- While the employees were required to submit to the security clearance process, this process was not directly related to their principal activities of locating items in the warehouse and preparing those items for shipment.

Integrity Staffing Solutions, Inc. v. Busk

Practical Impact

- In finding that the security screening time was non-compensable, the Court validates such practices by companies to safeguard their inventory and minimize theft.

- Decision only addresses claims under the Federal FLSA; state or local laws may be more stringent.

Integrity Staffing Solutions, Inc. v. Busk

Practical Impact (cont.)

- Unions may bargain for compensation for time employees spend waiting for and undergoing security screenings.
- Case did not change federal law with respect to compensation of time spent “donning and doffing” protective gear.

Integrity Staffing Solutions, Inc. v. Busk

Practical Impact (cont.)

- Steiner v. Mitchell; time battery plant employees spent showering and changing clothes compensable

- Mitchell v. King Packers Co.; time meat packers spent sharpening their knives because dull knives would slow down production, affect the appearance of meat, cause waste and lead to accidents

PREGNANCY DISCRIMINATION

YOUNG V. UNITED PARCEL SERVICE

(Decided March 25, 2015)

PREGNANCY DISCRIMINATION ACT

- The Pregnancy Discrimination Act (PDA) specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."

- Further, "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work..."

Young v. United Parcel Service

Facts

- Peggy Young worked as a part-time delivery drive for UPS when she became pregnant in 2006.
- Her doctor advised her that she should not lift anything over 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter.
- Young informed UPS of her lifting restriction and requested that she be placed in a light duty position for the remainder of her pregnancy.

Young v. United Parcel Service

Facts (cont.)

- UPS' policy was to offer light duty positions only to drivers who (1) had become disabled on the job; (2) had lost their DOT certification; or (3) or suffered from a disability covered by the ADA.
- Because she did not fall into one of these categories, UPS refused her request and told her she could not work due to her lifting restriction.
- She was out of work, without pay and health insurance coverage, for the remainder of her pregnancy.

Young v. United Parcel Service

Facts (cont.)

- She sued UPS for unlawful pregnancy discrimination under the PDA, claiming that UPS treated her differently than other similarly situated drivers when it refused to accommodate her lifting restriction.

- UPS countered that the PDA does not require accommodations or special treatment for pregnant workers, and claimed that it had treated Young as it would have treated other non-pregnant drivers who suffered an off-the-job injury.

Young v. United Parcel Service

Facts (cont.)

- The federal trial court sided with UPS and dismissed Young's claims, and the Fourth Circuit Ct of Appeals affirmed the dismissal.

- Young appealed to the Supreme Court.

- On January 1, 2015, UPS voluntarily changed its policy and now makes temporary light duty work available to pregnant workers with medically certified restrictions.

Young v. United Parcel Service

Issue

- Whether, and in what circumstances the Pregnancy Discrimination Act requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

Young v. United Parcel Service

Ruling

- The Supreme Court rejected both Young and UPS' interpretations of the PDA.
- The Court refused to grant what it perceived to be Young's request to give pregnant workers a "most-favored-nation" status.
- The Court stated that employers who provide an accommodation to one or two workers do not have to provide similar accommodations to all pregnant workers.
- The Court established a new standard for lower courts to apply when deciding pregnancy discrimination claims.

Young v. United Parcel Service

Standard in PDA Cases

- Pregnant workers can make out a *prima facie* claim of disparate treatment discrimination under the PDA by showing that:

  (1) she is or was pregnant

  (2) she sought an accommodation

  (3) the employer did not accommodate her; &

  (4) the employer did accommodate other workers "similar in their ability or inability to work."

Young v. United Parcel Service

Standard in PDA Cases (cont.)

- Once the pregnant woman meets her burden, the employer must then articulate "a legitimate, non-discriminatory reason" for denying the requested accommodation.

- The employer's reason cannot simply be that it would be too expensive or inconvenient to accommodate pregnant workers.

Young v. United Parcel Service

Standard in PDA Cases (cont.)

- If the employer can articulate such a legitimate, nondiscriminatory reason, the woman's PDA claim may still succeed if she can show that the employer's policies impose a "significant burden" on pregnant workers, and that the employer's legitimate, nondiscriminatory reason(s) are not sufficiently strong to justify the burden.

Young v. United Parcel Service

Practical impact

- Employers should review their current accommodations and/or light duty policies to ensure that they are not unjustifiably treating pregnant workers less favorably than non-pregnant workers who have similar working restrictions.
- If current policies do "significantly burden" pregnant employees, the employer must have a clear legitimate nondiscriminatory reason to justify the burden.

Young v. United Parcel Service

Practical impact

- The Supreme Court did not give any weight to the pregnancy discrimination guidance issued by the EEOC last summer.

- Though the Supreme Court may have refused to be guided by the EEOC guidance, employers should still expect the EEOC to follow its guidance in its investigation of pregnancy discrimination claims.

SUPREME COURT PREVIEW

RELIGIOUS ACCOMMODATIONS

EEOC v. Abercrombie & Fitch Stores, Inc.

(Oral Argument: February 25, 2015)

EEOC v. Abercrombie & Fitch Stores, Inc.

Facts

- Abercrombie & Fitch requires its employees to comply with a "Look Policy" that reflects the store's style and forbids black clothing and caps, though the meaning of the term cap is not defined in the policy.

- If a question arises about the Look Policy during the interview or an applicant requests a deviation, the interviewer is instructed to contact the corporate Human Resources department, which will determine whether or not an accommodation will be granted.

EEOC v. Abercrombie & Fitch Stores, Inc.

Facts (cont.)

- In 2008, Samantha Elauf, a practicing Muslim, applied for a position at an Abercrombie store. She wore a headscarf, or hijab, in her interview. Elauf did not mention her headscarf during her interview and did not indicate that she would need an accommodation from the Look Policy.

- Her interviewer likewise did not mention the headscarf, though she contacted her district manager, who told her to lower Elauf's rating on the appearance section of the application, which lowered her overall score and prevented her from being hired.

EEOC v. Abercrombie & Fitch Stores, Inc.

Facts (cont.)

- The federal district court granted summary judgment for the EEOC.

- The U.S. Court of Appeals for the 10th Circuit reversed and held that summary judgment should have been granted in favor of Abercrombie because there is no genuine issue of fact that Elauf did not notify her interviewer that she had a conflict with the Look Policy.

EEOC v. Abercrombie & Fitch Stores, Inc.

Facts (cont.)

- The EEOC sued Abercrombie on Elauf's behalf and claimed that the company had violated Title VII by refusing to hire Elauf because of her headscarf.
- Abercrombie argued that Elauf had a duty to inform the interviewer that she required an accommodation from the Look Policy, and that the headscarf was not the expression of a sincerely-held religious belief.

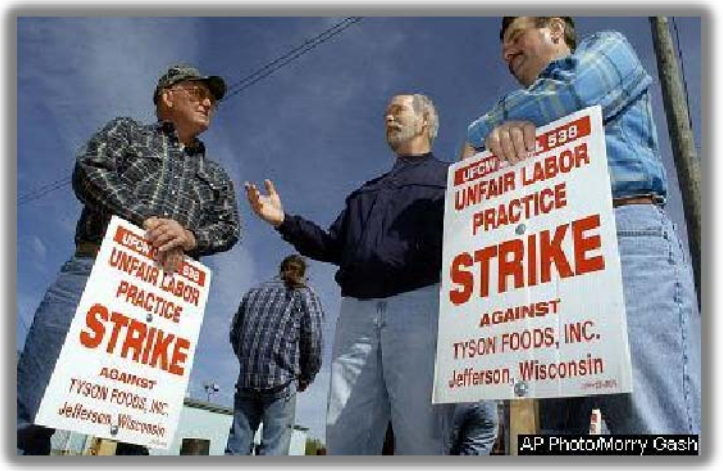
EEOC v. Abercrombie & Fitch Stores, Inc.

Issue

- Whether an employee can be liable under Title VII for the refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

PROPOSED CHANGES TO THE F.L.S.A.

Fair Labor Standards Act

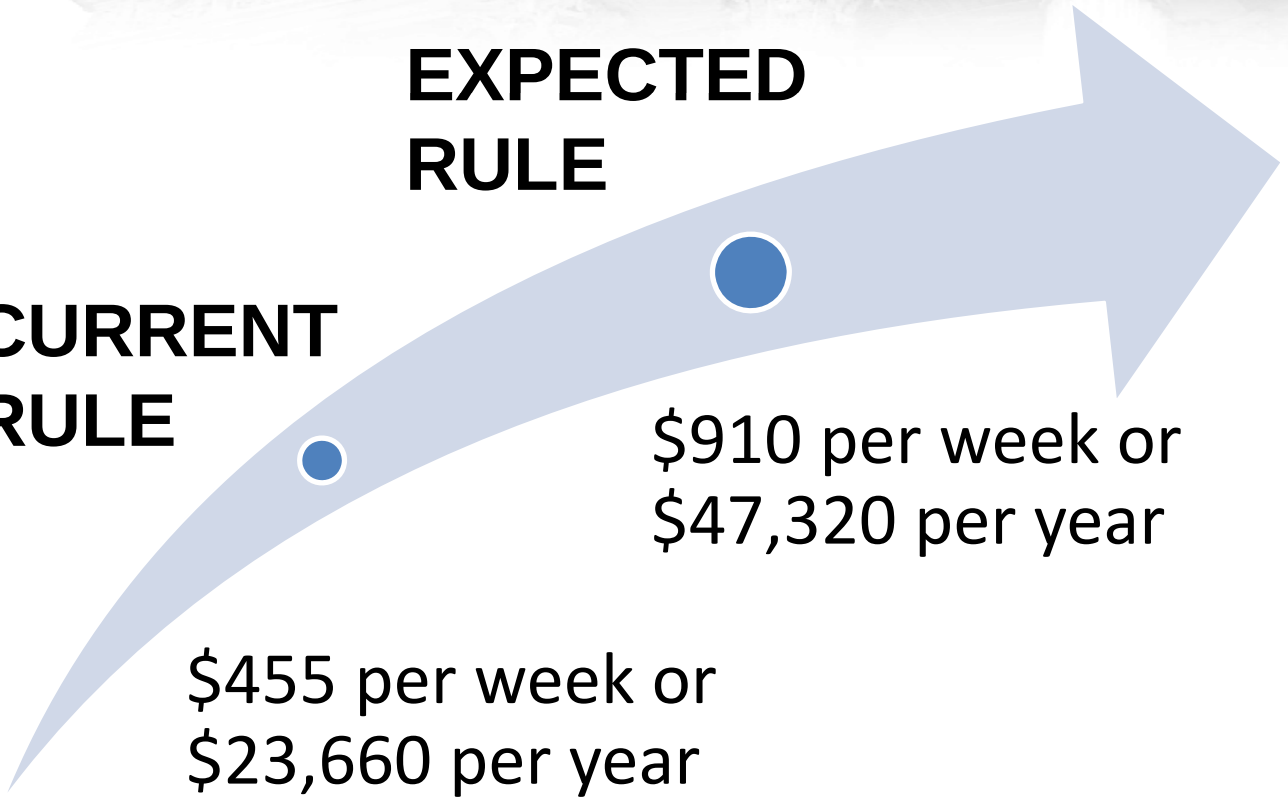


Proposal to amend 541 overtime regulations

- On March 13, 2014, President Obama sent a presidential memorandum to the U.S. Department of Labor directing the agency to "modernize" and "simplify" the Section 541 rules.

- Under the FLSA 541 Regulations, an employee qualifies as exempt from overtime if he or she satisfies a "Duties Test" (under the Executive, Administrative, Professional, Computer and Outside Sales regulations) and the employee is paid on a "Salary Basis."

SALARY BASIS TO DOUBLE



EXECUTIVE: CONCURRENT DUTIES

Current Rule

- Concurrent performance of exempt and non-exempt work does not disqualify an employee from exemption

- Exempt executives decide when to perform nonexempt duties and remain responsible for supervising and other management functions

Expected Rule

- Non-exempt work counts against the exemption, as managers must spend more than 50% of their time supervising

EXECUTIVE:
TWO OR MORE FULL-TIME EMPLOYEES

Current Rule

- Requires executives to supervise at least two fulltime employees, but does not define "full-time"

- In the past, as an enforcement policy, DOL has recognized that supervising as low as 70 hours meets this requirement

Expected Rule

- "Full-time" may be defined as 80 hours of FLSA compensable work under supervision

ADMINISTRATIVE EXEMPTION: FINANCIAL SERVICES

Current Rule

- Exempt if employee analyzes income, assets, investments, debts of customers; determines which financial products best meet the customer's needs and circumstances; advises the customer regarding advantages and disadvantages of different financial products; and markets, services or promotes the employer's financial products

Expected Rule

- Deleted or significantly modified to limit selling activities

ADMINISTRATIVE EXEMPTION: DISCRETION & INDEPENDENT JUDGMENT

Current Rule

- Exempt administrative employees must perform work requiring the exercise of discretion and independent judgment with respect to matters of significance

Expected Rule

- ???

OUTSIDE SALES

Current Rule

- Employee is "customarily and regularly engaged away from the employer's places of business"

- "Customarily and regularly" means "work normally and recurrently performed every workweek"

Expected Rule

- Adopt the California rule: employee must sell away from employer's places of business more than 50% of the time

COMPUTER EXEMPTIONS

- DOL will be looking for opportunities to narrow the computer exemption
- Because the duties test for exempt computer employees is in the FLSA statute itself, DOL's discretion is limited and subject to challenge
- Most likely, DOL will propose new examples of employees who do not meet the exemption

GUAM BILL – CREDIT HISTORY IN THE EMPLOYMENT PROCESS

PROPOSED GUAM BILL
CREDIT HISTORY IN THE EMPLOYMENT PROCESS

AN ACT TO ADD A NEW (h) to § 5201 of 22 GCA RELATIVE TO THE USE OF AN INDIVIDUAL'S CREDIT HISTORY IN THE EMPLOYMENT PROCESS.

5 PM 1:41

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. Legislative Findings and Intent. *I Liheslaturan Guåhan* finds consumer credit scores and credit reports often exclude relevant information or include inaccurate information. A 2011 study conducted by the Policy and Economic Research Council suggests that more than twenty million Americans have material errors on their credit reports. According to researchers at the Center for Economic Justice and the National Consumer Law Center, there is evidence that racial and ethnic disparities exist in, and are perpetuated by, consumer credit scoring and credit reporting. In its 2011 report "Discrediting America", the nonpartisan public policy research and advocacy organization Demos concluded that consumer credit scores and credit reports are being used more often and in more contexts than ever before, including by employers, utility companies, and insurers. Despite a lack of evidence showing that consumer credit history correlates to an individual's job performance or likelihood to commit fraud, the number of employers relying on consumer credit information to evaluate employees or potential employees has increased dramatically. The National Conference for State Legislatures reports forty-six bills in 26 states and the District of Columbia were introduced or pending in the 2013 legislative session relating to the use the credit information in employment decisions. Out of the total 46 bills, 42 address restrictions on the use of credit information in employment decisions.

INTENT OF BILL NO. 44-33

- *I Liheslaturan Guahan finds consumer credit scores and credit reports often exclude relevant information or include inaccurate information.*

- *Despite a lack of evidence showing that consumer credit history correlates to an individual's job performance or likelihood to commit fraud, the number of employers relying on consumer credit information to evaluate employees or potential employees has increased dramatically.*

INTENT OF BILL NO. 44-33

- *It is the intent of I Liheslaturan Guahan to limit an employer's use of an individual's credit history unless a particular job or licensed activity requires such an examination prior to, or during, employment.*

PROPOSED GUAM BILL
CREDIT HISTORY IN THE EMPLOYMENT PROCESS

It is the intent of *I Liheslaturan Guåhan* to limit an employer's use of an individual's credit history *unless* a particular job or licensed activity requires such an examination prior to, or during, employment.

Section 2. A *new* (h) is added to §5201 of 22 GCA to read:

"(h) For any employer to use the circumstances of an individual's credit history as a reason for denial of employment, or as a reason for termination of employment, *unless* the circumstances are substantially related to the requirements of a particular job or licensed activity. An employer may request a credit history background check as part of the application process where it is shown to be directly related to the position sought by the applicant under at least one of the following circumstances: 1) the position requires bonding or other security under state or federal law for an individual holding the position; 2) the position is managerial and involves setting the direction or control of the business; 3) the position meets criteria in specified federal or state administrative rules to establish the circumstances when a credit history is a bona fide occupational requirement; 4) the duties of the position involve access to customers', employees', or the employer's personal or financial information other than information customarily provided in a retail transaction; 5) the duties of the position involve a fiduciary responsibility to the employer; or 6) the position includes and expense account. Any employer who chooses to use an individual's credit history as a part of the hiring process, or an individual's credit history as part of the retention process, *shall* disclose this fact to the individual."

BILL NO. 44-33

§ 5201. Discriminatory Practices Made Unlawful; Offenses Defined.

It shall be an unlawful employment practice or unlawful discrimination:

(h) For any employer to use the circumstances of an individual's credit history as a reason for denial of employment, or as a reason for termination of employment, *unless* the circumstances are substantially related to the requirements of a particular job or licensed activity.

BILL NO. 44-33

An employer may request a credit history background check as part of the application process where it is shown to be directly related to the position sought by the applicant under at least one of the following circumstances:

1) the position requires bonding or other security under state or federal law for an individual holding the position;

2) the position is managerial and involves setting the direction or control of the business;

3) the position meets criteria in specified federal or state administrative rules to establish the circumstances when a credit history is a bona fide occupational requirement;

4) the duties of the position involve access to customers', employees', or the employer's personal or financial information other than information customarily provided in a retail transaction;

5) the duties of the position involve a fiduciary responsibility to the employer; or

6) the position includes and expense account.

BILL NO. 44-33

Any employer who chooses to use an individual's credit history as a part of the hiring process, or an individual's credit history as part of the retention process, *shall* disclose this fact to the individual.

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Thank You!