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# HRAGC LEGAL UPDATE

OCTOBER 15, 2020

## FEDERAL

**United States Court of Appeals for the Sixth Circuit**

On October 6 the Court of Appeals for the Sixth Circuit, which hears appeals from the federal courts in Michigan, Ohio, Kentucky and Tennessee, ruled that a Nashville dispatcher was properly fired for a racist slur in a Facebook message. On election night 2016, the dispatcher (who is white) posted a message expressing happiness in the outcome of the Presidential election. She was off duty at the time, though her profile identified her as a Nashville dispatcher. Someone responded using the "N" word and her reply message repeated that person's words. Several complaints about the message were made by co-workers and a member of the public and the dispatcher was terminated following a hearing. She filed suit contending the termination violated her First Amendment rights. The Sixth Circuit employed a balancing test to weigh the competing interests and determined that the government agency's interest in maintaining a properly functioning workplace that efficiently delivered its services outweighed the employee's right to address matters of public concern. The Court examined whether the employee's statement (1) impairs discipline by superiors or co-worker harmony, (2) has a detrimental impact on close working relationships, (3) impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or (4) undermines the mission of the employer. Upon completing its examination of those factors, the Court found the evidence supported termination. The case is *Bennett v. Metro Gov't of Nashville* (No. 19-5818).

**United States Department of Labor**

The DOL's Office of Federal Contractor Compliance Programs issued a guidance on October 7 regarding racial sensitivity training seminars by federal contractors. The Guidance states that "Unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously." This was issued in furtherance of and to clarify the President's recent Executive Order that prohibited certain racial sensitivity training by federal contractors and training that constitutes race or sex "scapegoating." The Guidance defines "race or sex scapegoating" as "assigning fault, blame, or bias to a race or sex, or to members of a race or sex, because of their race or sex." The OFCCP is setting up a hotline to report prohibited seminars and indicates it will investigate all complaints.

The OFCCP is reportedly reviewing whether diversity initiatives at Wells Fargo and Microsoft are discriminatory. Microsoft revealed plans to invest $150 million in diversity and inclusion with the goal of doubling the number of Black and African American managers and senior leaders by 2025. Wells Fargo expressed its intention to double the number of Blacks in leadership positions over the next five years. The OFCCP letter states "Although contractors must establish affirmative action programs to set workforce utilization goals for minorities and women based on availability, contractors must not engage in discriminatory practices in meeting these goals." This review follows a settlement in August between Wells Fargo and the OFCCP under which Wells Fargo agreed to pay $7.8 million to resolve claims of discrimination in its hiring practices over an eight-year period.

This guidance is limited to federal contractors. But all employers who are engaged in diversity and inclusion efforts should be mindful of the DOL's view. Care should be taken to avoid key words and phrases that may lead to scrutiny by a regulator or that could be used to challenge hiring and promotion decisions.

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## NEW HAMPSHIRE

**New Hampshire Superior Court**

**Restrictive Covenants.** On June 30, 2020 a Superior Court Judge issued a decision that cogently outlines the limitations of restrictive covenants and identifies the traps for employers. The key aspects of the decision are:

- Restrictive covenants are disfavored and are narrowly construed
- A restraint will be upheld if it is reasonable. To determine reasonableness the court will examine whether
    - The restriction is greater than necessary in geographic and temporal scope and if it is limited to protecting a legitimate business interest;
    - Does the restriction create an undue hardship; and
    - Is the restriction injurious to the public interest
- A court may reform or rewrite an overbroad agreement but only if the employer acted in good faith at the time of execution
- RSA 275:70 requires that a noncompete agreement be provided to a prospective employee prior to the employee's acceptance of an offer of employment or it is unenforceable. This law was effective July 28, 2014.

Employers should review whether their restrictive covenants were signed in conformance with RSA 275:70 and examine whether the agreements are narrowly tailored in time, geographic scope and subject matter. Employers may generally protect their goodwill and confidential information and may usually restrict former employees from soliciting the customers and prospects with whom they had contact, but employers typically may not prevent former employees from competing for new business.

**Best Practices to Maintain a Safe Workplace**

As we head back inside, schools are back in session, a second wave is predicted or at least feared, and it is a great time to revisit Covid-19 practices and policies. OSHA imposes a duty to maintain a safe work environment, there are mandatory state guidelines in place, and an infection can cause death or serious harm and derail a business operation. Consider the following:

- Review and revisit the Governor's Universal Guidelines (last updated October 6, 2020) and the industry specific guidelines. All must be followed
- Update (or conduct) a workplace hazard assessment, including remote work locations
- Review the company safety plan to make changes or implement updates
- Revisit employee and visitor compliance and renew education and training
- Consider whether to pay more attention to off duty conduct and how to address concerning behavior
- Tighten the approval process for use of PTO and restrict as necessary to meet company needs
- Prepare to address illness and exposure
- Examine the leave policy, review for consistency and adjust as necessary
- Remember to protect employee privacy
- Ensure universal compliance with state, federal and company guidelines – at all levels of the company

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