THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES
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COLORADO GOES TO WASHINGTON: AN UPDATE ON *MASTERPIECE CAKESHOP*

In June, the United States Supreme Court issued its long-awaited decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

The case involved a baker in Colorado who refused to make a wedding cake for a same-sex couple because, according to the baker, to do so violated his religious beliefs. The couple filed a charge with the Colorado Civil Rights Commission, and the Commission found "probable cause of discrimination," meaning the Commission determined it was more likely than not the baker improperly discriminated against the couple. After various appeals, the United States Supreme Court agreed to review the case. And, in the end, the Supreme Court ruled in favor of the baker on a procedural issue. The decision did not provide blanket permission for businesses to refuse to serve certain patrons. Rather, the Court strictly focused on the Colorado Civil Rights Commission's handling of the case.

In its decision, the Supreme Court explained that the Commission violated Colorado's duty to avoid imposing laws and regulations that are hostile to a religion or religious viewpoint. According to the Supreme Court, the Commission was "hostile" toward the baker's religious beliefs when the Commission (1) stated, or implied, that religious beliefs cannot play a role in business decisions, (2) characterized the baker's faith as "merely rhetorical," and (3) compared the baker's beliefs to beliefs defending slavery and the Holocaust. So, the Supreme Court determined that in these statements, the Commission did not consider the case with the religious neutrality that the Constitution requires. Because it determined that the Commission did not handle the case properly, the Supreme Court reversed the Commission's decision and ruled in favor of the baker. The Supreme Court did not necessarily rule, however, that the baker acted permissibly in refusing to make the same-sex couple's wedding cake.

Shortly after the *Masterpiece Cakeshop* decision, the Supreme Court addressed a similar case – *Arlene's Flowers v. Washington*. In that case, a flower shop owner refused to prepare floral arrangements for a same-sex wedding couple on the basis of the owner's religious beliefs. The Supreme Court initially agreed to hear the case, but after issuing its *Masterpiece Cakeshop* ruling, the Court sent the case back to the Washington State courts for further consideration.

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Practical Tip: The Colorado Antidiscrimination Act prohibits discrimination on the basis of a person's sexual orientation, religion, disability, race, creed, color, sex, age, national origin, and ancestry. Employers may not base employment decisions (*e.g.*, hiring, firing, promoting, etc.) on any of these protected classes. Likewise, places of public accommodation (*i.e.*, businesses that offer their services to the public) may not discriminate against their patrons based on these protected classes. Therefore, employers should make sure that they have and implement antidiscrimination policies.

ARE ARBITRATION AGREEMENTS THE NEW ORANGE?

The push and pull of two federal laws (*i.e.*, the National Labor Relations Act and the Federal Arbitration Act) came to a head recently in the United States Supreme Court case *Epic Systems Corp v. Lewis*. This case considered whether employers can require employees to sign arbitration agreements (e.g., agreements requiring a third party, called an arbitrator, to hear the case rather than a judge or jury in a court of law) wherein the parties agree to resolve disputes via arbitration, outside of court, and without being able to file the action as a class or collective action.

One law, the National Labor Relations Act (NLRA), gives employees the right to self organize and "engage in concerted activities for the purpose of mutual aid or protection." In essence, the NLRA permits employees to "band together" in filing class and collective actions against their employer. The other law, the 1925 Federal Arbitration Act (FAA), allows employers to "settle by arbitration" disputes with employees.

As background, in 2012, the National Labor Relations Board, which is the government agency responsible for enforcing the NLRA, ruled that agreements requiring only individual arbitrations —that is, barring class or collective arbitration —violated the NLRA and were an unfair labor practice. The NLRB held that making claims on behalf of several employees together was a form of acting concertedly for "mutual aid or protection" protected by the NLRA, and employers could no more require employees to agree to refrain from such joint claims than they could require employees to agree not to join a union. Since then, the NLRB steadfastly took the position that employers violated the law by requiring their employees to sign arbitration agreements that include class or collective action waivers. But courts have been less definitive. Enter the United States Supreme Court.

In *Epic*, the U.S. Supreme Court decided, in a 5-4 decision, that arbitration agreements requiring individualized proceedings (*i.e.,* prohibiting class actions) were not unlawful and must be enforced. Writing for the majority, Justice Neil Gorsuch wrote that Congress instructed that arbitration agreements written like the ones before the court must be enforced as written. The majority also found that nothing in the NLRA suggested that Congress had the intention to displace the FAA.

While, of course, the majority decision set the law for the United States, the *Epic* case may be best known for the 30-page blistering dissent from Justice Ruth Bader Ginsburg, which Justice Ginsburg read from the bench. Justice Ginsburg lamented that, "individually, [workers'] claims are small, scarcely of a size warranting the expense of seeking redress alone. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced." The "upshot," Ginsburg

concluded, is that employers will "no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."

Practical Tip: What to do in light of the *Epic* decision is the question. Many legal publications wondered if Congress would enter into the debate by enacting a law addressing the "legality" of arbitration agreements. Frankly, tjat seems unlikely considering the current level of rancor in Washington, D.C. Many other publications opined that the use of arbitration agreements would increase. And while that may be the case, companies should consider the potential downside to making arbitration agreements the new employee handbook. After all, while the theory is that the use of arbitration agreements will reduce/eliminate class actions, arbitration decisions are accused of "splitting the baby," which means that while employees won't win a lot of money, arbitrators are reluctant to completely dismiss the claim. So, such rulings would require organizations to pay the employee's attorney fees. In the end, organizations need to carefully and thoroughly consider whether arbitration agreements are right for them.

KEEPING PERSONAL IDENTIFYING INFORMATION CONFIDENTIAL IN COLORADO

During the 2018 legislative session, Governor Hickenlooper signed a bill that may have far-reaching effects for organizations that have, keep, or retain identifying information for customers, clients, or other individuals.

House Bill 18-1128, which goes into effect on September 1, 2018, applies to an individual or business entity "that maintains, owns, or licenses personal identifying information in the course of the person's business, vocation, or occupation." And the definition of "personal identifying information" is very broad, as it includes social security numbers, PIN numbers, passwords, drivers license numbers, and information related to a financial transaction device.

So, if an organization (or an individual) has any covered type of personal identifying information, it must take steps to keep the information private and confidential by prohibiting "unauthorized access, use, modification, disclosure, or destruction." This is achieved by putting into place "reasonable security procedures and practices" along with ensuring that any third party who receives personal identifying information does the same.

The statute also requires those covered entities to notify individuals if a security breach or disclosure occurs. In such an event, covered entities must investigate the situation and, when appropriate, notify the Colorado residents whose personal information was obtained or disclosed within 30 days after learning about the event. For security breaches that affect 500 or more Colorado residents, the Colorado Attorney General's Office also must be notified. Larger breaches affecting 1,000 or more Colorado residents must be reported to consumer reporting agencies. The Colorado Attorney General will enforce this law, including prosecuting criminal violations that may arise.

Importantly, the disclosure of "personal information" that triggers a notification requirement is not the same as, and appears to be broader than, the personal identifying information that governs whether a person or organization is a covered entity. For example, while personal identifying information includes things like social security numbers, passwords, drivers licenses, and similar items, a breach is triggered when personal

information like the disclosure or acquisition of "a Colorado resident's first name or first initial and last name...with...[a] social security number...email address, in combination with a password or security questions and answers, that would permit access to an online account," and other situations occur. So, the incidents that trigger a security breach can be broader than simply disclosure of the type of information described as "personal identifying information."

Further, it does not appear that security procedures found in other statutes, like HIPAA, are accounted for in this new bill. Rather, it appears that compliance with this bill, in addition to HIPAA, would be required in the event of a breach.

Practical Tip: Most organizations have or keep personal information related to clients, customers, patients, or other individuals. In light of this sweeping new law, take the time this summer to review your organization's security procedures compared to this statute's requirements, and consult your trusted counsel as necessary with any questions.

BRINGING THE EXPANSIVE ADAAA BACK TO THE FOREFRONT

The Americans with Disabilities Amendments Act is now more than nine years old. During the last nine years, courts have given us guidance about how employers should apply the ADAAA to their workplaces. As we near the ADAA's 10-year anniversary, it's a good time to ensure that your workplace is complying with the ADAAA's expansive scope.

Congress enacted the ADAAA with the intent to provide "a broad scope of protection" for disabled individuals. This is an important point to keep in mind in the workplace because, while not all health-related issues are covered by the ADAAA, many will be covered due to the statute's intent that coverage be applied broadly.

In short, the ADAAA's coverage extends to physical or mental impairments that cover one or more major life activities. In the same theme of creating broad coverage, the ADAAA sets out that major bodily functions–such as impairments of the immune system, brain, circulatory system, etc.–are part of the concept of "major life activities." Very similarly, activities like providing self care, hearing, walking, and similar tasks are covered as "major life activities." The ADAAA brought attention to and expanded the physical and mental health conditions that fall within the ADAAA's purview.

Over the last nearly-10 years, we have seen courts embrace the idea of the ADAAA's broad coverage. For example, in one case, a federal court in South Dakota held that an individual established that anxiety related to the individual's fear that she would be fired from her job was a disability under the ADAAA. *Huiner v. Arlington School Dist.*, 11-4172-KES (Sept. 26, 2013).

Practical Tip: If you or any manager receives information that a physical or mental health condition may be impacting an employee in your workplace, be sure to appropriately follow up on the information regardless of whether it appears to indicate that a condition is only temporary or that it is minor. While some minor conditions may not be covered disabilities under the ADAAA, the best practice is to consider each condition separately and then determine whether a reasonable accommodation is needed.

HERE'S A TIP: THERE'S A NEW ACT RELATED TO TIPS!

Under the Fair Labor Standards Act, employers may take a tip credit against the minimum wage for employees who keep all of their tips or are part of a tip-sharing arrangement, (frequently referred to as a "tip pool") comprised only of employees who "customarily and regularly receive tips." The tip-pooling rule caused confusion regarding whether employees could share tips when the employer did not claim the tip credit (*i.e.*, the employer paid employees the full minimum wage).

In an effort to clear up some of the confusion, the Department of Labor issued regulations in 2011 that provided that tip pools could only be used where the employer did not take a tip credit and paid employees the full federal minimum wage. But courts became split on this regulation, with some courts refusing to enforce the regulation because the courts determined the DOL violated the FLSA because the regulation did not allow the DOL to determine who "owned the tips."

So, earlier this year, the Tip Income Protection Act was enacted. This federal Act prohibits employers from keeping or redistributing to nontipped employees any of an employee's tips received from customers. Specifically, the law states that employers may not "keep tips received by its employees for any purpose, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." So, given these developments, the DOL stated that "employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools." In essence, employers are permitted to have tip pools among non supervisory/managerial employees if the employer pays the employee at least the current minimum wage.

The new Act provides some clarity in how employers can distribute tip money, but questions remain. For example, the law does not define the term "managers or supervisors." What should an employer do about an employee who may serve as a manager-on-duty but primarily serves customers? Additionally, the law does not define what it means "to keep" tips. Does "keeping" mean only when the employer uses the money for its own purposes, or does it also include distributing tips to other employees, as in a valid tip pool? The DOL is expected to issue new rules in the near future.

Practical Tip: Violations of the Tip Income Protection Act can be costly – up to $1,100 per violation in fines. Employers with tipped employees should therefore ensure that they are not keeping any of their employees' tips and that managers and supervisors are not keeping any portion of employees' tips. These employers should also keep an eye out for future editions of *Employer's Advisory* to see how courts interpret the new law.

FIRM NAME ANNOUNCEMENT!

Bechtel & Santo is proud to announce it has changed its name to Bechtel Santo & Severn to recognize Alicia Severn's continued outstanding service and dedication to the firm. Alicia has been with the firm for five years and has also become partner. To view her bio, or for more information about the firm, our attorneys, upcoming seminars, or to read the current and archived issues of the Employer's Advisory, go to www.bechtelsanto.com.

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UPCOMING SEMINAR IN DURANGO

On August 8, 2018, the Durango Area Human Resource Managers will present its annual all-day Employment-Law Update. Bechtel Santo & Severn is proud to work with DAHRM in this conference. Agenda topics include:

2018 Legislative & Case Law Update. Laws, regulations, court cases, etc. that impact our field don't just come up yearly or monthly; they come up every day. So, our ever-changing field demands that employers stay abreast of all the changes. This session will provide attendees with an update on recent changes to Colorado and federal law and recent employment decisions.

The Ins and Outs of Investigations in the Era of #metoo: Who, What, When, and Why. In this session, we will begin by discussing the types of conduct that give rise to a duty to investigate, including who can conduct an investigation, what a workplace investigation should include, pitfalls to avoid in conducting an investigation, how to spot potential "me too" issues that arise during an investigation, and how to successfully conclude an investigation.

Additionally, we'll present talks regarding employee handbooks, reasonable accommodations in the workplace (*e.g.,* ADA and others) and the top 10 pitfalls that every employer should watch for. Finally, we'll also include a first-time ever Employment Law Jeopardy: "I'll take FLSA exemptions for $400, Alex."

Registration is on a first-come, first-serve basis and spots are going quickly. Please go to the DAHRM website to sign up: https://dahrm.org/meetings.

We look forward to seeing you there.

Q&A

Q. I know the requirement to complete the Colorado Affirmation Form is no longer in effect, but what am I supposed to do with all the ones I've already got? Can we just get rid of those old Colorado Affirmation Forms?

A. You are correct that employers in Colorado no longer have to complete that Form. But the law gives the director of the Division of Labor and Employment the authority to audit documentation kept by employers. While we have not seen an audit specifically focus on whether an employer retained the Forms, we believe this could be a component of any state audit. So, to ensure your organization has all documentation that was required to be completed when the employee was hired, we recommend that you retain those Forms, even though you no longer need to complete them.

Q. *We ask all job applicants to provide a salary history. Is that okay?*

A. Employers should be careful about asking about salary history. Although the Colorado legislature has struck down multiple bills proposing a ban on asking about prior salary history, a federal appellate court recently held that using prior salary information, even in combination with other factors, cannot justify a wage differential between men and women. Therefore, even though Colorado employers can ask about salary history, employers should be hesitant to ask for this information because it could easily lead to claims of discrimination.