Third Thursday –Crowell & Moring's Labor & Employment Update

July 18, 2013

The webinar will begin shortly. Please stand by.

Today's Presenters

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EEO Cases

- Vance v. Ball State University
- University of Texas Southwestern Medical Center v. Nassar
  - Decided June 24, 2013
  - Title VII cases
  - Employer-friendly decisions
  - Decisions create increased opportunities for summary judgment

Vance v. Ball State University

- Issue Presented:

  Who qualifies as a "supervisor" in a Title VII hostile work environment case?

- Background:
  - Prior Supreme Court cases make a distinction between "supervisors" and "co-workers" for purposes of establishing liability.
  - But left open the question of who constitutes a "supervisor."

Vance v. Ball State University

- Facts:
  - Vance alleged that Davis, another department employee, subjected Vance to a hostile work environment based on race.
  - Vance argued that University was liable for the alleged harassment because Davis was her "supervisor."
  - Lower courts concluded – Davis not a supervisor.

Vance v. Ball State University

- Holding:
  - A "supervisor" is one who is authorized to take *tangible employment actions* (e.g., hiring, firing, demoting, promoting, transferring, disciplining).
  - Requires more than directing daily work or giving assignments.

Vance v. Ball State University

- Implications
  - Decision created a bright-line rule for determining who is a supervisor. Question can now be resolved earlier in litigation
  - Decision does not mean that employers are off-the-hook for harassment by co-workers.
  - Employers should (a) review their anti-harassment policies and procedures and (b) ensure appropriate training and education of employees at all levels.

Univ. of Texas Southwestern Med. Ctr. v. Nassar

- Issue:

  Whether a plaintiff in a Title VII retaliation case must prove retaliation by his employer using the "but for" causation standard.

  - OR -

  Is the lesser "motivating factor" standard applicable to Title VII discrimination cases applicable?

Univ. of Texas Southwestern Med. Ctr. v. Nassar

- Facts:
  - University Medical Center ("UMC") had affiliation agreement with Parkland Memorial Hospital ("PMH") requiring PMH to offer open staff positions to UMC faculty.
  - Dr. Nassar was a faculty member of UMC and PMH until he was allegedly harassed by his supervisor, Dr. Levine.
  - Dr. Nassar complained about the harassment to Dr. Fitz (Dr. Levine's supervisor), but made arrangements with PMH to keep his position there.
  - PMH subsequently rescinded offer at the behest of Dr. Fitz.

Univ. of Texas Southwestern Med. Ctr. v. Nassar

- Holding:
  - "But/for causation" standard is applicable to Title VII retaliation cases.
  - "Motivating factor" standard is applicable to Title VII discrimination cases

Univ. of Texas Southwestern Med. Ctr. v. Nassar

- Implications
  - Two decisions on the same day in which the Court rejected the EEOC's interpretation of Title VII. (See Vance v. Ball State University)
  - Decision (coupled with Vance) shows a clear move by Court to simplify litigation of Title VII cases and to reduce frivolous retaliation claims.
  - Case provides clues for what employers need to focus on at the time of employment decisions and during discovery process to increase chances of prevailing on summary judgment.

US Airways v. McCutchen

- 133 S. Ct. 1537 (April 16, 2013)
- Plan's subrogation action against beneficiary not subject to equitable defense of "double recovery" because of clear plan document language barring such arguments
- Court follows *Sereboff.*
- Case characterized as an action to enforce an equitable lien by agreement
- "Common fund" principles applied as to attorneys fees issue, in light of the plan's silence on this point.

US Airways v. McCutchen

- *Quest Diagnostics v. Bomani, et al.*, 11-CV-00951 (D. Conn., June 19, 2013)
  - Recovery action permitted based on the reimbursement provision of the plan, which stated that the employee was "responsible for reimbursing the plan for 100% of the amounts paid by the medical plan…regardless of whether [the employee] ha[s] been made whole."

U.S. v. Windsor- § 3 of DOMA Unconstitutional- Implications for Benefit Plans and Employer Practice

- State of spousal recognition rules
- Background on DOMA
- Overview of the Court's holding in *U.S. v. Windsor*
- Open questions for employer-sponsored plans
- FMLA and other specific issues for health and welfare plans

U.S. v. Windsor-
State of Same-Sex Marriage Recognition

- Currently 13 states and the District of Columbia provide for legal same-sex marriage

- ✓ California (2008, June 2013)
- ✓ Connecticut (2008)
- ✓ Delaware (July 2013)
- ✓ District of Columbia (2010)
- ✓ Iowa (2009)
- ✓ Maine (2012)
- ✓ Maryland (2013)
- ✓ Massachusetts (2004)
- ✓ Minnesota (August 2013)
- ✓ New Hampshire (2010)
- ✓ New York (2011)
- ✓ Rhode Island (August 2013)
- ✓ Vermont (2009)
- ✓ Washington (2012)

The Anatomy of DOMA (pre- U.S. v. Windsor)

- 1996 federal statute
  - Section 1: The title
  - Section 2: Full faith and credit provision
    - Provides that one state does not have to recognize a same-sex marriage from another state
  - Section 3: Provides a federal definition of "spouse" and "marriage"

U.S. v. Windsor- The Decision

- Plaintiff, Edith Windsor, and her partner were residents of NY state
- In 2007 they were married in Canada; the marriage was recognized by NY state following the state legislature's enactment of a law allowing for/recognizing same-sex marriages
- Following her wife's death, Ms. Windsor filed a claim for refund of approximately $363,000 of estate taxes. The IRS denied the claim on the basis that she was not an opposite-sex spouse within the meaning of DOMA
- Ms. Windsor then sued the Department of the Treasury for a tax refund of the $363,000, alleging that she should have been eligible for a spousal deduction for federal estate tax after her wife died and that DOMA operated to violate her Constitutional rights
- By a 5-4 decision, Supreme Court ruled that Section 3 of DOMA is an unconstitutional deprivation of liberty protected by the Fifth Amendment of Constitution
- The Court specifically did NOT address constitutionality of Section 2 of DOMA, which remains the law… for now

The Anatomy of DOMA (post- U.S. v. Windsor)

Remains Law…

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Ruled Unconstitutional

U.S. v. Windsor- Potential Implications for ER-Sponsored Plans

- Full scope and extent of implications may not be known for some time
- While *Windsor* was unequivocal in overturning Section 3 of DOMA, the decision provides no guidance with respect to employer plans
- Some very important questions remain unanswered at present
  - Who will answer them?
  - When will they be answered?
  - What do I do now?

U.S. v. Windsor-
Potential Implications for ER-Sponsored Plans

- What are some of the open questions?

  Q1: Do I HAVE to provide benefits to same-sex spouses?

  Q2: If I want to provide 100% equivalent benefits to same-sex spouses, can I?

  Q3: Will I have to go back and re-administer some or all of my plans?

  Q4: Can I as employer, or my employees, file a refund claim for taxes paid?

U.S. v. Windsor-
Potential Implications for ER-Sponsored Plans

Q1: Do I have to provide benefits to same-sex spouses?

A1: Appears very likely with respect to at least certain benefits

U.S. v. Windsor-
Potential Implications for ER-Sponsored Plans

Q2: If I want to provide 100% equivalent benefits to same-sex spouses, can I?

A2: If the same-sex spouse resides in a state that recognizes same-sex marriage- YES. If the same-sex spouse resides elsewhere- HOPEFULLY YES, BUT NOT ENTIRELY CLEAR AT PRESENT

U.S. v. Windsor-
Potential Implications for ER-Sponsored Plans

Q3: Will plans have to go back and re-administer certain benefits in order to maintain their tax-qualified status?

A3: Unclear (but if so, hopefully, very limited)

- Our understanding is that the IRS is currently looking at the issue, specifically as it relates to tax-qualified retirement and pension plans
- Guidance is hoped for that precludes and/or limits the need for plans to go back and re-administer benefits
  - Perhaps just 2013 plan year?

U.S. v. Windsor-
Potential Implications for ER-Sponsored Plans

Q4: Can my employees, or I as employer, file a refund claim for taxes paid?

A4: Most likely, YES (in some circumstances)

- Guidance is expected to be forthcoming
- IRC section 7805 provides IRS with authority to make changes in tax law prospective only; however, not clear that this authority will extend to the *Windsor* case
- Appears likely that taxpayers will have the ability to claim refunds for any "open years"

U.S. v. Windsor- Family and Medical Leave Act ("FMLA")

- Requires employers to permit employees to take a time-limited leave of absence to care for a "spouse" or child.
  - **BEFORE** *Windsor:* Employers were only required to extend these leave rights to an opposite-sex spouse; however, an employer could voluntarily extend these enrollment rights to an employee's same-sex spouse or domestic partner (or may have had obligation under state family leave act)
  - **AFTER** *Windsor:* Appears employers must now extend these rights to an employee to care for a same-sex spouse (depending on the "state of domicile"/ "state of celebration" issue)
    - An employer may voluntarily extend equivalent leave rights to an employee's same-sex spouse or domestic partner

U.S. v. Windsor-
Other Health and Welfare Plan Issues

- Tax treatment of employer-paid health care generally
- HSAs, HRAs, FSAs
- Code section 125 salary reduction [cafeteria plans]
- COBRA
- HIPAA special enrollment rights

Mandatory Arbitration Agreements – Supreme Court Clarification

- *Oxford Health v. Sutter*
  - FAA does not authorize a challenge to an arbitrator's interpretation of a mandatory arbitration agreement to permit class proceedings
  - *Stolt Nielson* distinguished
  - Lesson: You're gonna live with the arbitrator's interpretation – good, bad or ugly.

Supreme Court Clarification *con't*

- *American Express v. Italian Colors*
  - Merchant is required to submit antitrust claim to arbitration even though the costs of proving the claim would far exceed the amount in controversy.
  - Kagan's dissent: the majority's view is a heartless "too darned bad."
  - Question: What's left of the "vindication of statutory rights" argument

Mandatory Arbitration Agreements – The Next Big Thing?

- *BG Group PLC v. Republic of Argentina, cert granted* June 10, 2013 (No. 12-138)
  - In disputes involving a multi-staged dispute resolution process, whether a court or the arbitrator determines whether a precondition to arbitration has been met.
  - Further guidance on identification of "gateway questions" that can be reserved to courts?

Mandatory Arbitration Agreements – Other Unresolved Legal Issues

- Unconscionability
- Specific statutory claims – application of the "complete vindication" theory
- Impact of procedural rules imposed by JAMS and AAA

Mandatory Arbitration Agreements – Strategic Considerations

- Recurring Legal Issues
  - Legal uncertainty, particularly in California
  - Mutuality of obligations requirements
  - Reservation of rights provisions
  - Effectiveness of Opt Out Provisions

Mandatory Arbitration Agreements – Some Practical Considerations

- Litigation in multiple forums
- Increased number of claims
- Cost of arbitration proceedings
- Impact on dispositive motion strategies
- Managing administrative agency charges
- Cost of collateral litigation on procedural and substantive issues

Mandatory Arbitration Agreements – Additional Resources

- *BG Group PLC v. Republic of Argentina*, 665 F.3d 1363 (D.C. Cir. 2012)
- *D.R. Horton*, 357 NLRB No. 184 (2012)
- *Rainiere v. Citigroup Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011)
- *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011)
- *Sonic-Calabasas A, Inc. v. Moreno, 51 Cal. 4th 659* (2011)(*petition for rehearing pending*).

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