insights

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Employment Law Update

Federal Agency Overreaching: A Trend Without an End

The Equal Employment Opportunity Commission and the National Labor Relations Board have been hard at work all year, continuing their efforts to extend their collective reach well beyond their established domains.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Disparate Impact of Blanket Criminal Background Check Policies

By Mechelle Zarou

The Equal Employment Opportunity Commission ("EEOC") has aggressively expanded its ongoing crusade to prohibit the use of pre-hire background check procedures that it believes have a disparate impact on African-American and Hispanic male job applicants, and therefore violate Title VII of the Civil Rights Act. Buoyed by a $3.1 million settlement with PepsiCo. Inc. reached in January 2012, which the EEOC had pursued based on PepsiCo's alleged policy of disqualifying all applicants with an arrest on their record, even if such arrest did not lead to a conviction, the EEOC has since expanded its legal theory to include even those employer policies that disqualify applicants solely due to convictions.

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On April 25, 2012, the EEOC issued *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm), which formally concluded that any blanket policy or practice that excludes <u>any</u> applicant with a criminal record from employment will not be job-related and consistent with business necessity, and will therefore violate Title VII, unless such a policy is required by federal law. The EEOC also determined that state or local laws prohibiting the employment of individuals with certain criminal records are preempted by Title VII. The EEOC believes that the only lawful policies are those in which the employer also conducts an individualized inquiry of each applicant to assess whether any such conviction is relevant to the job to be performed, thereby ensuring that any prohibition is justified by business necessity. The State of Texas filed suit against the EEOC to block the agency's April 2012 guidance, reasoning in its complaint that "Texas and its constituent agencies have the sovereign right to impose categorical bans on the hiring of criminals, and the EEOC has no authority to say otherwise." *Texas v. Equal Emp't Opportunity Comm'n*, No. 5:13-cv-00255 (N.D. Tex.). While the District Court dismissed the case on procedural grounds, in its filings the EEOC admitted that the 2012 guidance was not legally binding, nor did it carry legal consequences, arguments that will only aid the defense of employers whose background check policies have been challenged by the EEOC.

Shumaker has addressed the EEOC's overbroad guidance in a previous edition of *insights*, describing how employers can properly conduct a criminal background screen without raising the ire of the EEOC. *See* Serena Lipski, *Criminal Background Checks and Hiring*, INSIGHTS, Spring 2012, at 19-21. Since that time, however, the EEOC has doggedly continued its attack on employer background check policies, even though to date, no court has found merit in its novel legal theory.

The EEOC's series of losses in this arena has not deterred it from continuing to aggressively litigate its position. For instance, in *EEOC v. PeopleMark, Inc.*, No. 08-cv-907, 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011), the EEOC sued PeopleMark in 2008 based on its alleged blanket policy refusing to hire <u>any</u> applicant with a criminal background, while ignoring evidence that flatly refuted this contention. In fact, the evidence disclosed during the litigation unequivocally demonstrated that PeopleMark had actually hired many applicants with felony criminal convictions. On the basis of this evidence, the parties filed a joint motion to dismiss stipulating that PeopleMark was the prevailing party for purposes of statutory costs and attorneys' fees. The District Court judge granted the motion to dismiss and ordered the EEOC to pay over $750,000 in legal fees and costs to PeopleMark, reasoning that once "the EEOC became aware that its assertion that PeopleMark categorically refused to hire any person with a criminal record was not true, or once the EEOC should have known that, it was unreasonable for the EEOC to continue to litigate on the basis of that claim, thereby driving up defendant's costs, because it knew it would not be able to prove its case." *Id*. The EEOC then appealed the award of attorneys' fees and legal costs to the Sixth Circuit Court of Appeals, which affirmed the District Court's decision in October 2013. *See id*. 732 F.3d 584 (2013).

Similarly, in 2009, the EEOC began pursuing a lengthy lawsuit against Freeman, a live engagement marketing services provider, spending three years engaging in discovery and compiling a statistical analysis of Freeman's hiring practices to support its claims of a disparate impact on certain minority groups due to Freeman's criminal background check policy. *See EEOC v. Freeman*, No. 09-CV-2573 (D. Md. Aug. 9, 2013). In December 2010, the EEOC filed a similar lawsuit against Kaplan Higher Education Corporation and its affiliates, which are educational institutions offering financial aid to students,. *See EEOC v. Kaplan Higher Education Corp*., No. 1:10-cv-02882 (N.D. Ohio, Jan. 28, 2013).

In both lawsuits, the EEOC could not even prove that the defendant's background check policies had a disparate impact on African-American or Hispanic male employees, since the EEOC's statistical evidence was flatly rejected by each reviewing District Court. In the *Kaplan* case, which was filed after *Freeman*, but decided seven months earlier, the Northern District of Ohio dismissed the EEOC's case against Kaplan based on the faulty statistical analysis prepared by purported expert Kevin Murphy, who holds a doctorate in industrial and organizational psychology. The District Court rejected Dr. Murphy's statistical analysis, which used a team of five "race raters" who each had "experience involving multiple racial populations" to determine the race of applicants by looking at a photograph (in some cases, a photograph selected by Dr. Murphy or his staff), and determining each applicant's race by consensus. The District Court rejected this analysis because the EEOC had not demonstrated that this form of determining race rating was reliable, nor had it been tested or subject to peer review and publication. The EEOC similarly failed to present any known or potential rate of error in this method, or proof of maintenance of proper controls to ensure reliability. In fact, the District Court was "greatly concerned" with Dr. Murphy's personal involvement in selecting the photographs used by the race raters, and that Dr. Murphy sat on one of the race rating panels used to determine the race of 15 applicants, since "Dr. Murphy both determined the underlying fact of race and also analyzed the significance of his own determinations in concluding that defendants' use of credit reports disparately impacted Black applicants." *Id*. at 16.

Moreover, the *Kaplan* court noted that the EEOC itself uses credit checks to screen applicants for 84 out of 97 agency positions, running background checks largely for the same reasons that private employers use them. While the Kaplan court did not reach the issue of whether the government should be estopped from objecting to a process that it also uses, this defense theory could become critical should the EEOC bolster the pending cases with admissible expert testimony to support its allegations of a disparate impact on minorities.

Despite the *Kaplan* court's sound rejection of the EEOC's statistical evidence, the EEOC appealed the case to the Court of Appeals for the Sixth Circuit, which, in a scathing opinion issued on April 9, 2014, affirmed the decision of the District Court, holding that the expert's methodology was unreliable in every possible way. *Equal Emp't Opportunity Comm'n v. Kaplan Higher Educ. Corp.*, No. 13-3408, slip. op. (6th Cir., 2014). The *Kaplan* court noted that the "EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." *Id*. at 7.

Similarly, in *Freeman*, the EEOC relied on the same expert testimony and statistical analysis that was denounced in the *Kaplan* case. Dr. Murphy's analysis was rejected as unreliable by the *Freeman* court because it was, in the words of the District Court, "an egregious example of scientific dishonesty." The *Freeman* court further noted that the "mind-boggling number of errors contained in Murphy's database could alone render his disparate impact conclusions worthless . . . Murphy's continued pattern of producing a skewed database plagued by material fallacies gives this Court no choice but to entirely disregard his disparate impact analysis." *Id*. at 19 and 20. Despite these severe flaws in its expert's statistical analysis, the EEOC appealed the *Freeman* case to the Fourth Circuit Court of Appeals, where it remains pending, following oral argument on October 29, 2014.

Undeterred by the staggering attorneys' fee award in the *PeopleMark* case and the evisceration of its purported expert's statistical analysis by three federal courts in *Freeman* and *Kaplan*, the EEOC continued to file more high-profile suits against Dollar General Corp., and BMW Manufacturing Co., LLC, alleging that these employers had similarly failed to conduct an individualized inquiry of each applicant with a criminal background, or otherwise terminated (or refused to hire) a higher percentage of African-American employees who had a criminal conviction on their records than similarly situated Caucasian employees. In both lawsuits, the defendants have sought to discover evidence of the EEOC's use of criminal background checks as part of its own internal hiring processes, which the defendants allege are highly relevant to the reasonableness of their own policies. The EEOC objected to these discovery requests, disclaiming the relevance of its own agency hiring practices. Most recently, in the *BMW* case, the District Court sided with the EEOC in ruling that the EEOC's use of background checks is not relevant to BMW's defense of its own policy. The *Dollar General* and *BMW* cases both remain pending in federal district courts.

The EEOC is likely to continue to pursue these contentious cases, as it most recently joined forces on this issue with the U.S. Federal Trade Commission ("FTC"), the agency that enforces the Fair Credit Reporting Act ("FCRA"), which provides consumer protections in background check procedures. The agencies jointly issued two technical assistance documents to explain how each agencies' respective laws apply to background checks used for employment purposes. In the March 2014 guidance, the EEOC and FTC continue to assert that an individualized inquiry is required when an employer conducts pre-employment background checks. Further, the agencies again assert that the provisions of the FCRA and Title VII supersede any state laws governing background screens, noting that only federal laws requiring criminal background screens should be followed.

As the remaining cases continue to wend their way through the courts, and employers attempt to adhere to the latest joint guidance from the EEOC and FTA, there will undoubtedly be more to come on this issue and Shumaker will continue to provide regular updates.

The Chilling Effect of Employee Release Agreements

In addition to its ongoing attempts to limit the use and effectiveness of employer background check policies, the EEOC has attempted to expand the EEOC's reach even further by limiting the effectiveness of employee release agreements, such as settlement agreements, severance agreements or other agreements that contain a release of all employment claims that an employee may have against an employer. Such agreements, when well-drafted, usually contain provisions safeguarding the confidentiality of the agreements and the employer's confidential information, and limiting the employees ability to discuss the agreement or disparage the employer in the future, provisions which the EEOC now believes interferes with former employees' non-waivable protected right to file charges and participate in agency investigations.

As background, the EEOC has taken a consistent position since 1997 that agreements prohibiting the filing of future charges or participation in agency investigations violate the federal discrimination statutes that the EEOC enforces. However, the EEOC has also recognized that an employee can validly release his or her own individual claims and right to receive individual damages, even while maintaining the right to file a charge in the future. The EEOC confirmed this position in 2006, when it entered into a consent decree with Eastman Kodak Co. requiring Kodak to use express releasing language stating that the employee released all individual claims, yet could continue to file a charge or participate in any agency investigation in the future, *provided the employee waived the right to individual monetary damages in any such charge.*

The EEOC suddenly changed this longstanding position on the recovery of individual damages in May 2013, when the EEOC sued Baker & Taylor, Inc. based on its severance agreements. Baker & Taylor's agreements contained an overbroad release prohibiting the filing of a charge with any administrative agency and a nondisparagement clause prohibiting discussions or comments about the termination of employment that would reflect negatively on the company, while specifically allowing the employee to comply with any government investigation. *See Equal Emp't Opportunity Comm'n v. Baker & Taylor, Inc.*, No. 1:13-cv-03729 (N.D. Ill. July 10, 2013). Soon after the complaint was filed, the EEOC and Baker & Taylor entered into a sweeping consent decree requiring the company to include specific language in its severance agreement confirming that employees retain the right to file a charge or claim or to communicate with the EEOC and similar agencies, and also "retain the right to participate in such any [sic] action *and recover any appropriate relief.*" *Id.* (emphasis added). The consent decree also contained language expressly stating that the right to communicate with the EEOC is not limited by any nondisparagement provision in the severance agreement.

With this language, the EEOC for the first time construed a nondisparagement provision, which is a standard release agreement term, as amounting to a prohibition on communication with the EEOC. Bolstered by this consent decree language, the EEOC filed two lawsuits in federal district court against *CVS* Pharmacy Inc. and CollegeAmerica Denver, Inc., asserting that each employer's severance agreements were overbroad and interfered with their employees' protected, non-waivable right to file a charge, testify, assist or participate in any manner in an investigation under federal discrimination laws. *See Equal Emp't Opportunity Comm'n v. CVS Pharmacy, Inc.*, No. 1:14-cv-00863 (N.D. Ill)(filed February 7, 2014); *Equal Emp't Opportunity Comm'n v. CollegeAmerica Denver Inc.*, No. 1:14-cv-01232 (D. Col.) (filed April 30, 2014). In filing these cases, the EEOC announced that "the right to communicate with the EEOC is a right that is protected by federal law. When an employer attempts to limit that communication, the employer effectively is attempting to buy employee silence about potential violations of the law. Put simply, that is a deal that employer cannot lawfully make." EEOC Press Release, February 7, 2014.

In the *CVS* case, the EEOC specifically challenged provisions that (i) require the employee to cooperate with the employer in future lawsuits by promptly notifying the company's General Counsel if contacted by an investigator, attorney or third party relating to any action against the company; (ii) prohibit the employee from disparaging the employer or its employees or principals; (iii) require the employee to maintain the confidentiality of information "concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning"; (iv) require a release of claims including discrimination claims; and (v) confirm that the employee has not and will not file any action, lawsuit, complaint or proceeding asserting any of the released claims, including discrimination claims; and (vi) provide that the employee will reimburse the employer for any legal fees incurred as a result of a breach of the agreement.

The EEOC's complaint recognized that the *CVS* release agreement contained disclaimer language providing that the employee retained the right to participate in a proceeding before any state or federal agency enforcing discrimination laws and expressly stating that the agreement did <u>not</u> prohibit the employee from cooperating with any such agency. To the EEOC, such a disclaimer was insufficient, since it was "buried" in purported "legalese" in a 5-page single-spaced agreement, appeared in only one place in the agreement, and was contradicted by the much more detailed objectionable clauses.

Thus, in its complaint, the EEOC sought a permanent injunction enjoining the employer from engaging in a pattern or practice of resistance to employees' protected right to file a charge, participate and cooperate with investigations by state and federal agencies. It also sought an order (i) requiring the employer to reform its separation agreement so that it would be consistent with the provisions of Title VII; (ii) requiring the company to issue a corrective communication to the company's workforce informing all employees that they retain the right to file a charge of discrimination and to communicate with the EEOC; (iii) providing 300 days for former employees who signed the objectionable separation agreement to file a charge of discrimination with the EEOC or state agency; (iv) requiring the employer to pay the EEOC's costs for filing the action and (v) granting such additional relief as the Court deems necessary.

In response, *CVS* promptly filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, which was granted on October 7, 2014. In its order granting CVS's motion for summary judgment, the District Court held that the EEOC failed to engage in mandatory pre-lawsuit conciliation procedures. Such informal methods of conference, conciliation, and persuasion are required whenever there is a reasonable belief that a person has engaged in an unlawful employment practice, even in cases, as here, alleging a pattern or practice of resistance to the full enjoyment of any right secured by Title VII. As of press time, the EEOC had not filed an appeal of this dismissal order.

> In light of the ongoing confusion created by these pending cases as to the permissibility of certain standard provisions in employer release agreements, Shumaker recommends that employers review their severance agreement templates to ensure that they clearly state that the releasing employee maintains the right to file administrative charges and participate in agency investigations.

In the *CollegeAmerica* lawsuit, the EEOC objected to the same provisions as alleged in the *CVS* case, as well as additional provisions prohibiting contact with governmental agencies and with those who have filed complaints against the company, a clause requiring the former employee to represent that he or she has not filed any claims to date, and a clause certifying that the former employee disclosed all non-compliance with regulatory requirements. The EEOC sought all of the same relief as in the *CVS* case, plus a permanent injunction enjoining the employer from engaging in resistance to employees' rights to file charges, including the individual former employee whose severance agreement was the basis of the suit, and barring unlawful retaliation against the former employee. In response to this complaint, CollegeAmerica filed a Motion to Dismiss in June 2014, which remains pending before the District Court as of press time.

In light of the ongoing confusion created by these pending cases as to the permissibility of certain standard provisions in employer release agreements, Shumaker recommends that employers review their severance agreement templates to ensure that they clearly state that the releasing employee maintains the right to file administrative charges and participate in agency investigations. Such a reservation of rights should be set off in a separate paragraph, preferably in bold type-face, and referenced in each of the paragraphs containing the other objectionable provisions identified by the EEOC. Further, given that the NLRB has raised similar concerns as the EEOC, this reservation of rights should also refer to the NLRB and similar state agencies.

Similarly, employers should consider the language of any release of claims and covenant not to sue, to be sure that it expressly allows for a future EEOC or similar agency action. Cooperation provisions, if included at all, should be very narrowly tailored to secure only the former employee's truthful testimony in future cases. Such clauses should only be included when an employer reasonably believes that future litigation will require the former employee's testimony.

Finally, given the EEOC's flip-flopping on an employee's right to recover individual damages in any future agency action, employers should continue to state that employees may <u>not</u> recover individual damages. Without further guidance from the EEOC or the courts, it is not yet clear whether the EEOC will be bound by its position in the Kodak consent decree allowing a waiver of individual damages, and it is premature to remove this language from severance templates.

In light of this evolving area of law, Shumaker has revised its standard release agreement templates to satisfy the EEOC's concerns. Please contact any member of the Employment and Labor Department to obtain an updated severance agreement template, or for assistance in ensuring that your company's severance templates meet all of the EEOC's requirements. Shumaker will continue to provide updates on this rapidly-changing area.

NATIONAL LABOR RELATIONS BOARD

Social Media Policies Revisited: The Facebook "Like" As Protected Activity

Like its counterpart the EEOC, the National Labor Relations Board ("NLRB") continues to expand its reach beyond its traditional role involving unionized workforces. In particular, the NLRB has continued an aggressive campaign begun in 2011 to crackdown on all employer policies governing social media, electronic forums where more and more frequently employees are engaging in informal collective activity regarding their terms and conditions of employment. The NLRB's pronouncements in this arena apply to **both** union and non-union employers. The NLRB, through its General Counsel, has concluded that employer policies prohibiting employees from discussing the terms and conditions of their employment on social media websites violate the National Labor Relations Act ("NLRA") by interfering with workers' rights to engage in protected collective activity.

As background, in a comprehensive Memorandum issued in May 2012, the Acting General Counsel commented on seven recent NLRB cases involving social media, finding in six of the cases that at least some of the provisions in employer social media policies are overbroad and unlawful under the NLRA. *See General Counsel Memorandum*, Division of Operations-Management, OM-12-59, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012). The Acting General Counsel also found in the seventh case that WalMart's social media policy, which was revised to comply with prior decisions and opinion memoranda, was lawful under the act. The Acting General Counsel attached WalMart's complete revised Social Media Policy to the Memorandum, as an example of a policy that provides rules that "clarify and restrict their scope by providing examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity." *See id*. at 20.

Despite this explicit guidance, employers continue to struggle with overbroad and vague social media policies, and making disciplinary decisions that purportedly intrude on employees' Section 7 rights to engage in collective activity to discuss work-related issues for the purpose of collective bargaining or mutual aid or other protection. Most recently, the NRLB issued a decision in *Three D, LLC d/b/a Triple Play Sports Bar & Grille v. Sanzone* and *Three D, LLC d/b/a Triple Play Sports Bar & Grille v. Spinella*, 200 LRRM 1569, 361 NLRB No. 31 (Aug. 22, 2014) (collectively *Triple Play*), holding that an employee who "likes" a status on Facebook is engaging in protected activity. The NLRB affirmed the decision of the Administrative Law Judge ("ALJ") that Triple Play had unlawfully discharged two employees for their Facebook activity, and had also violated the NLRA by threatening employees with discharge and interrogating employees about their Facebook activity, as well as informing employees they were being discharged because of their Facebook activity. Triple Play also unlawfully threatened employees with legal action for engaging in that activity. The NLRB also reversed the ALJ's findings with regard to the employer's Internet/Blogging policy, finding that the employer violated the NLRA by maintaining the policy.

In *Triple Play*, the employer had made a tax-withholding error, which resulted in employees owing an unexpected amount of state income taxes. In the Facebook post at issue, a former employee had posted a Facebook status stating: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!!! Now I OWE money…Wtf!!!!" Several current Triple Play employees and customers made comments about this post, including derogatory comments about one of the owners, along with a discussion about contacting the "labor board" to investigate money owed to employees by Triple Play. The posts also discussed an upcoming employee meeting to address the tax withholding error. Employee Jillian Sanzone, a waitress/bartender, chimed in on the discussion, posting "I owe too. Such an *ssh*le." Vincent Spinella, a cook at Triple Play, did not post a comment but clicked "like" on the original post.

One of Triple Play's two co-owners found out about Sanzone's and Spinella's Facebook activity from his sister, who was Facebook friends with the former employee that made the original post. When Sanzone reported to work two days after posting her comment, Triple Play terminated her employment for "lack of loyalty" based on her Facebook post. When Spinella reported to work the next day, Triple Play's owners confronted him about his feelings toward the company and interrogated him about his clicking "like" on the post, asked for the identity of those who posted comments, and asked whether he had written anything negative about the owners. The owners then stated that the "like" option meant that Spinella stood behind the other commenters, and because he liked the disparaging and defamatory comments, it was apparent that he wanted to work somewhere else. One of the owners explained that his attorney told him to discharge anyone involved in the Facebook conversation for defamation, and discharged him. As Spinella was leaving, he was told "You'll be hearing from our lawyers." Spinella indeed received a letter threatening a defamation action from Triple Play's attorney, although no legal action was taken against him.

The ALJ concluded that the Facebook activity was concerted activity, since it involved four current employees and was part of an "ongoing sequence" of discussions that began in the workplace about the miscalculation of taxes. In the Facebook post, the employees discussed issues that they intended to raise at the staff meeting, as well as possible avenues for complaints to government entities; thus they were seeking to initiate, induce or prepare for group action. The ALJ found both Sanzone and Spinella were engaged in protected concerted activity, since Sanzone directly complained about the error and since Spinella's selection of the "like" button expressed his support for the others who were sharing their concerns. The ALJ rejected the employer's contention that because of the allegedly defamatory and disparaging comments, the Facebook posts lost the protection of the NLRA.

The ALJ found both Sanzone and Spinella were engaged in protected concerted activity, since Sanzone directly complained about the error and since Spinella's selection of the "like" button expressed his support for the others who were sharing their concerns. The ALJ rejected the employer's contention that because of the allegedly defamatory and disparaging comments, the Facebook posts lost the protection of the NLRA.

The NLRB affirmed the ALJ's conclusion that the comments were statutorily protected, but used a different line of cases to analyze the issue than the case relied upon by the ALJ. Nevertheless, the Board concluded the discharges were unlawful, because "the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Id*. at 1575. Further, the derogatory comment was not defamatory, since it was not "maliciously untrue" and merely expressed Sanzone's personal opinion. *Id*. at 1576. Thus, the NLRB held that the ALJ had correctly found the discharges unlawful.

The NLRB next considered whether the employer's Internet/Blogging policy violated the NLRA. Because employees reviewing the policy could reasonably construe the policy to prohibit the type of protected Facebook posts that led to the unlawful discharges, the NLRB found the policy unlawful. Specifically, the policy provided that "when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees . . . engaging in inappropriate discussions about the company, management and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment." *Id*. at 1577. The General Counsel urged the NLRB to find that the prohibition on "inappropriate discussions" was overly broad, since employees "would reasonably construe the policy to prohibit their Section 7 activities." *Id*. at 1578. Since the policy lacked illustrative examples to employees of what the employer considered inappropriate, the NLRB agreed with the General Counsel that the policy was unlawful.

In light of the *Triple Play* analysis, employers considering discipline due to an employee's Facebook activity should avoid knee-jerk reactions, and instead consult with counsel to fully consider whether social media activity is so disparaging and defamatory as to lose the protections of the NLRA. Further, it is even more critical for all employers to review their social media and online networking policies to ensure that they provide concrete examples of prohibited behavior such that an employee would not construe the policy as prohibiting Section 7 collective activity. Since the NLRB has not hesitated to take action against non-union employers, as well as those with a unionized workforce, all employers must abide by the NLRB rulings. Please contact any member of Shumaker's Employment and Labor Department for assistance in navigating these uncharted waters.

In light of the above governmental agenda, Shumaker will continue to monitor both the EEOC and the NLRB as they continue to test the furthest limits of their regulatory authority, continuing a trend that does not seem to have an end in sight.

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