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EMPLOYMENT LAW UPDATE

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June 3, 2021

Webinar Housekeeping

- **Questions** – Type your questions for the speaker into the Questions pane and we will seek to address them at the end of the webinar as time permits.
- **CLE** – The ACC-CLT Chapter will coordinate CLE for this webinar.
- **Legal disclaimer** - Portions of this communication may qualify as "Attorney Advertising" in some jurisdictions. However, Parker Poe intends for it to be used for educational and informational purposes only. This communication also is not intended and should not be construed as legal advice. For questions, contact ParkerPoe@parkerpoe.com.
- The law is changing rapidly in this area. This presentation is our best attempt to summarize the current state of the law as of June 3, 2021, but is subject to change.

Today's Presenters

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AGENDA

I. Judicial Decisions

- U.S. Supreme Court
- 4th Circuit
- North Carolina

II. Covid, Vaccines and Other Return To Work Issues

SUPREME COURT DECISIONS

SEXUAL ORIENTATION, TRANSGENDER & TITLE VII

Altitude Express v. Zarda
Bostock v. Clayton County, Georgia
R.G. & G.R. Harris Funeral Homes Inc. v. EEOC
(Decided June 15, 2020)

- Title VII protects employees against discrimination based on sexual orientation and transgender status.
- Discrimination on basis of sexual orientation or transgender status involves making decisions, at least in part, on basis of sex.
- Sex cannot be sole or contributing reason for employment decisions.

SEXUAL ORIENTATION & TITLE VII

- Employers should amend policies and procedures to prohibit discrimination and harassment on the basis of sexual orientation or transgender status.
- Anti-discrimination and anti-harassment training should include clear explanation that these mandates extend to LGBTQ individuals.

"MINISTERIAL EXCEPTION" TO ANTI-DISCRIMINATION LAWS

Our Lady of Guadalupe v. Morrissey-Berru

(Decided July 8, 2020)

- **Issue:** Do the 1st Amendment's religion clauses prevent courts from adjudicating employment discrimination claims brought by an employee against their religious employer, when the employee carried out important religious functions, but was not otherwise a "minister"?

"MINISTERIAL EXCEPTION" TO ANTI-DISCRIMINATION LAWS

Our Lady of Guadalupe v. Morrissey-Berru

(Decided July 8, 2020)

- The independence of religious institutions in matters of "faith and doctrine" is closely linked to independence in what the Court has termed "matters of church government."
- Courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.

FOURTH CIRCUIT DECISIONS

TERMINATION UPON RETURN FROM FMLA LEAVE

FRY v. RAND CONSTRUCTION CORP.

(Decided July 1, 2020)

- Employee terminated for poor performance after disclosing M.S. diagnosis and returning from FMLA Leave.
- Emails and formal records of performance problems pre-dated notice of M.S. and request for FMLA leave—and demonstrated that performance issues were not pretext.
- DOCUMENT! DOCUMENT! DOCUMENT!

REEMPLOYMENT UNDER USERRA
Harwood v. American Airlines
(Decided July 6, 2020)

- Employer cannot discriminate against a servicemember employee by taking any adverse action "on the basis of" the service, where service was a "motivating factor" in the employment action.
- USERRA provides reemployment rights for a returning servicemember if:
  - o Returning member gives advance notice of uniformed service;
  - o Service time does not exceed 5 years
  - o Returning member submits application for reemployment

REEMPLOYMENT UNDER USERRA
Harwood v. American Airlines
(Decided July 6, 2020)

- Once qualified for reemployment, must be reemployed "promptly."
- "Promptly" really means promptly. Employers cannot delay!
- Escalator position: employer must return the employee to where the employee would have been or to a position of like seniority, status and pay.

ADA, EMPLOYEE TRANSFERS AND ADVERSE ACTION

Laird v. Fairfax County

(Decided October 23, 2020)

- Discrimination and retaliation claims both require “adverse action.”
- Slight difference in what qualifies as an adverse action for each type of claim.
  - o Discrimination—adverse action must affect employee’s employment or workplace conditions
  - o Retaliation—any adverse employment decision or treatment that would be likely to dissuade a "reasonable worker" from making or supporting a charge of discrimination

ADA, EMPLOYEE TRANSFERS AND ADVERSE ACTION

Laird v. Fairfax County

(Decided October 23, 2020)

- Employee's voluntary acceptance of a lateral transfer was not an adverse action.
- A transfer cannot be because of a reason that is unlawful under the ADA if it occurred as a result of an employee's own request.
- ADA does not require employers to provide employees with a reasonable accommodation of their choosing.
- Document the reasonable accommodation process and discussions with employee.

LIMITATIONS ON REASSIGNMENT AS REASONABLE ACCOMMODATION UNDER ADA

Elledge v. Lowe's Home Centers, LLC

(Decided November 18, 2020)

- 2002 SCOTUS decision in *Barnett* case held that qualified disabled employees are entitled to reassignment to an existing vacant position under the ADA if they become unable to perform the essential functions of their current job, with or without reasonable accommodation.
- EEOC's view: If disabled employee is qualified for the alternative job, they must be given the position, regardless of whether there are better qualified candidates.

LIMITATIONS ON REASSIGNMENT AS REASONABLE ACCOMMODATION UNDER ADA

Elledge v. Lowe's Home Centers, LLC

(Decided November 18, 2020)

- Held: *Barnett's* reassignment obligation does not require employers to automatically move a disabled employee into a vacant position.
- Provided employer allows disabled employee fair and equal opportunity to apply for the alternative position, employer may apply its policies that make ultimate hiring decision based on succession needs and relative qualifications of applicants.

LIMITATIONS ON REASSIGNMENT AS REASONABLE ACCOMMODATION UNDER ADA

Elledge v. Lowe's Home Centers, LLC

(Decided November 18, 2020)

- Employer must demonstrate clear, written policies explaining the business criteria for selecting applicants.
- In the absence of such clear policies, employer may have difficulty showing a bona fide selection system.
- Employers need to be mindful of their ability to prove why the successful candidate was the most qualified.

PARTNERS ARE NOT EMPLOYEES UNDER TITLE VII

Lemon v. Myers Bigel, P.A.

(Decided January 19, 2021)

- Title VII only applies to employment relationships—owners, partners, contractors and others in non-employment relationships.
- Ownership, equal voting power, compensation based on profits and losses of firm, role in managing business and requirement of majority vote of partnership for removal all weighed against finding employee status.
- Likely applicable to other partnerships and professional associations—accounting firms, architectural firms and medical practices.

ARBITRATION AGREEMENT CAN PRECLUDE APPELLATE REVIEW

Beckley Oncology Associates, Inc. v. Abumasmah

(Decided April 8, 2021)

- Arbitration agreement provided that arbitrator's decision "shall be final and conclusive and enforceable in any court of competent jurisdiction without any right of judicial review or appeal."
- Parties to an arbitration agreement are entitled to only a "minimum level of due process" in the form of a single judicial review.

ARBITRATION AGREEMENT CAN PRECLUDE APPELLATE REVIEW

Beckley Oncology Associates, Inc. v. Abumasmah

(Decided April 8, 2021)

- FAA states that an "appeal *may* be taken."
- Nothing in case law or under the FAA precludes an appellate waiver (as opposed to a general judicial waiver).
- Parties' agreement to waive appellate review furthered the FAA's policy objectives—to treat arbitration as an alternative to litigation
- Consider including provision to preclude appellate review in your arbitration agreements.

REASSIGNMENT IS ADA ACCOMMODATION OF LAST RESORT

Wirtes v. City of Newport News

(Decided April 30, 2021)

- To the extent an employee may be accommodated through a variety of measures, the employer, exercising sound judgment, can choose the accommodation, as long as it enables the employee to perform their essential job functions.
- BUT--it is generally inappropriate for an employer to unilaterally reassign a disabled employee to a position the employee does not want when another reasonable accommodation exists that would allow the disabled employee to remain in their current, preferred position.

REASSIGNMENT IS ADA ACCOMMODATION OF LAST RESORT

Wirtes v. City of Newport News

(Decided April 30, 2021)

- Held that "an employer fails to accommodate its qualified disabled employee when it transfers that employee from a position they could perform if provided with reasonable accommodations to a position they do not want."
- Transferring an employee against her stated preference is an accommodation of last resort.
- Fourth Circuit's decision aligns with other federal circuits and the EEOC's view.

SAME-SEX HARASSMENT

Roberts v. Glenn Industrial Group, Inc.

(Decided May 21, 2021)

- *Oncale (1998* SCOTUS case) identified three evidentiary routes to prove same-sex harassment:
  - o Evidence of harasser's homosexuality and harassing conduct that involved proposals of sex
  - o Evidence of use of sex-specific and derogatory terms indicating general hostility to the presence of someone of the victim's sex in the workplace
  - o Comparative evidence showing that the harasser treated members of one sex worse in a "mixed-sex workplace."

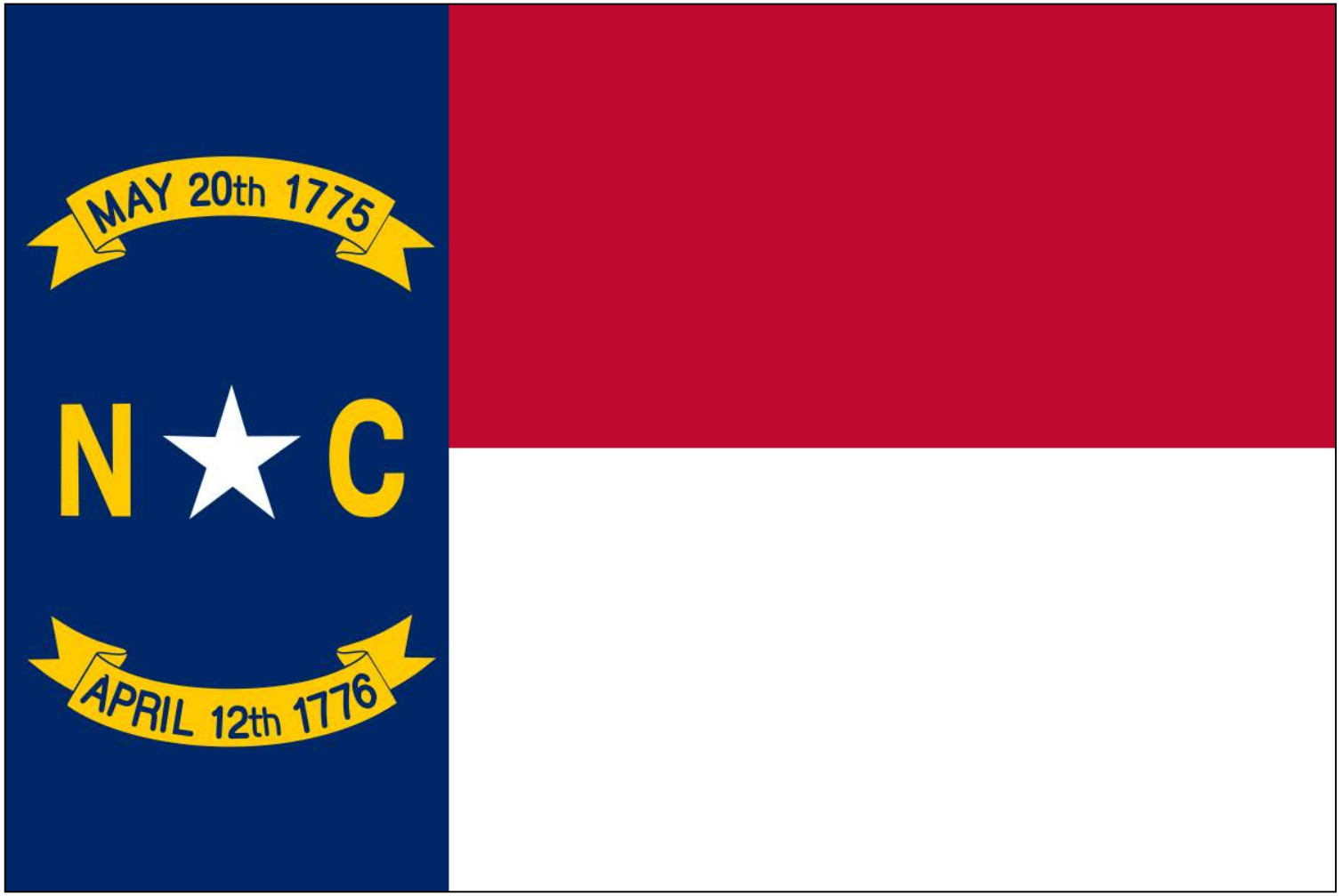
SAME-SEX HARASSMENT

Roberts v. Glenn Industrial Group, Inc.

(Decided May 21, 2021)

- Fourth Circuit held that *Oncale* does not provide an exclusive list of ways to prove that same-sex harassment is sex-based discrimination.
- Additional forms of proof are available, including evidence of failure to conform to gender stereotypes
- Underscores importance, especially post-*Bostock,* of updating anti-discrimination and anti-harassment policies and training to address discrimination and harassment on the basis of sexual orientation or transgender status.

NORTH CAROLINA



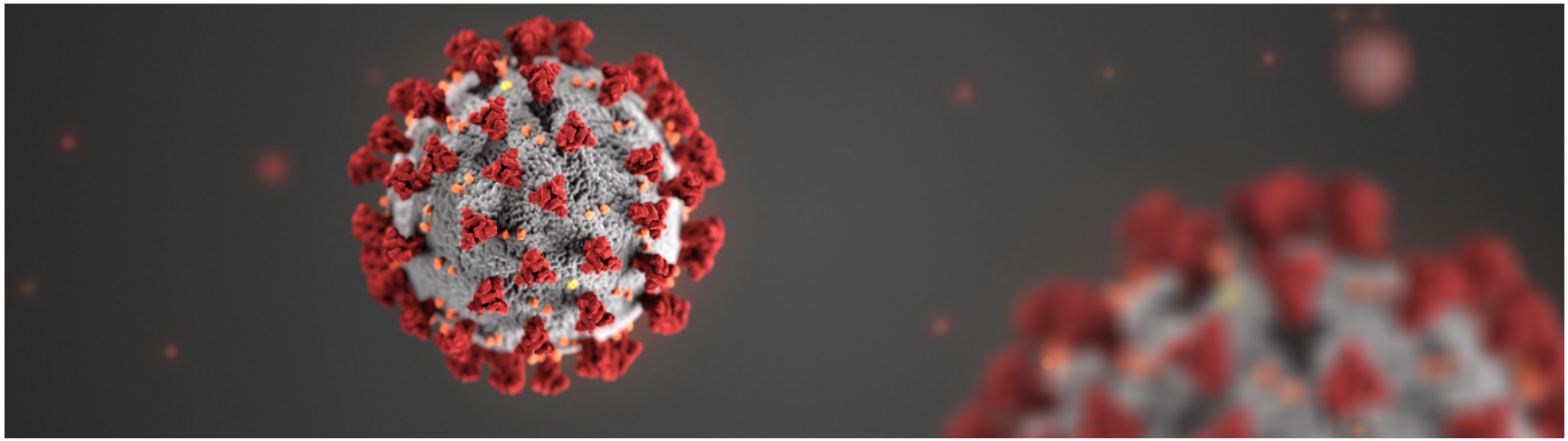
CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

- NC Ct. of Appeals continues to strike down noncompetition/nonsolicitation agreements.
- Restrictions should be limited to the "same or similar" position with a competitor.
- Nonsolicitation of customers should be limited to customers with whom employee had contact, absent showing that employee had access to confidential information.
  - "All of employer's customers" will usually be found to be overly broad.
  - Employee's contacts should be material.

CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

- Once a customer ≠ always a customer.
- Consider recency of customer relationship.
- If a Covid-19 layoff ended the employment relationship and employee is rehired, have employee re-sign noncompetition or nonsolicitation agreements.
- Restricted period typically begins to run upon separation from employment.
- Prior agreements will not spring back to life upon reemployment.

COVID, VACCINES, AND OTHER RETURN TO WORK ISSUES



American Rescue Plan: Tax Credits

FFCRA

- Extends voluntary FFCRA tax credit through 9/30/21

ERTC

- Extends Employee Retention Tax Credit from 4/1/21 through 9/30/21
- Increases value of credit to up to $7,000 per quarter per employee
- Changes threshold to 500 employees to determine “Qualifying Wages”

American Rescue Plan: COBRA

COBRA Subsidy

- Subsidy for all COBRA premiums paid by employee subject to involuntary termination or reduction in hours through 9/30/21

New Public Health Guidance

CDC

- Fully vaccinated:
  - No mask/distancing except if required by law or regulations, including business rules
  - Testing not required after known exposure.
- Unvaccinated:
  - Continue with prevention measures including masking, distancing, and testing

NCDHHS

- Businesses strongly recommended to have unvaccinated employees and guests wear a mask indoors.

State Mask Mandates

- **NC**: No mandate except in child care facilities, health care settings, transportation, and detention facilities.
- **SC**: No mandate.
- **VA**: Unvaccinated must continue masking.
- **GA**: No mandate.

Workplace Mask Policies

Universal

- All employees continue to mask and social distance
- Justifications:
  - OSHA guidance not updated
  - Workplace safety
- Challenges:
  - Objections from vaccinated

Conditional

- Only unvaccinated employees mask and social distance
- Justifications:
  - CDC guidance
  - Return to normal
- Challenges:
  - Objections from unvaccinated
  - Enforcement

Workplace Mask Policies

Enforcement

- Honor system
- HR/Supervisor responsibility
- ID system:
  - Risky given EEOC guidance that vaccination status = confidential

Proof of Vaccination

- Can require from employees
  - Confidential under ADA
- Can require from guests and customers <u>unless</u> state ban on "vaccine passports"

State Vaccine Passport Laws

- **SC:** Executive order prohibiting state and local agencies and governments from requiring vaccine passports for any reason
- **NC:** No law
- **VA:** No law
- **GA:** No law
- **TX:** Executive order prohibiting state and local governments and businesses receiving public funds from inquiring about consumer vaccination status

Workplace Mask Policies

Considerations before revising policy

- Local laws and regulations
- Workplace vaccination rate
- Recent COVID-19 exposures and/or positive tests
- Customer/client expectations
- Enforcement
- Employee relations

Mandatory Vaccine Policies

Risks and Benefits

- Legally permissible
- If administered by employer/agent ADA restrictions on disability-related inquiries apply

Accommodations

- Must evaluate requests for accommodation based on:
  - Disability
  - Sincerely-held religious belief
- Accommodate unless undue burden
  - Telework, masking, distancing, testing

Voluntary Vaccine Policies

Risks and Benefits

- Lower risk of legal challenge
- If vaccine administered by employer/agent, restrictions on disability-related inquiries do not apply

Incentives

- If administered by employer/agent, must not be so substantial as to be "coercive"
  - No incentive allowed for family members
- No limit if incentive for voluntarily proving vaccinated by third party
  - Incentive for family members allowed

Contact Us With Questions

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