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General Contractor Found Liable for Harassment and Retaliation Against Subcontractor's Employees

Liability under Title VII is premised on an employer-employee relationship. Parties not in an employment relationship cannot be found liable for discrimination, harassment or retaliation claims. Last month, the Sixth Circuit Court of Appeals found an exception to this rule, holding a general contractor potentially liable for harassment and retaliation claims brought by its subcontractor's employees.

EEOC v. Skanska USA Bldg., Inc., involved claims brought by employees at a Tennessee construction site. The plaintiffs alleged that they were subjected to racial harassment at the job site, despite multiple complaints to their actual employer as well as ones made to the general contractor. Skanska claimed that it could not be liable for the conduct under Title VII because it was not the plaintiffs' statutory employer.

The Sixth Circuit rejected this defense, concluding that the general contractor controlled the subcontractor's employees' daily work. The court stated that this level of control made the general and sub "joint employers" under Title VII. Skanska had the ability to hire, fire, discipline and supervise the plaintiffs' work. In comparison, the subcontractor had minimal control over its employees' work at the jobsite, and was almost never present at the worksite.

Federal courts rarely apply the joint employment theory under Title VII. Construction general contractors are more familiar with attempts by OSHA to hold them liable under this theory for subcontractors' employees exposed to safety hazards. As with the OSHA cases, this decision places general contractors in a difficult position. The more supervision they exercise over the subcontractors' employees, the more likely they will be found to be liable to those workers under various federal labor laws. However, by foreswearing such supervision, the general contractor risks increased safety and production problems involving such employees.

The written agreement with the subcontractor should clearly spell out respective responsibilities for legal compliance. To the extent legally allowed, the agreement should also provide indemnification for the general contractor faced with claims from subcontractors' employees. Beyond the written agreement, general contractors need to carefully plan and implement a legal compliance strategy with respect to all workers on the job site, whether or not they are directly employed by the general contractor.

NLRB Debunks "No Gossiping" Policy

Office gossip has probably been a workplace scourge since the building of the pyramids. While most managers would love to wave a wand and have the rumor mill disappear, some take steps to try to actually stop employees from talking about one another. According to a recent decision from a federal Administrate Law Judge, a blanket ban on office gossip runs afoul of the National Labor Relations Act.

Laurus Technical Inst. involved a written company policy that prohibited gossip about the company, employees and customers. Gossip was defined as talking about someone when they are not present, or making untrue or disparaging remarks about another person. The policy was adopted two days after the plaintiff had been warned by management about complaining about work issues to co-workers outside of her chain of command. She was subsequently fired for violations of the policy.

The federal ALJ quickly determined that the no gossiping policy was overbroad, and violated employees' rights to engage in concerted activity under the NLRA. The expansive ban essentially prohibited any discussion about anyone or anything relating to the workplace. Employees could not complain about work-related conditions or share information or take concerted activity to have such problems addressed.

This decision does not mean that employers are powerless to respond to situations involving malicious gossip in the workplace. In addition to their legal problems, no gossiping policies are difficult if not impossible to reasonably enforce. However, employers can deal with office gossips on a case-by-case basis. When the rumor-mongering does not relate to terms and conditions of employment, employers can consider such activity to be grounds for disciplinary action. Employees should be counseled, warned and eventually terminated if they are unwilling to adhere to common standards of civil behavior with respect to their treatment of co-workers. While complaining about work may be protected activity, malicious gossip unrelated to working conditions is not protected speech under the NLRA.

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We at Goldman remain committed in assisting you and your business to adjust to these changes in the Law. For further information you may contact Luis F. Antonetti, Esq. or any of the attorneys in the Labor & Employment Law Department.

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