The Year in Review: Labor and Employment Law Developments in 2014

Pittsburgh Employment Law Conference

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CLARK HILL

BACKGROUND – THE CONTRACEPTIVE MANDATE

- U.S. Department of Health and Human Services (HHS) regulations:
  - Require group health plans to provide preventive care to women at no cost
  - Specify 20 contraceptive methods that plans must include, including four methods that prevent fertilized eggs from implanting
  - Provide exemption from contraceptive mandate for churches and other non-profit religious institutions
  - No exemption for for-profit corporations
- ACA imposes penalties for failure to comply

BACKGROUND – HOBBY LOBBY

- Family-owned arts-and-crafts chain store
- Owners have pledged in writing to run the stores in accordance with Christian beliefs
- Hobby Lobby filed a lawsuit contending that:
  - The contraceptive mandate violated its religious freedom, because the mandate required Hobby Lobby to pay for methods of contraception that it believes to be akin to abortion and morally wrong
  - The mandate violated the Religious Freedom Restoration Act of 1993 ("RFRA"), which prohibits the government from "substantially burdening" a person's exercise of religion, except where the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest

THE HOBBY LOBBY DECISION

- 5-to-4 decision
- U.S. Supreme Court struck down the contraceptive mandate, as applied to closely-held corporations that have sincere religious objections to providing contraceptive coverage
- Holding:
  - A closely-held corporation is a "person" within the meaning of the RFRA
  - The ACA's penalties for failure to comply with the contraceptive mandate are a "substantial burden" within the meaning of the RFRA.
  - Giving employees access to free contraceptives serves a compelling government interest
  - The government, however, had not shown that the contraceptive mandate was the least restrictive method of advancing the governmental interest in guaranteeing access to contraceptives without cost to the employee

IMPLICATIONS OF THE HOBBY LOBBY DECISION

- Applies only to closely-held corporations with sincere religious objections to providing contraceptive coverage
- Does not define what is meant by "closely-held corporation"
  - — Courts may adopt IRS definition: Corporations in which five or fewer individuals own 50% or more of the stock
- Closely-held corporations with sincere religious objections to forms of birth control that prevent implantation of fertilized eggs are not required to provide those forms of birth control as part of their group health insurance plans
- May allow closely-held corporations with sincere religious beliefs to challenge other aspects of the ACA

BACKGROUND - EMPLOYER LIABILITY

- Burlington Industries, Inc. v. Ellerth and Farragher v. Boca Raton
  - In 1998, Supreme Court established framework for when employers may be held liable under Title VII for workplace harassment
    - Where the harasser is a co-worker, the employer is liable if it knew or should have known of harassment and failed to stop the harassment
    - Where the harasser is a supervisor, and the harassment results in a tangible employment action, the employer is strictly liable for the harassment
    - Where the harasser is a supervisor, but there is no tangible employment action, the employer may escape liability by establishing that:
      - the employer exercised reasonable care to prevent and correct any harassing behavior; and
      - the complaining employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer

BACKGROUND – FACTS OF VANCE

- Maetta Vance, an African-American woman, sued her employer, Ball State University
- Vance alleged that another BSU employee, Saundra Davis, created a racially hostile work environment for Vance
- Vance alleged that Davis was her supervisor
- Parties agreed that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance

VANCE DECISION

- U.S. Supreme Court addressed the question of who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment
- The Court answered the question by holding:
  - An employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim
  - Tangible employment actions are significant changes in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits
- The Court rejected the "nebulous" definition of supervisor advocated in the EEOC's Enforcement Guidance, which tied supervisor status to the ability to exercise significant direction over another's daily work

IMPLICATIONS OF THE VANCE DECISION

- Employers should identify employees who are supervisors and ensure that those employees are properly trained in avoiding harassing or discriminatory conduct
- Employers should ensure that employees are aware of anti-harassment policies and the complaint mechanism to be used by employees to report harassment and discrimination
- Employers should enforce their anti-harassment and anti-discrimination policies

BACKGROUND – PRESIDENT OBAMA'S RECESS APPOINTMENTS

- In January 2012, the NLRB was down to two members
- President Obama appointed three NLRB members during a three-day break when Congress was in session
- The Obama Administration contended that these were "recess appointments" that did not require Senate confirmation
- NLRB proceeded to render decisions in a large number of cases, with most of the decisions coming out in favor of organized labor

BACKGROUND – NOEL CANNING

- Pepsi distributor located in Yakima, WA
- Production workers represented by the Teamsters Union
- In 2011, the Union filed a ULP, contending that Noel Canning had violated Section 8(a)(5) of the NLRA, by refusing to sign a CBA to which the Company had orally agreed
- In February 2012, the NLRB, with President Obama's recess appointees, affirmed an ALJ decision against Noel Canning
- Noel Canning appealed, contending:
  - President Obama's January 2012 appointments were invalid because the three-day adjournment during which the President made the appointments was not long enough to trigger the recess appointment clause
  - NLRB's decision was invalid, because the NLRB rendered the decision without a quorum of at least three properly-appointed NLRB members

THE NOEL CANNING DECISION

- 9-0 vote
- The U.S. Supreme Court ruled that President Obama's January 2012 appointments were invalid
- Rationale:
  - The recess appointment clause may apply to appointments made between sessions of Congress or to appointments made during breaks within sessions
  - Under the clause, the President may fill vacancies that arise during recesses, or that arise prior to recesses but continue into recesses
  - The three-day period of time in January 2012 when Congress was in session, but was not actually conducting business, was too short a period of time to be a "recess" within the meaning of the recess appointment clause

IMPLICATIONS OF THE NOEL CANNING DECISION

- All NLRB decisions rendered between January 3, 2012 and August 4, 2013, including the NLRB's Noel Canning decision, are invalid
- Invalidated decisions include NLRB decisions striking down the following employer rules and policies:
  - Blanket rule requiring employees to maintain the confidentiality of company investigations
  - Rule prohibiting employees from commenting to the media regarding the employer
  - Rule prohibiting hospital employees from having access to the hospital, other than for patient visits, while off duty
  - Policy prohibiting employees from walking off the job.
  - Policy requiring employees to be courteous
- The NLRB obtained a valid quorum on August 4, 2013
- The current, properly-constituted NLRB is now reconsidering and ruling on the cases that were decided by the NLRB when it lacked a proper quorum

BACKGROUND – FITNESS FOR DUTY CERTIFICATIONS UNDER THE FMLA

- The Family and Medical Leave Act (FMLA) permits an employer to have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for the employee's own serious health condition to submit a fitness for duty certification before the employee is able to resume work
- The fitness for duty certification must be sought only with regard to the particular health condition that caused the employee's need for leave
- An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job, if the employer timely provides the employee with a list of the essential functions of the employee's job and indicates that this type of certification is required

BACKGROUND – FACTS OF THE BUDHUN CASE

- Budhun was a credentialing assistant for Reading Hospital, a position that involved approximately 60% typing
- Budhun broke the bone connecting her wrist to her pinky finger
- When Budhun returned to work in a splint, she was told that she had an injury that prevented her from working full duty, and was provided with FMLA leave forms
- Budhun obtained, from her physician, a certification that stated that she could return to work and that Budhun had no restrictions while she was wearing the splint. The certification was based on Budhun's description of her job duties
- When she sought to return to work for a second time, the hospital questioned Budhun's ability to work without restrictions, noting that she needed to perform at the same capacity as she did prior to going on leave, with the ability to fully use all of her digits
- Therefore, Budhun took additional FMLA leave. After she exhausted her FMLA leave, the hospital filled Budhun's position with another employee.
- Budhun filed a lawsuit alleging that the hospital interfered with her right under the FMLA to be reinstated by requiring her to have use of 10 fingers, despite the fact that there was no essential function of her job that she could not perform

THE BUDHUN DECISION

- The Third Circuit Court of Appeals reversed the dismissal of Budhun's FMLA claims because the hospital did not comply with the FMLA when Budhun tried to return to work
  - Although an employer may require a fitness for duty certification to address the employee's ability to perform the essential functions of her job, it may do so only if the employer provides a list of essential functions to the employee at the time the employer notifies the employee that she is eligible for FMLA leave
  - The hospital did not provide Budhun with a list of essential functions. Budhun's physician's certification was based only on the description of duties provided by Budhun.
  - If the hospital had questions about Budhun's fitness for duty certification, it could have contacted the employee's health care provider (because Budhun had authorized it to do so) for clarification. The hospital did not have the right to delay her return to work while it was obtaining that clarification. The hospital did not seek clarification from Budhun's physician, but unilaterally overruled the certification.

KEY TAKEAWAYS FROM THE BUDHUN DECISION

- Case highlights the importance of properly utilizing employer's rights under FMLA
- Employers must ensure that their fitness for duty certification is FMLA-compliant
  - Employers should notify employees at the time of FMLA designation that the employee will be required to present a fitness for duty certification
  - Employers should include, with the notice, an accurate job description or list of essential job duties
  - Employers should obtain employees' authorization to seek clarification from the heath care provider
  - Employers should seek clarification of the certification, if appropriate
- Employers should ensure that job descriptions or essential job duties are accurate and up-to-date
- Employers should not require employees to return to work "without restrictions." A rule like this is contrary to the duty to accommodate under the Americans with Disabilities Act.

NLRB RULINGS ON CONFIDENTIALITY AND SOCIAL MEDIA POLICIES

Lily Transportation Corp., Case No. 01-CA-108618 (ALJ April 22, 2014)

- Lily Transportation ("Lily") is a trucking company that delivers goods to Whole Foods stores
- Lily confidentiality policy prohibited "Disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files"
  - ALJ holding: policy was unlawful, because employees could reasonably interpret the language as prohibiting them from discussing wages and conditions of employment
- Lily social media policy: "Employees would be well advised to refrain from posting information or comments about Lily, Lily's clients, Lily's employees or employees' work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees."
  - ALJ holding: policy was overly broad, because advising employees to refrain from posting comments about Lily or its employees, and holding persons accountable for disparaging or negative information, interfered with employees' Section 7 rights

NLRB RULINGS ON CONFIDENTIALITY AND SOCIAL MEDIA POLICIES

Durham School Services, L.P., 360 NLRB No. 85 (April 25, 2014)

- Durham School Services ("DSS") is a California company that provides school bus and other student transportation services
- DSS social networking policy:
  - Communication with coworkers should be kept professional and respectful, even outside of work hours
  - Employees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers should not have any expectation of privacy, and may be subject to investigation and possibly discipline
- NLRB held that the language was unreasonably broad:
  - Employees are permitted, under Section 7, to communicate "unprofessionally" or "disrespectfully" about wages, hours, or other terms and conditions of employment
  - Employees have the right to share unfavorable information about their employers
  - Employees could reasonably interpret these policies as restricting them in their Section 7 right to communicate freely with fellow employees and others, regarding work issues

NLRB RULINGS ON CONFIDENTIALITY AND SOCIAL MEDIA POLICIES

Laurus Technical Institute, 360 NLRB No. 133 (June 13, 2014)

- Laurus Technical Institute ("LTI") operates three for-profit technical schools in the Atlanta area
- An admissions representative who worked for LTI complained to one of LTI's managers about an alleged hostile work environment; in response, LTI's President issued a "no gossip" policy
- LTI No-Gossip Policy:
  - "Gossip is not tolerated at Laurus Technical Institute. Employees that participate in or instigate gossip about the company, an employee, or customer will receive disciplinary action."
  - "Gossip" includes: (1) talking about a person's professional life without his supervisor being present, (2) negative, untrue, or disparaging comments or criticism of another person, and (3) sharing or repeating information that can injure a person's credibility or reputation
- NLRB holding: no-gossip policy was unlawful under Section 7
  - The rule had the effect of restricting employees from discussing or complaining about terms and conditions of employment
    - Restrictions on talking about a person's professional life
    - Negative or disparaging comments or criticisms
    - Sharing information that could injure a person's reputation

NLRB RULINGS ON CONFIDENTIALITY AND SOCIAL MEDIA POLICIES

Purple Communications, Inc., 361 NLRB No. 43 (Sept. 24, 2014)

- Purple Communications ("PC") is a California company that provides sign language interpretation services
- PC work rules:
  - Prohibit employees from "causing, creating or participating in a disruption of any kind during working hours on Company property"
  - Prohibit employees from using PC's email system for any non-business reason
- NLRB holding: PC's "no-disruption" policy was unlawful
  - Employees could interpret the policy as prohibiting lawful strikes, solicitation, or even concerted activities away from the workplace that cause disruptions at the workplace
- The NLRB did not rule on the validity of PC's rule regarding the use of PC's email system, but has invited the parties and third parties to submit briefs on this issue

NLRB RULINGS ON CONFIDENTIALITY AND SOCIAL MEDIA POLICIES

IMPLICATIONS

- NLRB is giving increased scrutiny to employer policies that limit employees' ability to disclose information, or to disparage their employer, supervisors, or fellow employees
- The employer's good intention in implementing the policy is irrelevant
- ULP's relating to overly broad policies may be filed against an employer, regardless of whether it is unionized or non-union
- Not all employee communications are protected: deliberately or maliciously false, violent, or threatening communications are not
- Employers should review all of their policies that potentially limit employees' Section 7 right to engage in concerted activities:
    1) Confidentiality
    2) Social media
    3) Disciplinary Rules
    4) Code of Conduct/Ethics Rules

EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES

- Issued on July 14, 2014 after a 3-2 vote of the EEOC Commissioners
- Provides guidance regarding the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) as those acts apply to pregnant workers
- First comprehensive guidance by EEOC on pregnancy in the workplace in over 30 years
- The Guidance has been a source of controversy, even within the EEOC
- Critics have questioned whether the Guidance is grounded in statutory authority
- U.S. Supreme Court will review Young v. United Parcel Service, Inc., a Fourth Circuit case that held that the PDA does not mandate the kind of accommodations discussed in the EEOC's Guidance

EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES

- Illustrates application of the PDA's provision that unlawful sex discrimination includes discrimination because of pregnancy, childbirth or related medical conditions:
  - Employers may not discriminate against an individual who is not currently pregnant based on her ability or intention to become pregnant
  - Employers should not ask employees or applicants whether they are pregnant or intend to become pregnant
  - Employers may not discriminate against employees because of a past pregnancy
  - Employers must allow individuals who are lactating to address lactation-related needs to the same extent as others are able to address similarly limiting medical conditions. Lactation is a pregnancy-related condition
  - Employers may not require a female worker to take a leave because she is pregnant or has given birth, as long as the employee is able to do her job

EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES

- Employers that provide light-duty work to employees suffering from work-related injuries must provide same light-duty work to pregnant employees similarly unable to work
- Although pregnancy itself is not a disability under the ADA, the Guidance notes that, with the ADA Amendments Act, the threshold for disability was substantially reduced, making it more likely that a pregnancy-related impairment will be considered a disability. Employers are required to accommodate pregnancy-related disabilities to the same extent as other disabilities under the ADA.
- Guidance provides examples of reasonable accommodations for pregnancy-related disabilities

EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES

- Guidance reiterates that employers should carefully distinguish between leave related to physical limitations imposed by pregnancy or childbirth and leave for purposes of bonding with a child or providing care for a child
- Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions
- However, parental leave (i.e. to bond with the child) must be provided to similarly situated male and female employees on the same terms

EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES IMPLICATIONS OF EEOC'S GUIDANCE

- Employers should review their existing accommodation and leave policies to ensure that they are not inconsistent with the law
- Employers should train management regarding the employer's obligation to accommodate pregnancy-related impairments
- Employers should expect that employees will have an increased awareness of their rights
- Employers may receive an increased number of accommodation requests
- Expect increased enforcement by the EEOC

RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES

- EEOC published new guidance on March 6, 2014
- Guidance focuses primarily on the obligation to reasonably accommodate an employee's or applicant's religion-based dress or grooming practices when those practices conflict with a job requirement
- Discusses:
  - Prohibitions on job segregation, such as assigning an employee to a non-customer service position because of his/her religious garb
  - Obligation to reasonably accommodate religious grooming or garb practices for employees with sincerely held religious beliefs
  - Requiring employees to forgo religious dress or grooming practices as a condition of employment
  - Non-retaliation obligations for employees who request or are provided accommodation, or file a discrimination complaint

RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES
IMPLICATIONS OF THE EEOC'S GUIDANCE

- Does not create any new obligations for employers.
- Illustrates the importance of employer respect of employee's religious beliefs and practices, and at times, the obligation to accommodate those beliefs or practices.
- Employers should be sure that they have a policy or procedure that addresses religious accommodation requests.
- Employers should clearly publish anti-harassment and anti-discrimination policies, and enforce those policies.

SOCKO V. MID-ATLANTIC SYSTEMS OF CPA, INC., 2014 PA. SUPER 103
(PA. SUPER. CT., MAY 13, 2014)

SOCKO - FACTS

- Mid-Atlantic Systems ("MAS") is a basement waterproofing business located in Central Pennsylvania
- MAS hired David Socko as a salesman in March 2007
  - Signed a two-year non-competition agreement ("NCA") upon hire.
  - Resigned in February 2009
  - Rehired in June 2009, and entered into a new two-year NCA
  - In December 2010, while still employed by MAS, signed a third NCA, containing a two-year NCA that covered any jurisdiction in which MAS does business
  - MAS did not provide Socko with any salary increase or benefit improvement in exchange for his entering into the third NCA
  - NCA stated that MAS and Socko were entering into the NCA "intending to be legally bound"

SOCKO V. MID-ATLANTIC SYSTEMS OF CPA, INC., 2014 PA. SUPER 103
(PA. SUPER. CT., MAY 13, 2014)

SOCKO ISSUE

- Under PA law, all contracts, including NCA's, must be supported by consideration
- Agreement to hire an employee, even on an at-will basis, constitutes adequate consideration to support a NCA
- Continued employment is not adequate consideration to support a NCA entered into after the beginning of the employment relationship
- Under the Pennsylvania Uniform Written Obligations Act, 33 P.S. § 6 ("UWOA"), a party may not object to the sufficiency of consideration that has been provided to support a written contract, if the contract contains language stating that the parties intended to be legally bound
- Socko issue: whether a NCA that was entered into after the beginning of an employment relationship, and for which the employer did not provide a salary increase or some other improvement in terms or conditions of employment, was nonetheless valid, if the NCA contained language stating that the parties intended to be legally bound

SOCKO V. MID-ATLANTIC SYSTEMS OF CPA, INC., 2014 PA. SUPER 103
(PA. SUPER. CT., MAY 13, 2014)

THE SOCKO DECISION

- The PA Superior Court held that the third NCA into which Socko had entered was invalid, due to a lack of consideration
  - — Employers that wish to obtain valid NCA's from existing employees must provide the employee with a salary increase, monetary payment, or improvement in benefits in order to obtain a valid NCA
  - — A statement of "intention to be legally bound" is not enough

SOCKO V. MID-ATLANTIC SYSTEMS OF CPA, INC., 2014 PA. SUPER 103
(PA. SUPER. CT., MAY 13, 2014)

IMPLICATIONS OF THE SOCKO DECISION

- Underscores the importance, to PA employers that wish to obtain NCA's from their employees, of requiring that the employees sign the agreements as a condition of hire
- If a PA employer does not obtain a NCA from an employee in connection with the employee's hire, the employer must provide the employee with some additional benefit if the employer seeks to obtain an NCA from the employee after his or her hire

THE PENNSYLVANIA WHISTLEBLOWER LAW ("PWL")

- Enacted in 1986
- Prohibits public employers from discharging, threatening, discriminating against, or retaliating against employees who:
  - Make a good-faith report, to the employer or an appropriate authority, of waste or misuse of government funds, or of violation of a statute, ordinance, regulation, or code of conduct designed to protect the public interest, or
  - Participate in an investigation, hearing, or court action relating to a report of waste or wrongdoing
- Historically applied only to "public employers:"
  - The Commonwealth of Pennsylvania and Pennsylvania counties, cities, townships, boroughs, regional governing bodies, and other political subdivisions of the Commonwealth
  - Councils, boards, departments, commissions, school districts, and agencies of the Commonwealth or its political subdivisions
- By case law, the coverage of the PWL was extended to Pennsylvania private employers that receive grants or funding from the Commonwealth

2014 AMENDMENTS TO THE PWL

- Effective August 31, 2014
- Makes the statute also applicable to any private employer that has a contract to provide services to the Commonwealth or to its political subdivisions, and that receives money from the government for the performance of those services
- Increases from $500 to $10,000, the maximum penalty for violation of the PWL
- As of August 31, 2014, the following categories of employers are prohibited from discharging, threatening, discriminating against, or retaliating against employees who make a good faith report of waste or misuse of government funds, or a good faith report of violation of a statute, ordinance, regulation, or code of conduct designed to protect the public interest:
  - Pennsylvania governmental entities
  - Private employers that receive government grants or other government funding
  - Private employers that contract with the Commonwealth or its political subdivisions, and that are paid by the government for providing those services

VALIDITY OF FLUCTUATING WORKWEEK UNDER PENNSYLVANIA MINIMUM WAGE ACT

- Under the Fair Labor Standards Act (FLSA), employers are permitted to pay non-exempt employees using a "fluctuating workweek" (FWW) method of compensation
- Under the FWW method of compensation authorized by the FLSA, employers are permitted to pay an employee a fixed weekly salary for all hours worked, so long as the employer pays an overtime premium equal to ½ of the employer's regular hourly rate for overtime hours

VALIDITY OF FLUCTUATING WORKWEEK UNDER PENNSYLVANIA MINIMUM WAGE ACT

Verderame v. RadioShack Corp., 13-cv-02539 (E.D. Pa., July 10, 2014)

- U.S. District Court for the Eastern District of Pennsylvania joined Pennsylvania's Western District Court in determining that the FWW method of calculating overtime for non-exempt employees is not lawful under the Pennsylvania Minimum Wage Act (PMWA)
- Unlike the Department of Labor's FLSA regulations, the PMWA does not include language expressly authorizing the FWW method
- Therefore, under the PMWA, an employer utilizing the FWW method must pay overtime at a rate of 1 ½ times the employee's regular rate for all hours worked, *in addition to the employee's weekly salary*
- Applying the District Courts' analyses results in an employee effectively earning double overtime

VALIDITY OF FLUCTUATING WORKWEEK UNDER PENNSYLVANIA MINIMUM WAGE ACT
IMPACT OF THE DISTRICT COURTS' DECISIONS

- Although the FWW method is permitted under federal law, employees are entitled to the benefit of the law that provides the greater protection
- Therefore, employers in Pennsylvania must be wary of continuing to use the FWW method for Pennsylvania employees
- Although the District Courts' decisions are not binding on Pennsylvania's state courts, the decisions should put employers on notice of the risks associated with continuing to utilize the fluctuating workweek method of compensation for Pennsylvania employees

QUESTIONS & ANSWERS

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THANK YOU!

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Note: This document is not intended to give legal advice. It consists of general information. Employees facing specific issues should seek the assistance of an attorney.

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