BUSINESS IN 2024

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Agenda

Michael Donlon – (12:05PM-12:15PM)

- SEC Regulatory Update – Whistleblower Enforcement Actions

Elizabeth Morgan – (12:15PM-12:25PM)

- What's New with Employee Retention Tax Credits

Christopher Cruz-Sierra – (12:25PM-12:35PM)

- The Latest in Title IX Enforcement

G. Oberfield – (12:35PM-12:45PM)

- Your Questions / Announcements

SEC Regulatory Update – Whistleblower Enforcement Actions

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Whistleblower Protection Rule

Rule 21F-17 of the Securities Exchange Act of 1934 prohibits a company from interfering with a person's right to report possible securities law violations to the SEC.

The rule states: "no person may take action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications."

Previous SEC enforcement cases

The SEC has been pursuing enforcement cases on whistleblower protection violations since 2015.

In 2023, the SEC settled actions against four companies (one of which was a private company) alleging that certain provisions in employment and separation agreements violated whistleblower protections or otherwise impeded whistleblowing activity.

Latest SEC enforcement actions

On September 9, 2024, the SEC announced seven settled enforcement actions against companies stemming from alleged violations of the whistleblower protection rule in employment, separation and consulting agreements, with the companies agreeing to pay more than $3 million combined in civil penalties.

The SEC concluded that the potential chilling effect on whistleblowers was sufficient to form the basis of a violation of the whistleblower protections rule.

Latest SEC enforcement actions

In all seven of the cases, the companies used various agreements that required employees to waive their right to recover a monetary award for participating in an investigation by a governmental agency.

The SEC determined that these provisions impeded potential disclosure by whistleblowers, notwithstanding explicit override provisions in the relevant agreements stating that nothing in the agreement should be interpreted as limiting the employee's ability to file a claim or charge with a government agency.

Problematic Provisions

"[N]othing in this Severance Agreement prohibits or prevents Employee from filing a charge with or participating, testifying or assisting in any investigation, hearing whistleblower action or other proceeding before any federal, state or local government agency (e.g., EEOC, DFEH, NLRB, SEC, etc.), nor does anything in this Severance Agreement preclude, prohibit or otherwise limit, in any way, Employee's rights and abilities to contact, communicate with, report matters to or otherwise participate in any whistleblower program administered by any such agencies. **However, to the maximum extent permitted by law, Employee agrees that if such an administrative claim is made, Employee shall not be entitled to recover any individual monetary relief or other individual remedies.**"

Problematic Provisions

"[Employee] represents that he has not filed any complaints or charges against any of the Released Parties with any local, state or federal agency or court, that he will not file any such complaints or charges arising out of or relating to events prior to the execution of this Agreement and that if any such agency or court assumes jurisdiction of any such complaint or charge against any of the Released Parties on behalf of [the company], he will request such agency or court to withdraw from the matter and that the complaint or charge be dismissed."

Problematic Provisions

"**Consultant shall hold in confidence and shall not copy, publish, disseminate or otherwise use any confidential information it receives from [TransUnion] and/or any [TransUnion] Affiliate** (as defined below in Section 13.3) by virtue of this Contract including but not limited to any such information Consultant received prior to the commencement of this Contract; provided however, that Consultant may use (but not copy, publish, disseminate nor use for any other purpose) any such confidential information solely to the extent necessary for Consultant's performance under this Contract. **Such obligations of confidentiality shall not apply to information** (a) which Consultant can demonstrate, by its written records, was already in the possession of Consultant prior to the first date of disclosure by [TransUnion] and/or a [TransUnion] Affiliate; (b) which is now or becomes publicly known through no fault of Consultant; (c) which Consultant rightfully receives from third parties; (d) which by [TransUnion's written authorization is approved for use or release by Consultant; or **(e) which is required by law (i.e., an order of a court or data request from an administrative or governmental agency with competent jurisdiction) to be disclosed; provided however, that Consultant shall provide [TransUnion] at least ten (10) days prior written notice before the disclosure of such information pursuant to this Subparagraph (e).**"

Key Takeaways

Companies should continue to regularly review and update their form agreements and policies to address and protect whistleblower rights in light of evolving SEC guidance on this issue.

- Confidentiality provisions should include a whistleblower carveout for affirmative voluntary disclosure of potential violations of federal law or regulations to governmental agencies (not just pursuant to court order or as required by law), and without a requirement to notify the company.
- Do not limit an employee's ability to seek a monetary award under a whistleblower program.
- Employee representations that they have not filed any complaints or charges against the company with a governmental agency should contain a clear exception for protected whistleblower activity (or be omitted altogether).
- Consider other provisions that could be seen as chilling whistleblower activity (such as non-disparagement and cooperation provisions), including provisions in any forms of release or other exhibits attached to the agreement, and ensure that each has an express reference to a carveout for such activity.
- Consider not just employment and severance agreements, but also consulting, client and other third-party agreements; incentive award agreements (and their attached releases); and employee handbooks and company policies.

Employee Retention Credit Update

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Employee Retention Credit Update

- Eligible Employers can claim the ERC on an original or amended employment tax return for qualified wages paid between March 13, 2020, and December 31, 2021. However, to be eligible, employers must have either:
  - Sustained a full or partial suspension of operations due to an order from an appropriate governmental authority limiting commerce, travel or group meetings because of COVID-19 during 2020 or the first three quarters of 2021, or
  - Experienced a significant decline in gross receipts during 2020 or a decline in gross receipts during the first three quarters of 2021, or
  - Qualified as a recovery startup business for the third or fourth quarters of 2021.
- Period to amend 2020 returns has closed; 2021 returns may be amended by April 15, 2025

Employee Retention Credit Update

- Warning signs of incorrect claims for ERC:
  - Promoter says there's "nothing to lose"
  - Government orders that do not qualify
  - Businesses unable to support how a government order fully or partially suspended business operations
  - Businesses citing supply chain issues
  - Essential businesses during the pandemic that could fully operate and did not have a decline in gross receipts
  - Businesses using wages already used for the PPP loan forgiveness

Employee Retention Credit Update

- Options for resolving incorrect ERC claims:
  - Claim withdrawal
  - Amend a return
  - Voluntary Disclosure Program

Title IX Updates

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Injunctions on Enforcing New Title IX Regulations

- Recent injunctions have barred the Education Department from enforcing the new Title IX regulations in many states.
  - Pursuant to federal court orders, the Education Department is enjoined from enforcing the new Title IX regulations in 26 states, affecting hundreds of institutions of higher education.
- However, the new regulations related to pregnant students are some of the least controversial.
  - We expect that some version of the regulations relating to pregnant students will ultimately apply to every institution in the future.

Title IX Protections for Pregnant Student, Employees, and Applicants for Admission and Employment

- Title IX prohibits and protects against sex discrimination based on:
  - Pregnancy, childbirth, termination of pregnancy, lactation, or related medical condition
  - Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Examples of “Related Medical Conditions”

- Includes morning sickness, fatigue, nausea, dehydration, gestational diabetes, preeclampsia, prenatal or postpartum depression, infertility, recovery from childbirth, miscarriage or abortion, and lactation conditions or complications
  - (Non-exhaustive list)
- Preamble clarifies that discrimination based on menstruation, perimenopause, menopause, and related conditions constitute prohibited sex discrimination

U.S. Dep’t of Ed. Releases Additional Guidance for the 2024 IX Regs.

- 2 resources released on September 12, 2024
  - Aimed at helping schools (including colleges and universities) and school administrators comply with the 2024 amendments to the Title IX Regulations.
- The resources explain how the 2024 Title IX Regulations clarify and update longstanding obligations related to Title IX coordinator duties, as well as prohibitions on sex discrimination based on pregnancy or related conditions and parental, family or marital status.

2024 Title IX Regulations: Impact on Title IX Coordinator Duties – Resource 1

- What training must be provided to a Title IX Coordinator?
- How must a Title IX Coordinator monitor for barriers to reporting sex discrimination?
- What steps must a Title IX Coordinator take in response to possible sex discrimination?
- When is a Title IX Coordinator not required to respond?
- What actions must a Title IX Coordinator take with regard to students who are pregnant or experiencing pregnancy-related conditions?
- What are the recordkeeping responsibilities related to a Title IX Coordinator's role?

2024 Title IX Regulations, Nondiscrimination Based on Pregnancy or Related Conditions & Parental, Family, or Marital Status – Resource 2

- Schools must not (1) discriminate against individuals in the protected groups based on pregnancy or related conditions; (2) treat those in the protected groups differently based on their parental, family or marital status; or (3) punish or retaliate against those in the protected groups for exercising a right under Title IX, such as seeking pregnancy-related leave or access to a lactation space.

Applicants for Admission

- School must not treat an applicant's pregnancy or related conditions differently than any other temporary medical condition.

Students

- Upon proper notice of a student's pregnancy or related conditions, a school must take action…
  - Notify student about its responsibilities to pregnant students, including its obligation to respond to sex discrimination and limit sharing of private information, and provide the school's notice of nondiscrimination
  - Allow voluntary access to other parts of the school's education program that are comparable to the general program
  - Allow voluntary leave of absence and reinstatement to the academic status the student held when the leave began
  - Access to a lactation space
  - Provide reasonable modifications

Reasonable Modifications

- The institution must make reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to its education program or activity.
- Each reasonable modification must be based on the student's individualized needs. The institution must consult with the student to determine what modifications are required.
- However, a modification that the institution can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification

Reasonable Modifications (continued)

- The student has discretion to accept or decline each reasonable modification offered by the institution. If a student accepts an institution's offered reasonable modification, the institution must implement it.
- Reasonable modifications may include (but are not limited to):
  - Breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom;
  - Intermittent absences to attend medical appointments;
  - Access to online or homebound education;

Reasonable Modifications (continued)

- Changes in schedule or course sequence;
- Extensions of time for coursework and rescheduling of tests and examinations;
- Allowing a student to sit or stand, or carry or keep water nearby;
- Counseling;
- Changes in physical space or supplies (for example, access to a larger desk or a footrest);
- Elevator access; and
- Other changes to policies, practices or procedures.

Suggested Best Practices

1. Consolidate all institutional pregnancy and lactation policies into a standalone pregnancy and lactation policy, if possible.
2. Consider a team approach to discuss academic accommodations (and convene the team).
3. We suggest that the final decisionmaker for academic accommodations should be a dean or provost, rather than an individual faculty member.
4. For programs leading to licensure, check on time restrictions to see if flexibility is possible in extraordinary circumstances.
5. Determine whether the requested modification or accommodation has ever been provided to a student (even if it was provided many years ago).
6. If leave is the best (or only) reasonable modification and a student requests a tuition refund, consider offering a tuition credit for future semesters.
7. Although the ultimate decision on reasonable academic modifications belongs to the institution, student requests should be seriously considered.
8. NEVER SAY NEVER!

Employees

- A school must treat pregnancy or related conditions the same as any other temporary medical condition for all job-related purposes
- Allow voluntary leave of absence if the school does not have an employee leave policy or if employee has insufficient leave or accrued employment time
- Reinstate employee to the status held when leave began or to a comparable position without decrease in pay/promotional opportunities/any other right of employment
- Reasonable break time to express breast milk or breastfeed
- Access to lactation space
- Not ask for marital status during the hiring process

Questions?

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The Pregnant Worker:

What to Expect When an Employee is Expecting

Labor and Employment Law Fall 2024 Breakfast Briefing

Albany • October 31
Binghamton • September 17
Buffalo • October 3
Corning • September 26
Ithaca • September 24
Melville • October 1
New York City • September 25
Rochester • September 19
Saratoga Springs • October 23
Syracuse • October 10
Utica • October 15
Watertown • October 24
Westchester • October 10

Learn more at bsk.com/events

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SEC Regulatory Update – Whistleblower Enforcement Actions

Michael Donlon, mdonlon@bsk.com

What's New with Employee Retention Tax Credits

Liz Morgan, lmorgan@bsk.com

The Latest in Title IX Enforcement

Christopher Cruz-Sierra

Sexual Harassment Prevention Training

To combat harassment in the workplace, every New York State employer must provide harassment prevention training for all employees annually.

For more information on Bond's online sexual harassment training click here or email bondonline@bsk.com

New York Employment Law: The Essential Guide

Purchase through Amazon **here**.

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Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.