CUT AND PASTE POST
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Back to Basics: Section 1981 Lawsuits

Last month, a Texas jury delivered a $70 million verdict in favor of 10 employees of Glow Networks. The case involved discriminatory practices and retaliatory action.

So, how do you end up with a $70 million dollar verdict?

Federal employment discrimination claims can be filed under Title VII of the 1964 Civil Rights Act, or under Section 1981 of the Civil Rights Act of 1866. In this case, the plaintiffs chose to file under Section 1981.

The key difference between these two laws is that Title VII caps the maximum amount a plaintiff can receive for compensatory and punitive damages at $300,000. ***Section 1981, has no cap on compensatory or punitive damages***, which allowed the jury to award this huge verdict.

Other distinctions between Title VII and Section 1981 include:

Time to File:

- Title VII: Before filing a Title VII lawsuit, an employee must first file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). Depending on which state the employee works in, a private sector employee has either 180 or 300 days to file. (Different procedures and time periods apply for federal, state, or local government employees.)
- Section 1981: Plaintiffs are not required to start with an EEOC complaint, which is really important if the employee misses the EEOC filing deadline.

Statute of Limitations:

- Title VII: A lawsuit must generally be filed within 90 days after the EEOC issues a Right to Sue Notice.
- Section 1981: The statute of limitation is four years.

For the reasons above, an employer who learns they have been served with a Section 1981 claim has a really good reason to cringe. But, there are two areas where Title VII provides broader protection than does Section 1981:

Protected Classes:

- Section 1981: Prohibits discrimination based on race or ethnicity.
- Title VII: Prohibits discrimination based on race, color, religion, creed, sex (including sexual orientation and gender identity), and mental disability.

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Type of Discrimination:

- Title VII: Prohibits disparate impact and intentional discrimination.
- Section 1981: Only prohibits intentional discrimination.

Professional Pointer, In addition to demonstrating the negative effects of employment discrimination, Yarbrough, et al. v. Glow Networks, Inc. serves as a necessary reminder of the legal remedies available to victims of this discrimination.

DOL Proposes Expansion to Davis-Bacon Laws

On March 11, 2022, the U.S. Department of Labor (DOL) announced proposed rulemaking to update and expand the regulations under Davis-Bacon prevailing wage laws.

Davis-Bacon applies to federal and federally assisted construction projects. Historically, the Act has applied only to onsite construction work for federally funded projects. The proposed rule would significantly expand the coverage of the Act to include work not previously covered or for which coverage was not always clear. The proposed rule includes many changes to coverage, wage rates, and administration and enforcement. For example:

- The proposed rule would clarify that "building or work" and "public building or public work" includes construction activity involving a portion of a building, structure, or improvement, or the installation of equipment or components into a building, structure, or improvement.
- The DOL has proposed language which addresses when demolition and similar activities meet the definition of covered "construction, prosecution, completion, or repair," which would add, among other circumstances, where subsequent covered construction is planned at the site of demolition or removal.
- The rule would broaden the definition of "site of the work" to encompass certain times when construction of significant portions of a building or work occurs at a secondary worksites (e.g., construction of manufactured buildings). This would clarify and strengthen the scope of coverage under the Act, but would also lead to more small firms being required to comply with the Act's labor standards. Currently, this type of work is usually excluded from coverage unless the work is performed at facilities established specifically for a covered contract or project.
- The proposed rule would expand coverage to include those involved in transportation of products to the construction site, and to laborers and mechanics employed in the construction or development of a project.

The DOL is taking written public comment on the proposed rule until May 17, 2022. Go to https://www.federalregister.gov/documents/2022/03/18/2022-05346/updating-the-davis-bacon-and-related-acts-regulations to submit your comments.

Professional Pointer: The State of Montana has a prevailing wage law which is similar to, but not exactly the same as, the Davis Bacon law. The Montana law applies to work done on public projects. If your company bids on federal, state or local contracts, it's really important to understand and follow these laws.

EEOC: Non Discrimination, COVID and Caregiver Duties

On March 14, 2022, the EEOC released a new technical assistance document, "The COVID-19 Pandemic and Caregiver Discrimination under Federal Employment Discrimination Law," reminding employers that, even as we return to post-COVID normal life (whatever that means…), many employers, schools, and daycare providers are still operating on hybrid schedules or may close with little advance notice which may place burdens on those with caregiving responsibilities. The guidance provides examples of discriminatory behavior that employers need to avoid, and steps employers may take to address these caregiving challenges.

Quest Diagnostics: Highest Drug Positivity Rate in Twenty Years

"Other than extremely high levels of caffeine, staff drug tests were negative."

According to a Quest Diagnostic Study analyzing workplace drug test results, in 2021 employers saw the highest rate of positive drug test results in twenty years. The study was released on March 30, 2022 and was based on more than 11 million urine, hair and oral fluid drug tests collected during calendar year 2021.

Of the seventeen industries tracked, all but mining saw an increase in overall positivity rates from 2017 to 2021. Although the overall positivity rates rose by only 1.8% since 2020, they were 12% higher than in 2017 and have risen steadily over the past five years. Other findings include:

- Over the past five years, positivity for marijuana in the general U.S. workforce increased 50%, and was the highest ever recorded. This is probably tied to numerous state-level marijuana laws.
- Over the same five year period, positive marijuana test results doubled or more than doubled in Transportation/Warehousing; Finance/Insurance, Utilities, Accommodations and Food Services, Retail Trade, and Professional, Scientific, and Technical Services. Accommodations and Food Services topped the list with a 7.5% marijuana positivity rate.
    - The Retail Trade industry saw a 55.6% increase in positive methamphetamine drug tests between 2017 and 2021.
- Over the 5 year period, the number of federal mandated pre-employment positive tests increased by 9.5% and, shockingly, post-accident positivity increased 41.9%.

The good news? Over the past year, positive drug testing rates for heroin and other opioids decreased or stayed the same across all workforces.

For an interactive map of Quest's Drug Testing Index with positivity rates and trend lines by drug categories and three-digit ZIP code in the United States, visit the DTIDrugmap.

Professional Pointer: While employers struggle to fill vacancies, the liability and safety issues related to on-duty impairment make it essential that your drug and alcohol testing policy reflects your company's needs and safety goals.