BUSINESS IN 2023

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

Gabriel S. Oberfield

Senior Counsel
goberfield@bsk.com
New York, NY

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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Intros / Agenda

Laura Harshbarger – (12:05PM-12:15PM)

- SCOTUS and Affirmative Action

Kali Schreiner – (12:15PM-12:25PM)

- SCOTUS and Religious Accommodation

Paige Carey and Delaney Knapp – (12:25PM-12:40PM)

- Whistleblower Standards and Not-for-Profit Organizations

G. Oberfield – (12:40PM-12:45PM)

- Questions / Wrap Up

We Are Back…

No Webinar on July 4th

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SCOTUS and Affirmative Action

Laura H. Harshbarger

Member
lharshbarger@bsk.com
Syracuse, NY

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The SCOTUS Decisions

- Student admissions cases
  - NOT employment cases
- Harvard and University of North Carolina
- Admissions processes were “race-conscious”
  - Harvard: Admissions committee ensured that there would not be a significant drop-off in its minority acceptance rate; race one of a few factors considered as the final selection criteria
  - UNC: Race as a “plus” factor in admissions process and the weight of this factor could make the difference in whether an applicant was admitted

The SCOTUS Decisions

- Applicable legal standard for race in *student admissions*
  - "Strict scrutiny"
    - Constitutional concept that requires:
      - A compelling interest
      - A narrowly tailored method of achieving the compelling interest
- SCOTUS struck down these admissions programs because
  - Their goals were not sufficiently measurable (not "narrowly tailored")
  - Race was being used as a negative factor and as a stereotype
  - No end point to these programs

What does this mean for employers?

- The *student admissions decisions* line of judicial precedent is ***not*** directly applicable to *employment decisions*
  - Even ***less*** legal permissibility for employment decisions based on race
- Public employers are subject to an Equal Protection ("strict scrutiny") analysis when it comes to race as a factor in employment decisions
- Private employers are subject to Title VII ("manifest imbalance") analysis when it comes to race as a factor in employment decisions
- These are both EXTREMELY narrow, limited standards
- AND the New York State Human Rights Law does not necessarily allow even those exceptions

What about employers subject to Affirmative Action Plan requirements?

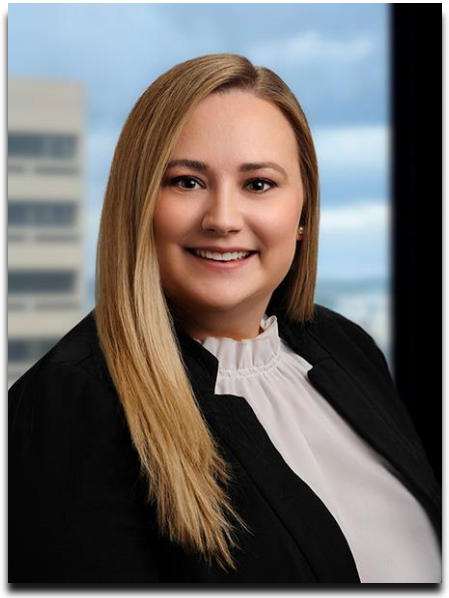
From OFFCP FAQs:

In contrast to the affirmative action implemented by many post-secondary institutions**,** OFCCP does not permit the use of race to be weighed as one factor among many in an individual's application when rendering hiring, employment, or personnel decisions, as racial preferences of any kind are prohibited under the authorities administered by OFCCP. **OFCCP, therefore, does not permit the use of race as a factor in contractors' employment practices to achieve diversity in the workforce, either by using race as one factor among many to achieve a "critical mass" of representation for underrepresented minorities or through direct numerical quotas or set-asides.**

What does this mean for DEI initiatives?

- DEI initiatives are not necessarily illegal
- There are lawful and unlawful ways to pursue DEI values
  - Be cautious in job advertisements and statements on company websites
  - Hiring personnel and hiring committees need to be properly trained
    - Diverse committees or processes may be beneficial
  - Increase the pool of qualified applicants (i.e., casting a wider net)
    - However, decisions about who to interview or not should not be based on race
  - Mentorship programs post-hire
  - Training of existing employees to increase welcomeness of working environment/eliminate bias
- Consult with legal counsel

SCOTUS and Religious Accommodation



Kali R. Schreiner

Associate
kschreiner@bsk.com
Syracuse, NY

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Title VII

1964 Version

- Required employers to accommodate the religious practice of their employees unless doing so would impose "an undue hardship on the conduct of the employer's business."
  - Discrimination because of religion?

1972 Version

- Clarification – employers must "reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" unless the employer is unable to do so "without undue hardship on the conduct of the employer's business."
  - Religious observance and practice → religion includes all facets of one's belief, observance, and practice

Trans World Airlines, Inc. v. Hardison

- Developed a standard for accommodating a religious employee's request given the "undue hardship" language
- Interpretation → the standard to determine undue hardship is whether it would require an employer "to bear more than a ***de minimis* cost**"
- Courts ran with this *de minimis* standard

Groff v. DeJoy - Background

- Plaintiff Gerald Groff is an Evangelical Christian who believes Sundays should be devoted to worship and rest
- Worked for USPS
- USPS implemented weekend shifts with Sunday deliveries for Amazon
- Groff attempted to avoid, eventually it caught up with him
- Received progressive discipline until he resigned

Procedural History

Groff sued under Title VII of the Civil Rights Act of 1964

District Court granted summary judgement to USPS

3rd Circuit affirmed based on *Hardison's low standard*

New Standard – Changes to Undue Hardship

- Court attempted to provide clarification as to what Title VII requires
- Other courts got it wrong, the focus in *Hardison* should have been that an accommodation is not required when it entails "substantial" "costs" or "expenditures"
- Substantial vs. *de minimis*
- Concern that employers were abusing this standard
- To establish "undue hardship," an employer must now "show that the burden of granting an accommodation would result in **substantial increased costs in relation to the conduct of its particular business.**"

Takeaways for the Employer

1. Fact Specific Inquiry – may depend on the size of the employer
2. This decision will likely have minimal impact on the EEOC guidance
3. The impact on coworkers (alone) will not be sufficient
4. Goal is actual accommodation

Whistleblower Standards and Not-for-Profit Organizations

Paige L. Carey
Associate
pcarey@bsk.com
New York, NY

Delaney M.R. Knapp
Associate
dknapp@bsk.com
Albany, NY

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Whistleblower Policy – New Protections & Requirements

- Effective January 26, 2022, New York Labor Law Section 740 requires certain whistleblower protections for all employers with one or more employees
  - This resulted in many smaller nonprofits adopting new whistleblower policies at the beginning of the year

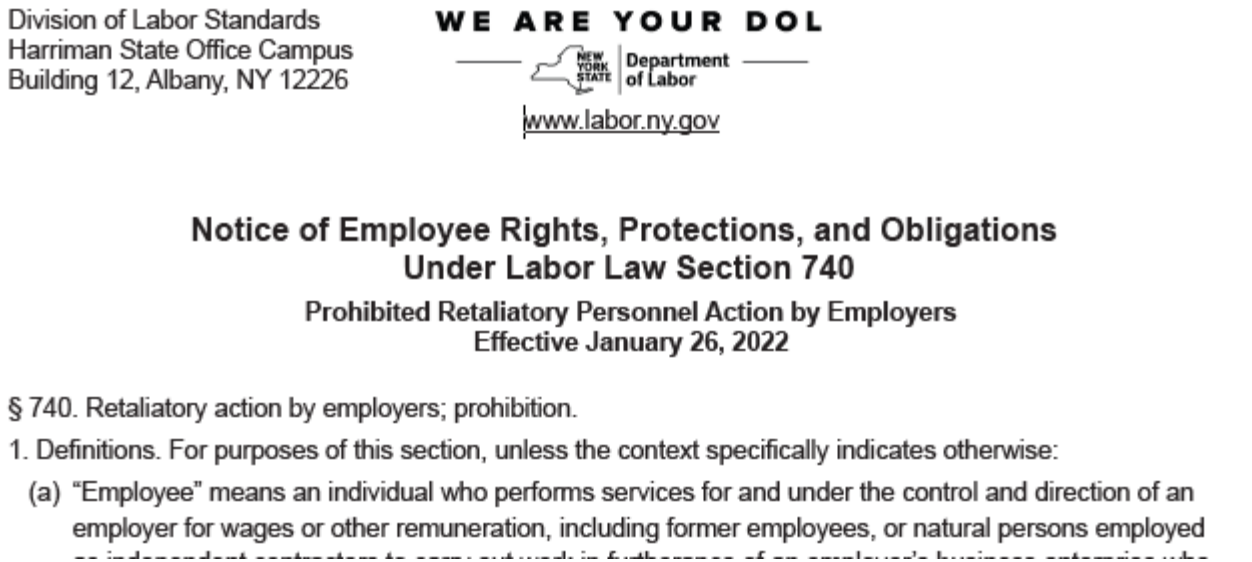
- **Coverage expanded to former employees.** Labor Law Section 740 protects not only current employees from retaliatory action but also *former* employees, as well as independent contractors, who are not typically covered under current whistleblower policies.

- **Expanded reporting protection.** Old Labor Law Section 740 protected whistleblowing with respect only to certain specified laws, while the new law has been broadened to cover all laws, regulations, local ordinances, executive orders and judicial and administrative decisions, rulings and orders.

- **Retaliation expanded.** Labor Law Section 740 has expanded prohibited retaliation to encompass certain types of adverse actions that were not commonly envisioned by existing policies, such as contacting U.S. immigration authorities regarding an employee's immigration status.

- **Good faith vs reasonable belief.** Labor Law Section 740 now protects employees who make reports whenever they "reasonably believe" there is a violation, whereas NPCL Section 715-b requires protection where there is a "good faith" report of a violation. Policies should be updated carefully to include both terms in ways that do not result in a violation of either requirement.

- **Form of Notice to Employees.** Labor Law Section 740 requires notification regarding the protections afforded by that law by posting information conspicuously in an easily accessible and well-lighted place customarily frequented by employees and applicants for employment. The NPCL, meanwhile, allows for a whistleblower policy to simply be posted on the employer's website.



Division of Labor Standards
Harriman State Office Campus
Building 12, Albany, NY 12226

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Notice of Employee Rights, Protections, and Obligations Under Labor Law Section 740

Prohibited Retaliatory Personnel Action by Employers
Effective January 26, 2022

§ 740. Retaliatory action by employers; prohibition.

1. Definitions. For purposes of this section, unless the context specifically indicates otherwise:

(a) "Employee" means an individual who performs services for and under the control and direction of an employer for wages or other remuneration, including former employees, or natural persons employed

Nicholas Pisano v. Michael T. Reynolds, et al.

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Background:

- Plaintiff served as Defendant's former Treasurer and Vice President
- While employed by Defendant, Plaintiff reported concerns of illegal fraud, corruption, and kickbacks and was subsequently discharged
- Plaintiff asserts:
  - (1) his employment was terminated by Defendant in retaliation for his good faith allegations of wrongdoing in violation of Section 740
  - (2) Defendant had no whistleblower policy that met the requirements of Section 715-b

Motion to Dismiss: NYLL Section 740 Claim

December 20, 2019
Former version of Section 740 becomes effective

October 28, 2021
Legislature adopts amended version of Section 740

December 14, 2021
Plaintiff discharged following allegations of corruption and illegal kickback

January 26, 2022
Amended version of Section 740 becomes effective

Motion to Dismiss: NYLL Section 740 Claim

December 20, 2019 Section 740	January 26, 2022 Section 740
• Applied only to complaints implicating substantial and specific danger to the public health or safety • "Reasonably believes" NOT included	Applies to: • Complaints implicating a reasonable belief that the employer is **in violation of law, rule or regulation** AND • Complaints implicating a reasonable belief of a substantial and specific danger to the public health or safety

Motion to Dismiss: NYLL Section 740

Decision on Motion: Claim Dismissed

- The addition of “violation of law, rule or regulation” in Section 740 has **only prospective effect**

- BUT other portions of the recent amendments to Section 740 DO apply retroactively.

- Specifically,
  - The amendment to Section 740 permitting a plaintiff to seek a jury trial (where he could not before) AND
  - The amendment to Section 740 permitting a plaintiff to bring a claim where he or she has a reasonable belief that a violation of law occurred (as opposed to the former version’s requirement of an actual violation)

Motion to Dismiss: NPCL Section 715-b

Decision on Motion: Claim Dismissed

- NPCL Section 715-b does NOT afford officers of not-for-profit corporations, such as Plaintiff, a private right of action.

- The statute empowers the Attorney General to protect these officers

Your Questions

Gabriel S. Oberfield

Senior Counsel
goberfield@bsk.com
New York, NY

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar here.
Non-NYS Bar Association Members can purchase through Amazon here.

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.