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Key Legislative Developments Affecting Your Human Resources

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Supervisor Status Revisited While Hill Remains Quiet

Congress continues on its recess, despite chatter that it should end before Labor Day. Meanwhile, congressmen revisit a Supreme Court decision that altered the factors relied on to determine "supervisor" status in workplace harassment cases.

Employer Liability for Workplace Harassment

In 2013, the Supreme Court addressed the meaning of a "supervisor" for purposes of determining the scope of employer liability for workplace harassment under Title VII of the Civil Rights Act of 1964. Specifically, in *Vance v. Ball State University*, the Court determined that a worker is a supervisor for those purposes only if the worker has the power to take tangible employment actions against the individual being harassed. Tangible employment actions include termination, demotion and failure to promote, as well as other changes in employment status, such as reassignment to a position with significantly different job responsibilities.

In response to this decision, in June and July 2016, Sen. Tammy Baldwin (D-WI) and Rep. Rosa DeLauro (D-CT) sponsored the Fair Employment Protection Act of 2016 (S. 3089 and H.R. 5693). This is substantially similar to legislation previously introduced in 2014 and would broaden the standard for determining whether a worker is a supervisor for purposes of harassment claims under Title VII, as well as under other federal anti-discrimination laws, including the Age Discrimination in Employment Act, Americans with Disabilities Act, Rehabilitation Act of 1973, and Genetic Information Nondiscrimination Act. Specifically, the bill would provide that individuals authorized to recommend tangible employment actions or direct an employee's daily work activities could be found to be a supervisor.

Importantly, although the Supreme Court's interpretation of a supervisor for purposes of employer liability for workplace harassment under Title VII is narrowly defined, it may be defined differently for other purposes. For example, under the National Labor Relations Act, an employee may be deemed a supervisor if independent judgement is used when performing or recommending a supervisory action, including terminating, promoting, disciplining and rewarding

employees. Under the EEOC's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, an individual may be treated as a supervisor if he or she has the authority to direct the work of another employee.

> **Comment.** These bills are not likely to be enacted before the new congressional term begins on January 3, 2017, as they have not garnered any bipartisan support. While they are likely to be reintroduced in the next Congress (which would be necessary as pending bills are not carried over from one congressional term to the next), it is unclear whether they will gain more traction. Notwithstanding, if anti-harassment training is not currently being extended to all employees who have supervisory responsibilities, employers may want to consider doing so.

Looking Ahead

Congress continues on recess until after Labor Day. In the meantime, with the November elections looming for all 435 House and 34 Senate seats, congressmen are increasingly focused on re-election campaigns and maintaining (in the case of Republicans) or gaining (in the case of Democrats) control of one or both chambers.

Title VII and Employer's Risk of Liability

Title VII generally prohibits discriminatory treatment on the basis of an employee's race, color, religion, sex, or national origin or harassment that involves such treatment. Title VII also prohibits employers from creating or perpetuating a hostile work environment. If an employer's supervisor harasses an employee and it results in a tangible employment action (such as a termination), then the employer may be vicariously liable for the supervisor's actions. If, however, no tangible employment action is taken, the employer may be able to avoid liability (e.g., if certain actions were taken to prevent and correct any such harassment and the victim unreasonably failed to take advantage of preventative or corrective opportunities the employer provided).

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