2011 Employment and Labor Law - Final Exam Answer Key

November 18, 2011

2011 EMPLOYMENT AND LABOR LAW

---- FINAL EXAM ANSWER KEY ----

Last week's final exam generated tremendous response from Nexsen Pruet clients and friends. Congratulations to **Sallie Williams** and **Tracie Beck** for being randomly selected from the pool of perfect scores and winning cookie baskets from *Charleston Cookie Company* and *Raleigh Cookie Company* respectively.

On to the answers:

1. Which part of the following statement is *false*?

The National Labor Relations Board (NLRB) has issued regulations requiring virtually all employers to post a large notice to employees informing them of their rights under the National Labor Relations Act (NLRA), particularly their right to unionize. Covered employers must display the poster beginning November 14, 2011.

(d) The poster must be displayed beginning November 14, 2011.

While the initial regulation called for posters to be displayed by November 14, the date was extended to **January 31, 2012**. [Nexsen Pruet Employment Law Update ("NP E&L Update"), September 2011: http://www.nexsenpruet.com/publications-595.html. Employers should be making plans now to comply with this new posting requirement, although it could be postponed again or struck down by a court.

2. Under the ADA Amendments Act (ADAAA), which of the following statements is *true*?

· Determining whether a claimed impairment substantially limits a major life activity does not require any scientific, medical or statistical analysis.

· Regardless of how many "major life activities" are affected, only one needs to be substantially limited for protection of the ADA to attach.

(c) Both statements are true.

The above statements are two of nine "Rules of Construction" implemented by the Equal

Employment Opportunity Commission (EEOC) to determine whether a claimed disability "substantially limits" a "major life activity." These rules expressly lower the perceived threshold for inclusion under the Americans with Disabilities Act. [NP E&L Update, June 2011: http://www.nexsenpruet.com/publications-569.html.]

3. Under Title II of the Genetic Information Nondiscrimination Act (GINA):

(a) A covered employer could face liability for asking about an employee's family member who may be suffering from heart disease, cancer or Alzheimer's disease.

(b) All written genetic information should be kept separately from the employee's personnel file.

(e) (a) and (b) only are true.

Employers should be very careful during any conversation with an employee that could lead to the discovery of genetic information. General questions such as "How are you feeling?" or "Is your mother recovering well from surgery?" are acceptable, but more specific probing can be problematic under GINA.

GINA covers employers with 15 or more employees. One of the law's requirements is that all written genetic information be kept separately from the employee's personnel file. [NP E&L Update, December 2010: http://www.nexsenpruet.com/assets/attachments/682.pdf.]

4. In 2011 both North Carolina and South Carolina passed state immigration laws mandating use of E-Verify and imposing penalties for failure to comply.

(a) True

Both North Carolina and South Carolina passed such laws this year, with effective dates in the future. In North Carolina, employers of 500 or more employees must begin to use E-Verify in the hiring process starting prior to **October 1, 2012**. For North Carolina employers of 100 to 499 employees, the deadline is **January 1, 2013**. The deadline is **July 1, 2013** for employers who employ 25 to 99 employees. In South Carolina, all private employers must enroll and participate in E-Verify by **January 1, 2012**. [NP E&L Update, August 2011: http://www.nexsenpruet.com/assets/attachments/721.pdf]

5. The Fair Labor Standards Act (FLSA) makes it illegal for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA] . . ."

Employees Alice and Beth have told their supervisor that the location of the time clock is preventing them from being paid for the time spent donning and doffing required protective gear. Beth then goes to the Department of Labor and files a complaint. The supervisor fires them both for being "whiners." Which of the following is true?

(a) Both Alice and Beth have potential retaliation claims against the employer.

In *Kasten v. Saint-Gobain Performance Plastics Corp*. 131 S.Ct. 1325 (2011), the United States Supreme Court held that an oral complaint to a supervisor can provide the basis for an FLSA retaliation claim. Despite the statute's language that an employee must have "filed" a complaint or "instituted" proceedings, the court ruled that a narrow interpretation of those provisions would undermine the FLSA's purpose of prohibiting "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." [NP E&L Update, May 2011: http://www.nexsenpruet.com/assets/attachments/712.pdf]

We hope you enjoyed this final exam.

To stay up-to-date in 2012 and beyond, be sure to read Nexsen Pruet's Employment Law Updates and attend our firm's Quarterly Breakfast Briefings in your area.