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Minnesota Department of Employment & Economic Development (DEED)

Small Business Notes

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The U.S. Supreme Court's 3rd Decision of June 29th, 2023

Much recent media attention has focused on two of the U.S. Supreme Court's decisions of June 29th: *Students for Free Admissions v. The President and Fellows of Harvard College* which held that Harvard's use of an applicant's race as a factor in admissions violated the Equal Protection Clause; and *303 Creative, LLC. V. Elenis* which held that the State of Colorado could not force a website designer to create expressive designs speaking messages with which the designer disagrees. Businesses should, however be aware of a third decision handed down by the Court on June 29th: *Groff v. DeJoy, Postmaster General.*

That case dealt with the question of how far an employer was required to go to accommodate the religious practices of an employee.

A 1972 amendment to Title VII of the Civil Rights Act of 1964 made clear that an employer must "reasonably accommodate" an employee's religious practices and provide workplace accommodations to permit those practices unless doing so would create an "undue hardship" for the employer. For 50 years the standard in place for definition of "undue hardship" has been the one articulated in the Court's decision in *Transworld Airlines , Inc. v. Hardison* [432 U.S. 63](1977) "requiring an employer to bear more than a "de minimis cost" to provide a religious accommodation is an undue hardship."

In the *Groff* case, Mr. Groff was an employee of the U.S. Postal Service whose Christian faith required observance of a Sunday Sabbath on which he could do no work. The Postal Service, however, had a contract with Amazon under which it would deliver Amazon packages to customers on Sunday. Groff requested a religious accommodation and to avoid Sunday work and the Postal service tried various shift swaps with other employees which, it said, was the only accommodation that could be put in place without adversely affecting delivery operations. When such swaps were unable to be done, Groff continued to avoid Sunday work for which he received warnings and suspensions. Finally, Groff quit saying he had no choice, and sued the Postal service for failure to accommodate his religious practice.

The federal district court which heard the case found for the Postal Service and the Third Circuit Court of Appeals upheld that decision. Both courts applied the "de minimis" test in *Hardison.*

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At the Supreme Court the Court the Justices did not rule on the merits of the case but instead set out a new test for review of an employer's decision. Writing for the Court Justice Alito wrote "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."

This decision's emphasis on overall context of an employer's burden will make it more difficult for employers to deny requests for religious accommodation and may invite future litigation.

New Federal "Pregnant Workers Fairness Act" (PWFA) Effective as of June 27th, 2023

The PWFA requires essentially all employers, public and private, with at least 15 employees to provide "reasonable accommodation" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions unless providing the accommodation will result in "undue hardship" to the employer. (See the earlier Note in this issue relating to the new standard for "undue hardship" put forward by the U.S. Supreme Court in *Groff v. DeJoy.* That decision was released June 29th, two days after the effective date of the PWFA.)

The PWFA deals only with accommodations in the workplace. Other federal laws make it illegal to discriminate in hiring or advancement on the basis of pregnancy.

The new law went into effect on June 27, and although the Equal Employment Opportunity Commission will be developing rules to implement enforcement, it announced that it began receiving charges from affected parties on June 27 for alleged violations of the law on or after June 27th.

Examples of possible reasonable accommodations include the ability to sit and drink water; to receive parking closer to the workplace; to have flexible hours; to receive appropriately sized uniforms and safety apparel; to receive additional break time to eat, rest, and use toilet facilities; to be excused from strenuous activities and/or activities that involve exposure to chemicals that are not safe for pregnancy.

Under the new law an employer cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the employer and the worker;
- Deny employment of other opportunities to a qualified employee or applicant for employment based on the need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation is available that would let the employee keep working;
- Retaliate against an individual for reporting unlawful behavior under the PWPA or participating in an investigation or other administrative action;
- Interfere with any individuals rights under the PWFA.

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Reminder: New Minnesota Ban on Non-Compete Agreements Effective July 1st, 2023

Effective July 1, 2023 a new Minnesota law bans almost all post employment non-compete agreements between an employer and an individual employee (to include individual independent contractors). For purposes of the law a non-compete agreement is an agreement that restricts the ability of the employee or independent contractor to engage in certain activities after the termination of his or her employment or contractual engagement:

- To work for another employer for a specific period of time;
- To work in a specific location or geographical area;
- To work for another employer in a role or function that is similar to the role or function the employee performed for the contracting employer.

There are two exceptions to the prohibition: non-compete agreements that are greed to during the sale of a business, and non-compete agreements that are entered into in anticipation of the dissolution of a corporation, partnership, or limited liability company.

For purposes of the law a non-compete agreement does not include a non-solicitation agreement; a nondisclosure agreement; an agreement for trade secret protection; an agreement restricting use of the employer's client lists.

Frequent Issues for Small Businesses in IRS Tax Compliance Audits

Midway through tax year 2023 small businesses should be mindful of three issues in tax compliance that the IRS has targeted for increased attention in audits of small businesses' tax returns:

- Form 1099 non-compliance in failure to issue 1099s to vendors and independent contractors. The IRS will look to the taxpayer- employer's procedures to ensure collection of a current and correct Tax Identification Number from business payees.

- E-commerce issues such as unreported income, improper losses and deductions. Since 2012 the IRS has in place mandatory audits for businesses that have e-commerce activities like online sales or collection of payments online.

- Misidentification of employees and Independent Contractors. The IRS no longer uses the earlier 20 factor test of Rev. Rul.87 to determine the degree of control that an employer has over the work of someone engaged and has collapsed that into a more general three factor test on performance control, financial control, and relationship control. The taxpayer bears the burden of proof to overcome IRS assumption in favor of employee status. Refer to IRS Independent Contractor (Self-Employed) or Employee?

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Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at Small Business Notes

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