Changes Afoot at the Massachusetts Commission Against Discrimination

2004-07-14

The Massachusetts Commission Against Discrimination (MCAD) has issued a standing order announcing that its Boston office was realigned effective July 1, 2004. Pursuant to this realignment, which is intended to better utilize the Commission's resources while reducing case turnaround time, the MCAD has adopted the Equal Employment Opportunity Commission's "team" approach to case management. Under this new approach, there will no longer be separate "Attorney Assisted" and "Pro Se" units–instead, the Enforcement Unit will comprise investigative units of Investigators and Enforcement Advisors, who will work collaboratively to process cases.

The standing order also announced several key changes that will streamline the manner in which cases are processed and hopefully reduce employer costs of defending cases. The process changes are effective immediately, except for cases in which a discovery order has been issued. One major change is that the practice of party-conducted discovery, first implemented in January 1999, is no longer permitted, and all fact gathering at the predetermination stage will instead be conducted by the Commission. In addition, the option of conducting investigative conferences will be reinstituted for all cases before the Commission, regardless of whether the complainant is attorney-assisted. Finally, parties will no longer be required to submit memoranda of fact and law. Under the new procedure, the Commission will request a position statement from the respondent following the filing of a discrimination charge. Once the position statement is received, the Commission will offer the complainant the opportunity to submit a response to the position statement. Thereafter, the Commission will determine whether an investigative conference is necessary and whether any additional information should be requested from the parties. Once satisfied that no additional information is needed, the Commission will issue a disposition of the case.

NLRB Issues Decision Limiting Weingarten Rights to Unionized Workplaces

The National Labor Relations Board (NLRB) has overruled *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), holding that non-unionized employees do not have the right to have a coworker witness present during investigatory interviews by the employer. In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that an employer violates the National Labor

Relations Act if it denies an employee's request to have a union representative present at an investigatory interview. The NLRB's recent ruling in *IBM Corporation*, 341 NLRB No. 148 (2004), that the *Weingarten* right does not apply to a non-union workforce, represents the latest of several changes of policy on this issue–the NLRB first extended *Weingarten* rights to non-unionized employees in 1982; reversed that decision in 1985; and, in 2000, reinstated *Weingarten* rights for non-unionized employees in *Epilepsy Foundation*.

In the wake of *IBM Corporation*, although an employer should not discipline a non-union employee for requesting to have a coworker present, it need not agree to such a request. In support of its change in policy, the Board referred to the changing landscape of the workplace, in which employers must conduct with increasing regularity, investigations in connection with federal, state and local laws, including laws relating to workplace discrimination and sexual harassment, as well as investigations involving workplace violence, breaches of corporate fiduciary duties and security issues.

For more information regarding these developments, please contact the attorneys listed above.