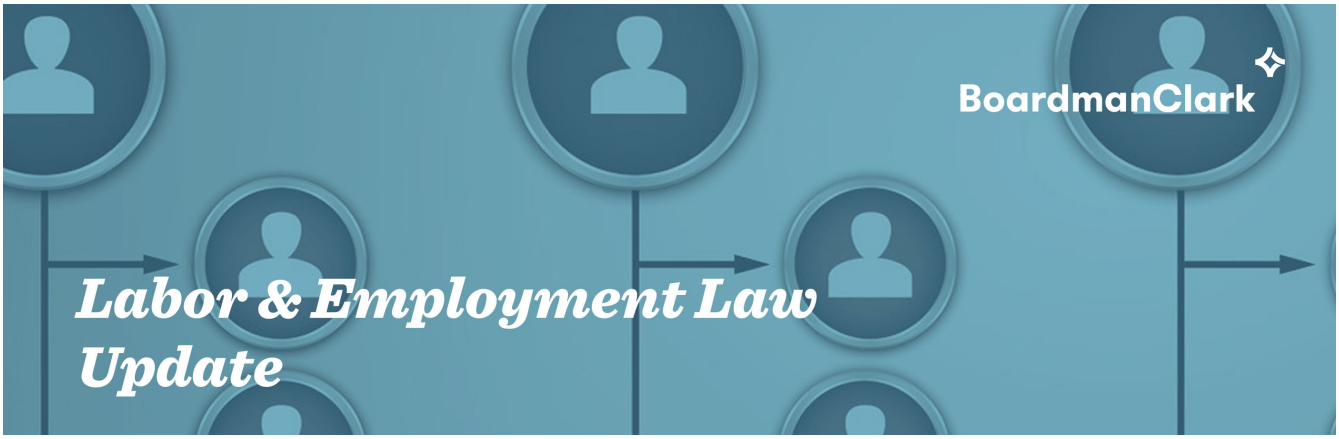

April Labor & Employment Law Newsletter

ROBERT E. GREGG | 04.04.23

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

NLRB Will View Employees' Diversity Discussions as Protected Activity. The National Labor Relations Board (NLRB) has announced a joint initiative with the U.S. Equal Employment Opportunity Commission (EEOC) to protect employees' rights to discuss or advocate for and about workplace equity and equal justice issues. This followed an unfair labor practice complaint (and an EEOC discrimination complaint) filed by a faculty member of the Kaiser Permanente Bernard Tyson School of Medicine, who was suspended and then had her contract non-renewed following discussion with other employees and in-class student discussions about effects of racial disparity and racial bias in the medical field. The NLRB concluded that "discussions about issues of race in medicine by Black employees and students was inherently concerted and was for mutual benefit and protection" ...such discussions on racism and equality "inure to the benefit of all employees and are for mutual aid and protection." This announcement follows on the efforts by Florida and several other states to restrict or ban discussion of Diversity and Equity topics in the classroom and the workplace, including private sector employer Diversity initiatives. A federal court has enjoined the Florida "WOKE" restrictions for now, in part for infringing on the right of private employers in deciding how to operate their businesses. This new NLRB-EEOC effort may place employers between conflicting compliance requirements on concerted activity/discrimination laws on one hand and state restrictive rules on the other.

Two More Agencies Weigh in on Employer Expense/Debt. Sometimes employer required expenses, training repayment agreements, and company charges can

substantially eat into workers' wages and can have the practical effect of reducing the "realized pay" to below minimum wage or below the Salaried Basis minimum. The Department of Labor (DOL) has found this to violate the Fair Labor Standards Act (FLSA). Now two more agencies, the National Labor Relations Board (NLRB) and Consumer Finance Protection Bureau (CFPB) have joined forces to also focus on these practices. The announcement stated, "Many workers discover that getting a job can mean piling on debt instead of making a living. Information sharing will support our efforts to end debt traps." This effort focuses more on employee debt, which discourages workers from leaving a job until the expense debt is paid (perhaps never as it continues to accrue) rather than on the DOL minimum wages issues.

$35 Million Fine Because Severance Agreements Violated the Law and Company Had Ineffective Process. Several government agencies require employers to have effective complaint processes for a variety of issues. Employees are also supposed to have unrestricted rights to contact or cooperate with these agencies. The Security and Exchange Commission (SEC) found that Activision Blizzard, Inc., the Call to Duty and Candy Crush producer, had violated both of these requirements and issued $35 million in fines. Activision made departing employees sign severance agreements promising they would inform the company if a federal agency (like the SEC) contacted them in the course of an investigation. The SEC stated that "taking action to impede former employees from communicating directly with the Commission about possible law violations is illegal." The SEC also found that the company failed to have an effective internal complaint policy. Just having a policy on paper does not create an effective policy; there must be an active process behind the policy. The SEC found Activision failed to keep track of employee complaints which could have and should have alerted it to problems. The company failed to have a process that passed employee concerns to higher management for attention. The company agreed to pay the large fine and settle the matter, without any admission of fault. *In RE Activision Blizzard, Inc*. (SEC case, 2023)

LITIGATION

Child Labor

Food Safety Company Had Youth Doing Unsafe Work. A national food sanitation safety service was found to be using over 100 children in unsafe work outside their age restrictions. This included 13- to 16-year-olds working overnight shifts and cleaning mechanical saws with hazardous chemicals in meat packing plants. The Department of Labor (DOL) also alleged the company attempted to mislabel some young workers as adults and tried to "derail" its efforts to investigate. The company will pay $1.5

million in fines and has entered into a Consent Order requiring a number of future compliance actions and monitoring. The DOL stated, "These children should never have been employed in meat packing plants and this can only happen when employers do not take responsibility to prevent child labor violations from occurring in the first place." *Walsh v. Packers Sanitation Services, Inc.* (D. NE, 2023)

Fair Labor Standards Act

Rehabilitation Clients or Employees? Is it Therapy or Work? Many non-profit organizations have a mission focused on rehabilitation, support, and basic skills training for those in need. Often these non-profits have funding provided and people referred to them by other agencies for provision of these services. The participants are considered to be "clients" or "recipients of service." However, the line between a "client receiving service" and an "employee" entitled to full wages can blur when the program involves job skills training or coaching. Suddenly the Fair Labor Standards Act (FLSA) can come into play. *Gieser, et al. v The Salvation Army* (S.D. NY, 2023) involves a 90-day rehabilitation counseling program for those with addiction and mental health issues in which the clients receive counseling and special support services, and employment skills training. This includes stints performing duties in the Salvation Army Thrift Store, sometimes for 40 hours a week. The participants received food, certain lodging, and between $5 and $30 per week. Several participants filed a FLSA case claiming they were owed at least minimum wage for all hours worked in the Thrift Store. The Salvation Army claimed they are rehabilitation clients and not employees. However, the court found sufficient basis for the employment claim. The participant clients seemed to perform actual work in the retail store, the same as any of the other paid employees, and the store received money and made a profit from their work. [Another similar issue for non-profit organizations involves volunteers. Can your volunteers be found to be employees entitled to pay? For more information request the article Liability Issues Regarding Volunteers by Boardman Clark, LLP.]

DISCRIMINATION

RACE/RETALIATION

Fed Ex Ordered to Pay $366 Million in Racial Discrimination-Retaliation Case. This case illustrates a significant difference between Title VII and 42 U.S. Code Section 1981. Both cover racial discrimination, but Title VII has limits, "a cap" on the amount of damages which can be awarded (based on size of the employer), while Section 1981 has no such limitations and damages can be much greater. In *Harris v Fed Ex* (S.D. TX, 2023), the court ordered the employer to pay the full $366 million jury award

to a Black sales representative who was fired after she raised concerns about racial discrimination. She was a high performing sales representative with an excellent record until she made internal discrimination complaints and then filed an EEOC complaint. The company then began close scrutiny of her work and terminated her employment. The jury found this to be retaliatory. Beginning a critical focus on or investigation of an employee only after they make a complaint almost always creates a presumption of retaliation. Employers should also pay attention to the various laws which cover discrimination, some with more expensive consequences than others. "Race" under Section 1981 has a broad coverage that can include certain ethnicity, certain religious groups, in addition to what people usually consider "race". One other difference: Title VII has a more flexible burden of proof for a plaintiff to win a case, such as showing an adverse impact (unintentional discrimination). Section 1981 is stricter and requires proof of actual intentional discrimination.

SEX/RETALIATION

Inconsistent Reasons For Discharge and Sham Investigation. An auto parts company's district manager was awarded $2.9 million in a retaliation case. He reported that another manager was engaged in sexually harassing female staff at work and at a conference. The day after the district manager reported the harassment, the company launched an investigation against him. The allegations were that he had a romantic relationship with an employee in his district, in violation of company policy, and he had shown nude photos of her to other employees. The investigation showed absolutely no evidence of a relationship or that any photos ever existed. Nonetheless, in spite of the absence of any evidence, the company discharged the district manager anyway. He filed a retaliation suit under federal and state discrimination laws. In the course of defending the case the company abandoned its original relationship-photos reason for the discharge and gave a new reason; the district manager had not properly reported the harassment situation promptly as required by company policy. This changing reason did not work. The evidence showed that a number of other employees, including managers, knew of the improper harassing behaviors and did not report them. However, none of these people suffered any negative consequences. So, the jury found there had been retaliation and awarded the $2.9 million. *Glowacki v O'Reilly Auto Enterprises, LLC* (W.D. MI, 2023)

Uniformed Services Employment and Reemployment Rights Act (USERRA)

$1.5 Million to Settle Military Leave Suit. Fed Ex has settled a claim regarding paying for military leave at a lesser amount than other employees received for other paid short-term illnesses, bereavement, or jury duty leaves. The National Guard and Reservists received no company pay when on Military Leave. Other employees could receive full pay while on the other sorts of leaves. USERRA prohibits discrimination on the basis of military service, including terms and conditions regarding leaves for active-duty training or service. So, military training leave is a similar situation to the other sorts of leaves in which employees do receive pay. The settlement does incorporate an offset of the military pay received during the active duty. *Beanland v Federal Express Corp.* (D. Del, 2023)

Trade Secrets

Jury Awards $7 Million Against Oilfield Employee Managers. A dozen oilfield pump and valve employees working for DNOW left and went to work for a competitor as managers. They took company information with them. They then used their prior company's information to benefit the new company. This resulted in a suit for theft of trade secrets. A jury found conspiracy to maliciously steal the information and awarded $7 million against the former employees. In addition, the jury found a breach of fiduciary duty to the former employer and ordered repayment of some $400,000 of prior compensation they had received from their former company. The taken information included details of highly confidential and proprietary DNOW information showing actual vs. budgeted year-to-date sales, base margin percentages and amounts, operating incomes, backlogged amounts, accounts receivable, inventory, statistics, invoices amounts and averages, year-to-date quote numbers and amounts, service revenues and booking reports. *DNOW LP v. Eoff, et al.* (434th Dist. Court, TX)

Most Unusual Case of the Month

Defiance of Discovery Orders and Snarky Comments Result in Default Judgment for Other Side. A default judgment is issued when a court finds one of the parties in a suit has not complied with procedural requirements. This may include non-compliance with the discovery process or court orders. The court then finds in favor of the other party without a trial. *Best Value Auto Parts Distributors, Inc. v. Quality Collision Parts, Inc., et al.* (E.D. MI, 2023) was a suit in which Best Value Parts Distribution alleged that Quality took valued proprietary information, including key customer lists. Best Value served pretrial discovery requests for relevant information about Quality's business records. Quality resisted and refused to comply. The court ordered Quality to comply on four occasions, yet it continued non-compliance. The court also found Quality gave false answers to interrogatories.

Further, Quality's attorney made combative and disrespectful responses to Best Value's requests, such as, "Discovery issues are your problem, not ours" and "If you want to go on a fishing expedition you can hang out at the lake for a weekend" and "My client would sooner be taken into custody for contempt of court than to allow ANY further and redundant examination of its business system." It seems the attorney's client, Quality, got its wish to be held in contempt and lost the suit without the other side having to actually prove its case. Parties in lawsuits are expected to aggressively represent their positions. However, this is a good lesson on the need to stay within the bounds of the litigation rules and professional civility.

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the *Business Minute* section:

IRS Eyes Implementing New Tipping Program
By Attorney Storm B. Larson

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