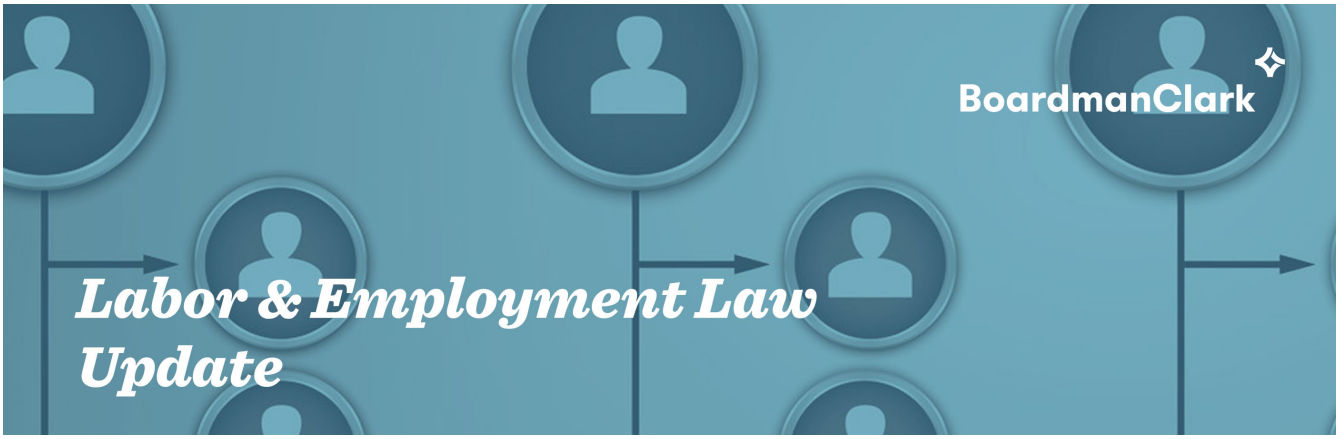

Both Employers and Employees Should Beware of BYOD

ROBERT E. GREGG | 06.08.22

TRENDS

Both Employers and Employees Should Beware of BYOD. A large number of organizations allow or even require employees to utilize their own personal electronic devices for work purposes. A growing number of cases are now being brought over the employers' rights to own and control the content and even remotely "wipe" the employees' personal devices without notice, upon termination or any other time; versus the individuals' rights to own and control content and privacy of their personally owned devices. The courts are divided in their decisions on these issues. Much of the litigation focuses on whether there is a signed agreement between the organization and employee and the content and scope of the agreement. Companies have found it difficult to protect confidential information once employees are allowed to have the information on their personal devices. Employees, on the other hand, have found that they gave their organization the right to wipe all content from their devices, including personal information and texts, or to force turn over and inspection of their devices post-employment. (It may be unwise to allow executives, salespeople, or other key employees with a great deal of sensitive communications information to use their own devices; company owned and controlled devices should be issued to them.) In the trade secret case of *Tesla v. Yatskov* (N.D. Cal, 2022), the judge denied a motion for a former engineer to turn over his computer to the company, *"I'm not invading this man's privacy just because you're worried"* about trade secrets being on the computer. However, in *Dey v. Seilevel Partners LP* (Ct. App., 2022) (See May Legal Update), the court ordered the former employee to turn over his private laptop for complete inspection. In the case of *In Re: Pork Action Trust Litigation* (D. MN, 2022), the court balanced the issues of whether

a Hormel employee's personal device was subject to being turned over. The court found some information could be subject to discovery, but a number of texts were outside the scope of the company's BYOD Policy. So, it is becoming ever more important to review BYOD policies and have clear agreements as to their scope and the rights and protections afforded to the organization and the employee.

"Mass Arbitration" being used as an offensive weapon against employers. Several years ago, numerous employers enthusiastically implemented mandatory arbitration agreements for all employment disputes, rather than use the standard legal system. These agreements generally prohibited class action suits. Though the company pays the arbitration fees, each employee has to separately hire and pay an attorney and go through the process individually – even if they are challenging general issues, such as pay practices, which may affect others as well. This is very expensive and cost prohibitive for an individual, thus keeping down actual complaints. For the employer it eliminates the greater cost of a multi-employee class action lawsuit where the company might also have to pay all the other employees to remedy the situation. However, this has turned into a double-edged sword, and is increasingly cutting against employers. Plaintiffs' attorneys are now engaging in "mass arbitration" tactics in which they identify large numbers of other affected employees and file individual complaints – in mass. The company is forced with having to pay the arbitration fees (often $1,000 each just to initiate the case) for hundreds, or even thousands, of cases. Then they have the expense of defending each one. This is far more expensive than a class action, which consolidates employees' similar issues into just one trial. The company will spend far more in individual case fees and defense costs than it might in just paying the actual damages. Plaintiffs' attorneys are using these mass arbitration tactics as an offensive weapon to bury the company in arbitration fees and expenses knowing the employer is likely to cave-in and offer lucrative settlement terms. Several employers have appealed to courts, attempting to get an Order to consolidate a mass filing into just one class action case. The courts have rejected these efforts. The arbitration agreements imposed by the employer were clear – No class actions. Having created this bitter pill, the employer must now swallow it. In *Morgan v. Sundance, Inc.* (May 2022), the U.S. Supreme Court ruled against a company, deciding that arbitration agreements are a contract, the same as any other and the parties are held to the terms of the contract. In *Uber Technologies v. American Arbitration Assoc.* (N.Y. App, 2022), the court rejected Uber's request for relief from its obligation to pay $3,400 per case filing and arbitration management fees in a mass arbitration filed simultaneously by 31,000 individuals. In many instances, arbitration has served a useful purpose and been beneficial to a company. However, this new trend is a reason to re-examine any arbitration agreements and see if they will be effective in the event of a mass arbitration filing.

LITIGATION

False representation

Bank Employee Altered Offer Letter Gets Federal Reserve Sanctions. Sometimes an employee will use an offer letter from another employer to bargain a better deal to stay at their current workplace. A bank's Client Service Specialist was offered a slightly better salary by another financial institution. He altered his offer letter to show a much higher wage, by about $30,000 per year. He then used this falsified letter to bargain with the Bank. It worked! The higher salary offer was matched by the current employer, and he stayed for another two years before leaving. The ploy was then discovered. In most employment this misconduct would result in discharge, if the employee was still there, or perhaps in a suit to recover the fraudulently induced overpayment. However, federally regulated financial institutions are not the usual employer. They are subject to the Federal Reserve Board's rules prohibiting "violation of regulations, unsafe or unsound practices or breaches of fiduciary duty." The misconduct was reported to the FRB which determined, "The Bank had sustained a loss in the amount of the increased salary" it paid due to misconduct. The FRB issued an Order describing the wrongful conduct and the resulting loss. Further, it ordered that the former Client Service Specialist must provide a copy of this Order to his current employer and to all future financial institutions or FRB regulated organizations, prior to accepting a job. So, the short-term salary boost will now have serious consequences for his present and future career chances in the financial industry. *In Re Romero* (Bd. of Governors of the Federal Reserve System, 2022).

Joint Employment

Nurses Receive $3.2 Million for TVPA Violations. A recruiting agency and two nursing homes will pay $3.2 million to settle a case by Philippine nurses who were recruited to come to the U.S. for healthcare jobs. The case alleges that once the nurses arrived, they were not paid the required prevailing wages they had agreed to. Further, they were held hostage in their jobs by a requirement to pay a $25,000 penalty if they left, in violation of the Trafficking Victims Protection Act (TVPA). Under the settlement, each nurse will receive full back pay for the amounts they should have received, with 9% interest, plus all attorneys' fees*. Paquirigan v. Prompt Nursing Employment Agency, et al.* (E.D. NY, 2022)

Lured Into ICE Ambush – Grower Settles Case and Sues Recruiter. A large greenhouse has settled a suit brought by a group of migrant workers. The plaintiffs claim they were forced to continue working after their visas expired, and then had their wages

withheld. When they protested for payment, they were told to meet their recruiter at a public location to discuss the issue. However, this turned out to be a ruse to have them show up at a prearranged site where Immigration and Customs Enforcement officers were waiting to arrest them for overstaying their visas. The workers sued the greenhouse company and the recruiter as joint employers, claiming the greenhouse company knew or should have known of the visa and wage abuse and stood idly by. The company denied any wrongdoing and it in turn sued the recruiter for any damages it might suffer. The company has now settled its part of the case with the workers for approximately $100,000 wages and undisclosed additional amounts in other damages. *Reyes-Trujillo, et al v. Four Star Greenhouses, et al* (E.D. MI, 2022)

DISCRIMINATION

Sex

"Facts are Stubborn Things" – Hostile Environment Case Can Proceed Against County Court Officials. In litigation, each side often tries to characterize the situation to its own advantage; seeking to either magnify or downplay what occurred. In *Doe et al. v. Schuylkill County Courthouse et al.* (M.D. PA, 2022), four female courthouse employees sued a judge and the court administration for sexual harassment. They alleged a long period of the judge's hostile sexual comments, sexual advances, touching, and coercion for sexual relations. They claimed the court administration was aware and aided and abetted the hostile environment and overt retaliation after their complaints. They sued under state and federal discrimination laws and for violation of their Fourteenth Amendment Equal Protection rights under 42 U.S. Code § 1983. The defendant judge and court administration sought to characterize the behavior as merely "*trivial unpleasant workplace encounters*" which did not rise to the level of legally actionable harassment. The federal judge looking at the evidence, however, rendered a very different conclusion, characterizing it as "*blatant abhorrent conduct*". The opinion went on, quoting President John Adams, to state that "*facts are stubborn things,*" regardless of how one wishes to label or characterize them, they tend to still be the facts, and paint a picture of their own. In this case, the facts show sufficient grounds for a harassment and retaliation case.

Bartender's Own Vulgar Behavior Undermines Harassment Case. A bartender filed a sexual harassment case for constructive discharge. She claimed she left employment due to the ongoing offensive environment and being called names such as "Fat A**". The court dismissed the case, finding that the bartender's own ongoing vulgar and offensive conduct undermined her complaint. The bar had a "culture of vulgar behavior," and the plaintiff was a major participant. She called other

employees, male and female, names including calling them the very same name she now complained of. All employees were referred to "Fat A**" regularly without any sexual connotation. Evidence showed the plaintiff engaged in *more* offensive behavior than others she accused of the harassment, including her telling of sex jokes, profanity, and name-calling. *Bouziotis v. Iron Bar* (S. Ct. N.J., 2022). Be aware that perhaps an employer can defend a case by showing everyone, including the plaintiff, engaged in raunchy conduct, once. However, allowing this can open the door to having to defend case after case filed when employees become dissatisfied; a "hostile environment" claim can easily be added onto any other sort of complaint. Failure to eliminate this sort of behavior after the first claim may also result in loss of insurance defense coverage for any future claims. "Everyone participated" is not a very viable defense strategy.

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