

## *Labor & Employment Law Update*

# ***Dept. of Labor Proposes Changes to Davis-Bacon Act***

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### **LEGISLATIVE AND ADMINISTRATIVE ACTIONS**

***Dept. of Labor Proposes Changes to Davis-Bacon Act.*** DOL has issued a notice of rulemaking to change provisions of the law governing prevailing wages for employees working on public projects. The DOL's proposal would try to clarify confusion in how to calculate a wage, allow setting a prevailing wage based upon smaller, more local, geographic areas, and incorporate antiretaliation provisions for those who report wage violations.

***Form I-9 Temporary Exception Ends May 1, 2022.*** During the COVID-19 pandemic, the Dept. of Homeland Security suspended some of its I-9 requirements, allowing employers to accept expired identity documents in the hiring verification process. That suspension ends May 1<sup>st</sup>. Not only will new hires need current documentation but also employers are required to now update any expired information accepted during the exception period and obtain current, up-to-date documents for anyone still employed.

### **Federal Courts Do Housekeeping**

Courts judge everyone else, but rarely become the focus of scrutiny for their own indiscretions. As a separate branch of government, the judges have often seemed immune to the laws and standards upon which they judge others, and the court system employees are not covered by a number of the laws which apply to all other employees in the Federal government. Recently the Federal Courts have had to deal

with embarrassing public revelations about improper conduct by judges and are trying to take corrective action.

**Transparency for Financial Disclosures.** The Federal Courts are applying more focus and a new automated online system to publicly disclose judges' financial holdings and other corporate connections which could create a conflict of interest on cases before them. This is a reaction to a Wall Street Journal investigation finding 130 judges had presided over 685 cases in which they or an immediate family member owned stock in a company which was a party in the case before them. The judges ruled in favor of the company they owned stock in 75% of the time. One judge had decided 138 cases in which he had a stock ownership conflict of interest. The revelation set off a wave of appeals to reverse decisions. So, the courts are tightening reporting and disclosure requirements. Congress is also acting to impose tougher scrutiny requirements on the courts.

**Abusive Conduct Report.** The Federal Courts' Judiciary Workplace Conduct Working Group has issued a report on progress to address the ongoing revelations about abusive conduct, sexual harassment and discrimination by its judges and officials. The report cites the implementation of stronger policies and codes of conduct; improvements in training; reporting, complaint processing; and dispute resolution. However, court employee advocates and the Congressional House Judiciary Committee on Courts have opined the changes are not enough, and the courts' self-policing still allows too little transparency without "robust safeguards". The Congressional Committee will be holding hearings and considering a Judicial Accountability Act to extend the same protections to judicial employees as apply to other government and private sector employees.

*In a related case, a State Judge is subject to Removal for Sexual Grope.* The Massachusetts Supreme Court has indefinitely suspended a state judge for having sexually groped a court employee at a conference. The judge denied the allegation, but the Court considered that his story about what occurred changed over time and was "fictional" and "concocted". This suspension will be followed by a procedure which may lead to permanent removal from office. In *Re P.M. Sushchyk* (S.Ct. Mass, 2022) This can also illustrate the fact that a good deal of harassment and improper behavior occurs after hours in social settings but can still be actionable under the employment laws. "Work Relatedness" can have a very broad scope. [For more detailed information, request the article *Off the Clock But Still on the Hook for Liability* by Boardman & Clark.]

## LITIGATION

### Saddest Case of the Month

#### **Employee and Wife Died While Small Children Wait in Car – Company Executive Criminally Indicted for Safety Violations and Cover-Up.**

An on-call Service Technician was dispatched to check a malfunction at an oil pumping station. When he entered the building, he was overcome by toxic fumes. When he did not return home for several hours and did not answer his phone, his wife became concerned. She put their two small children in the car and drove to the pumping station to check on him. When she entered the building, she too was overcome by the fumes. Both died. The children remained in the car until someone else came along, found them, and called for First Responders. OSHA investigated and found flagrant safety violations and that the company impeded the investigation by submitting false documents to OSHA and state investigators. The Dept. of Justice has obtained a criminal indictment against the company and a vice-president, individually. The criminal complaint is for knowingly failing to take adequate protections against exposure to the toxic gas; making false statements impeding the investigation and submitting false reports regarding the safety of the operation. *U.S. v. Aghorn Operating, Inc.* (W.D. Tx, 2022) The company previously settled the civil case brought on behalf of the deceased and the children. This case is one of a growing number of criminal prosecutions of individual owners and executives for knowingly disregarding employee safety and filing false reports to hide operational problems. [See the March 2022 Update for additional case example]

### Wages & Hours

**U.S. Soccer Foundation Settles Equal Pay Case with U.S. Women’s National Team.** The USF will pay \$24 million to settle a long running and often acrimonious pay discrimination case over the much lower pay to women soccer players. Over the course of the litigation the pay for WNT players has risen, making the settlement now feasible. *Morgan et al v. U.S. Soccer Federation, Inc.* (9<sup>th</sup> Cir. 2022)

**Steakhouse Pays \$1.45 Million for Overtime Records Violations.** A company with three restaurants has been assessed \$1.45 million in backpay and punitive damages for intentionally not paying overtime to kitchen staff and keeping inadequate “spotty” records, especially for Hispanic workers. Though proper records were kept, and OT paid for front of the house hosts and servers, the kitchen staff records did not show the overtime hours worked and they received no extra pay. Extra damages were assessed due to intentionality of the violations. The judge rejected the defense of

“innocent mistake,” because the restaurant company had been previously investigated and had to pay damages for exactly the same sort of violations. *Walsh v. Fusion Steakhouse, Inc. et al* (W.D. Pa, 2022)

**Restaurant Pays Servers \$800,000 for Tip Credit Violations.** The special pay rule for tipped employees requires careful work monitoring. Too much non-qualifying work negates the lower regular pay allowance. *Reynolds v. Turning Point Holdings, LLC* (E.D. Pa, 2022) was a case brought by servers who claimed “side work” should have been paid regular wages and overtime instead of the tipped credit wage. The company settled the case for approximately \$800,000 backpay. In addition, it has adopted a new computer system to keep track of employees’ work duties and requires each employee to verify at least 85% of their daily work time doing tipped work.

**Reason Other Than Gender.** The Equal Pay Act prohibits unequal pay for substantially the same work done by women and men. It was the first major sex discrimination law before Title VII. However, a defense to differing pay is “any other reason besides gender.” This has led many defendants to really stretch to describe some “other reason” to justify sex discrimination in pay. However, in *EEOC v. University of Miami, FL* (S.D. FL, 2022), the jury found that a female political science professor was paid \$30,000 less than a male colleague due to validly different factors. In this case, it was academic publications. The male professor had more numerous articles in “top tier” academic journals and was often sought out by national media for interviews on political developments. His articles were more significant for the university academic certification and public reputation. It also helped that the highest paid professor in the department was a woman, and the lowest paid was a man. There was no pattern of discrimination.

## DISCRIMINATION

### Sex

**Professor Wins \$3 Million for Pregnancy Discrimination.** An Assistant Professor in Engineering was on course for full professor, with high recommendations until she took leave twice, using the school’s benefits for pregnancy. Then her progress halted. In her tenure review process, she was asked repeatedly about her two pregnancies and future leave potential. Tenure was then denied. The university policy states that pregnancy-childbirth leave will have no impact on employment or tenure decisions. However, this did not seem to be the case. A jury awarded \$3

million for backpay, pain and suffering. *Nikolova v. University of Texas at Austin* (W.D. Tx, 2022)

**Long John Silver's Settles Sexual Harassment of Teenager Case.** The EEOC announced that a Long John Silver's restaurant has settled a harassment case it brought on behalf of a teenage female employee. Two adult male managers allegedly subjected her to ongoing lewd comments, touching, propositions for sex and sexually explicit texts and videos. When the teenager complained, instead of investigating, the restaurant cut her hours. The company will pay \$200,000 to the former employee and engage in training, plus a period of close monitoring. *EEOC v. LIS Opco Two, LLC d/h/c Long John Silvers* (S.D. Ill, 2022)

**"Seething Hostility Toward Women"**. A judge upheld a \$2 million sex discrimination jury verdict in favor of a Boston Police Dept. detective, finding the city's motion to overturn or reduce the amount "rests on flawed legal positions previously rejected by the court." The evidence considered by the jury showed that the female detective's supervisor "seethed with hostility toward women in positions of leadership in general and specifically toward Gavin "(the plaintiff) due to her successful work and promotion to head the Human Trafficking unit." The supervisor gave "anemic resources" to the unit compared to male colleagues and he kept a special 48-page log of Gavin's every supposed flaw or minor error. He then arranged a transfer to a less visible unit, derailing her career. In addition to the \$2 million damages, the court awarded \$1.3 million in attorney fees to her legal counsel. *Gavin v. Boston Police Dept, et al* (D. Mass, 2022)

## **Age**

**Bath Companies Defense Does Not Wash.** In *Lemonade v. Bath Saver, Inc.* (S.D. Pa, 2022) the court found sufficient evidence to warrant a jury trial on a 66-year-old former sales employee's age discrimination case. The company claimed the employee was demoted and ultimately left the company due to poor performance. However, this defense did not seem to hold water, and could be pretext. There was evidence of ongoing focus on the plaintiff's age. There was "constant questioning" of when he was going to retire. He was routinely called "the old guy" and teased about age. A top manager objected to having the salesman in his unit stating, "He is old as F\_\_\_\_!" These multiple and ongoing age references created a strong appearance that age was a factor in employment decisions and the case should proceed to a jury. This case is a good reminder that loose comments create cases. Employers should adopt policies which prohibit negative comments and joking about protected EEO

categories in the scope of employment (including work related social situations). “Attempts” at humor about a person’s EEO status can come back later as not so funny in court.

## INTELLECTUAL PROPERTY

**Former employees Each Get One-Year Prison Sentence for Taking Trade Secrets.** Two Genentech research employees took trade secrets, thousands of documents, in order to start their own company. They then induced another pharmaceutical company to invest \$101 million in the new company by convincing it they had independently invented a new process. The scheme collapsed, and the pair were convicted of theft of trade secrets and wire fraud. In addition to a one-year prison sentence, there is three years of supervised release they must submit to. *U.S. v. Jordanov and Lin* (N.D. Cal, 2022)

## WHISTLEBLOWER/FALSE CLAIMS ACT

The federal government renewed focus on fraudulent activity by federal contractors and rewarding the whistleblower employees continues to see an escalation of enforcement actions and large damage recoveries by the Dept. of Justice and the Securities Exchange Commission.

**\$1.7 Million Recovery for Retirement Savings Ruse.** An investment firm convinced “tricked” federal employees to change their retirement savings accounts to ones which generated much higher commission for the firm, but not such a benefit to the employees. The firm netted \$1.7 million from the scheme. A jury found the firm violated the Securities Act. *SEC v. Keystone Capital Partners, Inc.* (N.D. GA, 2022)

**False Freight Weights Result in \$6.8 Million.** A freight company massively overcharged the military by inflating the weight of the loads its trucks were delivering and collecting the unearned extra freight charges. A company employee filed a False Claims Act complaint, and the Dept. of Defense pursued the matter and got a \$6.8 million settlement. The whistleblower will receive \$1.3 million under the FCA’s provisions regarding successful prosecution of contractor misdoings. *U.S. v YRC Freight, Inc.* (W.D. NY, 2022) In addition, the company also had to settle a class action suit by its own stockholders growing out of the False Claims matter.

**Drug Company Pays \$234 Million for Misreporting and Keeping Rebates.**

A whistleblower received a \$40 million share of a \$234 million settlement for his FCA report of a drug company’s misfeasance. Under the Medical and Drug Rebate

program, the company was supposed to make rebates to the federal government based on the difference between sales price collected and a “base price average” manufacturing price. The company reports overstated the base price, rebated millions less than due, and kept the difference. A company manager reported the discrepancy internally, trying to achieve correction. When the company did not do so, he resigned and filed the FCRA complaint. The Dept. of Justice pursued the case and achieved the settlement. In addition to the \$234 million, the company will pay \$26.3 million to resolve allegations of paying illegal kickbacks to doctors to induce qualifying Medicare reimbursement purchases. *DOJ v. Mallincrodt* (DOJ settlement, 2022)

### **OTHER RECENT ARTICLES**

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

#### **[Wis. Court Addresses Substantial Relationship Test for Arrest and Conviction Record Discrimination](#)**

by Atty. Doug Witte & Atty. Storm Larson

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