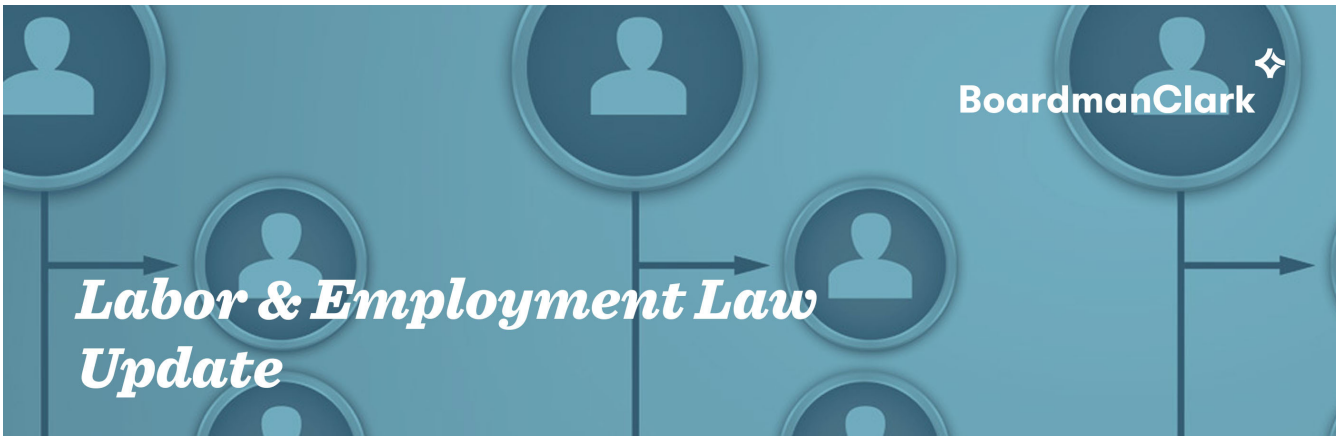

More States Are Banning Non-Disclosure Agreements (NDAs)

ROBERT E. GREGG | 05.04.22

TRENDS

More States Are Banning Non-Disclosure Agreements (NDAs). Non-disclosure and non-disparagement clauses (NDAs) have been common in severance and settlement agreements and even in hiring documents. The former employees are prohibited from revealing anything negative about the company, or the reason they raised complaints or concerns about their employment. These provisions have long been criticized as silencing the victims of wrongful practices, or illegality, and allowing the employer to "sweep it under the rug" and do nothing to correct systemic problems; so, the company then continues to harm others. Recently more and more states are banning such clauses, making them unenforceable. Washington has become the most recent with the Silence No More Act, effective in June 2022. Each state may have differing provisions. For instance, some may have a blanket ban on NDAs. Another may provide for a high dollar threshold amount paid to the employee which is deemed sufficient to allow an enforceable NDA clause. There are already Federal rules which discourage and can penalize NDAs in the settlement of sexual harassment cases. These state laws can prohibit NDAs in all severance, settlement agreements and hiring agreements. This is yet another area in which employers with multi-state operations are having to thread their way when adopting policies or drafting agreements applying to differing locations. [Wisconsin does not have such a law at this time]

Workplace Romance. The COVID-19 pandemic and the continuing work from home trend has made a number of changes in the way employees interact. One would expect this remote work separation to have significantly decreased on-the-job flirting and workplace romance. However, that does not seem to be the case. Recent research, including a Society for Human Resources Management (SHRM) survey, found workplace romance still alive and even found upticks in some areas. Casual flirting has somewhat decreased, since it is often a face-to-face, in-person dynamic. However, romantic "connections" are still occurring and even increasing. Work from home may make one feel more isolated in general and feeling more in need of connection, and more prone to connecting with a coworker. Further, online dating services and internet connecting have become the common way people are meeting their romantic partners. So, the increase in internet connection brought about by work from home feeds right into this sort of ability to possibly connect with coworkers. It also makes it more difficult for employers to be aware of and identify problems where these connections are unwelcome or turn sour and impact the employee(s), since people are not at the workplace for problems to be seen or to easily report them. Many employers have workplace romance policies and procedures; this may be a time to review them for effectiveness in the work-from-home era. [For more information on types of effective policies, see the article Restrictions on Workplace Romance and Consensual Relationship Policies by Boardman Clark.]

LITIGATION

Trade Secrets – Privacy

Former Employee Ordered to Turn Over "Private" Laptop for Forensic Inspection. A consulting firm accused a former employee of "nefarious bulk downloads of proprietary information" as he was leaving the company. The company filed for an order that he turn over his personal laptop for inspection. In objecting to the request as an invasion of his privacy, the employee's story also kept changing. First, he represented that he had completely deleted all company information prior to leaving employment. There was evidence to the contrary. Then he claimed he no longer had the laptop; that he had sold it to a "random individual in a van" through a Facebook Marketplace. However, he then admitted to giving the laptop to his wife, but claimed he had "wiped" it of all contents. The court found grounds to disbelieve the former employee. It granted a "Direct Access Order" in which the company's expert could have "unfettered access" to all contents, regardless of any personal information

which also might be on the laptop. (His claim about personal content privacy also seemed contradictory to his earlier claims that he had completely "wiped" the computer when he gave it to his wife.) *Dey v. Seilevel Partners LP* (Ct. App. TX, 2022)

Joint Employment – Franchises

Joint employment is a major area of legal focus under a number of employment laws. The liability of two organizations for harm to a worker of one of them continues to expand. The cases have often focused on local franchise operations of national brands. The courts continue to mark the boundaries of when joint employment does and does not apply.

KFC Was Not Joint Employer for Harassment Case. A fast-food worker brought suit alleging she was sexually harassed and assaulted by her supervisor at a KFC restaurant in Illinois. She sued the restaurant franchise owner, and KFC Corp., the national franchisor. The court dismissed the national corporation from the case. It found the worker was solely the employee of the local restaurant. She had no relationship with KFC Corp., and it had no control or input over the local supervision or work of the local franchise. The situation had none of the factors which have made national franchisors joint employers, such as dictating the employment handbook and practices of the franchise stores or having corporate-regional managers become too involved in giving direction to local franchise operations regarding employment practices. *Budzyn v. KFC, et. al.* (N.D. IL, 2022)

DISCRIMINATION

Retaliation

In *Duong v. Benihana Nat. Corp.* (3rd Cir. 2022), a Head Chef claimed he was fired due to having opposed sexual harassment in the workplace by one of the waiters. However, the chef's method of opposing was not exactly in line with company policy on reporting harassment. When he discovered that the harasser was making unwelcome advances toward his girlfriend and others, the chef picked a fight with the waiter. The chef was fired for violating the anti-violence policy. The waiter was fired for harassment. The chef filed the case, claiming he had engaged in the "protected activity" of opposing workplace harassment. However, the court ruled that one must use the proper process, such as using the company Harassment Policy to report concerns. Picking a fight with the harasser was outside the scope of any protection. The case was dismissed.

Dueling Discrimination Claims

Employees ADA Leave of Absence Claim Contradicts Her Title VII Hostile Environment Claim. An Illinois Tollway employee filed a case alleging that she was subjected to a Title VII sexually harassing, hostile work environment and that the Tollway violated ADA rights by denying a leave of absence and terminating her employment. The employee had FMLA due to postpartum depression and PTSD. She exhausted FMLA and continued to be off work for over a year when her doctor recommended a continued leave for the condition. The Tollway denied the leave and terminated the employment. She then sued, making an ADA denial of accommodation claim, and alleging she had been subjected to a sexually hostile environment prior to taking FMLA. First the court ruled that the doctor had provided no return date, only a request for indefinitely continuing leave. Indefinite leave is not required or "reasonable" under the ADA. Then the court found that since the employee had been off work so long, she could not possibly have been subjected to unwelcome attention or a hostile environment within the 300 days prior to filing her case, as required by the Title VII statute of limitations. Further, there was no evidence that any earlier concerns about harassment played any role in the decision to deny continuing leave. The ADA related facts precluded the Title VII claim. *Nachampassack v. Ill. State Toll Highway Authority* (N.D. IL, 2022)

Disability

Military Stopped from Discharging Asymptomatic HIV Service Members. The Military can no longer enforce a rule prohibiting deployment and retention of HIV positive service members with undetectable viral levels. A judge ruled the policy was "irreconcilable with current medical evidence" and was "irrational, outdated and unnecessary." Modern antiviral treatments which effectively eliminate any risk to or from asymptomatic people have been available for years. *Harrison et al. v. Austin et al.* (E.D. VA, 2022).

Post-Leave Fitness for Duty Physical and Mental Exams Violate ADA. The Boston Police Dept. required mental and physical fitness exams for any officer returning after a leave of three months or longer, regardless of the reason for leave. In *Lacroix v. Boston Police Dept.* (D. MA, 2022), the court ruled the policy was not job related or consistent with business necessity and violated the Americans with Disability Act. The policy was not based on any evidence that the particular officer had taken leave for any situation or condition which might impact physical or mental ability. Instead, it was applied to return from any leave, including FMLA for having cared for a family

member, parental leave for a new child, extended National Guard or Reserve Training, and other reasons which had nothing to do with the officers' own physical or mental conditions. The Police Department could not show valid reasons for the policy.

LABOR RELATIONS

Starbucks Unionization – Is This a Tidal Wave? On December 9, 2021, a Buffalo, NY location became the first Starbucks Corporate store to vote for a union, the Service Employees International & Workers United. Then stores in other states quickly followed suit, and there is now a nationwide campaign, with workers' petitions for elections filed in stores in several more states coast to coast. Starbucks has attempted to slow the wave by asking the NLRB to rule that individual stores (averaging 30 full & part-time employees) are too small for a bargaining unit, and requesting larger, multiple store units over a geographic area; for example, the 16 Starbucks locations in the Knoxville, TN metro area, where employees may exchange shifts between stores. The theory seems to be that multi-store units would dilute the pro-union interest which may be strong in one store, but weak in others. The company could also be able to consolidate its efforts to oppose unionization, rather than have multiple battles. The company has proposed this approach in Tennessee, New Jersey, Arizona, and Washington, without success. Not surprising under a pro-labor NLRB, the NLRB Regional Offices ruled that single store bargaining units seemed most appropriate in each of the circumstances. The most recent effort involved the Knoxville, TN petition. *Starbucks Corp. v. Workers United* (NLRB Region 10, 2022)

Independent Contractors Can Unionize – Jockeys Win Right to Bargain. Horse racing jockeys are "hired" as Independent Contractors. They may ride for several different horse owners in a given season. However, most are tied to a particular racing facility and the track owner, and the horse owners often have their own "association," setting track rules such as maximum jockey weight, prize percentages to a winning jockey, and similar per race fees to the Independent Contractors. A group of jockeys in Puerto Rico sought to collectively bargain – since they are "captive labor" uniquely limited to one track and receive only 25% of the compensation compared to their mainland contemporaries who have multiple tracks to choose to work at. The track and horse owners sought an injunction. The question is whether the jockeys were truly Independent Contractors or laborers who had little control over their compensation. In this case, the court ruled that the jockeys were laborers, with

a right to collectively strike and bargain. *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños, Inc*., (1st Cir. 2022)

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