EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

New Spousal Rules And "Explosion" Of FMLA Cases. The DOL's new rules for same sex spouse FMLA leave are now in effect–mostly. The rules require employers to recognize the marriage based on the "state of celebration," rather than the state in which the leave is requested or taken. DOL will not currently enforce the rules in four states, Texas, Arkansas, Louisiana, and Nebraska, where courts have issued injunctions against enforcement pending the U.S. Supreme Court decision on states' rights to define marriage.

The U.S. Court's Administrative Office has reported a sudden 26% increase in FMLA cases filed in 2014. Many of these involve intermittent leave. This may be a warning for employers to be sure FMLA policies and forms are up-to-date with all the changes which have occurred in the past couple of years, and to be careful that FMLA procedures are thoroughly followed and decisions are made carefully.

LITIGATION

Theme Of The Month - Contracts

There are a variety of Agreements between Employers and Employees: commission plans, hiring agreements, no-competes, severances, settlement of discrimination complaints just to name a few. These Agreements create Enforceable Contracts – or not. The terms must be reasonable and follow the often detailed provisions of relevant laws. The following are recent cases on aspects of enforceability.

"Paid In Full" Does Not Mean Sufficient Payment To Resolve Wage And Hour Issue. Some employees complained that they had been misclassified as salaried-exempt, and should receive back overtime pay. The company decided to privately resolve the issue and unilaterally sent each a check. Each check was stamped *"full payment from Actionlink for wages earned, including minimum wage and overtime, up to the date of the check."* The employees cashed the checks. However, some felt this was not all they were due. They, with the Dept. of Labor, continued a claim for more. The company claimed it had an enforceable contract, cashing the checks was a full release of all claims. The law, though, was not on the company's side. The FLSA has special provisions that require the DOL or a court to approve any final release of payment of overtime claims, especially if it is not a payment of complete and full amounts due. The company's "paid in full" stamp had no legal effect at all; it was unenforceable. *Beuford v. Actionlink* (8th Cir., 2015).

Blanket Waiver Of Future Employment Is Invalid. Agreements to settle legal claims often include a provision that the person will not apply for future employment with the organization or its affiliates. In *Golden v. Cal. Emergency Physicians Group* 9th Cir., 2015), the agreement settling the claims of a discharged doctor went further. In the future *"if CEP contracts to provide services to or acquires rights in a facility at which Golden is employed or rendering services, CEP will terminate Golden without any liability whatsoever."* The doctor challenged this language, seeking to enforce payment of the settlement without the future firing provision. The court agreed. The prohibition was a "restraint of such substantial character," so broad, and so likely to do unpredictable future harm that it was unenforceable. The doctor could never predict when or where CEP might get a service contract, and oust him from his job.

Wisconsin Loosens Consideration Requirement For Non-Compete Agreements – But. Contracts generally require "consideration;" something of new value to induce the parties to agree. Wisconsin has held that "continuing employment" is not valid consideration to induce an employee to sign a no-compete agreement. The person already has the job, so something of additional value must be given. In *Runzheimer International Ltd. v. Friedler* (Wis. S.Ct., 2015), the Court changed the rule. It found that continuing employment (threat of discharge for not signing) was valuable consideration, and the non-compete could be enforced. However, the decision also implied that this form of consideration could alter the traditional Employment at Will relationship. The company would not be free to discharge the Employee at Will soon after. The "continuing employment" provision implied a real continuation of the job and the employee may then be protected by general employment contract principles such as "good faith and fair dealing" in any

discharge. One must also be consistent in enforcement. If the company did not fire even one employee who refused to sign, then all those who did sign would also be relieved of their further no-compete obligations. One exception could render everyone's agreement unenforceable. So, the old standard forms of consideration may still be advisable.

73 Year Old Doctor Was Not An Employee. Physicians often enter into contractual agreements with hospitals for "practice privileges," rather than employment. This is often more lucrative for them than being paid as an employee. They can directly bill the patient and keep all of the proceeds (which is why patients receive multiple bills from different parties, clinic-hospital-three separate doctors- independent laboratories, etc. etc. for just one hospital visit). In *Ashkenazi v. South Broward Hosp.* (11th Cir., 2015), this usually advantageous relationship resulted in dismissal of a 73 year old surgeon's age discrimination case, following the cancellation of his surgical privileges. The ADEA is an "employment" law. It does not cover independent contractors. So, the hospital could enforce the contractual relationship and avoid liability for any alleged age discrimination.

Also, beware of carelessly written employment handbook policies which can create contractually enforceable obligations and liabilities you did not know you had. Employees can later enforce these contracts in court. For recent examples, see the May and February, 2015 Updates regarding FMLA and Harassment Policies.

Discrimination

EEOC Files First Transgender Cases. The EEOC recently announced that it now considers LGBT issues to be included under the standard sex discrimination umbrella, rather than having to fit these issues into a "sexual stereotyping" mold. It has now brought the first cases under that new interpretation.

Pretext On Layoff. In *EEOC v. Lakeland Eye Clinic* (M.D. Fla., 2015) a clinic paid $150,000 to settle a discharge claim. When the Director of Hearing Services began transition from male to female, the doctors allegedly made derogatory comments, and stopped referring clients. The clinic then "eliminated the position" stating it was closing its hearing services unit. However, it soon hired another person to do the same job, and continued the operation. The discharge seemed to be a pretext for discrimination.

Restroom Restriction – Delay In Surgery. The EEOC achieved a settlement in *Lusardi v. McHugh – Dept. of the Army* (EEOC, 2015). A male civilian employee began presenting as female and informed Redstone Arsenal management of a planned sex change operation. Management raised a concern about the privacy and discomfort concerns of other employees of having a person dressed as female using the men's

restroom, or a biological man dressed as a woman using the women's room. Lusardi agreed to use a unisex restroom until the operation, and then use the women's facility. However, the surgery was delayed indefinitely. Lusardi then requested to use the women's facility, because the unisex did not have a shower or other amenities as did the standard men's and women's rooms. This was denied, resulting in a charge by the EEOC. The EEOC ruled that once Lusardi began presenting as a women, she was entitled to be treated as such, and not restricted in any way.

Age

"Too Old" Birthday Comments Create Case. A construction worker, on his 73rd birthday, was told by his supervisor, *"Get out of here, you're too old and you're no use anymore. Go live off Social Security."* He left. The company defended the ADEA suit by claiming the employee had been called back to work at the construction site only three days later. However, he was called back to work for another contractor on the site, not by his original employer. This defense might help in diminishing the damages, but it did not work to shield the employer from the issue of discriminatory discharge. *Morales v. Venegas Construction Corp.* (D. PR, 2015).

Race

Patient's Request Did Not Justify "No Blacks Allowed" Care Policy. An elderly Hispanic woman was hospitalized due to being mugged by a robber she believed to be African-American. She said she was now afraid of dark-skinned people and asked that no African-American or dark-skinned doctors, nurses or other staff be allowed to treat her or be near her. The hospital agreed to the request as a "treatment need." This resulted in disruption of schedule for some staff, and one African-American nurse was replaced by a White nurse and not allowed to be in her unit during the time the patient was in the hospital. The nurse was told she could use paid vacation time during this period. In *Dysurt v. Palms of Pasadena Hospital* (M.D. Fla., 2015), the court found a violation of 42 U.S. Code §1981, which prohibits "race matching" due to customers' or patient preference. "There is no bona fide occupational qualification or business necessity defense" under §1981.

"Get A Job In Africa" Cements Race-National Origin Claim. An African convenience store manager, born in Malawi, was fired due to his White district manager's (DM) false accusations and racial/national origin statements. The DM seemed to take a harsh focus after the manager got a Master's degree from Tennessee State U.; the White DM had no degree. He became critical of performance. He made statements such as "Get the F___ out of my business, use that degree in Africa" and "Get a job in Africa." The Malawian manager was fired after the DM reported that a number of lottery tickets were stolen under the manager's watch. The evidence showed this was not true, the DM knew that a White manager was on duty when the tickets disappeared. The court found clear evidence of pretext and that Race and Nationality were the motivating factors for the discharge. *Bondwe v. MAPCO Express Inc.* (M.D. Tenn., 2015).

Disability

EEOC Guilty Of Failure To Accommodate. The EEOC denied the request of one of its own employees with a lung condition to work from home. The open office area was too large for her air purifier to be effective; she requested a more enclosed office space, or to work from home. The request was not acted upon for several months – "management is still looking into it." She alleged that in the meantime her supervisor began harassing and retaliating against her for having raised the disability issues – rudeness, yelling and cutting off communications. The employee took a disability retirement, and then sued under the Rehabilitation Act for constructive discharge. The court dismissed the harassment and retaliation claims due to insufficient evidence. It allowed the failure to accommodate claim to continue. The EEOC had not shown that work from home was unreasonable or would pose an undue hardship.

Employee Whipsawed By Conflicting Directions, And Lack Of Management Coordination Regarding Parking Space. An employee with MS and unable to walk used a wheelchair and specially equipped van to get to work. He was given a parking space by the loading dock, wide enough for the van to deploy the wheelchair. OSHA then issued a fine and citation for unsafe loading dock hazards, as trucks pulled in and out. The parking space was a factor, since OSHA deemed this space was needed for truck mobility. The employee was told to move to the front of the building. The regular parking lot across the street was wheelchair inaccessible. So he was told to park in one of the two handicap slots by the front entrance. However, they were often taken by others. Plus, the front doors were not automatic, and there were times he could not get in and had to wait until someone came along to open a door. A reserved space was not made available. There were resulting attendance/tardiness issues. Finally, his supervisor directed the employee to go back to the original parking space. However, the loading dock supervisor became hostile. She threatened to call the police and have his van towed. During this period the employee continued to request accommodation and clarification, but kept being told "we're working on it." He finally stated he could no longer come to work under the circumstances, and filed a Rehabilitation Act case. The court found the employer had allowed a breakdown in communications which resulted in the failure to reasonably accommodate. *Sansone v. Donahoe – US Postal Service* (N.D. Ill, 2015).

Fair Labor Standards Act

Mandatory Alcohol Counseling And Treatment Is Not Paid Time. Two police department employees were told they must have alcohol counseling/treatment in order to keep their jobs. They entered treatment. Then they filed an FLSA action claiming pay and overtime for all hours spent, because it was a mandatory order by the employer. The court disagreed. The FLSA requires pay for all "work," which is "controlled or required by the employer, and primarily for the benefit of the employer." Alcohol counseling was not directly related to any of the actual job duties. Further, the treatment was primarily

for the "benefit of the workers." They had the benefit of a second chance, rather than termination, and the direct personal benefit of the counseling. *Gibbs v. City of N.Y.* (S.D. NY., 2015).

LABOR ARBITRATION

Off Duty Threats Justify Discharge. An off duty sheriff's deputy was arrested for OWI in a neighboring county. She tried to use her deputy status to ask to get out of the arrest, name-dropping all the key officials she knew in that county. She told the arresting officer that she would give him a break if the roles were reversed. When this did not work, she warned the officer that he ought to "be prepared to pay the price" if you ever come to my county. When this came to the attention of the officer's own county, she was fired for abuse of her position as a law enforcement officer. An arbitrator upheld the discharge, disregarding the argument that the action was too severe, since no threat had actually been carried out, no one was hurt. The officer's verbal conduct was sufficient for discharge. *In Re Wis. Professional Police Assoc. v. Clark County* (2015).

In a similar case, a firefighter's discharge was upheld. When his wife was arrested for public intoxication, the off-duty firefighter went to the police department. When the police would not release her, he called the police officers profane names, made threats, called them "morons" and "incompetent Barney Fife SOBs." He said "I'll take your head; I don't know where you live, but I will." He was then arrested. The department fired him. The arbitrator rejected his defense that since he never carried out any of the threats, they were irrelevant. They were clearly of a serious nature and damaged the important working relationship between firefighters and the police department. *In Re City of Ada Oklahoma and Int. Assoc. of Fire Fighters 2298* (2015).

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