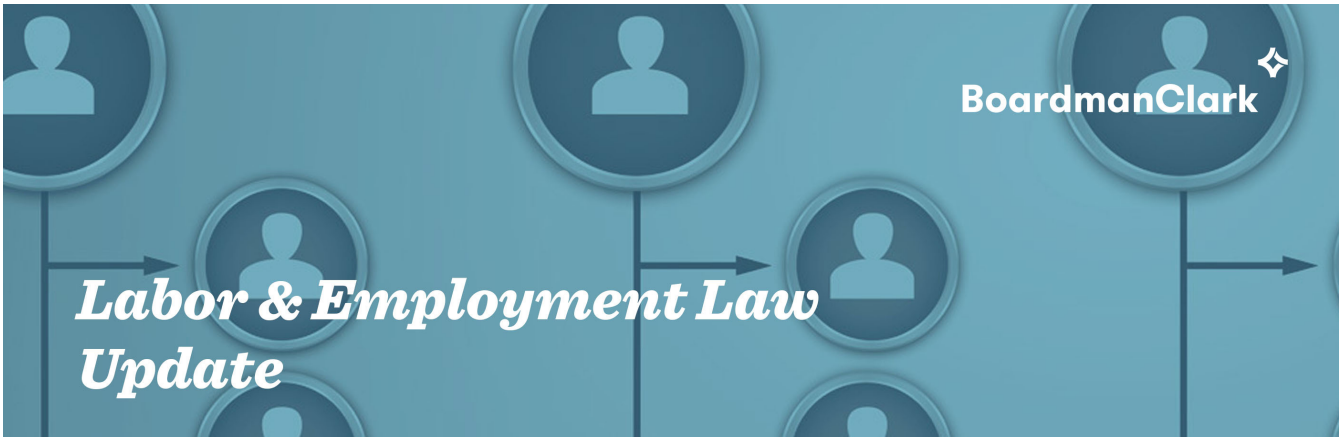

EEOC Issues Artificial Intelligence (AI) Guidelines

ROBERT E. GREGG | 07.01.22

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

EEOC Issues Artificial Intelligence (AI) Guidelines. The EEOC is focusing on preventing bias that would violate the Americans with Disabilities Act (ADA). This guidance addresses the growing use of AI and algorithmic decision-making systems in recruitment and other employment decisions such as pay and promotions. It identifies major concerns for employers, and suggests practices they should consider in order to mitigate the risk of ADA violations. The AI Guidelines supplement the EEO's Artificial Intelligence and Algorithmic Fairness Initiative on the use of emerging technologies.

Consumer Finance Protection Bureau (CFPB) Studying Training Repayment Agreements. The Federal CFPB announced that it will be studying agreements in which employees obligate themselves to pay back costs of training, equipment, and other expenses. The agreements generally obligate workers to pay their employers some amount of money to defray the cost of their training if they quit within a certain timeframe. Consumer and labor advocates have argued these arrangements are too often anti-competitive, one-sided, and essentially a modern twist on indentured servitude. Employers argue that these arrangements are necessary when they pay for employees to develop new skills or credentials. They do not wish to pay for the education only to have the employee suddenly take their new skills to a competitor before the company can get the benefit of having paid for the training.

DC Prohibits Employers from Firing Pot Users. The District of Columbia has joined a growing number of jurisdictions which limit employers' ability to test for legal marijuana use. The DC Cannabis Employment Protections Act of 2022 prohibits

refusing to hire, or to discipline, discharge, or otherwise penalize an employee for use of cannabis or testing positive for marijuana. There is an exception for safety sensitive positions, which includes a variety of security, driving, equipment operation, and medical positions. The Act does not protect employees from discharge for on-the-job use, sale, or possession unless the possession is medically authorized.

TRENDS

Microsoft Announces It Will Not Enforce Non-Competes. Microsoft Corp has announced that it will no longer include non-compete clauses in employment agreements and will not enforce those already in existence. The company does not believe these are effective as a *"retention tool"* and hamper recruitment of new employees. It will also no longer include non-disclosure (gag order) provisions in separation and settlement agreements. This announcement comes at a time when non-competes and non-disclosure agreements are under increasing scrutiny by states and federal agencies and are becoming more and more difficult to enforce. Several states have banned them completely and in other states they are becoming severely limited. Federal agencies have focused much more attention on non-competes, resulting in suits for restraint of trade and collusion.

LITIGATION

Wrongful Discharge – Public Policy Whistleblowing

Moldy Marijuana. A court found sufficient grounds for a former cannabis company worker's retaliation case to proceed. The employee, a production supervisor, inspected the cannabis product before it was processed for consumers and medical patients. He discovered and reported excessive mold in large batches of product on several occasions. This resulted in the company not being able to process and sell the cannabis in its higher priced natural flower bud form. Instead, it could only be processed in its less profitable infusions. Allegedly, his manager told him to stop reporting moldy marijuana to Quality Control. However, he continued to abide by the quality control requirements and was fired for refusing to circumvent health requirements and allow moldy product to be sold to consumers and medical patients. The court found he engaged in an activity protected by the Illinois Whistleblower Act by refusing to violate state public health policy. *Sanford v. Pharmacann, Inc.* (Cook Co. Cir. Ct., 2022).

Fair Labor Standards Act

Morgue Trainee Was Validly an Intern — No Pay Owed. A person enrolled in a six-month county training program to learn to become a forensic photographer. She did

this training in a morgue as an unpaid intern. However, at the end of the program, she filed an FLSA claim for minimum wage and overtime. The court found that the program and this work qualified under the FLSA unpaid internship exception. There is a seven-factor test that applies to internships, the most significant is that the "intern is the primary beneficiary" of the training program, i.e., the internship is an educational opportunity and results in a new degree or career, and the organization devotes substantial time and effort into the intern's training. This situation met the standard, and no pay was due. McKay v. Miami Dade County (11th Cir. 2022) Unpaid internships, volunteers, and trainees are an ongoing FLSA issue. Employers have lost a number of cases due to failing to carefully consider the factors needed to meet the specific exception. Any use of interns should be arranged through an educational program and with attention to meeting those standards.

For more information on the seven-factor test and other cautions request the article Liability Issues Regarding Volunteers (& Interns & Trainees) by Boardman Clark.

DISCRIMINATION

Sex Discrimination

Health Insurance Discrimination Against Transgender Deputy. A judge has found valid grounds for a health insurance discrimination case. The case was brought under the ADA and Title VII by a transgender Sheriff's Deputy who was denied coverage for gender-conforming surgery. The judge ruled that gender dysphoria is not a "disability" and the ADA does not apply. However, LGBT status is a protected category under Title VII and benefits discrimination is covered. In this case the health plan treated transgender employees differently for the same services which others were readily granted. The health plan covers mastectomies when medically necessary for cancer treatment, but not when they are medically necessary for "sex change" surgery. And the plan pays for hormone replacement therapy to treat menopause, but not for gender-conforming surgery. According to the judge's order, *"The undisputed, ultimate point is that the exclusion applies only to transgender members." Lange v. Houston County* (M.D. GA, 2022)

Retaliation

$460 Million Retaliation Verdict for Two Supervisors Who Reported Harassment. A jury awarded $460 million under Title VII and California state laws to two utility supervisors who were fired after reporting several instances of harassment. The evidence showed a "fraternity-like culture" where racial and sexual harassment were rampant. Several female employees brought concerns to the supervisors, viewing

them "as about the only supervisors who could be trusted and who hadn't engaged in the harassment." The supervisors did their duty and reported the concerns to higher management. Then the word got back to other managers about the two who had "ratted them out." Witnesses testified that they heard other managers "making plans to get back" at them. Then the supervisors were subjected to a series of "bogus complaints and investigations" which forced them out of the company. The jury awarded double the amount of punitive damages than any prior similar case in the state. *Martinez and Page v. S. Ca. Edison Co.* (Superior Ct. of CA, 2022)

ROMANCE

Sexual harassment involves unwelcome attention and does not include consensual relationships. However, these too can create problems in the employment context.

Park Director Fired for Romance with Subordinate. In *Myers v. City of Hampton* (4th Cir. 2022), the Court of Appeals upheld the dismissal of the Title VII race case of an African American Parks Director. The discharge was due to the Director's romantic relationship with a subordinate. The city received complaints of favoritism toward the subordinate. The Director denied any relationship, twice. After the third complaint, the city found significant evidence of the relationship and that the Director was going outside normal procedure to influence the evaluation of the subordinate. He was fired. The Director then sued, claiming he was satisfactorily performing his duties and was replaced by a White man with lessor experience. However, the court found that the discharge was for different reasons than job performance, so his claims were off-base. The city had valid grounds to discharge the Director due to covering up the relationship and the improper favoritism.

Executive Sends Love to Spy on Competitor. *Movement Mortgage, LLC v. CIS Financial Services LLC* (N.D. AL, 2022) deals with a conspiracy to take proprietary information under the Defend Trade Secret Act and Computer Fraud and Abuse Act. The president of a mortgage company developed a romance with a subordinate employee. Then she had him obtain a job at a successful competitor company to allegedly learn its trade secrets and confidential information and report back so her company could adopt them or out-maneuver the other company. He worked there for a year and evidence shows he did relay such information back to his love. The suit seeks economic and punitive damages.

EMPLOYMENT AGREEMENTS

After Acquired Evidence Voids Severance Agreement. *In Slinger v. The PendaForm Co.* (6th Cir. 2022), the court ruled that a Wisconsin company could refuse to pay-out a severance agreement based on evidence it found after the employee had left. The

former CEO's employment agreement provided for a year of severance pay upon a termination without cause. The CEO's employment ended without cause. However, after termination the company discovered evidence of misconduct which could have been grounds for a "cause" discharge. Then it argued the evidence should be applied retroactively and it should now have no obligation to pay the severance. The CEO argued that the termination was not based on this information, so the company was bound by its agreement and was in breach of its contract. The court applied its interpretation of Wisconsin law and ruled that the after acquired evidence could be retroactively applied. If the company would have fired the CEO, had it known of the misconduct, it might now get out of paying the severance. This is not the final decision. The case was remanded to the lower court for more consideration of the cause issue.

Be aware that this case was brought in the 6th Circuit where the former CEO now resides. Wisconsin is in the 7th Federal Circuit, which is more familiar with and more frequently interprets the application of Wisconsin's state laws and sets the precedent for Wisconsin, Illinois, and Indiana. So, a similar issue could still be argued before the 7th circuit and come out differently.

The After-Acquired Evidence Rule has often been used to cut off damages in a discharge case from the moment the evidence of a dischargeable offense was finally discovered. However, the courts have often allowed back pay damages up to that point, but not retroactively.

STRANGEST CASES OF THE MONTH

Intern Wrestling Results in Criminal Charges Against Manager. The former General Counsel for the New York City Elections Board plead guilty to criminal charges of misconduct for exploiting his position. He promised at least two male university student interns that he could get them lucrative security jobs at political events if they could pass his physical ability assessment. This assessment involved the General Counsel measuring the interns' body parts and then placing them in various wrestling holds and seeing if they could wrestle out. He also took photos of the "assessments." He repeated this "assessment" several times over the internships. However, there were no actual security positions. The "assessment" was done for the General Counsel's own "personal gratification." *New York v. R. Richman* (N.Y. Cir. Ct., 2022). The interns have also filed civil suits for sexual harassment against the Elections Board alleging it had knowledge of prior similar behaviors by its General Counsel and did nothing, thus enabling him to proceed to harass them.

Strangling Manager to Prevent Revealing Trade Secrets? Usually, a company will seek to protect trade secrets by having confidentiality agreements, as well as going to

court to restrain employees or former employees making revelations and will sue for any damages. However, in *Maltese v. N.Y. Football Giants et al.* (Superior Ct. NJ, 2022), the team's video manager sued over being threatened with violence. He alleged the team's General Counsel threatened to strangle him if he shared confidential information; "*I will personally go into your office and strangle you until you can no longer breathe!"* The manager was then fired when he made a complaint about the threat. The evidence established that the general counsel did make the *"strangle"* statement. However, he claimed that he was *"just joking"*. There were also allegations that the team had allowed other managers to physically attack subordinate employees without serious consequences, and there was a culture of violence. The team lost its motions for summary judgement dismissal of the case; it has settled the case for undisclosed amounts and terms. Comments about assault and violence are not funny, even if said in jest. Employers should take prompt, corrective action to address any such comments.

Also, see the article It was Just a Joke by Boardman Clark for more guidance on how "humorous" comments can have serious consequences.

Author

Robert E. Gregg
(608) 283-1751