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# Legislation & Administrative Actions

***NCD Recommends Elimination Of Subminimum Wage For Disabled Workers.*** The National Council on Disability (NCD), a federal board, has recommended ending FLSA §14(C), the 80-year old subminimum wage provision for disabled workers (approximately 350,000 current workers). The provision reflects the 1938 workplace, which could legally exclude people with disabilities; it tried to incentivize manufacturers and "charities" to set up special employment situations. The NCD recommendations cite great changes in the workplace, especially since the ADA was passed. The subminimum wage no longer seems to fit the modern employment environment. The recommendations include a six-year phase-out for existing subminimum situations; a moratorium on granting any new 14(C) certificates; and amending the requirements that all federal agencies purchase certain services from non-profits employing blind workers, to expand that requirement to better cover people with disabilities in general. The recommendations also urge increased funding to expand supported employment services.

# Litigation

## THEME OF THE MONTH - POLICIES

***Policies.*** This month's Update includes cases which illustrate how company policies can create a solid defense to an age discrimination case or even a deer hunting grievance. However, policies also can be used abusively to create a trap or be a pretext for unfair discharge in race discrimination or FMLA cases. Unfair or overly aggressive use of "policies as a trap" can result in personal liability for the supervisors. Policies should also be understood by those expected to follow them.

## SUPREME COURT

***ADEA Covers Public Sector Employers With Fewer Than 20 Employees.*** A small fire district was found to be covered by and liable under the Age Discrimination Employment Act. The court found that the 20 employee minimum threshold applied to private sector employers engaged in interstate commerce. However, public employers were mentioned in a different sentence of the law, which made no mention of the 20 employee criteria. Thus, very small local governmental units must comply with and may be sued under the ADEA. *Mount Lemmon Fire Dist. v. Guido* (U.S. S. Ct., 2018).

# DISCRIMINATION

## AGE

***VP Fired For Unauthorized Trip – Times Change*** A 67-year old coal company VP sued for age discrimination after having been fired for unauthorized travel expenses. The VP claimed the same travel had routinely been approved in the past, and the discharge was a pretext for age discrimination. The court found in favor of the company. The VP had previously gone to and been paid for conferences. However, the company's business tanked, and it was forced to cut costs, and was laying off a significant percent of the workforce. New company policy forbade travel without special reasons and advance approval. The VP put in a request to go to an annual conference in Myrtle Beach, South Carolina. He did not get an approval. He went anyway, and charged several thousand dollars on the company credit card. He was fired. The court found that changed economic conditions and a new policy voided the VP's argument about the company previously always approving his travel. The company's action was not a pretext. The VP could show no one else who was treated more favorably. The court dismissed the case. *Stearman v. Ferro Coals, Inc.* (6th Cir., 2018).

## RACE

***Termination For Unauthorized Expenses Seemed To Be Pretext*** An African-American supervisor made repeated complaints of racial discrimination. The people he supervised, and some other managers, made racial comments; White employees refused to follow his direction and went to White supervisors to get a "second guess" or directive; there were a number of hostile racial texts among White employees and managers about the supervisor. His complaints about discrimination were met with a directive for him to "stop bringing up the race issue." He was then fired for putting "unauthorized" travel charges on the company credit card. He filed a Title VII discrimination case as well as a state violation of contract case. The court denied the company's Summary Judgment Motion, regarding falsification of expenses. The same travel expenses had routinely been approved prior to the employee's complaints of discrimination. The employee had presented all expense requests to his manager prior to any of the questionable payments being made. So the company's reason for discharge seemed to hold no water – to be pretext. *Randall v. UPS* (D. Or., 2018).

## SEX

***Harassment By Mayor's Son.*** A city may be liable due to a non-employee – the mayor's son – harassment of a city employee. The employee made several verbal complaints that the mayor's adult son would frequently come to her office and inflict unwelcome sexual attentions. These complaints had no result. She finally filed a written complaint. Then the city took action to stop the interaction. However, after years of positive feedback, she then suddenly received negative evaluations and her manager brought up months' old issues to find fault. She asked why this sudden change. The manager allegedly said because she complained about the mayor's son. She resigned, and filed a harassment and retaliation case. The court found the city had ample verbal notice of the son's harassment and failed to act, allowing harassment until the written complaint. The manager's comment was evidence of retaliation. *Iravedra v. Municipality of Guayrabo* (D. Pr., 2018). This case illustrates how non-employees may have "special status" or wield influence on executives, and create discriminatory situations. (See the article, Son of CEO by Boardman & Clark. However, it can also be a daughter of a CEO or spouse of a CEO or other influential family members who create hostile environments.)

***Signature On Harassment Policy Is Meaningless If Employee And Supervisor Do Not Read English And Have No Idea What They Signed.*** An employee filed a sexual harassment case regarding ongoing, vicious rumors about her sexual activities and resulting sexual attention and propositions from co-workers and from her supervisor. She resigned due to the continuing behavior. All employees in the work unit, including the supervisor, were Spanish speaking and were not literate in English. When the employee filed a Title VII harassment case, the company defended by claiming that the employee should have followed the company's Anti-Harassment Policy and make a written complaint. All employees, including the supervisor, had signed the company Handbook and the Anti-Harassment Policy. However, the policies were in English. The supervisor testified that he did not know the sexual attention and propositions were against any company policy. He had no idea he was supposed to prevent and cure harassment. He testified that he and all other workers in the unit had been ordered to sign the policy, but had no idea

what it was. He was unaware it was a Harassment Policy, and had no clue what it contained. It was just a bunch of meaningless words on paper which he was told to sign. The court had no difficulty in finding that the company had an ineffective policy and had abrogated its duty of care to prevent or address harassment. *Tinoco v. Thesis Painting Inc*. (D. Md., 2018).

## FAMILY & MEDICAL LEAVE ACT

***Bait And Switch.*** An Administrative Assistant in a care facility informed Human Resources that she needed a hip operation and had scheduled it for January 31st, after her January 25th one-year anniversary, when she would have FMLA eligibility. She did this due to the company policy requiring 30 days' notice of any planned FMLA leave. On January 9th HR told the employee to take immediate leave, so she would not subject herself to any further injury (even though the employee had no medical restrictions, and was in an office job). Then HR urged her to "move up" her operation to January 17th if she could, and guaranteed that FMLA leave would be granted and her job preserved. So the employee did so. However, on January 22nd she received a letter denying FMLA due to "not yet being eligible." On January 24th she was informed her position was being replaced, and her employment terminated. She filed a complaint for FMLA interference. The court found solid grounds for the suit. Had the employee unilaterally left for surgery there would be no FMLA issue. However, Human Resources baited her into leaving early, and promised that she would receive FMLA protection. The employer could not then switch and spring a trap of its own design and take unfair advantage. The action was a denial of FMLA rights, and interference with leave. Further, an employer should not be able to take advantage of the FMLA's advance notice requirements, and its own policy by asking for such notice, then terminating those who complied. This would turn the advance notice requirements "into a trap for newer employees" and violate the protection purpose of the law. *Reif v. Assisted Living by Hillcrest LLC* (7th Cir., 2018).

***Preemptive Strike – And A Perfect Storm Of Employer And Personal Liability*** A court granted Summary Judgment (employee wins without even having to go to trial) against a hospital and found extra personal liability against two supervisors. The employee, with PTSD, suffered panic attacks. His doctor (from the same hospital) recommended periods of intermittent FMLA leave for temporary episodes. The employee presented FMLA paperwork and medical certification to his supervisor. Three days later he informed the supervisor he could not work due to "the FMLA issue." The next day he obtained and submitted a doctor verification that he had been unable to work due to the FMLA PTSD/anxiety condition and would need to be off for a week. However, he received a letter stating he was discharged due to taking an unapproved absence, because his FMLA application was still in process, and "not yet approved." The employee filed a case for not only FMLA denial, but also violation of due process, breach of implied contract, and retaliatory discharge. The court found such a clear case that it granted judgment without a trial. The hospital's claim that FMLA did not apply because it had not yet been processed and approved fell flat. The employee had a qualifying condition, and had properly submitted all required documents. It would be contrary to the law to require employer pre-approval before one can take qualifying leave for sudden or emergency situations. The two supervisors who took the action knew that the FMLA paperwork was submitted and in process and qualified for approval. Their discharge action was an intentional and willful violation and interference with rights and subjects them to personal liability for extra damages. *Cordova v. Univ. of New Mexico Hospital* (D. N.M., 2018).

## FAIR LABOR STANDARDS ACT

***"Salary" Violated The Law.*** A supermarket will pay $351,000 in back wages, interest and additional liquidated damages to 20 low wage employees who it classified as "salaried" and paid a set weekly salary no matter how many hours worked. The employees did not qualify as exempt in any way. The long hours meant that often the "salary" dropped below minimum wage per hour, in addition to no overtime pay. The store owners claimed they thought paying a "salary" created an OT exemption. However, the Dept. of Labor found this unpersuasive and cited them for intentional violations, assessing a penalty of several thousands of dollars, in addition to the back wages and damages payments. *DOJ v. R&J Supermarket Corp.* (DOL settlement, 2018).

## OSHA

***Invisible Vests And Non-Working Headlights Create Tragic Preventable Accident***. OSHA cited and fined US Xpress and Dollar Tree Distribution Center, Inc. due to a preventable fatal accident when a night shift worker was

struck by a vehicle inside a distribution center. It found the companies failed to have workers wear highly visible vests at night, and allowed continued use of vehicles with non-functioning headlights. This combination created foreseeable dangers which could have been prevented. The fines were $143,000 plus remedial orders (OSHA citation, 2018).

## LABOR ARBITRATION

***Deer Hunting Leave – Race To The Box - Minutes Matter And Policy Controls.*** Days off in deer hunting is a major issue, at least in Wisconsin. People put in their request months, even a year in advance. A sheriff's department allowed only one person to be off during the season. It granted the first request which was time stamped and the in the "locked leave request box," which also recorded time of deposit. In early November, the lucky person announced he was moving to a new job and gave up his leave. This resulted in a mad scramble. Within two minutes, another officer filled out and time-stamped a leave request. However, he did not get it to the locked box until a couple of minutes after another officer – who had the form timed later, but got it into the box first, and was granted the leave. The first officer grieved, demanding he receive the deer hunting leave. He claimed he completed the form first and he had more seniority, so he should have received the leave. The arbitrator disagreed. The key point of the policy was deposit in the box rather than when the form was filled out. There was no seniority provision in the policy – it was a "race for the deer." The grievance was denied. In Re *Winnebago Deputies Assoc. and Winnebago Co.* (2018).