Labor & Employment Law Update

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Legislation & Administrative Actions

States Voiding Restrictions On Sexual Harassment Claims In reaction to the Supreme Court's Epic Systems v. Lewis decision, which allowed employers to require mandatory arbitration, and prohibit class actions of employment claims, states are taking action to limit the effect, especially regarding sexual harassment. Maryland is the latest, passing the Disclosure of Sexual Harassment in the Workplace Act of 2018. Effective October 1, 2018 no employer may limit the rights of any employee to bring claims of sexual harassment or retaliation. Thus, mandatory arbitration agreements and any limits in class actions may be against public policy, and void when it comes to sexual harassment and retaliation. The #METOO movement has created major attention and action regarding this topic, with an unprecedented level of state legislative actions. This also includes the recent Federal tax reform law, which included a provision creating a tax penalty if an employer attempts to have a confidentiality/non-disclosure provision in a settlement of a sexual harassment case.

Trends

THE WEINSTEIN CLAUSE

A new factor is being introduced into business purchases and corporate mergers – The Weinstein Clause! No longer are value of business, volume, inventory or physical plant the driving factors. #METOO and the very high publicity and liability costs of sexual harassment have altered the equation. *"Social diligence"* is now a major consideration. This now includes purchases and merger contracts containing clauses in which the seller guarantees that its executives or other managers have no history of sexual impropriety or harassment. These include "claw back" provisions in which the seller will refund or forgo a significant monetary amount if allegations of harassment later surface, and harm the reputation, profitability, or cause liability for the company. Some deals escrow 10% to 20% of the price in case "social issues" arise within a certain number of years. These are being called Weinstein Clauses, after one of the prime figures in the national sexual harassment attention. Selling/merging companies are now paying a LOT more attention to the behavior and historic behavior of key managers and those they are hiring as managers. An MBA may no longer be as important as an understanding of social issues and a social conscience. Business schools should perhaps increase the requirements to take courses in civics and social studies in order for their graduates to get hired and then survive in this new and changing business/liability environment.

Litigation

LIABILITY COVERAGE

Punching Customer In The Face Voids Insurance Coverage A company's security guard punched a customer twice in the face, breaking his jaw. The customer sued the business and its liability insurer. The insurance company declined to cover the incident. The court agreed that the guard's willful intentional act was outside the coverage. The court did rule, though, that there was no ground for a negligent supervision case. Since the business owner had no prior knowledge the guard had any propensity for violence, it had no duty to provide specific training on not punching people in the face. *Talley v. Mustafa* (Wis. S. Ct., 2018).

RESTRAINT OF TRADE – NO COMPETE/NO POACHING

Jimmy John's Franchise Agreement May Be An Antitrust Violation In 2016 the U.S. Dept. of Justice announced that it would criminally prosecute businesses which collude to have no poaching agreements, under the Antitrust Act. This involves competing businesses which agree, among themselves, to not recruit each other's employees, and to refuse to hire each other's employees, or former employees who apply for jobs. This is a restraint of trade, and prevents employees from reasonably being able to get another job in their profession (a form of indentured servitude; if you cannot leave to work for a similar job in the industry). A class action has been brought against Jimmy John's sandwich company claiming that its franchise agreements violate the law. The franchise agreements include provisions that the local franchise owner will not poach or hire employees of other Jimmy John's franchises. Employees are not permitted to seek work or better pay at other stores. The franchise agreements also require the local owners to force employees to sign no-compete agreements that they will not work for any type of "deli-style fast food restaurant" for two years after ending Jimmy John's employment. *Butler v. Jimmy John's Franchise LLC* (S.D. Ill., 2018). The DOJ and the attorney generals of 11 states are actively investigating a number of other franchise operations, including Arby's, Burger King and Dunkin Donuts, for similar issues.

Discrimination

SEXUAL HARASSMENT

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Harassment Standard Is Different In Nursing Homes And Treatment Facilities – BUT Nursing homes, treatment facilities and some other employment venues have the purpose of serving patients or clients whose disabilities and conditions render them less able or unable to control their behaviors, including sexual, racial and

physical behaviors. Employees are hired to serve those clients and must regularly deal with behaviors which would quickly constitute "illegal harassment" in any other workplace. They must handle these overly improper-harassing behaviors by maintaining professionalism and care for the offensive patient or client. It can be a tough job. However, there are limits. In *Gardner v. CLC of Pascagoula LLC* (5th Cir., 2018), a nursing home patient with dementia, a brain injury and Parkinson's had a history of uncontrolled sexual, physical and verbal aggressiveness. He tried to sexually grab female care givers and made ongoing overt sexual requests. However, one day he punched a CNA as she tried to move him to a wheelchair. Then he punched her again in the side. Then he sexually grabbed her and hit her hard a third time. She reacted to that by cursing and swinging her fist at him. The swing missed. However, the CNA was injured and went to the hospital and was off work for three months. On return, she was fired for having cursed and taken a swing at the resident. She sued for a harassing hostile environment under Title VII. The court found the CNA had a sufficient case, in spite of the heightened care facility harassment standard. The evidence included the fact that later that same day the resident had another similar incident, and the management then moved him to an all-male unit with all-male staff and prevented further interactions with female staff. The management was well aware of the resident's violent behavior and had failed to act, including when the CNA at issue had raised prior concerns. The CNA's action seemed to be a natural defense reaction to an overt attack, and not grounds for discharge. In spite of the extra degree of tolerance staff must have when caring for those with impaired control, the employer must take steps to protect staff once there is overt physical aggression and sexual groping.

Retaliatory Emails Net $1.3 Million For University Professor A Columbia University finance professor made a sexual harassment complaint against another professor. That professor then launched an email campaign against her. He sent multiple negative emails from his Columbia email account to important finance industry leaders, Federal Reserve Banks, economic journals and finance departments at other top tier universities. The emails labeled her as "evil," "crazy" and more. The female professor filed suit for retaliation and destroying her reputation, her chance at tenure, and her ability to find another position at a top university or in the industry. A jury agreed and found the professor liable and the university liable for having allowed the retaliation. It awarded $750,000 in compensatory damages and $500,000 punitive damages. *Ravina v. Columbia U.* (S.D. N.Y., 2018).

DISABILITY

Wife's Letter Justified Psychological Evaluation A postal worker returned to work following a leave for severe depression. His psychologist gave a "full return to duty – no restrictions" report. However, the employee's wife sent the employer a letter questioning her husband's emotional stability and stating he may suffer a mental breakdown upon return to the postal service's hostile work environment. The letter stated her husband was aware she was sending it. USPS then placed the employee on leave until a further independent evaluation could be done as to whether he could return without suffering further harm to himself, or potentially others. He refused to undergo evaluation. He was terminated and filed a Rehabilitation Act disability suit. The court dismissed the case, finding that USPS had a valid foundation for seeking further medical information, and extending his leave. The employee's refusal broke the interactive process and made him responsible for the termination. *Mitchell v. U.S. Postal Service* (6th Cir., 2018).

GENETIC INFORMATION NON-DISCRIMINATION ACT

Overbroad Medical Request Creates GINA Liability A doctor's overbroad medical request created liability for the company which requested an independent medical evaluation. An employee took FMLA for colon surgery. On return, she was asked to go through a medical screening for vision and physical ability to operate machinery. She passed, and there was no evidence of any visual or physical inability. Yet the doctor made a further in-depth inquiry regarding the employee's prior history of colon issues and cancer and requested her complete medical records. She refused the requests and instead presented further verification from her doctor regarding her ability to work with no restrictions. The company terminated her for not meeting the company doctor's request. She sued and the court found violation of GINA and the ADA. The company had valid reason to ask for a fitness for return evaluation. However, it had no reason to ask for additional information after she passed that evaluation. Especially there was no reason to ask for past medical records, and for all medical history. Failing to limit the scope of medical exam and

inquiry to what was currently necessary violated the law. Further, the company had no GINA "safe harbor notice" which would have warned the doctor against overbroad inquiry, and which stated the employee's right to not provide such information. This eliminated the employer's ability to separate itself from liability for the doctor's violation. *Jackson v. Regal Beloit America, Inc.* (E.D. Ky., 2018). [For more information on the GINA Safe Harbor Notice, see the article GINA II – Cautions for Employers by Boardman & Clark.]

$189,000 Settlement For Asking Applicant Family Medical History The City of Minneapolis has settled a GINA case alleging it illegally asked a veteran applying for a police job to provide family medical history and then not hiring him once it found he had a prior PTSD diagnosis. He complained to the U.S. Dept. of Justice, which brought suit. It then found the city routinely asked police applicants for family history; a violation of both GINA and the ADA and Rehabilitation Act. *United States (DOJ) v. City of Minneapolis* (D. Minn., 2018).

FAIR LABOR STANDARDS ACT

Abercrombie & Fitch Will Pay Up To $25 Million To Settle Clothing Case The FLSA considers that required uniforms or clothing should be paid for by the employer, rather than be an expense borne by the employee. In low wage jobs a uniform charge or laundry charge deduction to employees can bring the pay below minimum wage. Some 31,000 Abercrombie and Fitch employees joined a class action claiming that the company's request for them to purchase and wear its clothing on the job diminished their wages (364,000 affected employees are eligible to join in the settlement). The settlement will reimburse such employees approximately 85% of the amounts they paid for the clothing. If all eligible people opt-in, Abercrombie & Fitch acknowledges it may have to pay out $25 million. *Bojorquez, Brown, et al. v. Ambercrombie & Fitch Co.* (S.D. OH, 2018) [Abercrombie & Fitch has had previous clothing case liability in *EEOC v. Ambercrombie & Fitch* (U.S. S. Ct., 2015). The Supreme Court found it liable for having refused to hire a Muslim applicant because it found a religious headscarf "unfashionable."]

EQUAL PAY ACT

Considering Past Pay Continues To Be Discriminatory The cases continue. More courts are finding that basing starting pay upon past wage history is inherently discriminatory. It serves to perpetuate the discriminatory pay levels of prior employers. It can automatically result in unequal pay for exactly the same work, and even in less pay for better or more experienced employees. A number of states now have laws banning this practice so it is surprising that major companies are still engaged in this practice. In *Cahill v. Nike, Inc.* (D. OR, 2018), female employees have filed an Equal Pay Act and Title VII class action case alleging that Nike's use of prior salary history in the hiring process results in sex discrimination/unequal pay for the same work.