Labor & Employment Law Update

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Legislation & Administrative Actions

DOJ And EEOC Enter Memo Of Understanding (MOU) For Investigation of State and Local Governments Both the Dept. of Justice Civil Rights Div. and the Equal Employment Opportunity Commission have enforcement jurisdiction over complaints of discrimination and other civil rights issues by public sector employers. Both can investigate. The MOU is intended to create better coordination and especially to enable more immediate expedited action and allow DOJ to initiate quick lawsuits to seek injunctions in situations in which quick action is needed to prevent further serious harm.

Trends

RIGHT TO BARE ARMS

Tattoos Are Here To Stay – It's Not The 1900's Anymore In the last couple of years dress code bans against tattoos have been falling like autumn leaves. Starbucks ditched its hard stand when it could no longer find baristas who did not have tattoos, and many others are finding it impossible to recruit and hire if they maintain the no tattoo or no visible tattoo standard. Some are leaving the final decision on what is allowed to show to be made by HR managers. Are you qualified to do tattoo evaluation? Now public sector employers are coming to the same conclusion. The Army and Marines have eliminated the no tattoos for recruits policy, and no visible tattoos for "already soldiers or Marines" policy. It is now a "proper place and depiction" policy with guidelines on what is not ok. Is there a Constitutional right to have, and display, tattoos? There is a growing challenge under the 1st and 14th Amendments to no tattoo policies, as the majority of employees in some public workplaces have tattoos. Further, some police departments, struggling to hire recruits, are also finding that visible, appropriate tattoos can make officers seem "more relatable" and "strengthen bonds" with the community. There have also been grievances by officers claiming they must wear the winter uniform all year (98° temps.) in order to cover their arms and comply with the "no visible" policy. Managers are complaining of enforcing a policy they think is no longer meaningful for the modern world, "It's not the 1900's anymore." Perhaps the message to companies struggling to hire qualified people is adapt to the new realities – or close up! Some Starbucks stores were on the brink of closing before changing the policy.

Litigation

CONTRACT

In *Epic Systems v. Lewis* the Supreme Court upheld the enforceability of mandatory arbitration provisions in which employees, as a condition of getting a job, sign away the right to file employment cases in court and to join in class actions to challenge alleged wrongful employment practices. However, some employers are now experiencing the downside of prohibiting class actions. Having initially seen this as a victory and benefit for the employer, some are now accusing employees of ganging up on them, as multiple individuals and overwhelming their resources. They are actually trying to challenge their own mandatory Arbitration Agreements.

Uber Is Sued For Abrogating Its Own Agreement. Twelve Thousand Five Hundred and One (12,501) Uber drivers from across the U.S. have filed a motion in Federal court to compel Uber to live up to the Mandatory Arbitration Agreement it forced them to sign; and which prohibited them from bringing any class actions. *Abdilla, et al. v. Uber Technologies, Inc.*, N.D. Cal., 2018. The drivers raised claims of minimum wage, overtime and sick leave pay violations. Each individual driver then filed for arbitration, as required by the agreement Uber insisted they sign. However, nothing happened. After months and months the arbitrations were not scheduled and the drivers have filed to compel. **The problem** seems to be that under its Agreement Uber is obligated to pay the initial nonrefundable $1,500 filing fee to the Judicial Arbitraton and Mediation Service (JAMS) for each individual case. The 12,501, so far, arbitration demands are growing each month. So, by now the mere filing fees are approaching $20 million, and growing. It appears that Uber is overwhelmed, and cannot keep up with the obligation it required the drivers to agree to in order to protect itself from any class action suits. **"It seemed like a good idea at the time!"** In retrospect, be careful what you wish for. Everything can have unexpected outcomes.

Fraudulent Inducment Voids Separation And Release Agreement Soon after returning from FMLA for cancer treatment an employee was informed that his position was being eliminated due to a company reorganization. He was offered a Separation Agreement containing a Release of any and all legal liability or other causes of action he may have against the company. In the process the company represented that he was valued by the company, was welcome to reapply when new positions developed, and given the impression he would likely be rehired at that time. He signed the Agreement. Sometime later he found out that his former manager had stated that he had been "reorganized out" because of his cancer and the concern that he would require further treatment and FMLA absences, and that he would never be rehired. The former employee filed suit under the FMLA and ADA, claiming the Separation and Release Agreement was invalid. The court agreed, rejecting the employer's effort to dismiss. The Agreement was void due to the employer's false representations about rehire, and the employee's reliance upon them. *Gardoski v. Pats Aircraft LLC* (D. Del., 2018).

FAIR LABOR STANDARDS ACT

Clothing Deductions Violate Minimum Wage Level. A pizza parlor violated the FLSA when its deductions for uniforms and uniform cleaning took low wage employees, mostly teenagers, below minimum wage. It also failed to keep proper records on wages and tips. It will pay $14,000, plus penalties to DOL. *DOL v. Max's Pizza* (DOL settlement, 2019).

Personal Liability – Restaurant Owner Goes To Prison For Labor, FLSA, Immigration, Tax Violations. The owner of two restaurants will spend over three years in prison for violating the rights of chefs and other employees. The restaurants recruited cooks from Asia, with promises of high wages and other benefits. Upon arrival the owner took their passports and other documents, kept them confined to the residence he had set up, and required long work hours without proper pay. The restaurants also did not properly report and pay employment taxes. The owner was prosecuted for forced labor, visa fraud violations and tax fraud. *United States v. Jumroon* (D. Or., 2019).

Joint Employment – Worker With Multiple Employers Can Sue Any One Of Them For Damages. A contractor, 1-800Courier, Inc., placed its employees as drivers for an Amazon hub-warehouse, under the scheduling

of the Amazon supervisors. One driver claimed she was not paid for all hours and overtime, and several other FLSA infractions. She sued Amazon. Amazon claimed she was not its employee and sought dismissal. The court ruled that Amazon was a Joint Employer, because it had sufficient supervision over her schedule and routing. "An employee with multiple employers can seek recovery from any of them." So the driver can sue either Amazon, or her "formal employer," or both, at her choice. *Miller v. Amazon.com, Inc.* (N.D. Cal., 2018).

DISCRIMINATION

AGE

7th Circuit Rules That ADEA's Adverse Impact Section Does Not Cover Job Applicants. In overruling a prior decision, the 7th Circuit Court of Appeals has ruled that the "adverse impact" section of the Age Discrimination in Employment Act only covers existing employees and not job applicants. *Kieber v. CareFusion Corp.* (January, 2019). Adverse impact applies where a hiring criteria or other decisional factors do not specifically mention age, or have any age-related intent, however, operate to screen out a far greater percentage of older people; an adverse impact. The suit is about the overall effect, not the intent.

This case does not change the "adverse treatment" section of the ADEA. Applicants, and anyone else, can challenge age discrimination which is more overt, intentional, and impacts the particular individual, as opposed to impacting the age protected group in general. The 7th Circuit covers Wisconsin, Illinois and Indiana, so this is not the "law of the land." But the 7th Circuit has now joined some other Federal Circuits in this opinion. Other courts continue to allow Adverse Impact cases. The Supreme Court may ultimately decide the matter. Also, no matter which Federal Circuit you may be in, never forget State Discrimination Laws. Most states' laws prohibit adverse impact discrimination. Sometimes these laws have more "punch" and liability than the ADEA. So, the Federal decision may well not change anything regarding an employer's need to examine for and prevent adverse impact in the hiring process.

PREGNANCY

Pregnant Officer Forced To Run 1.5 miles In Fitness Test. A Juvenile Corrections officer has prevailed in her Pregnancy Discrimination Act case. She asked for the accommodation of not taking the 1.5 mile run part of the annual physical fitness test due to her pregnancy. She was told that it was required and other pregnant officers had made the run; so she was ordered to run. She developed a placental bleed and did not finish. She then presented a doctor's medical certification to excuse her from the run due to the danger of further harm. Nonetheless, the supervisors ordered her to retake the run exam. She did not make the required time, but did suffer further injury. She filed the PDA case alleging failure to accommodate. The court ruled in her favor. The Department ignored the doctor's directive. The primary evidence was that the Department made all pregnant employees take the physical test but routinely excused non-pregnant officers from the test if they presented medical certification of almost any other condition needing accommodation. *Thomas v. Fla. Parish Juvenile Justice Comm.* (E.D. La., 2019).

SEX

Texting To Teenagers Traps Subway Manager. A Subway franchise will pay $80,000 to settle a quid pro quo harassment case. A manager propositioned 17 year old applicants promising jobs for sex. The evidence was his overt sexual texts "___ ___ ___ and the job is yours," etc., which he sent to the teenagers. The company will also engage in extensive management training and other compliance obligations. *EEOC v. Draper Development LLC* (N.D. NY, 2019).

Troubling Lack Of Maturity. Companies which employ a larger percentage of teens and young adults often remark that the workplace is full of "*ongoing drama.*" There is a lot of flirting and romantic ins and outs, magnified emotions, cliques, rumors, side taking – drama. Even the U.S. Supreme Court (in the *Davis v. Monroe County Bd.* harassment case) ruled that "there are an amazing array of immature behaviors" among youth in an organization. (Though too many older adults can also engage in the same.) *McCullough v. Whitaker* (D.C. D.C., 2019) involved two such employees who dated, then he broke it off. He was then suspended for harassing and improper behavior.

However, he filed a Title VII sex discrimination case alleging that he was the victim of harassment by his ex and her gang of female friends, yet he got disciplined and they did not. The court granted summary judgment against him. There was evidence that his ex and her friends did seek to shun him, and talked negatively about him to other workers. However, his behaviors were over the top. He spread false rumors, made overtly graphic sexual comments to others, refused to work with his ex's friends, refused to participate in the investigation of the situation, and refused to acknowledge that his behaviors were inappropriate in any way. The court found "a troubling lack of maturity" in the workplace in general, but that the male employee's behaviors were much more egregious in comparison with others, and warranted the discipline.

RACE

Double Standards – No Action When White Employee Is Called Racial. Two employees got into an argument over a standard work issue. Both cursed and called each other stupid. The African-American employee used hostile racial comments, including dumb White redneck and hillbilly toward the White employee. The White employee complained to a Manager. No action was taken regarding the African-American employee. The White employee was later fired due to the Manager claiming he was aggressive and rude when he complained. A Title VII case was filed charging race discrimination and retaliation. The court sided with the discharged employee. The problem for the company included that White employees were disciplined or discharged for using racial insults toward minority employees. Taking no action for a racial insult of a White employee seemed to be unequal treatment and a racial double standard. Also, the security video of the conversation which the Manager claimed to be aggressive and rude had somehow been destroyed. Another Manager who said she had seen the video said she did not see any aggression and she would recommend rehire of the employee. *Bland v. Sam's Club East Inc*. (M.D. GA, 2019).

Blanket Targeting Of Black Men – Personal Liability. State investigators and the Department Secretary can be personally sued for violation of Constitutional rights and the state tort of Outrage, due to overt racial discrimination in the state's investigation of an anonymous report that a Black employee had abused a resident in a care facility. This anonymous complaint was received by the State. The state investigators then targeted every single Black male employee as suspects and demanded the facility suspend them all. This included men who had absolutely no contact with residents and for whom there was no reason to believe they could be involved. If you were a Black man you were suspended. The investigation demanded that one CNA be fired, even though there were not yet any findings and no evidence of his involvement – guilty by being present and being Black. It turned out that the report was unfounded and assault did not occur. The fired employee sued for deprivation of his 14th Amendment rights, racial equal protection and violation of his liberty interest by the State agents, and for outrageous conduct under state law. The court found the investigators were not entitled to any immunity and could be individually sued. Further, the Secretary of the Dept. of Disabilities Service was not entitled to qualified immunity, and could be sued because of exercising authority over the outrageous conduct. *Odhuno v. Reed's Cove Health and Rehab LLC and State of Kansas* (D. Kan., 2019). The case is also proceeding against the care facility itself for allowing and participating in the racial discrimination.

RELIGION

UPS Settles Hair & Beard Case for $4.9 Million. United Parcel Service will modify its appearance code of no beards and no below collar length hair for delivery drivers to allow religious accommodation for applicants and employees where faith requires longer hair and/or beards. UPS could not show an undue hardship which would prevent it from making accommodations to these requirements. UPS will pay $4.9 million to applicants and affected employees from 2005 to present. *EEOC v. United Parcel Service, Inc.* (E.D. NY, 2019).