BOB GREGG | LABOR & EMPLOYMENT GROUP | (608) 283 1751 | SIGN UP: RGREGG@BOARDMANCLARK.COM

Legislation & Administrative Actions

Dept. Of Labor Increases Penalties – Noncompliance Is More Expensive The Dept. of Labor enforces a number of employment laws. These include the FLSA, FMLA, OSHA, Immigration & Nationality Act, Public Contracts Acts, ERISA, Mine Safety Act and more. DOL has the authority to audit, inspect and file cases and impose penalties/fines in addition to any actual damages and other remedies for violations. The Department has now increased these penalties as an inflation adjustment. So, non-compliance is now more expensive.

Court Enjoins 2019 Final Rules For Religious, Moral Exemptions To Contraceptive Coverage A Federal court in California has issued an injunction preventing the implementation of Federal rules regarding religious and moral exemptions for contraceptive coverage in health plans. Among the reasons cited by the court was that the moral exemption rule was not in accordance with the Patient Protection and Affordable Care Act (ACA) and that the regulatory agencies involved did not follow the Administrative Procedures Act when issuing the moral exemption. *California v. Health and Human Services* (S.D. Cal. 2019). This injunction is in effect in the states whose Attorney Generals challenged the rule. It may not be applicable in other states which did not join in the lawsuit.

Trends

Will California Law Drive Gender Diversity In Corporate Boards? California is such a big market and economic force that it has a huge influence in the U.S. economy and corporate practice. If California imposes consumer product restrictions, manufacturers comply – nationwide – so they can sell goods in California. California now requires all publically-traded corporations headquartered in the state to have at least three female members on their Board of Directors by 2021. (A number of European countries require a minimum 40% Board gender balance – either female or male.) Since so many corporate headquarters are in California, this may have a major effect on U.S. business, and have a "carry-over" effect pressuring other corporations to move in the same direction under increasing public attention to corporate equality. Or, will the law be voided? The U.S. Chamber of Commerce is mounting Constitutional Equal Protection and Commerce Clause and California Civil Rights Law sex discrimination objections. Will corporations move their headquarters to other states? California Governor Brown pointed out these possible problems with the law when it was passed by the Legislature. Stay tuned!

Litigation

PRIVACY

I Didn't Know Doesn't Work. A city's cell phone policy stated that all employee cell phone usage was automatically backed up on the city computer system with access by management. Use of personal cell phones for official business would connect them to the backup for all usage – unless one took special efforts to segregate personal from official. One employee's personal use included nude pictures of herself and others. This was then incorporated into the city computer backup system, and seen by managers. This triggered an investigation which also revealed evidence that she had also been working for another employer while on the clock for the city. She was fired. She filed a Fourth Amendment and privacy case, alleging warrantless search, and inadequate process. She claimed she did not know connecting her phone to the city system and using it for city purposes would create a backup record for all usage. The court ruled against her. The city usage policy was clear, connection to the city system and use for city purposes incorporated one's personal cell phone into the city system. The policy clearly warned about the automatic backup of all usage. So, there was no expectation of privacy; no warrantless search. The employee should have more carefully read the policy or made efforts to segregate her official and personal usage, before engaging in inappropriate content. *Smith v. City of Pelham* (N.D. Ala., 2019).

FALSE CLAIMS ACT

Walgreens Will Pay $209 Million For Intentional Insulin Overcharges – Whistleblowers Get 25%. Walgreens chain of pharmacies has agreed to pay $209.2 million to settle Federal charges that it deliberately adopted a scheme to overcharge the United States (Medicare, Medicaid and other insurance and benefit plans) multi-millions per year by over-dispensing insulin pens. The agreement also will pay much of the money to states which made Medicaid payments for these drugs. In this situation no consumers were short-changed. In fact, they received more insulin than needed. Walgreens over-dispensed, pushed large amounts of "unprescribed medically unnecessary insulin" and then charged the government programs. The violation was reported by two ethical Walgreens pharmacists. Under the False Claims Act, the Whistleblowers are entitled to receive up to 25% of the government's recovery, up to $25 million each for reporting the fraudulent activity. *Ex Rel Rhimi v. Walgreens Boots Alliance* (S.D. NY 2019).

DISCRIMINATION

SEX

Is Quid Pro Quo Sexual Harassment Also A Criminal Violation Of The Sexual Trafficing Victims Protection Act (TVPA)? – Weinstein Board of Directors Sued A plaintiff who was allegedly sexually assaulted by Harvey Weinstein sued the production company, naming members of the Board of Directors for having known of and fostered Weinstein's sexual predations, and thus authorizing his quid pro quo pressuring of women to engage in sexual activity as a condition of employment. The TVPA prohibits committing or fostering "sexual enticement, fraud, coercion for a commercial purpose." It creates civil liability and can be a federal crime. The plaintiff alleged that Weinstein, the company President, repeatedly sexually coerced, intimidated and assaulted her under threat of losing her employment, and wrecking her career. The court found there was a commercial purpose, since the company obtained employment services based on coerced sexual activity. The Board members were, or clearly should have been, aware of Weinstein's reputation and "propensity" for sexual coercion in many locations (interstate commerce). The Board failed to investigate, failed to control its executive's behaviors, and acquiesced and contributed to the sexual exploitation. The corporation also maintained other employees on its payroll whose role was to assist Weinstein by introducing, enticing and placing vulnerable women into "pretextual meetings" in hotel rooms which the staff had reason to know would result in quid pro quo sexual exploitation. All of this was corporate supported conduct. The Federal Sex Trafficking Act fit the situation and the corporation and Board could be liable. *Noble v. Weinstei*n (S.D. NY 2019). The TVPA has a longer statute of limitations than a Title VII sexual harassment case, and much more extensive damages.

AGE

Vague Disclosure Statement In Release Allows Laid Off Employees To Take Severance And Still File Suit
The Older Workers Benefit Protection Act (OWBPA) imposes several requirements in order for a Release of Liability to be effective in a severance agreement. One of these is a "disclosure statement" when a lay-off or reduction in force (RIF) effects more than one person. The statement is supposed to clearly inform as to the "affected group(s)," criteria for selecting who is laid off, and ages of those going and those staying. In *Ray v. AT&T, Inc.* (E.D. PA, 2019), a manager signed the RIF Separation and Release Agreement, and took the severance pay. Then she learned information to believe there had been age discrimination in the lay-off decision. She filed an ADEA suit, claiming that the Release was invalid. The court agreed, and allowed the suit to continue. The court ruled that the Disclosure Statement "was not understandable to the average worker" and thus failed to provide sufficient information to assess whether there was any indication of a pattern or practice of age discrimination. Among the flaws is the company's definition of Affected Groups as "The Combined Affected Groups," lumping in all employees in all units, rather than a unit-by-unit analysis, and "the pool from which the terminated employees were chosen was "the combined AWGs in the ADEA listing." The ADEA listing then defined the AWGs as being "comprised of positions at the same level with similar definable characteristics from which the surplus employees are selected," and stated that the AWGs may be "any portion of an organization, described in terms of level, job title, similar job functions, geography, lines of organization or other definable attributes based on needs of the business." The court found that this "vague and circuitous definition" seemed designed to deny the employees any meaningful information or understanding of the RIF. This case illustrates the importance of the Disclosure statement and giving it serious attention in any layoff. It is not a *pro forma* issue. One cannot use a "standard statement," one cannot just use the statement from the last layoff, nor from a RIF in some other company location (or borrow a copy from some other company). The statement requires time and effort and care to meet the requirements and avoid the results in this case.

Cat's Paw – Supervisor Intentionally Failed To Inform HR Of Reason For Employee's I-9 Defect-Discharge Is Discriminatory "Cat's Paw" is the term for when the actual formal decisionmaker is unaware of any malice or discriminatory motive, however another influential manager injects those wrongful elements, keeping them hidden, but strongly influencing the negative decision. Managers sometimes have "hidden agendas" when they present information to and put pressure upon HR to discharge employees. Then the company becomes liable for incorporating that manager's bias into the decision. This seems to be the case in *Chase v. Frontier Communications Corp.* (M. D. PA, 2019). A 66-year old former employee was rehired. She had previously used her married name. Now on the verge of divorce, she "felt independent" and began using her maiden name. She signed all documents using the maiden name. She clearly informed the supervisor of this divorce and change in name usage. In the first days of training, the supervisor made comments about her having been hired at such an age and allowed others to tease her about her age. She complained. Then an issue arose about a discrepancy in her I-9 documents – a name mismatch. The supervisor was asked to handle the matter (rather than it being done by HR). The employee said she would provide whatever was needed to clarify the married vs. maiden name issue but did not know when they were needed. The supervisor never informed HR of his advance knowledge of the new maiden name usage, or her offer to correct. He just said that the employee had not given clarifying information – and had given no date to do so. So HR proceeded to terminate the employment. The employee filed age and retaliation claims. The court found sufficient evidence that the supervisor's failure to share relevant information with HR about his knowledge and about the employee's willingness to correct the issue created a prima facie case of retaliation. A reasonable fact finder (jury) could conclude that this cat's paw caused the HR Manager's action to terminate, rather than allow correction of the problem.

DISABILITY

Deaf Driver Has Case A Coca-Cola distributor refused to place an employee into a delivery driver position due to his deafness. The employee obtained a Dept. of Transportation hearing exemption to operate commercial vehicles. He then passed all written and driving tests to obtain a Commercial Driver's License (CDL). However, he was not placed into a driving position. An HR representative told him that "Management does not want deaf people driving." So he filed an ADA complaint. The company's defense included the claim that there was no document regarding the reason for rejecting the employee, and the HR rep. was not the decision maker and his statement was a non-official stray comment. However, the HR rep. was not speaking in an official capacity; he was providing "inside information"

to the plaintiff regarding upper management's discriminatory reasons. This is valid evidence of the rationale of the actual decision maker. Thus, the case could proceed to a jury. *Grady v. Swipe Coca-Cola* (D. Col. 2019).

NATIONAL ORIGIN

Improper Questions – Was It Poor Interview Answers Or National Origin Supervisor's "curious" questions and improper notations in hiring are enough to mess up any valid decision, and place the whole process before a jury. *Saweress v. Ivey* (MD. Fla, 2019) is a Title VII and 42 USC 1983 and 1981 national origin/race discrimination case brought by a person of Egyptian origin, over not being hired for a deputy sheriff position. The employer claimed that the applicant did not adequately answer interview questions; a valid non-discriminatory defense. However, in the interview he was asked where he learned English. Another interviewer wrote "Egyptian" in the interview form comments section. Another note was on whether there may be "cultural differences." These references could be evidence that national origin or race improperly affected the decision, and were sufficient to cast doubt upon the employer's defense and forward the matter to a jury trial. The message is that the best designed processes can be undone by supervisors' curiosity, loose comments and careless inclusion of suspect factors. Those conducting interviews should receive training on proper and improper questions; a refresher before the actual interviews, and coordination with HR in validating questions and standards.

RELIGION

Hotel Dishwasher Awarded $21.5 Million For Failure To Accommodate Sabbath A dishwasher at a hotel restaurant-conference center stated, at time of hire, that her Soldiers of Christ Catholic missionary faith required her to do no work sunrise to sunset on Sundays. So the company accommodated. She was not required to work on Sundays. Then after a number of years her supervisor informed her that she would be scheduled for Sundays. When she traded shifts, a standard staff practice, to avoid Sundays, the supervisor reprimanded the person who took the shift and insisted that the employee work her own Sunday shifts. She continued to request accommodation and state her faith-based inability to work Sundays. She was then terminated due to unauthorized absences. She filed Title VII and State of Florida religious discrimination cases. A jury found that the company had fired the employee in violation of her religious rights and in retaliation for raising her protected rights. It awarded $600,000 in wages and emotional damages, and $21 million in punitive damages. The Title VII award will be reduced to meet the Federal "cap" on damages. The state case will allow greater damages to stand. *Pierre v. Park Hotels & Resorts* (Miami, FL, 2019).

LABOR ARBITRATION - PREFERENTIAL TREATMENT

Mayor Hits Light Pole – Officer Fired For Facebooking About It At 3:00 a.m. the Mayor smashed his truck into a city light pole. He received preferential treatment, no ticket, no test for alcohol, and was given a police ride home before a tow truck or the press showed up; not for the first time. A police officer who was not present, nor on duty, learned of the incident and she posted an anonymous Facebook message describing the incident and critical of the special treatment. This resulted in public attention and Open Record requests by the press. The Mayor was upset. He found out who made the Facebook post, and had a private meeting with the Police Chief, on a golf course. The Mayor demanded action. The Chief then proceeded to fire the officer. She grieved the discharge, and won. The U.S. Supreme Court (*Garcett v. Ceballus*) established that public employees retain their off-duty First Amendment rights – within limits. In this case the officer did not make the comments in her official capacity, she did not identify herself as an officer. There was no confidential information. There was no disparagement of groups of citizens (i.e., race, sex, religion, etc.). The comments were on a matter of serious public importance which outweighed any embarrassment to the Mayor or the Department's special handling of the incident. The officer was restored to duty with back pay. In *RE Grievant and City of Mission, TX* (2019).

Failure To Report Drunk Officer Justified A Suspension A police supervisor grieved his disciplinary suspension for his handling of the report about a fellow officer's drunken off-duty behavior at a local bar, while armed. The discipline was for the supervisor's (1) failure to respond appropriately to a call, (2) failure to have another officer check out the situation, (3) failure to talk to the off-duty officer to determine if there was reason for concern, and (4) failure to report the incident. The arbitrator concluded that the record supported the suspension. The officer violated his duty, and the penalty was appropriate. *City of Champaign and Illinois FOP Labor Council* (2019).