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Legislation & Administrative Actions

October Is Disability Employment Awareness Month The U.S. Dept. of Labor asks employers and labor organizations to use October to emphasize the rights of disabled workers, the benefits those employees bring to the workplace, to review policies and practices for effectiveness and give supervisory training.

New Salary Level Rules Finally Final The Dept. of Labor's new minimum pay for salaried-exempt employees will take effect January 1, 2020. The new minimum will be $684 per week or $35,568 annual salary. Up to 10% of the new minimum may consist of non-discretionary bonuses, commissions, incentives paid at least once a year to bring the pay to the minimum annual level. The new "highly compensated employee" exemption for certain non-salaried employees will be $107,432 per year. [For more information, see the article DOL Overtime Rule Has Arrived by Boardman & Clark.]

FAIR Act Would Ban Most Compulsory Arbitration The House Judiciary Committee passed the Forced Arbitration Injustice Repeal Act (FAIR Act) by a vote of 22 to 14. Introduced on February 28, the legislation would eliminate forced arbitration clauses as a pre-condition for obtaining a product, service, or job, in employment, consumer, and civil rights cases, but it would allow consumers and workers to agree to arbitration *after* a dispute occurs. Sponsor Jared Nadler (D. NY) states: "Private arbitration has been transformed from a voluntary forum for companies to resolve commercial disputes into a legal nightmare for millions of consumers, employees, and others who are forced into arbitration and are unable to enforce certain fundamental rights in court." Republicans oppose the bill. Rep. Doug Collins (R. GA) stated that: "Arbitration gives consumers a simpler, cheaper, and faster path to justice than does the judicial system."

Litigation

RESTRAINT OF TRADE

Conspiracy – Wage Fixing In Chicken Industry A class action lawsuit has been filed against 18 of the nation's largest chicken producers, alleging they have engaged in an anti-competitive conspiracy to artificially keep down wages of hundreds of thousands of poultry processing workers in plants which produce over 90% of all chickens sold in the U.S. The case is filed under the Sherman Antitrust Act. The companies allegedly shared wage information and reached agreements not to raise wages or benefits beyond what the others were paying, in order to keep wages depressed throughout the industry. The suit alleges that while productivity and company profits dramatically increased, the conspirators colluded to keep wages static to the detriment of all the employees. *Jien v. Perdue Farms, Inc., et al.* (D. Md., 2019).

DEFAMATION & PERSONAL LIABILITY - POST-EMPLOYMENT COMMENTS

Defamation And Tortious Interference – False References A neurosurgeon had a contentious relationship with her department chairman. She eventually left the hospital. Three years later she was conditionally offered a job at another hospital. Then it was withdrawn due to a bad reference from her former department chair. Among other

things, he told the prospective employer that the neurosurgeon had been fired, was unreliable, habitually late and had also been fired another time at a prior hospital. None of this was true. She sued the chairman personally and the medical center. In the ensuing depositions, the chairman admitted that some of his statements were false. The court found ample grounds for defamation and tortious interference with employment. It rejected the defendant's argument that the principle of Qualified Privilege should protect references. The court noted that Qualified Privilege requires "good faith" and truthfulness. False statements do not fit and are not protected. *Soni v. Wespiser* (D. Mass., 2019).

Employee Stays Fired – But Has Defamation Case A supervisor was discharged following a Human Resources investigation. Then after he was gone HR informed a number of other employees, vendors and customers, who had not been involved, of the alleged details of the investigation and reasons for discharge, including characterizations and rumors about his personal life, i.e., "unprofessional," "didn't care about his job," "bad attitude," "had multiple extramarital affairs," etc. He sued, alleging the investigation was a "sham" in order to fire him because of his age, and the post-discharge revelations were false and defamatory. The employer claimed it had non-age related reasons for discharge and the investigation results were protected by the Qualified Privilege. The court granted Summary Judgment, dismissing the Age case, due to insufficient evidence of an age-based motive. However, the defamation case seemed solid. Not only was much of the revealed information false, overblown, and not job-related, there was no reason to go beyond the discharge and inform other employees and third parties. The Qualified Privilege does protect an employer's ability to gather and use information, even if not always accurate. However, it requires good faith and confining that information to those who have a need to know. Publishing the information after the discharge served no legitimate purpose and removed the Qualified Privilege protection. *Kieftogiannis v. Inline Plastics, Inc. (D. Conn., 2019).*

INDEPENDENT CONTRACTORS – ARBITRATION

WARN Act – Another Challenge To Uber's Independent Contractor Model – Ten Thousand Driver Suit
Uber abruptly pulled out of Austin, Texas, without advance notice, leaving 10,000 of its drivers high and dry without work. Uber claims the drivers were Independent Contractors, with no rights. The drivers claim they should be classified as employees, and were entitled to 60 days' notice or pay under the WARN Act. Uber also claims that the Arbitration Agreement signed by each Independent Contractor would prevent any class action against it. Uber's claim of Independent Contractor/Non-Employee status was not automatically accepted. The case will proceed to determine "employee" status. Then if it is granted, the court will decide whether a class action can be brought, or whether each Warn Act claim must be individually arbitrated. *Johnson v. Uber Technologies, Inc.* (N.D. Cal., 2019). [The Federal courts have concentrated several Uber issues in this California court.] This is just the latest in a long series of challenges by Uber drivers claiming they are employees. Uber has lost a number of these, and paid hundreds of millions in liability under various employment laws. Uber's arbitration agreements have also resulted in problems and liability for the company [see the entry Contracts - Arbitration Bites Back, in the February, 2019 Update.]

In another contemporaneous case, the 3rd Circuit Court of Appeals has refused to enforce Uber's arbitration agreement for drivers engaged in interstate transportation (i.e., between New Jersey & New York). The Federal Arbitration Act may have an exclusion for employees engaged in interstate transport. So, if the drivers win their challenge to Independent Contractor status, they may also void their arbitration agreements. *Singh v. Uber Technologies, Inc.* (3rd Cir., 2019).

DISCRIMINATION

RELIGION

Police Dept. Should Have Allowed Beard A police captain took a medical leave. While on leave he intensified his Christian faith and grew a beard. He requested a religious exemption from the department's no-beard rule, citing "the strength that comes from wearing beards as set forth in the Bible." The request was denied and re-denied. The department did not discuss it with him, and provided no explanation. He was refused a return to work unless he shaved off the beard, and was placed on permanent "unfit for duty" status when he did not. The captain sued for violation of his First Amendment Constitutional rights. The court found ample evidence to support the case. It found a public employer's denial of religious requests is subject to scrutiny, and requires compelling evidence. The department had no evidence as to its reasoning. The department made beard exemptions for officers with medical conditions. It could not explain why a religious exemption would pose any problem which medical exemptions did not. It appeared to be an arbitrary denial. *Cunningham v. City of Shreveport* (W.D. La., 2019).

Church Organist Was Ecclesiastic Employee – Court Cites Mozart The Bishop of Chicago fired a parish organist. The organist sued claiming Title VII Polish national origin discrimination. The church claimed the "ecclesiastic/ministerial exemption" from Title VII coverage. The organist argued he had no faith-based duties, he "simply robotically" played music which was preselected. The court ruled for the church. It found that music is an integral part of worship and the organist is an essential part of the worship service and thus is within the ecclesiastic exemption. The judge cited the long history of musicians being subject to ecclesiastic decisions, referencing Mozart being fired by the Archbishop of Salzburg because of displeasure in his playing. The judge also opined that perhaps the organist warranted being discharged because he "simply robotically" played the music. *Sterlinski v. Catholic Bishop of Chicago* (7th Cir., 2018).

RACE

Baptist Football Coach Rejected Because Of His Jewish Mother Has Race Discrimination Case A Baptist college rejected an applicant for assistant football coach. The head coach had recruited him and recommended him. The applicant was a life-long Baptist and had played ball at a Baptist college and held prior coaching jobs. The college president then found out the applicant had a Christian father and Jewish mother. The president then informed the head coach he was rejecting the applicant "because of his Jewish heritage, which was not good for the college." The applicant sued under 42 U.S. Code §1981 for race discrimination. The court rejected the college's defenses that assistant football coach is an "ecclesiastic/ministerial" position, and that Jewish is not a race. 42 USC §1981 has always allowed racial discrimination cases to be filed on this basis. The law was passed in the 1800's when "Jews were considered to be a separate race," just as African-Americans, Native Americans and Asians, and were (and still too often are) routinely referred to as "the Jewish race." The courts have consistently allowed §1981 race discrimination cases by Jewish plaintiffs. *Bonadona v. Louisiana College* (W.D. La., 2019). 42 U.S. Code §1981 can be a more extensive remedy than Title VII. It does not have the "liability caps," it allows for more extensive damages, it allows suit of individuals in their personal capacity, with potential collection of damages from their personal assets.

Race-Based Counseling Assignments A Methadone treatment center will pay $110,000 to settle a racial discrimination case, over making race-based counseling assignments to accommodate White clients' preferences to not be assigned to Black counselors, and allowing White clients to use overt racial slurs and derogatory comments toward staff. In addition to the monetary payment, the center will cease race-based assignments and inform all clients that they can be suspended or dismissed from the treatment program for using racially offensive language or refusal to accept a counselor due to race. *EEOC v. Lexington Treatment Associates* (M.D. N.C., 2019).

Nurse's Reassignment In a similar case, a nursing supervisor reassigned an African-American nurse when a patient said she did not want "that Black b---" treating her. The nurse complained and HR replied that patients have a right to refuse care for any reason from any staff member. In the ensuing Title VII complaint, the court disagreed. The patient must have a "legitimate reason," and racial prejudice is not a legitimate reason, and should not be given effect by the employer, even for a short time. *Williams v. Beaumont Health Syst.* (E.D. Mich., 2019).

SEX

$200,000 For Illegal Pregnancy Policy A health care provider will pay $200,000 to settle a case over its handbook policy which provided that employment of caregivers would be terminated at the fifth month of pregnancy. It then did so, regardless of whether or not the employee could still effectively perform the job duties. This violated the Pregnancy Discrimination Act section of Title VII. *EEOC v. A Plus Care Solutions, Inc.* (W.D. Tenn., 2019).

Grabbing, Hugging CFO – Company Liable for Harassment, CFO Can Be Personally Liable For Assault And Battery Female employees sued a company and its Chief Financial Officer due to the CFO's lengthy pattern of grabbing them and pulling them into intense hugs which allegedly caused distress and some physical injury. Repeated demands to cease, complaints to HR and attempts to resist had no effect. The employees sued for sexual harassment and filed tort actions for assault and battery and resulting emotional distress. The CFO claimed he just "*intended to be friendly and express his caring for women.*" The court opined that the conduct could instead be seen as being for his own personal gratification, especially after the numerous objections and complaints. The behavior created a valid Title VII hostile environment harassment case against the company, and the CFO could be held personally liable for the state tort action for assault and battery. *Dao v. Fauston* (E.D. Va., 2019).

UNIFORMED SERVICES EMPLOYMENT, REEMPLOYMENT RESTORATION RIGHTS ACT

Perceived PTSD – Supervisors Stereotyped Fear Of Military Vets A retired Marine veteran was hired as a technician by Exxon, and sent to training for the job. The supervisor/trainer learned of the vet's active duty and started expressing concerns that vets have PTSD, and the ex-Marine "may freak out at any time," and come out and shoot people, and the "PTSD is a red flag" for instability. The supervisor/trainer spread rumors about the PTSD and shied away and provided only limited training. The veteran was then let go because he was "behind in training" and might be a "safety risk" – due to PTSD. The vet did not have PTSD, and had never been diagnosed with or treated for PTSD. The supervisor overreacted to his own illogical fears. The vet filed a USERRA case. Exxon claimed that USERRA does not cover disability or perceived disability. The court disagreed, finding USERRA covers discrimination based on military service and the PTSD stereotype was a discriminatory association with military service. Cain v. Exxon Mobile (E.D. La., 2019).