Labor & Employment Law Update

JANUARY 2020

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

Legislation & Administrative Issues

DOL Final Rule On What Is Includable In Regular Wage Rate – After 50 Years DOL has issued Final Rule (it issued preliminary Proposed Rule in March, 2019). They will become effective January 15, 2020, and clarifies the "regular rate" requirements. The Rule defines what form of non-dollar "payments" must be included – or can be excluded in calculating the regular wage and overtime pay. Non-dollar items include housing, wellness programs, health club memberships, non-ERISA benefits (legal services, discount clubs, tuition or educational reimbursement, employee discounts on company products, gifts, pay for unused vacation or sick leave, and more). Items employers often do not even think of as constituting "wages," until the DOL audits. The rule also covers pay for stand-by or call-in time, sign on bonuses and other actual paid dollars. The rule has not been revised for 50 years and no longer fit the 21st century. For more information see the HR Heads Up – DOL Issues Final Rule on Regular Rate by Boardman & Clark.

Workplace Violence Prevention For Health Care And Social Service Workers Act In a bi-partisan vote, the House passed HR1309 to address the growing number of injuries health and social service workers experience from patients, clients and the public. If passed in the Senate, the law will require OSHA to create standards for employers to follow to foster safety and to promptly report and address incidents of violence.

Litigation

TRENDS

BIOMETRICS

Biometric Data – Suit of Amazon Employers increasingly use biometrics, fingerprints, palm prints, facial recognition and eye scans, for clocking in, cell phone security, computer access, and a growing array of other uses. That biometric information must be stored somewhere, with access by the company, and who knows who else? Walmart has been sued over its handprint scan process for opening cash registers. *Roach, et al. v. Walmart, Inc.* (C. Ct. Cook Co. Ill., 2019). States are passing laws to set standards and give protection to employees. These laws can have an effect on employers far beyond the boundaries of the state. Facebook was sued in a California Federal Court under Illinois law. If you have just one employee in that state, a suit can challenge and force change of the entire biometric system – nationwide. That is happening. Illinois has one of the stronger Biometric Privacy Laws. Companies located in and operating in Illinois have been found liable under that law. Now, Amazon (not located in Illinois) is being sued in Illinois. Not for its own employees, but because it does the biometric information storage for companies operating in Illinois and allegedly is not in compliance, or ensuring those companies are in compliance, when it is taking and storing their data; especially the requirements for a variety of disclosures, knowing and clear employee consent, retention and destruction details.

Ragsdale v. Amazon Web Services (C. Ct. Cook Co., 2019). The suit seeks to make the storage provider responsible for assuring its customers are in compliance, as well as having its own proper practices. The suit has just commenced. Amazon is maintaining a vigorous defense, so the outcome is not at all clear. However, this is a caution regarding care in implementing biometrics, and clear warning that you do not have to be headquartered in a state to be subject to its laws. If you use one system for your data, then any connection with a state, one employee, may challenge and change your system and practices everywhere.

CANNABIS/CBD

CBD products are the new trend (oils, gummy bears, even CBD beer). CBD won the hottest new product of 2019 title, far outstripping all others. CBD is advertised as a "cure-all," which will not get you high and not show on a drug screening. It is totally unregulated, and is the new "snake oil" with some undependable – fly by night producers. Beware of what you buy.

Employee Stays Fired, But Can Sue CBD Oil Manufacturer For Failing Drug Test A truck driver tested positive for marijuana (THC), after having used CBD oil to relieve pain and inflammation from a car accident. The oil was extensively advertised as THC Free, and the driver sought reconfirmation of this via company brochures and a customer service consultation. When he was fired for the positive test he reordered more oil and sent it to a lab for analysis. The result was that the CBD oil contained sufficient THC to trigger a positive test. The employer is not required to revisit its testing; the trucker stayed fired. He sued the CBD oil manufacturer for false representation and under the Federal RICO Law for advertising and selling what it should have known to be an illegal, criminal product under Federal law, selling narcotics. The court held that this advertising was not just a "one-off" instance of "promotional puffery." Instead, it had the appearance of being a fundamental selling point in a well-orchestrated nationwide marketing campaign to induce public reliance. *Horn v. Medical Marijuana, Inc.* (W.D. NY, 2019).

SAFETY AND JOINT EMPLOYMENT

McDonald's Workers Sue Over Violent Customers Employees at 13 Chicago area McDonald's have sued their franchise owner and McDonald's national corporation under Illinois state law as joint employers. The issue is safety. Chicago area McDonald's in general average over 20 police-emergency service calls per day. Employees have been sexually groped, threatened, and assaulted by customers who jumped over the counter or otherwise got into the employee areas. The suit alleges McDonald's has failed to provide a safe work place, and has not corrected store design flaws which create unsafe security risks and dangerous conditions, and management has failed to act to address ongoing employee concerns. McDonald's National Corporation recently defeated a Joint-Employment FLSA claim in California because it had no control over and no role in locally-owned franchise stores hiring, firing or pay decisions. In this case, though, the plaintiffs allege that the National Corporation does indeed dictate the local store physical plans, counter heights, and is responsible for the security design flaws in all the locally-owned stores. The local store often has no choice except to follow the national standards. Thus, it should be considered a Joint Employer, responsible for the unsafe workplace. *Acura v. McDonald's Corp., et al.* (Cook Co. Ct., 2019).

DISCRIMINATION

EFFECTIVE DEFENSES FOLLOW-UP

The "Many Ex-Wives Defense" Didn't Work - $58 Million Verdict The December Update included the case of *Kahn v. Hologram USA and Alki David* (Cal. Superior Ct. – LA County) in which the defendant's main point was that he could not be a sexual harasser because he is "*a family man . . . who respects women*". . . including "*my many ex-wives*." The question was whether that defense would be effective. It was not. The jury proceeded to award $58 million in economic and punitive damages for sexual harassment and assault.

RELIGION

Christian Firefighter Has Case For Retaliation A firefighter complained that the behaviors of his co-workers created a hostile environment for his Christian morals. They openly watched pornography and engaged in having sexual affairs in the firehouse. He did not complain about anyone's off-duty morals or behaviors, only those behaviors

in the firehouse environment. The complaints did not result in changed behaviors, but did result in hostility by managers, and co-workers and disparagement of his religious beliefs. He was then fired in what he alleged were trumped up charges of time rule violations. He filed suit under Title VII and 42 USC §1983 for violation of his First Amendment religious rights and retaliation. The court found evidence that the Fire Chief had expressed displeasure about the firefighter's moral stand, and had stated that he was tired of hearing the complaints, prior to recommending the discharge. Thus, the discharge could have been pretext. *Hudson v. City of Highland Park* (6th Cir., 2019).

SEX

Burgers, Beer And $150,000 Bucks For Not Hiring Men A burger bar chain, Burgers & Beer, has settled an EEOC case regarding failure to hire men as servers. Over 90% of servers were female. The chain discouraged male applicants and when a male busser repeatedly tried to move up to waiter he was told that the owners "only wanted female servers, like Hooters." The company will pay affected applicants $150,000, change its job advertising, adopt quotas for hiring men, and gave anti-discrimination training to managers. *EEOC v. Burgers and Beer* (S.D. Cal., 2019).

The Mommy Track Five female attorneys at a large law firm will receive payments in a settlement of a sex discrimination case. The case demanded $200 million, but the actual settlement amount and details were not revealed. The case alleged that once an attorney became pregnant, she would be consigned to a "Mommy Track" that hindered pay, lowered advancement, and placed their employment in jeopardy. The case alleged the firm had an "old boys club" favoring men and childless women. The employer denied any discrimination in settlement of the case. *Doe v. Morrison and Foerster LLP* (N.D. Cal., 2019).

"Bro Culture" - $10 Million Settlement A video game company has settled a discrimination and sexual harassment class action filed by female employees. The case alleged the company had a "men-first" approach in hire, pay and promotion. Its work environment was a "Bro Culture" which fostered sexual harassment and demeaning treatment of women, including groping, overt sexual comments and allowing an ongoing sexually abusive e-mail campaign by male employees. The settlement will address unequal pay and harassment for current and former employees and independent contractors. *McCracken et al. v. Riot Games, et al.* (LA Co. Ct., Cal., 2019).

Locked In Freezer For Complaining Of Harassment Chipotle paid $95,000 to settle a case alleging that a restaurant worker was locked into a freezer in retaliation for complaining about being sexually harassed by his female manager. The employee claimed his manager overtly, repeatedly propositioned him, and sexually touched him. The manager also made sex talk an integral part of the environment, questioning employees on their sexual activity and frequency. Then she tracked their answers on a score board and demeaned those who had low scores, or refused to participate. Another worker complained about this to the manager's Director, who took no action, and did not report it to HR. When the employee complained, he was called into a meeting with the Director and the harassing manager, who yelled at him. She then continued the harassment and got co-workers to ostracize him. This culminated when he went into a freezer, and was locked in; his cries for help were ignored. He was able to find and open the emergency escape. He then filed Title VII harassment and retaliation charges. The EEOC brought the case. In addition to the $95,000 payment, the company will revise its policies to require all harassment complaints, verbal or written, be immediately reported to HR, and mangers will receive training, including that they will be fired if they do not properly report complaints. *EEOC v. Chipotle Mexican Grill, et al.* (D.C. N. Cal., 2019).

LABOR RELATIONS – FALSE CLAIMS ACT – BRIBERY

GM Sues Fiat Chrysler For Racketeering – Bribing Of Union To Get Better Contracts Usually employees sue companies over employment practices. Sometimes the union or the government files suit. It is unusual for another corporation to sue over the employment practices of its competitor. Fiat Chrysler Automobiles (FCA) and the UAW union have both been found to have engaged in a scheme in which the company paid millions in bribes to union officials in order to get very favorable Collective Bargaining Agreements. Several union officials and Fiat Chrysler executives have been convicted and are going to prison. Now GM has sued Fiat alleging that its illegal "Racketeer Influenced and Corrupt Organizations" (RICO) violations did great harm to GM, giving Fiat contracts GM could not get, and giving Fiat a huge competitive advantage in union concessions, wages, benefits, hiring and much more. *General Motors LLC v. FCA U.S. et al.* (ED Mich., 2019).

Shareholders Also Get In On The Act – Securities Action Fiat Chrysler Automobiles (FCA) shareholders have filed a class action suit under the securities laws over the FCA-UAW bribery scandal, naming both the company, its CEO and CFO personally. The suit alleges that FCA's false reports regarding legal compliance and hiding its wrongful acts and making false public promotions kept share prices artificially high. Once the Federal corruption investigation of FCA's employment practices was public, and there were convictions, the stock value dropped, causing significant loss to investors. *Kong, et al. v. Fiat Chrysler Automobiles, et al.* (E.D. NY, 2019).