Labor & Employment Law Update

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Justice Ginsburg – and a Major Shift in the Supreme Court. The passing of Justice Ruth Bader Ginsburg is mourned by the legal profession and millions of Americans. The press and journals have published many detailed articles and tributes and assessments far beyond what this Update could add to. However, the Employment Community should be aware that this will change the Supreme Court's balance to be more strongly conservative and the Court's upcoming decisions are now anticipated to make it easier to classify people as Independent Contractors; increase employee rights to have religious accommodations, creating a greater burden for employers in denying the accommodations; decrease other EEO protections, including women's ability to challenge unequal pay, based on prior salary history, in hiring or promotions; and placing the Affordable Care Act at more risk.

Legislation And Admininistration Actions

House Passes Pregnant Worker Accommodation Bill On September 17, 2020, by a bipartisan vote of 329 to 72, the House passed the Pregnant Worker Fairness Act which would require reasonable accommodation for pregnancy, childbirth, or related medical conditions. Currently, this is not a requirement of the Pregnancy Discrimination Act (part of Title VII). Several courts have interpreted the law to require accommodations similar to the ADA. However, other courts have not done so. Therefore, this law would clearly establish an accommodations requirement for employers. Since a large number of Republicans voted in favor of the bill, there is a good chance it will receive favorable attention in the Senate as well.

COVID-19

NLRB Warns Against Using COVID to Violate Labor Laws The NLRB General Counsel issued a warning that the agency will be closely scrutinizing businesses that may try to use the COVID pandemic as a cover to thwart union activity or discharge, furlough or lay off employees who support unions, or who protest wages or conditions of employment. The General Counsel cited instances in which lay offs and recalls seem to be heavily targeted toward those employees who had engaged in NLRA protected activities, or used COVID safety issues to selectively discharge people who were union supporters, yet ignore similar infractions by others.

JP Morgan Will Seek to Identify PPP Abuse. JP Morgan & Chase Co. has announced that it will be mounting an aggressive search to identify potential illegal activities by customers and its own staff for abuse or fraud in regard to the Federal COVID-19 stimulus funds. Any problems will be reported to Federal

authorities. This is part of a growing effort by government agencies and employers to pursue fraud and abuse of the stimulus funds.

Litigation

Criminal and Personal Liability

Bechtel Will Pay $58 Million for Overcharging the Government and Help Prosecute Its Own Employees Bechtel National Inc. and its subcontractors have agreed to pay $58 million for 10 years of overcharging the U.S. government and taxpayers for alleged wages paid for work on the Hanford radioactive waste treatment facility in Washington State. The Dept. of Energy alleged Bechtel engaged in a "massive scheme" to submit false wage reports in its use of craft workers. This settlement does not resolve ongoing criminal prosecution of the individual company managers who facilitated or participated in the false practice, and Bechtel has agreed to cooperate in this investigation and prosecution of its own employees. *United States v. Bechtel Corp. et al.* (E.D. Wash, 2020).

DISCRIMINATION

RACE

NRA Attorney Reports Arbitration Judge's Racial Bias Arbitration judges are often referred to as "Neutrals." In fact, the Judicial Arbitration and Mediation Services (JAMS), which decides many employment and business cases uses that term for its arbitrators and gives assurances they are unbiased. However, an attorney for the National Rifle Association (NRA) reported an arbitration judge for having sent racist email messages regarding the failed "Experiment of Integration and Equality" and "people from the jungles of Africa can never be integrated into White America," plus disparaging "Black inferior intellect." The judge did not apologize, claiming these were "private" emails to a group of friends and the NRA attorney, who was involved in a case he was hearing, was mistakenly sent the message. The "friends" included other JAMS arbitrators, who evidently did not report the racial comments. JAMS fired the arbitration judge. Then, the National Employment Lawyer Association demanded that JAMS review all employment cases that judge decided for evidence of discriminatory bias, and then rescreen all of its "Neutrals" and implement a more thorough vetting process in its selection of arbitrators. JAMS has issued a generic statement that it plans to make "firm commitments to do better in the future," but without providing any concrete details or specific plan of genuine intent to act. Also, the NRA has now sued JAMS, demanding it repay all costs and fees it has generated in the arbitration and having to find a new "Neutral" for its arbitration proceedings. *NLRA v. JAMS and Winston & Straus, LLP* (D.C. Superior Ct, 2020).

Wells Fargo Pays $7.8 Million for Racial Discrimination Settlement Wells Fargo Bank is a government contractor. The Office of Federal Contract Compliance (OFCCP) brought charges that the company had discriminated against some 34,000 Black job applicants. There was a significant disparity in the hiring of applicants, especially for Teller positions in banks across several states. The company agreed to pay the $7.8 Million in back pay to non-hired applicants and to revise its hiring process and be subject to ongoing monitoring (Dept. of Labor OFCCP Settlement, 2020).

RELIGION

Limits to Ecclesiastic Exemption – Church Is Not Immune to Harassment Charges Religious organizations have an immunity to suit for employment decisions in the hiring and firing of "ministerial" or "ecclesiastic" positions; those with faith-based functions. However, in *Demkovich v. St. Andrew the Apostle Parish* (7th Cir., 2020), the court ruled that this did not extend to a suit for ongoing harassment. The plaintiff, a church Music Director, alleged he was harassed due to being gay. The church requested

dismissal based on the employee's ministerial functions. However, the court ruled that the ecclesiastic exemption is not all encompassing. It covers tangible decisions such as hiring, firing, assignment and pay; it does not extend to hostile work environment claims based on protected EEO categories. The church could have fired the gay employee with impunity. However, it could not keep him employed and subject him to ongoing bullying and abuse by a supervisor. Keeping the Music Director employed indicated that the presence of a gay person was not anathema to the church's religious mission, thus not a ministerial decision issue. So, subjecting him to harassment seemed to be a non-ministerial based decision to simply engage in illegal harassment and abuse.

DISABILITY

Disability Is No Excuse For Positive Drug Test. The ADA protects employees from discrimination due to having a disability, but not always from behavior allegedly caused by the condition. A nurse came to work apparently impaired and was sent for a drug test. She tested positive for non-prescribed opioids. She was fired under the standard hospital policy. She sued under the ADA and FMLA, claiming she had psychiatric conditions which were responsible for her use of the drugs and an opiate addiction, and the hospital should have allowed FMLA as a reasonable accommodation to let her get treatment to solve the problem. The court rejected this argument. She violated an important hospital safety policy. She waited until after the test to inform the employer of her condition. She could identify no other similar employee who had not been fired after a positive test. *Iapichiro v. Hackensack Univ. Medical Center* (D. NJ, 2020).

Trade Secrets

High Rollers Are Trade Secrets A court has ordered a former casino executive to turn over his cell phone because it contained a list of the names and numbers of High Roller gamblers who spent large amounts. He went to work for another casino. The evidence showed that he then used the list to contact these frequent gamblers and entice them to come to his new premises. Some of these High Rollers ceased going to the former casino and switched to the executive's new location. The court ruled that the names and contact information were Trade Secrets wrongfully retained and taken by the former executive. Any monetary damages will be determined in future proceedings. *Marine District Development Co. v. AC Ocean Walk LLC* (D. Nev., 2020).

Labor Relations

Handbook Creates NLRA Unfair Labor Practice Under the NLRA, employees have rights to raise concerns and openly join together to discuss wages, hours and other work issues. An employer may not interfere with, curtail or "chill" these rights without risking an unfair labor practice charge. Overly restrictive Employee Handbook policies are often the focus of these charges. In *Stericycle Inc. and Teamsters Local 628*, the National Labor Relations Board found that the company handbook policies on conflict of interest and personal conduct were "overbroad" and violated employees' rights. The policies required employees to keep any harassment allegations confidential and from taking any actions "which could harm the company's reputation." The NLRB found this could result in discipline for complaining about wages and hours or discussing other working conditions among themselves, which are protected activities. Though a company may have a valid interest for keeping employees from harming its reputation with current or potential customers, there is not a legitimate interest for restricting what employees can say to each other.