Labor & Employment Law Update

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Legislation And Admininistration Actions

OSHA COVID Reporting Plan – Designed To Be Ineffective? OSHA has issued guidance that employers are required to report COVID hospitalizations if the employee caught the virus at work within the past 24 hours. There is no requirement to report hospitalizations which occur more than 24 hours after exposure. This guidance has received great criticism. COVID symptoms do not even start to appear for 2 to 14 days after exposure, so no one is likely to be hospitalized within the first 24 hours. The guidance seems to guarantee that employers will never have an incident which is required to be reported, and OSHA or employees in the workplace will not know if there has been a workplace exposure. The 24-hour hospitalization rule may work for standard accidents such as falls, electrocution, or being run over by a bulldozer, but not for COVID and will result in a great drop in COVID reporting. OSHA does require reporting COVID deaths which occurred within 30 days of exposure if determined to be due to workplace exposure. No report is needed if death occurs more than 30 days after exposure. This is a longer period, but again will miss the large percentage of cases which go beyond 30 days. Both forms of reporting require that the infection was contracted in the workplace. If there is a good faith doubt of where the person was exposed, then no reporting is required.

OSHA Has Assessed $1.2 Million in COVID Penalties in 2020 OSHA has issued citations this year to 85 employers due to complaints of violations in not implementing respiratory protections, safety plans or proper training, and collected $1.2 million in penalties. Most of these 85 citations involved nursing homes and medical facilities. OSHA has received over 4,500 complaints regarding COVID violations during 2020.

Litigation

Caution of the Month

Three cases this month are reminders that the costs of employment litigation are not just the standard awards of back pay, benefits, and consequential damages to successful plaintiffs. Employers also face significant costs in attorney fee awards, court costs, and other expenses of litigation which significantly add to and even exceed the traditional damage awards. Sometimes these are magnified due to ill-chosen tactics to unreasonably "stonewall" or obstruct the other party, perhaps in the hope the plaintiff will give up or settle cheaply when faced with having to overcome these roadblocks. Litigants should adopt a vigorous defense and explore all the legitimate procedural tactics available. However, unreasonably delaying, obstructing, or stonewalling can result in additional penalties, contempt citations and even personal liability for the company officials who engaged in or approved obstreperous tactics.

ARBITRATION COSTS

Company Claims It Can't Pay Union Attorney Fees For Unreasonable Delays In Arbitrations. A small security guard services company was ordered to pay the union's attorneys' fees of $51,000 because it had been "slow-walking" and "stonewalling" arbitration proceedings in an employment dispute. The company then filed an appeal of the award claiming it could not afford to pay that much and could be driven into bankruptcy. The Appellate Court rejected the appeal, ruling that the company's size and finances had been properly considered when determining the amount to award and the court "had ample reason to conclude it had the ability to pay." Further, the company officials could be individually held in contempt if the payment was not made. A contempt award may also not be dischargeable in bankruptcy and the company officers could be left personally liable. *Service Employees Int. Union v. Preeminent Protective Services, Inc*. (US Ct. of Appeal D.C. 2020). A number of bankruptcy courts in the US have discharged companies from liability, and then left the owners, officers, or directors personally on the hook for payment. [For more information, request the article Are You In the Crosshairs – Your Personal Liability For Employment Laws by Boardman & Clark.]

Company Can't Get Out of Paying $70 Million Fee For Arbitrations It Mandated Like a number of other companies, Postmates, Inc. required employees to sign Arbitration Agreements which forced them to give up rights to file employment disputes in Court and to waive any right to a class action. Each individual dispute would be arbitrated. The company was responsible to pay the arbitration filing fee. As several other companies have found, this "class action avoidance" strategy can backfire. When 5,200 employees simultaneously filed individual claims, the company was faced with far more expense than any class action would ever cost, over $10 million in just the fees due to the American Arbitration Association. It refused to pay and tried to get a court to allow it to back out of the agreement it had forced employees to sign, claiming it was unreasonable to have to pay so much in arbitration fees for what could more economically be turned into a sort of class action. The court rejected the company's argument and ordered the company to live up to its agreement for separate arbitrations. *Adams et al. v. Postmaster, Inc.* (9th Cir, 2020).

INDEPENDENT CONTRACTORS

Lyft Cited for "Pointless" Defense in Independent Contractor Case In a suit claiming Lyft drivers should be classified as employees, rather than Independent Contractors, Lyft claimed that California state law on Worker Classification violated the US Constitution's Contract Clause and would destroy hundreds of thousands of drivers' contracts. It requested dismissal of the case. The court ruled that the Federal Court had twice rejected the same argument and it was "pointless." The court also cited Lyft's "prolonged and brazen refusal to comply with the California law" and its "obstructive tactics." *California v. Lyft, Inc.* (Superior Ct. of CA, 2020). A week later, the court ruled in the state's favor and required both Lyft and Uber Technologies to reclassify their independent contractor drivers to employee status. This is just one of multiple cases against Lyft and Uber across the US. They have lost or settled most, paying hundreds of millions in back pay and benefits to independent contractors who should have been classified as employees.

Uber Sued For Intimidating Interference with Drivers' Political Rights Uber drivers filed suit to stop the company from sending them "inaccurate and threatening messages" in order to influence or coerce their vote for California Proposition 22, which would void the state law requiring them to be classified as employees instead of independent contractors. Uber and other similar companies initiated the proposition and Uber has spent over $188 million to promote it. The drivers claim that when they log on for driving, they are faced with targeted messages threatening that if the proposition is not passed, Uber will lay off or fire 70%, or even fire all drivers and probably not reinstate them for any future driving. The Uber tactic is claimed to violate the state law against employers' interference with the political rights and freedoms of employees by, among other things, wrongfully pressuring them to support a particular political position. *Valdez v. Uber Technologies, Inc.* (Cal Superior Ct., 2020).

COVID-19 – DUMBEST CASE OF THE MONTH

The federal government has shifted significant attention from the original efforts to implement the Coronavirus Aid Relief & Economic Security Act (CARES Act) to now pursuing misfeasance and fraud in collecting relief payments. This results in personal liability and criminal prosecutions.

Rappers Prosecuted For Video Boasting Most committers of fraud go to lengths to be secretive and cover their tracks. However, a rapper called Nuke Bizzle created a YouTube online video with a song, openly bragging about he and his group collecting over $1 million in false Unemployment Compensation COVID relief benefits, under several names and false addresses. The video features lines such as "unemployment is so sweet, we had 1.5 land this week." The video featured the group displaying envelopes from the California UC authority. The Federal agents zoomed in on the envelopes to read the names and addresses, and then followed up to find the recipients, the addresses, false names and then trace the actual payments to Nuke Bizzle and the other performers. Arrests were then made, and they are being prosecuted for fraud, identity theft, and interstate transport of stolen property (debit cards received from the UC authority). The group achieved their moment of fame. It turned out to be very brief, but may result in long sentences.

DISCRIMINATION

Man Cannot Maintain Pregnancy Suit A male employee filed suit under the Pregnancy Discrimination Act, part of the Title VII sex discrimination provisions. He alleged that he was harassed by his supervisor and suffered adverse employment decisions because of taking time off due to his wife's pregnancy and the birth of their child. The court dismissed the case, ruling that the Act protects employees who are pregnant, not all new parents, not employees whose spouses are pregnant. That is not a protected class under Title VII. *Van Soren v. Disney Streaming Services* (S.D. NY, 2020).

Marijuana Paraphernalia Defeats Sex Discrimination Two romantically involved Disneyland custodial employees had a falling out. They verbally argued through the day and sent upset texts. They engaged in a physical altercation at the end of the day. The female employee was fired; the male received a 15-day suspension. The female filed a sex discrimination case claiming that since she was "similarly situated" she should have received only suspension instead of discharge. The court, however, found the company had a valid reason for the different treatment. When the fight was broken up, marijuana paraphernalia was found on the female employee, in violation of the company drug policy. Further, the evidence showed that she was the instigator and aggressor in the altercation and had inflicted physical injuries upon her boyfriend, while she suffered no damage. The court found the two were not similarly situated because their respective misconduct was not the same. *Castro v. Walt Disney Parks U.S.* (Ct. App. CA, 2020).

Labor Relations

Union Officers Criminally Prosecuted For Accepting Bribes to Help Companies Avoid Being Unionized The president and 10 other Enterprise Association of Steamfitters Local 638 officials were indicted under the Taft-Hartley Act and state laws for taking bribes. They allegedly took thousands of dollars to assure the companies which paid would remain free from having to hire union labor. *United States v. Cahill, et al.* (S.D. NY 2020). The Dept. of Justice has not indicated whether charges will be brought against the companies which paid the bribes.

"Saliva Spewing Pickets" Create COVID Danger A New York development company is being picketed by a union over its hiring of a non-union contractor to handle work in a major demolition and redevelopment project. The development firm has filed suit against the union for engaging in a campaign to not only harass but to "terrorize" those outside its offices, mostly "unsuspecting neutral" visitors,

innocent bystanders, or passers-by. The suit alleges that the pickets aggressively patrolled the very narrow city sidewalk without wearing masks or distancing and engaged in "saliva spewing" yelling, blowing of ear-piercing whistles and "blowing spit over the public." This is not an unfair labor practice case filed with the NLRB. Instead, it is a public nuisance/safety case alleging violation of New York's rules to combat spread of the COVID virus. *SL Green Realty Corp. v. Construction General Building Laborers Local 79* (S.D. NY, 2020).