BoardmanClark

Labor & Employment Law Update

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Legislation And Admininistration Actions

Record Year For Whistleblower Awards The Securities and Exchange Commission announced that fiscal year 2020 (Oct. 2019 through Sept. 2020) has been a record year - $175 million for Whistleblower awards. The SEC made $37 million in awards in just the last week of the fiscal year. Then, in October 2020, it made an award of $114 million to one whistleblower who reported corporate wrong-doing; the largest award ever made. The SEC is just one of the agencies which have Whistleblower protections and awards. The False Claims Act is a major law encouraging the reporting of fraud and misfeasance in use of federal funds for health care, defense contracting, etc. In October 2020, the U.S. Dept. of Justice awarded $2.7 million to a former Chief Compliance Officer of Merit Medical Systems who was forced out after repeated efforts to get attention to cure violations of Federal rules. The whistleblower complaint resulted in an $18 million recovery by the government and the taxpayers.

Litigation

COVID-19

Tyson Suspends Managers Who Organized Betting Pool on How Many Plant Employees Would Catch COVID Tyson Foods has suspended several managers in charge of an Iowa meat or chicken processing plant for allowing unsafe conditions and for organizing a management betting pool on how many workers would contract COVID-19 as it spread through the plant because they knew the plant was unsafe. Management ignored pleas from the local sheriff and health department to close the plant due to unsafe COVID conditions which were spreading the disease into the community. Over 1,000 plant employees became COVID infected and several died. (Plus, numerous secondary infections of family and community members.) The betting pool came to light after suits were filed over the situation. The cases alleged intentional disregard of safety; lying to employees about being in a COVID-free facility even after 12 employees were in ICU and, ordering known exposed and infected employees to continue working on shoulder-to-shoulder processing lines with others. The company retained an independent legal team led by former U.S. Attorney General Eric Holder to come in and investigate the situation. The suits for gross negligence, intentional disregard and fraudulent representation are continuing. *Buljic, et al. v. Tyson Foods, et al.,* and *Fernandez v. Tyson Foods, et al.* (N.D. Iowa, 2020)

Federal Judge Weighs In On COVID Masks, Father-In-Law and Courthouse Food. U.S. District Court Judge William Ray laid down the COVID protocols for jury trials in the Northern District of Georgia. Masks will be required at all times "except when it is your turn to speak." Anyone who expresses an anti-

mask opinion will be barred from the jury pool. The judge stated that his own father-in-law is an anti-masker and will not be allowed on court premises. Finally, the judge is scheduling trials without a lunch break in order to keep jurors from eating maskless and spreading the virus. Trials will have two 20-minute breaks, skip lunch, and end early each day. The judge said, about the court-provided lunc*hes,* "Once they get ahold of what we serve them, they might not think that eating lunch is a great option." The court has been in consultation with virus experts at Emory University in setting its protocols.

Independent Contractors

One Law Is Not All For Pet Sitters – The FLSA Is Just One Of Many Standards Most of the attention regarding whether a person is an "Independent Contractor" or an employee who is owed wages and overtime, has focused on the Fair Labor Standards Act, the DOL's six-factor test, and new DOL's proposed rules seeking to clarify and ease the standards. However, this is not the only law at play. The IRS also has its own and different 20-Factor Test (122 factors counting all the sub-parts). In *Pet Sitting, Inc. v. Div. of Employment Security* (MO, 2020) a court found that pet sitters who contracted with a placement service were employees under the IRS 20 factor test, and did not consider the FLSA standards at all. Be aware that people sometimes pass muster as Independent Contractors under one law yet are still found to be employees under a different law, with a different agency demanding the "employer" now pay back taxes, fees and other liabilities. This is especially so with state agencies which do not feel bound by the FLSA and are happy to collect taxes and fees by finding employment status. Besides the Dept. of Labor's FLSA rules, there are also the IRS, state Unemployment Compensation Divisions, Workers Compensation Departments, state tax/revenue agencies, and Equal Employment Opportunity agencies, all of which may have their own standards; all of which must be considered when deciding to use Independent Contractors.

DISCRIMINATION

PROCEDURES

No Limit The statute of limitations for filing a complaint with the EEOC is 300 days. However, it seems there is no limit on how long the EEOC can then take to file a suit against the employer. In *EEOC v. LogisticCare Solutions, LLC* (D. AZ, 2020), the EEOC took seven (7) years to actually pursue filing a suit after the original complaint was filed with it. The defendant company requested dismissal due to the unreasonable delay, claiming the delay had harmed its ability to defend, or even produce witnesses who still remembered anything about the original timeframe. The court rejected these arguments. The employer clearly knew the complaint had been filed and was still outstanding – unresolved – unclosed. So, it had the opportunity to preserve evidence at the time. The company could produce no substantial actual evidence to back its claim of unfair detriment. So once the complaint was made, the EEOC had "forever" to decide to actually file in court. This case is a warning to employers to preserve evidence while it is fresh and to heed the EEOC rule about preserving employment records for "one year or until formal resolution of a complaint."

DISABILITY

Employers Not Required to Void Merit System to Accommodate Disabled Employee A Market Director for Lowe's had a knee condition which prevented him from performing essential functions of his job, including travel to multiple stores and walking in stores more than up to 4 hours a day. Several attempted accommodations did not enable him to do the job. He was offered a management position he could perform but rejected it due to lesser pay. Instead, he demanded to be placed into an open key management position which paid as much or more than his current job. The employer said he could apply and be considered, but then he was not the successful applicant. He sued, claiming that the ADA mandated that a disabled employee is entitled to automatically be placed into an open position, without competition,

ahead of others who might be interested in applying for the job. The EEOC filed an amicus brief in support of this position. The court rejected these arguments. It ruled that the company had a long standing merit-based system for selecting key management positions from among the best qualified applicants. The ADA does not pre-empt valid merit-based selection systems, seniority systems, etc., to give a disabled person "super rights" over other qualified or even better qualified people. The ADA's provisions regarding placing people into open positions they can perform is not an absolute mandate which overrides other legitimate non-discriminatory company practices. *Ellege v. Lowe's Home Centers, LLC* (4th Cir, 2020). .

RACE

Department Store Settles Promotion Dillards Department Stores has agreed to settle a case alleging that it avoided promoting qualified Black employees to management positions in its stores across the southern states and avoided selecting non-White college students for management internships. It failed to post notices of promotion opportunities and allegedly just placed less qualified White employees into the jobs, often having the more qualified Black subordinates then train them. The company will pay $1 million to affected present and past employees and change its practices. *EEOC v. Dillards, Inc.* (E.D. Ark, 2020).

SEX

"Working Security Is Not Proper For Pregnant Women" A security guard was promoted to supervisor over security for a massive highway tunnel construction project under Seattle due to her excellent performance. Then she announced that she was pregnant. Her manager then said he thought "working security is not proper for pregnant women." She was demoted. Then her doctor advised her to stop work due to complications. She took FMLA. When this restriction was lifted, still within the 12-week FMLA period, the company refused to let her return. It said she would have to reapply for employment. But then it marked her personnel file as "ineligible for rehire" and she was unable to reapply – ever. The EEOC pursued the case under the Pregnancy Discrimination Act and FMLA, for failure to accommodate the pregnancy and failure to restore her to her position under the FMLA. The company will pay $375,000 to the former employee. *EEOC v. Oatridge Security Group, Inc.* (W.D. WA, 2020).

Male Firefighters Foul Female Living Area The city of Houston has settled a case of "egregious" sexual harassment. Male firefighters in one location allegedly decided they would not tolerate women firefighters and would get rid of them. They engaged in a prolonged pattern of abuse including overtly hostile comments and repeatedly "befouling" the women's living/sleeping area with trash, sexual graffiti and even urine. When the women's complaints resulted in an internal investigation, they received death threats and even more trash and hateful graffiti to their living space. The female employees quit and complained to the U.S. Dept. of Justice. The city will pay $227,000 back pay plus other damages. There are no details as to whether or not any action was taken to discipline the male perpetrators. *U.S. Dept. of Justice v. City of Housto*n (S.D. TX, 2020).

EQUAL PAY

Be Careful In Mergers Yale University has settled an equal pay charge regarding female doctors receiving less pay than men for the same work. Yale acquired another hospital and clinic operation and merged it into its Yale-New Haven Hospital Systems. In doing so, Yale did not properly assess the existing pay of the several female doctors in comparison to what it was paying already employed male doctors, nor assign them to the faculty category which represented their actual work. The settlement results in back pay and raising the female doctors to the proper pay level. (OFCCP settlement, 2020.) This is a good caution about mergers or purchases of other companies. It is not sufficient to just continue the newly acquired employees under their "usual" wages and conditions. They are now part of a different employer and can raise rights to have equal pay, benefits, etc. Also, if the acquisition brings in higher-paid employees,

then your existing employees may point to them as comparators and claim that their wages should now be raised to match. So, careful assessment should be done before everything comes together.

Fair Labor Standards Act

Court Rejects Settlement Settlement of a suit must be approved by the court before the parties can proceed to pay the agreed upon amounts and end the case. Recently, courts seem to be more closely examining whether the settlement is actually in the best interest of the class of plaintiffs, rather than in the interest of the attorney in collecting the legal fee awards.

"Sweetheart Deal" Rejected In Wage Case In *Monplaisar et al. v. Integrated Technologies & ITG Communications, LLC* (N.D. Cal, 2020), the court rejected the proposed settlement over wage payments and other labor law violations to a large number of cable installers. The judge, in a strongly worded opinion, found the payments to be received by the actual workers was inadequate; a "slim recovery." However, the settlement would still pay the attorneys for the class "$1.5 million, an extraordinary amount" and "a steal for class counsel." The court would "not bless counsel's sweetheart deal." The attorneys for both sides were ordered to renegotiate or proceed to litigate the issues.

Labor Relations

The Resurgent Rodent-NLRB Asks For Public Comment Perhaps the most persistent item of NLRB contention has been Scabby The Rat, a giant, 35-foot inflatable rat. Scabby has made appearances for many years at strikes and union protests throughout the U.S. He sometimes appears with a giant cockroach companion. Scabby draws a lot of public attention to the dispute and is universally disliked by the employers at issue and by others who are affected by secondary boycotts. Thus, the focus of repeated cases attempting to ban him. The current NLRB has engaged in efforts to declare Scabby a public safety/traffic hazard, etc. This time, the issue is an appeal of an NLRB Administrative Law Judge's ruling that allowed Scabby to be displayed outside the entrance to a trade show at which a union was protesting one of the exhibitors "harboring of rat contractors." The Board has asked for amicus briefs by any interested party to help it consider how to balance between a union's right to protest, and unduly interfering with other non-direct parties in secondary protests. In *Re IUOE #150 and Lippert Components, Inc.* (NLRB, 2020).