Labor & Employment Law Update

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Legislation & Administrative Issues

Fair Chance Act – Criminal Background, Ban The Box For Federal Contractors The Fair Chance Act will prohibit Federal contractors from asking applicants about conviction records in the initial stages of the hiring process, starting in 2021. Records may be checked after a conditional offer of employment. The Act has exceptions for jobs where such record checks are required by other laws, or by the contract, such as for law enforcement, national security, etc. The Act does not cover the contractor's positions which are not engaged in contract-related work

DOL Issues FLSA Joint Employment Rules In January, 2020, the Dept. of Labor issued its Final Rule regarding whether two entities are considered a Joint Employer under the Fair Labor Standards Act. The rules provide a four-factor test for assessing Joint Employer status for wages and hours. Does the entity in question:

- hire or fire the employee;
- supervise and control the employee's work schedule or conditions of employment to a substantial degree;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records

All four do not have to be met and are not exclusive. The rules recognize that other factors may also be considered in some industries or situations. The rules are for FLSA. They do not address whether Joint Employment liability may exist under the FMLA, NLRA, ERISA, OSHA, EEO laws, migrant labor laws or other employment laws (see following McDonald's case note).

Litigation

JOINT EMPLOYMENT

McDonald's Takes Opposite Position – Tries To Have It Both Ways McDonald's USA Corp. recently won a major FLSA decision, holding that it was not a Joint Employer responsible for the wage practices of its locally owned franchises. *Salazar v. McDonald's Corp.* (9th Cir., 2019). McDonald's USA strongly argued it was completely separate from the franchise operations. Now McDonald's seems to be making the opposite argument. *Turner v. McDonald's USA, et al.* (N.D. Ill., 2020) challenges McDonald USA's no-poaching provisions it required to be included in the franchise agreements, which prohibited the various McDonald's locally owned franchises from hiring workers who had worked for other McDonald's franchises. This limited workers from being able to go elsewhere and arguably helped depress wages. In this case McDonald's has argued that the national corporation and all the various local franchises constitute a "singled brand" with a unified market for employees. Thus, it is essentially one operation which should be able to control the movement of labor within that operation. (McDonald's has since ceased to impose the

no-poach requirements. The Dept. of Justice has recently taken a more active approach in challenging these "industry collusion-restraint of trade" practices.)

WORKERS COMPENSATION

Employer Must Pay For Worker's Marijuana A work-related injury resulted in chronic pain for which the employee's doctor prescribed marijuana, which is legal under New Jersey's medical marijuana law. The Workers Compensation Division ordered the employer to reimburse the employee for all treatment and medication, including the ongoing marijuana use. The employer appealed, claiming the Order would cause it to violate the Federal Controlled Substance Law and/or force it to aid and abet the employee's violation of that criminal law. Further, the employer argued that the New Jersey law exempted health insurance providers from having to cover medical marijuana. The Court rejected these arguments. Workers Compensation is not a standard health insurance plan (which usually will not cover work injuries); it is a state mandated program. The Order did not require the employer to manufacture, possess, sell, or even purchase a substance as prohibited by the federal law – only to reimburse someone else. Similarly, the reimbursement was not voluntarily "seeking" to procure marijuana as prohibited by Federal law; it was under a state Order. So, there were no grounds to refuse to reimburse the marijuana prescription. The employee's condition was deemed to be permanent; so the employer may have years of WC marijuana reimbursement obligation.

DISCRIMINATION

SEX

WNBA Players' Contract Boosts Pay and Benefits The players' new contract with the Women's National Basketball Association is another step toward fairer pay and conditions – though still a long way from any parity. The contract will boost base pay by 30% (still only $130,000 on average for the professional athletes) and increase benefits, including paid leaves and more reasonable travel support and conditions, such as single hotel rooms instead of two or more players crammed into one room.

Title VII and Equal Pay Act Can Have Different Standards Sex discrimination in pay can be challenged in more than one way. The Equal Pay Act prohibits unequal pay for doing substantially the same work. One must identify people of the other gender being paid more for the same jobs. In *Lenzi v. Systemax Inc*. (2nd Cir, 2020), however, the Court pointed out that Title VII just requires a showing that pay was set on a discriminatory basis, even though the jobs may be very different. A Vice President of Risk Management alleged in a Title VII claim that she was paid less than male executives doing other sorts of work. The Court rejected the company's argument that she must show a "same work" comparison as under the EPA. The two laws are different. Title VII prohibits using gender to set wages in any job, such as creating a class of low wage and duty jobs for women, and higher wage and duty jobs for men, or setting different pay for "comparable worth" jobs, based on gender of the incumbents. In this case, there was evidence the company intended to underpay the VP because she was female. The evidence also showed the company paid her under the market rate for her position and experience, yet paid the male VPs, who had less experience, consistently above the market rate. [The EPA is a sex discrimination law and only applies to unequal pay due to gender. Title VII covers a broader scope and can cover pay inequity based on religion, race, national origin as well.]

RACE

Staffing Agency Sues Client For Race Discrimination Against the Placed Workers A staffing agency filed a 42 U.S. Code § 1981 case against a hospital it alleged engaged in racial discrimination by asking the agency to place Hispanic workers and not African Americans. The hospital allegedly rejected workers sent by the agency based on race and instructed the placement agency that it "preferred Hispanic employees." The agency claimed this placed it into a position to have to discriminate against its workers and was an interference to its staffing/placement contract. The Court rejected the defense that the staffing agency itself must have a corporate "racial identity," like an individual plaintiff, in order to bring a case. It was sufficient that the agency's contract and operations were impacted due to the racial discrimination against the employees it recruited and placed. *White Glove Staffing, Inc. v. Methodist Hospitals* (5th Cir., 2020).

RELIGION

Alternative Position Opportunity Was Adequate Sabbath Accommodation A Seventh Day Adventist Walmart employee took a job as Assistant Manager, then informed the store that he could not work on his Saturday Sabbath – the busiest sales day of the week. Walmart withdrew the promotion. It did provide the employee with alternative supervisory position opportunities which could avoid Saturday work. He declined, since they paid less, and he insisted on being accommodated in the Assistant Manager position, with Saturday Sabbaths off. Walmart refused. The employee filed a Title VII claim and the EEOC brought suit. The Court found in Walmart's favor. The Assistant Manager's routine absences on major sales days created an undue hardship for the store. Walmart did engage in an interactive process to consider accommodations and offered alternatives which would address the Saturday Sabbath issue and enable the employee to observe his Sabbath. Title VII does not require the accommodation the employee desires and does not require one "that spares the employee any cost whatever." So, even though less pay, the alternative positions would have been valid accommodations and the employee's refusal to consider them voided his case. *EEOC v. Walmart Stores East LP* (W.D. Wisc., 2020).

LABOR RELATIONS

Retaliation by Investigation The Federal Court upheld the NLRB's decision that a hospital retaliated against a long-term nurse for her active support of a successful union organization effort. There was evidence the management had animosity toward the nurse due to her active pro-union role. It began an investigation of the nurse the day after the successful vote for union representation and then fired her for alleged errors. The timing of the investigation itself was highly suspicious and created a presumption of retaliation. Evidence showed the supposed errors did not violate any hospital policy or protocol and that other nurses engaged in the same errors and no one else had ever been "investigated" or suffered any discipline or other consequences for those errors. The NLRB found an Unfair Labor Practice and ordered restitution and back pay. The hospital appealed and the Court upheld the NLRB decision. *DHSC LLC v. NLRB* (D.C., DC, 2020).

Marijuana Workers Unionize In another sign that the marijuana industry has "arrived," the United Food and Commercial Workers are actively organizing cannabis workers. UFCW entered into contracts with Vireo/MaryMed and Cresco Labs for employees in marijuana products, processing and manufacturing plants. The UFCW has implemented an aggressive Cannabis Workers Rising Initiative with the goal of fostering thousands of well paying, new middle-class union jobs.