
# Labor & Employment Law Update

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## Legislation & Administrative Issues

***EEOC Publishes Case Filing Data*** The EEOC has released the figures on complaints it received in 2019, and, as usual, Retaliation cases lead the list (53% of all charges) followed by Disability (33%), Race/Color (37%), Sex (32%), Age (21%), National origin (10%), Religion (4%), Equal Pay Act (1.5%), GINA (0.3%). This adds up to more than 100% because many cases allege more than one basis of discrimination (ie. Sex and Retaliation; Age, Disability and GINA). This is only a report on filings and does not provide information on outcomes.

***EEOC Gets $22 Million In Settlements in First Month*** The EEOC announced it procured over $22 million in settling 16 cases in just the first 20 days of 2020. ("20 by 2020") The largest was with Jackson National Life Insurance to settle a race and sex class action case regarding wage rates and hostile, offensive comments. The second largest was with Fidelity Home Energy in which EEOC alleged a telemarketing manager of Afghan origin was directed to avoid soliciting customers of Mid-East and Indian origin, and to place them on a "No call" list.

## Litigation

### STRANGEST CASE OF THE MONTH

#### STRANGEST PROSECUTION

***Attorneys Conceal Death of Client For A Year*** A fired Fire Chief sued the city for violating his due process rights. The Circuit Court ruled against him, so he appealed to the next level. Unfortunately, he died soon thereafter. However, his two attorneys continued the appeal, without informing the Court. They continued to seek back pay, damages and fees. They continued briefings and arguing the case. They also failed to substitute-in an executor of the estate or other party to stand in for any damages (the back pay claim would probably cease) and missed any deadline to do so. So they kept it secret until it was time for oral arguments in the Court and the plaintiff was supposed to be present. The concealment then came to light. The Court dismissed the case due to the lack of a viable plaintiff. It cited the two attorneys for "inexcusably hiding their client's death" and reported them to the proper Ethics/Licensing agency for sanctions. *Murenette v. City of Canandaigua* (2nd Cir., 2020)

#### STRANGEST DEFEENSE

***Marijuana Company Defends FLSA Suit by Claiming its Employees are Illegal Criminal Drug Traffickers*** A marijuana industry company, operating under Colorado state Marijuana laws, was sued by employees for not paying overtime as required by the Federal FLSA. The company defended by claiming the FLSA could not be applied to it because it was an "illegal operation" under Federal law. The company argued that marijuana is an illegal drug under the Federal Controlled Substance Act. Federal Employment Laws, the FLSA, do not apply to criminal activities, so their employees were "*illegal criminal drug traffickers*". "Congress did not intend to

guarantee minimum wages and overtime for individuals who traffic Schedule 1 drugs", so their people do not meet the definition of "Employees" under the Federal FLSA. The Court rejected this defense, finding nothing in Congressional intent which would exempt a business, legal in a given state, from the law's coverage. *Kennedy et al v. Helix TSC* (10th Cir., 2020) The company perhaps should have done its historical research. Al Capone was convicted and went to prison for violating the Federal Income Tax laws; not reporting the income from his illegal activities. The Federal law certainly applied to his illegal business and continues to apply today.

## ARBITRATION

***Court Criticizes Company's "Hypocrisy", As Arbitration Bites Back*** Ever since the Supreme Court ruled in the *Epic Systems* case that a company can force employees to give up class action rights and be compelled to individually arbitrate disputes, things have taken some turns that cause employers to rethink that "win". Several companies which thought arbitration would curtail employees' rights and eliminate a lot of challenges – just too hard for each individual to take on the company on their own – are defending thousands of individual cases and paying far more in arbitration fees than in any class actions. DoorDash, Inc. tried to petition the Court to allow it out of the Arbitration agreement it had forced upon all employees. It had 5,010 employees file individual claims with the same wage payment and overtime issues. So it wants to consolidate them into one class action. The court rejected this "hypocrisy", ruling: "Employers have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them, too, thus taking away their ability to join collectively to vindicate common rights". "The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of filing fees it agreed to pay in the arbitration clause... Instead, in irony upon irony, DoorDash now wishes to resort to a classwide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed by the court." *Abernathy et al v. DoorDash, Inc.* (N.D. Cal., 2020)

## DISCRIMINATION

### AGE

***Self Assessment Is Not Evidence – Airline Employee Case Will Not Fly*** An airline Senior Analyst claimed she was fired due to age discrimination after seven months of employment. However, she could not overcome the company's defense that she had poor performance. It presented tangible evidence of missed deadlines, numerous errors, incomplete work and lack of attention to detail. The Analyst claimed that her work was satisfactory and not defective. However, she offered no tangible evidence except her own self-evaluation of her performance. Her opinion was not valid evidence and could not be used to refute the defense. Nor could she produce evidence of any younger employees who had similar errors, incompleteness, etc. and were not fired. The court granted summary judgement dismissing the case. *Gibson v. JetBlue Airways Corp.* (M.D. Fla., 2020)

***EEOC Sues Yale Hospital Over Making 70 Year Old Doctors Take Special Tests*** The EEOC has sued Yale University Hospital over its Late Career Practice Policy in which medical professionals age 70 and older are required to take neuropsychological and eye exams to continue practicing there. Yale claims it is to protect patients from potential harm. However, no one else is required to take such exams. Further, the exams have not seemed to weed out any harmful older doctors; they are given without any indication that the person has any problems or deficiencies, but just because of their age. There are undoubtedly younger medical professionals who do have deficiencies and may be of potential or actual harm to patients – yet there is no exam required for them. The EEOC claims the exams do not focus on potential harm and do not treat people equally based on any valid criteria – just a discriminatory focus on age. *EEOC v. Yale New Haven Hospital* (D.C. Conn., 2020)

### DISABILITY

***Inability To Do One Job Is Not a Disability*** An employee claimed that his migraines were caused by his specific job's stressful condition and supervision and were disabling. He requested the accommodation of transfer to another position. This was denied. He was eventually discharged for under performance. He filed an ADA suit. The court ruled that inability to perform one position does not constitute a substantial limitation of the "major life activity of working". One must show inability on a "broad range of jobs" to prove a disability. The court dismissed the case. *Woolf v. Strada and Bloomberg LP* (2nd Cir., 2020) [Be aware that the standard under some state disability laws, such as Wisconsin's, is different. State laws may define a disability as having a condition which seriously impairs the ability to perform that one specific job.]

## RACE

***Burger Chain Hid Evidence of Hiring Discrimination – Reject any Non-White sounding names*** In the case of *EEOC v. Whataburger Restaurants* LLC (N.D. Cal., 2020) the EEOC has filed for sanctions against the burger chain for withholding evidence. After the discovery period passed, emails and other documents surfaced which indicate that the company's management was not truthful when it claimed to have no racially discriminatory hiring. The documents support the claims of a whistleblowing manager who was instructed to review names on applications and select only applications with "names that sounded White". Then to hire only White people if any minority people made it through the "Name Screening". The manager, who was White, ignored the instruction and selected the most qualified applicants regardless of race or national origin, including a number of non-White hires. This resulted in retaliation, including transfer to night shift, denial of days off and verbal abuse by her manager. She quit and filed the EEOC complaint. The EEOC is pursuing the race and retaliation suit. Whataburger is contesting the issue. It strongly denies it based hiring on racial dynamics. It claims the documents at issue are not really relevant to this particular case and did not show any retaliation against the manager.

## FAIR LABOR STANDARDS ACT

***Toilet Techs Get $7 Million From Port-A-Potty Provider*** A port-a-potty company with the name of Call-A-Head will pay over $7 million to settle a suit over unpaid wages and overtime. The case was brought by a class of Portable Toilet Service Technicians who deliver, clean and repair the port-a-pottys. The company paid only for a set number of hours a day, even when more was worked. Techs routinely were ordered to work through meal breaks without pay. The company allegedly did not correct when notified, and continued the practices. The company agreed to settle and pay the $7 million with no admission of violations. *Vargas v. Howard d/b/a Call-A-Head.* (S.D. NY, 2020)

## UNEMPLOYMENT COMPENSATION

***Being in Jail is a "Voluntary Resignation" for Unemployment Compensation*** Unemployment compensation payments are generally for those who lose jobs due to no substantial fault of their own (lay-off, medical inability to do that particular job, even poor performance which is not "misconduct"). However, it is not given when an employee voluntarily resigns due to no fault or action of the employer. In *Sylla v. Bd of Review* (N.J. Appellate Ct, 2020) an employee was arrested and jailed and could not post bail. So he was absent from work for over a month before he was released from jail. During this time, his employment was ended due to attendance. He filed for Unemployment Compensation benefits but was denied. The UC Division and the Court decided that incarceration was attributed to him, not the employer, so this was a "voluntary resignation without good cause attributable to the employer". It may be difficult to view being locked up against your wishes as "voluntary", but the employee got into that situation on his own, and it did not meet the state's definition of qualification for U.C.

## LABOR RELATIONS

***Two Google Cases Show the Line Between Criticism of Company Diversity Policy and Unprotected Harassment*** The National Labor Relations Act protects employees' rights to communicate with each other regarding terms of work, including expressing negative opinions about policies. Google has an internal message board on which employees discuss and debate a wide range of company and social and personal issues. On February 14th, the NLRB issued two memos regarding employees use of this process. In one, it found Google violated the Act by disciplining a software engineer for his caustic comments about the company's Diversity Policy. Though "insensitive", the comments were not disruptive, abusive or discriminatory. They were the sort of unpopular views the NLRA is supposed to protect.

The other memo upheld the firing of another software engineer who crossed the line in his criticism. Instead of just attacking the Policy, he attacked the presence of women professionals, with disparaging comments about women being intellectually inferior and not biologically suited for technical jobs. The NLRB found these to be overtly discriminatory statements which could create a harassing hostile environment, causing serious disruption.