Labor & Employment Law Update

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U.S. Supreme Court

Different Standard For Federal Employee ADEA Cases The U.S. Supreme Court has made a significant distinction between age discrimination cases filed by federal government employees and those in the private sector. The Court had previously ruled in all cases the ADEA required a "but-for test", meaning that age had to be the reason for an adverse action, not just a reason among others.

Now, in *Babb v. Wilkie*, the Court has found that the federal employment section of the ADEA is different than that covering private sector employment. The federal provision states that "*personnel actions affecting Federal employees or applicants for employment... shall be made free from any discrimination based on age.*" Thus, including "any" age related consideration among the decision factors violates the law. "*Untainted by any consideration of age*" is the standard set by the *Babb* decision. This makes proving a case much easier for federal employment. It does not change the "*but for*" standard for other cases under the ADEA since the decision was based on the different wording of the section on Federal employment.

Trends

COVID-19 WILL HAVE FUTURE EFFECTS

Boost in Union Organizing Activity and Membership During the pandemic crisis, many "front-line" workers performing essential functions regularly raised concerns about inadequate equipment, protective procedures, and lack of management attention or concerns about their safety. When protective equipment was not forthcoming and people perceived lack of action and concern, they began to have collective upset. They began to turn to a ready source of support, unions. Workers in health care, grocery stores, ambulance services, food processing, delivery drivers and more have apparently reached out to unions, which were ready and willing to act. Union lobbying was in part responsible for agencies such as OSHA and state health/safety authorities to start implementing enhanced safety rules, and for a number of employers to seem to pay more attention to these issues. This may well have a lasting effect. After years of declining union membership and apparent worker disinterest over wage and hour bargaining, personal safety may have triggered a new interest for collective action, and may result in a surge in union organizing.

Work From Home Aftermath. Almost half of the workforce who remained active during the pandemic worked from home. Will things ever get back to "*Normal*" or will this now become the New Normal? Some employers may recognize the savings of not having to have such a large physical footprint with the resulting overhead for the facility and encourage or mandate more remote working. More employees may also now request work from home, or demand it as an accommodation under the ADA. It may be much more difficult for employers to deny this and claim it is an undue hardship, given that they allowed it for so long during the pandemic. Absent any proof of hardship, an employer may have difficulty in addressing this issue. Now, while the emergency work from home is occurring, is the time to

also identify and document any resulting inefficiencies and difficulties. Waiting until after a request for continuing home-based work is made, to perform such problem identification will seem like an "after the fact justification" which carries much less weight with investigators and courts.

Expect More Employment Cases Not only has there been a massive disruption of employment, but the raft of emergency relief laws are so convoluted, confusing and at-odds with each other that both workers and employers can get lost in the process and can get out of compliance. So expect suits for unsafe conditions, FLSA and FFCRA violations, discriminatory lay off, failure to accommodate and many more. Safety cases are already in process. *Nedeltcheva v. Celebrity Cruise Lines Inc.* (S.D. Fla) alleges that the cruise line failed to inform ship staff of infections onboard, allowed infected vendors and new cruise members to come on board at ports, failed to alter regular activities or provide safety precautions for a prolonged period after it knew of significant dangers and failed to follow even basic safety procedures after notice of onboard infections. McDonald's employees in Chicago have filed an OSHA case over the employer's alleged failure to inform them and take protective action after discovering in-store COVID-19 infections.

On the other hand...

Business Associations Lobby for Immunity from COVID-19 Employment Suits In anticipation of the myriad of legal actions resulting from COVID-19, a coalition of the US Chamber of Commerce, Americans for Tax Reform, Americans for Prosperity, Tea Party Nation and several other businesses lobbying groups are urging Congress and states to grant businesses immunity from suits by "front line workers," or for significant reforms in tort law to limit such suits by those who get COVID-19 due to their employment and claim the employer was deficient in safety measures or other procedures in keeping them warned, informed and safe. The lobbying groups assert that "greedy plaintiff's lawyers" will take advantage of the situation to bring an explosion of cases of such magnitude as to threaten to bankrupt businesses and whole industries and thwart an economic recovery. [Some states, including Wisconsin, have passed laws creating immunity or limiting liability from COVID-19-related suits brought by patients, clients or the public against health care providers and/or front-line health care-related employees.]

Constitution

COVID LOANS

Exotic Dance Club Sues to be Eligible for COVID-19 CARES Act Loan DV Diamond strip club has filed a Constitutional challenge to the SBDC regulations which ban COVID-19 relief loans for establishments that have "live performances of a prurient sexual nature." The club claims that this ban violates the First and Fifth Amendments because it discriminates against businesses which are legally legitimate and are abiding by the state and federal laws. The strip club claims "All of the entertainment provided by DVD is non-obscene, appeals to healthy human interests and desires, and is in full compliance with the numerous required licenses and permits." The club claims it and its employees deserve help and protection "Just like every employee in every other small business throughout the country." *DV Diamond Club of Flint, LLC v. SBDC* (E.D. Mich., 2020).

DISCRIMINATION

AGE

NASA Pays $10 Million to Settle Age Suit NASA's Jet Propulsion Labs has settled an EEOC suit alleging that it systematically and willfully discriminated against older employees in layoffs and recall from layoffs. In addition to the $10 million payment to employees and former employees, NASA will take action to assure against discrimination and hire a special Director to oversee its recruiting and a special Layoff Coordinator to assure compliance. *EEOC v. Jet Propulsion Laboratories, et al.* (C.D. Cal., 2020).

NATIONAL ORIGIN

Court Upholds Park Supervisor Jury Award The Chicago Park District appealed the $521,000 verdict in favor a long-term Hispanic Supervisor who was discharged. The District claimed the discharge was due to falsification of time sheets. However, the jury and the appellate court found sufficient evidence of discrimination to support a verdict

in her favor. This included the fact that the District had fired over 20% of all Hispanic supervisors in the preceding two years but did not fire any White supervisors who committed similar offenses. The District refused to consider her rebuttals of the time sheet accusation. The District subjected her to an intensive investigation but seemed to barely look into White supervisors accused of the same time sheet violation. A valid conclusion could be reached that this supervisor was targeted because she was Hispanic. *Vega v. Chicago Park Dist.* (7th Cir, 2020).

RACE

IBM's Defense "Unworthy of Credence" in $2.5 Million Commission Case A court found substantial evidence that race was a factor in suddenly reducing a commission earned by a senior salesman by $2.5 million. The African-American employee had devoted months, including frequent 24-hour days as the lead person in landing a huge deal. His share of the commission would have been $2.5 million. However, IBM balked at the amount. It proposed $1.5 million, then switched that and paid the salesman only $232,000. He sued under Title VII. In ruling on the company's summary judgment motion, the court found the evidence showed that there was no reduction of the large commission of White salespeople involved in the deal, only of the African American. "IBM's explanation of revisions are unworthy of credence because it is internally inconsistent or so a jury could find. The evidence could be disturbing to a jury." *Beard v. IBM Corp.* (D.C. N. Cal, 2020).

CHILD LABOR

Chipotle Settles Child Labor Claims for $1.4 Million Wage and hour violations carry even more serious liability under the Child Labor Laws than for adult FLSA issues. An audit investigation of Massachusetts's locations of the restaurant found that minors worked too many hours per day and week than allowed by the child labor rules and there were not valid work permits for a number of them. It found 13,250 violations. The investigation was generated by the complaint of a teen employee's parent. The company settled the matter for $1.4 million after being issued citations for the violations. In *Re: Chipotle Mexican Grill, Inc., and State of Mass.* (2020).

NON-COMPETITION AGREEMENTS

Former Executives Must Pay Back $1.4 Million for Violating Non-Compete Agreements Non-competition agreements result in a good deal of post-employment litigation. They can be difficult to enforce. Successful employers are often granted restraining orders and some limited damages. Rarely do these cases result in million-dollar figures. In *Allegis Group, Inc. (Aerotek) v. Jordan et al.* (4th Cir, 2020), executives were eligible for an incentive pay program. The agreement for the pay included a No-Compete clause, prohibiting competition with the company or any of its subsidiaries or soliciting any employee or client. An executive who took the incentive pay then left and set up a company in competition. Three other executives who had taken the incentive pay also joined him in the competing business and solicited company employees away from Allegis and subsidiaries. They defended the ensuing suit by claiming the No-Compete was too broad to be enforceable. The court disagreed. In addition to other remedies, it ordered repayment of all incentive payments they had received under the agreement - $1.4 million. A lot to come up with for people who had probably already spent most of the money. A factor in enforcement was that the defendants were high level, business savvy executives who had a clear understanding of what they were doing when they signed the agreement and elected to take the incentive pay. Courts tend to give more careful scrutiny of No-Compete clauses and more leniency in enforcement toward lower-level "regular" employees.

Dumbest Case of the Month

NATIONAL LABOR RELATIONS ACT

Don't Pee on the Poster Media Network Company, Barstool Sports, settled a NLRB unfair labor charge. It had been accused of threatening to fire workers who organized a union. It created a bogus website to trick union-supporting employees into "outing themselves" so they company could act against them. The company pledged to cease any interference with employees' rights to organize and it posted notices stating it respected workers' rights to organize without any adverse action by the company. That should have been the end of the matter. THEN, one of the company's lead personalities engaged in an on-air broadcast rant about how "Unions are the worst," how the NLRB settlement required not defacing the required non-interference posters and how he had torn down and had "just peed on" the

posters. This resulted in a new unfair labor practice charge filed by the Committee To Preserve The Religious Rights To Organize, for violating the NLRA and violating the terms of the settlement. This is a good reminder that it's not over when one settles a case. It is important to actually abide by the settlement terms and keep your upset to yourself! In *RE: Barstool Sports, Inc. et al.* (NLRB, 2020). Perhaps the company will claim that the on-air rant was Just A Joke! And defacing the posters really did not occur. However, that would not be a very effective defense. It did not sound like "jokes" in the broadcast. "Joking" about protected activities still generates liability. It would be a very expensive "joke," costing the company tens or hundreds of thousands of dollars to defend the resulting case. [For more illustrations of the dangers of "humor" about legal issues, see the article, It was Just a Joke, by Boardman & Clark.]