Labor & Employment Law Update

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THEME OF THE MONTH – STANDARDS (DIFFERENT LAWS – DIFFERENT STANDARDS; SAME LAWS – CHANGING STANDARDS)

This month, EEOC guidance and two significant cases illustrate how one size does not fit all. Similar situations under different laws can result in the need for very different approaches. Two other significant cases show that nothing stays the same; the law's interpretation and coverage must change over time to match the realities of our changing world. The laws cannot remain frozen in the past, while society, technology, business and the world move into the future. Also, the new EEOC guidance and two other cases show some of the complications and warnings associated with the current COVID pandemic.

Administrative and Legislative Actions

Return to Work – EEOC COVID Guidance - Disability, Age, Pregnancy, Different Laws, Different Standards The ADA May Give Vulnerable Employees a Right Not to Return. The ADEA Gives Older Employees the Right to Come to Work. Title VII Goes Both Ways for Pregnancy Discrimination. The CDC has identified several areas of special "vulnerability" for increased risk from COVID-19. These include those over 60, people with a variety of disabilities, and some complications of pregnancy. Some employers may wish to prevent these employees from returning to the general workplace due to concerns for their health and safety, and due to concerns for liability in exposing "high risk" people to potential infection. Other employers want everyone to come back from Work at Home or Furlough to do the needed work; yet some employees resist and claim that they should not be forced to return due to their vulnerable status. There are *rights* and *obligations* on both sides of this equation. However, they are different under each of the laws. The EEOC has recently updated its COVID guidance to address this.

The ADA requires reasonable accommodation for qualified individuals with disabilities. So, if an employee claims returning to work creates a special serious risk for their specific condition, this triggers the required Interactive Process. Continued work from home may be a required accommodation. However, an employer may not ban a disabled person from return out of fear or concern about their vulnerability. That would be discrimination due to disability or perceived disability.

The Age Discrimination in Employment Act (ADEA) prohibits barring people from return simply due to their vulnerable age. They have a right to come back. The ADEA has no accommodation provisions. So an employer has more authority to demand return if the employee is reluctant. (An employer can voluntarily agree to no return but that is not required by the ADEA.) If the employee's vulnerability concern is about an underlying medical condition, then that is no longer "age;" it may be a disability and the ADA comes back into the picture.

Title VII includes the Pregnancy Discrimination Act (PDA). An employer may not ban a pregnant employee from return nor from work duties due to a stereotypical concern for the person or baby. That is discrimination. However, the PDA increasingly requires reasonable accommodation of conditions associated with pregnancy, so the PDA goes both ways. An employer cannot ban the employee who wants to return; yet it must engage in the Interactive Process with the employee who wishes not to come back and cites a medical basis for vulnerability. Of course some medical complications of pregnancy are caused by other long term disabilities such as diabetes, heart conditions and more – so again, both Title VII and the ADA may apply. The laws can be complex.

Litigation

U.S. SUPREME COURT

Sexual Orientation and Gender Identity are Covered Discrimination under Title VII In what may prove to be the major employment decision of 2020, the U.S. Supreme Court consolidated three cases and ruled that both sexual orientation and gender identity discrimination are covered under the sexual provisions of Title VII. The cases are *Bostock v. Clayton County GA*; A*ltitude Express, Inc. v. Zarida et al.; RG & GR Harris Funeral Homes, Inc. v. EEOC (collectively "Bostock").* This is the culmination of a long road of shifting lower court decisions. For years, the EEOC took the position that sexual orientation and gender identity were not covered under Title VII; only biological female/male discrimination, whether based on sexual offensiveness or upon one's gender. Sexual orientation was recognized as an Equal Protection category for 42 U.S. Code Sec. 1983 but not under Title VII for most employment purposes. Then EEOC changed its interpretation and stated that it would take Title VII employment cases for both categories. The U.S. Dept. of Justice disagreed, and these two parts of the federal government have been fighting each other in court cases. Lower courts all over the map have been all over the map with differing decisions on what was covered or not. The Supreme Court has now ended the confusion in a solid 6 to 3 decision authored by Justice Gorsuch. He is one of the conservative members of the Court and is known as a "strict constructionist." This means he looks at the actual wording of the statutes and the case situation must fit within the statutory language to be covered. Justice Gorsuch recognized that the 1964 law focused on discrimination against women, yet he found that the modern situation fit within the wording of Title VII without need for any expansive interpretation. Discrimination due to sexual orientation or gender identity is due to sex which "plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids." He went on to state that the original drafters of Title VII probably did not consider "many of the things which have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees...But the limits of the drafters' imaginations supply no reason to ignore the laws' demands." The express terms of the statute ban discrimination on sex and when the situation is sex, whether sexual orientation or gender identity they fit and "thus all persons are entitled to its benefit." Giving literal meaning to the words of the statute these must be included.

Will this decision void the new HHS Rule which allows discrimination against Transgender people under the Affordable Care Act? On June 12, just three days before the Supreme Court ruling, the Trump Administration finalized a Health and Human Services rule removing civil rights protection and allowing health insurance companies and health care providers to discriminate against Transgender patients under the ACA. This was based on the administration's position that interpreting sex discrimination to include gender identity goes "beyond the plain meaning" of the law. "Sex means only male or female as determined by biology." The administration timed release of the final rule to coincide with Gay Pride Month. The new Supreme Court Bostock decision means that Transgender is now actually squarely within the meaning of the sex discrimination law. So, this may mean the new HHS rule will not be valid.

Court Invalidates Effort to End DACA In Dept. of Homeland Security v. Regents of the University of California, et al. the Supreme Court blocked the Administration's effort to dismantle Deferred Action Childhood Arrivals (DACA) or "the Dreamers Act," and be able to deport some 700,000 residents, including those who have served in the US Military. The Court ruled that the Administration had failed to comply with the requirements of the Administrative Procedure Act and the effort regarding the issue was an unconstitutional exercise of executive authority to circumvent the immigration laws. This does not end the issue. The Court made no judgment as to whether the Administration could end DACA. It ruled that the effort had been done improperly and must be redone correctly, from the starting point. This means a multi-month process. In the meantime, Dreamers may still be employed and considered to be legal residents.

DISCRIMINATION

HARASSMENT

"They say she's the same – but she's not the same." (The standards read the same way, but the interpretation changes with the times.) "They say she's the same – but..." is one of John Goodman's most famous lines, when they changed the actress playing the older daughter on his TV Show. The same seems true in Employment Law. Interpretation of the legal standards change over time. Just as the Constitution is the same, we do not stay frozen in time 230 years ago. The words stay the same, but our society, technology, and world move on, and the interpretations have to evolve to meet the changing conditions. So, old legal precedents may no longer be reliable guides as to how the courts or juries will see a current case. This was made very clear in *Kenneh v. Homeward Bound Inc.* (Minn S. Ct., 2020) a sexual harassment case. A major Title VII harassment standard for decades has been a requirement that the conduct be "severe or pervasive" in order to violate the laws – "more than minor," more than "simply crude, boorish or vulgar" behavior. Older cases seemed to tolerate some fairly gross behavior, since the standard was established when society tolerated much of this as "normal" male-female interaction. In *Kenneh*, the court stated that *"severe or pervasive" continues to be the standard, however considering what is appropriate workplace conduct must be evaluated in light of today; for the severe or pervasive standard to remain useful...the standard must evolve to reflect changes in societal attitudes toward what is acceptable behavior in the workplace. Today reasonable people would not tolerate the type of behavior the courts previously brushed aside..."* [This standard applies to all forms of harassment under the EEO laws so, be aware that using old legal decisions to guide your current behavior, policies or work rules is very unwise. Employers should also revise policies and training to educate employees that times change and so do the workplace expectations.]

Employee Fired for Attempted Suicide at Work has Harassment Case "In *Fernandes v. Trees Inc.* (11th Cir. 2020) the court found ample evidence of severe and pervasive behavior to warrant the harassment claim of a Cuban-born tree trimmer. The employee's supervisor began making routine overtly degrading remarks about Cubans and announced, "A new policy in the company; no more Cuban people!" The comments were allowed to continue despite complaints by the employee and other workers. This went on for two months. One day the tree trimmer attempted to take his own life. A coworker acted to stop him. The company then fired the tree trimmer for the incident. Then the evidence showed that the company forced the other workers to sign statements saying they had never heard any discriminating or harassing comments directed at the tree trimmer or anyone else. The court found the ongoing hostile comments were pervasive and sufficiently humiliating to create a hostile environment.

RELIGION

Hospital HR Employee's Religious Refusal to get Flu Shot Was Not the Reason for Discharge. A court dismissed EEOC v. Baystate Med. Center (D. Mass, 2020) which alleged that the hospital fired a Human Resources employee after she requested a religious exemption from getting the required annual flu shot. The court found that the hospital accommodated her request. Instead, she was fired for violating the policy

which stated that anyone who did not get a vaccination was required to wear a mask at all times while in the facility. The employee would remove the mask at times when she felt it was not necessary and was getting in the way of her communication. She was disciplined for this and fired when she continued to do so. The court rejected the employee's claim that a mask was not really effective prevention for the spread of flu. The court found that her religious beliefs had been accommodated and it would not second guess the hospital's opinion as to the effectiveness of masks. Since the employee had no religious foundation for not wearing a mask, her "effectiveness" argument was not relevant to a Title VII claim. Also, the mask rule applied to anyone who had not been vaccinated, for religious reasons or otherwise.

COVID WARNINGS – FRAUD AND EMPLOYEE AGREEMENTS

PROSECUTION

Employee's False COVID Report Results in Criminal Prosecution . The massive amounts in Federal COVID relief are tempting targets for abusers. Federal authorities are starting to aggressively prosecute those who seem to be scamming and abusing the new COVID relief laws. An example is United States v. Davis (N.D. GA, 2020). An employee presented a forged medical report stating that he had tested positive for COVID-19 and should be quarantined for 14 days. Thus he was eligible for the 10 days of pay to stay home under the FFCRA. Due to the report of a positive test, the company then closed the facility where he worked for cleaning and had all its other employees stay home for two weeks, also paying them, at a cost of over $100,000. A Human Resources Specialist had suspicions about the letter; the letterhead seemed not quite right, there was no signature, etc. A call to the supposed medical facility revealed that it was not conducting any COVID testing at all and had not issued the letter. The company reported this to the FBI and Georgia Corona Virus Fraud Taskforce. The Dept. of Justice than brought the criminal case including interstate wire fraud charges, since the employee sent his fraudulent letter from his location in Georgia to HR in Pennsylvania.)

NON-COMPETES AND OTHER RESTRICTIVE AGREEMENTS

Warning to Renew Agreements Following Layoff A court declined to enforce a Non-Competition Agreement, allowing a former employee to continue working for a competitor. At the time of hire, in January 2016, the employee had signed a Confidentiality and one-year post employment Non-Compete Agreement. However, later that year, he was subjected to a layoff, then recalled a few months later and asked to resign the Agreement. Then he was laid off again in 2018. On recall, after only a month, there was no renewal of the Agreement. The layoff notices had stated that the employment was terminating, there was no guarantee of recall and employees were issued COBRA notices for their insurance. In January 2020, he quit and took a job with a competitor. The company tried to enforce the one-year no compete agreement. However, the court declined to do so. It found that the one-year time frame had started to run at the 2018 layoff which terminated the employment. The recall was a new hiring (a re-hire, not a "recall") and did not reactivate the Agreement. The rehire should have been accompanied by new consideration and a fresh Agreement. *Russomano v. Novo Nordisk, Inc.* (1st Cir., 2020) This is a warning to all the companies which have laid-off or furloughed people due to the COVID situation. Many of these layoffs or "furloughs" did not, and could not, guarantee recall, so there was an impression that the employment was likely to be ending. So, if you have non-competes, confidentiality, intellectual property or other important agreements, it may be wise to have them renewed and resigned with fresh consideration for those who are recalled.

Non-Compete Agreement Signed After Start of Employment is Unenforceable An agreement generally requires giving the employee "consideration" of something new and valuable. Usually that is getting hired and important agreements are signed before or at the time of hire. Once an employee is already on the job for a while, then the consideration is no longer "new" and they already have the "valuable" part. In *Rullex Co. LLC v. Tel-Stream Inc.* the agreement was signed sometime after the work began. Though there had been

verbal discussion and a “tentative agreement.” there was nothing on paper to show a final agreement had been reached until sometime after the employee had already started work. So the court found the late signed Non- Compete Agreement was devoid of new and valuable consideration, and was unenforceable.