Labor & Employment Law Update

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Legislation And Admininistration Actions

Federal Employees Get 12 Weeks Paid Parental Leave In October 2020, employees of the Federal Executive Branch, Judicial Branch and civilian military employees will be eligible for 12 weeks of paid leave for birth, adoption or placement of a foster child. This was part of the December 2019 Budget Act, which took until now to go into effect. Though Congress passed this law, it does not apply to employees of Congress, nor to the Postal Service.

DOL is Rescinding Thousands of FLSA Guidance Documents and Starting a New Process. The DOL has long issued a variety of documents, both internally and externally, in response to FLSA questions from individual employers. Some of these documents were intended as advice in that specific situation, and were non-binding, non-precedent, private opinions. However, many of them became public and were circulated and often cited in other FLSA situations. The DOL is changing its practice stating: "Unlike regulations, guidance documents historically have not gone through processes that are transparent and provide for public participation," the DOL said. "In light of the stakes, the public often treats guidance from agencies as binding, even if it technically is not." DOL is removing many documents from its website. Now, only "official" interpretations issued after public comment, or documents intended for public guidance and intended for publication on the official website will be considered as "guidance." The Department has issued a new proposed rule with more information as to what will constitute

Telework Pay Bulletin. DOL has issued a Field Assistance Bulletin (FAB 2020-5) regarding employers' obligations to track teleworking or other remote location work hours. The new work from home issues created by COVID are resulting in more flexible schedules and "work at all hours" situations which do not fit the standard mold and are often not well tracked by the standard payroll systems. The FAB emphasizes the requirements to identify and accurately record all pay for all hours worked.

Litigation

Case of the Month – Duty of Professionalism

HR Manager Fired for Advising Employee to Sue Company In *Gogel v. Kia Motors Mfg., Inc.* (11th Cir, 2020), the court ruled that the company could validly fire a Human Resources Manager when it found out she had secretly advised an employee to file discrimination cases, and had helped that employee contact and obtain an attorney to do so. In dismissing the former HR Manager's Title VII retaliation case, the court held that a manager's "right to oppose discrimination does not give license to engage in acts that so

interfere with the performance of the job that it renders the employee ineffective in the position for which they were employed." The HR Manager breached the employer's trust and the duty of professionalism in a way that Title VII "was not intended to immunize." An HR professional is supposed to implement internal policies and practices to address discrimination and other issues and not do a behind the scenes end-run which undermines that process and/or the company's decisions as to what actions to take – whether the manager agrees with them or not. Doing otherwise destroys the organization's faith that the manager can be professionally trusted to implement policies and be trusted to participate in the often sensitive, confidential and often "privileged" communications and discussions about legally fraught issues. An HR Manager is supposed to work with the company, not against it. However, this does not remove HR Managers from the law's anti-retaliation coverage. HR staff and other managers have every right to raise concerns about discrimination; every right to object to company policies or decisions and every right to advocate for changes when they believe practices or decisions are wrong, and especially contrary to the laws. It should be done internally, using the authority and scope of the manager's position and the internal process. Any retaliation for this activity is protected under the law. The manager may also file their own legal actions regarding discrimination or ethics or other "whistleblower" matters and be protected from retaliation. The problem in this case was departing from the professional duty and doing a secret, end-run which undermined the company process, and the company's trust.

TRADE SECRETS

Ex-Bank Manager Sanctioned in Theft of Trade Secrets Suit and Loses New Job as Well A bank sued several managers who suddenly left and went to work for a rival bank. The suit alleged they accessed files with confidential trade secret information just before departing and took the information with them. A court granted a restraining order and injunction, requiring them to turn over all documents taken when they departed and forbade keeping any copies. One of the defendants, Mr. Casebier, indeed turned over his documents, but he secretly made cell phone photos and stashed them. This was discovered and the court issued a contempt citation. Perhaps even worse, his new employer fired him when it discovered his duplicity. So now he has civil sanctions and no job! *Seacoast Banking Corp v. Diemer, et al.* (M.D. Fla, 2020).

DISCRIMINATION

RACE

Face Mask Discord In *Frith, et al. v. Whole Foods Mkt. Inc.* (D. Mass, 2020), Whole Foods banned Black Lives Matter (BLM) logos on employee face masks. It claimed customers complained of being subjected to political beliefs while shopping. Whole Foods cited that opposing "Black Lives Matter," "All Lives Matter" and "Support Police" logos were appearing and threatening to create hostility among workers. So, it banned all employee political messages. BLM supporters sued under Title VII, claiming that this was aimed at BLM specifically and was racial discrimination, because the company had previously freely allowed employees to wear other social issue messages at work. Be aware that, whoever "wins" this case, the company will have a public relations issue. Regardless of the legitimacy of the reason to prohibit messaging, there will be a public reaction to being "against racial justice" or "being against the police." So, these are additional factors to consider. For example, Starbucks originally banned Black Lives Matter clothing and accessories on the grounds that it could lead to misunderstandings. The company required employees to adhere to the pre-existing Starbucks dress code policy, citing the need to create a safe and hospitable environment for customers. Starbucks employees who wanted to wear Black Lives Matter attire cited to past instances where the company allowed baristas to wear LGBTQ pins and pro-marriage equality attire to express their views. (Title VII requires employers to provide a discrimination-free workplace, so any dress code policy should be neutral, adopted for non-discriminatory reasons, and applied

consistently to all employees.) Following public backlash, Starbucks changed its policy and now permits employees to wear attire and accessories supporting the Black Lives Matter movement. Starbucks has also created Black Lives Matter shirts that their employees may choose to wear. Other companies have also backtracked on whether "messaging" attire is permitted under their workplace policies. (For more information, see the article Workplace Appearance Laws and Case by Boardman & Clark.)

RELIGION

Buddhist Pilot Required to Attend Alcoholics Anonymous Meetings The EEOC sued United Airlines for unlawfully requiring a Buddhist pilot to attend AA meetings. The 30-year veteran employee reported that he was entering alcohol treatment. As is usual procedure, the FAA and the company suspended his flight certification pending treatment and company approval to resume flying. In order to get approval, United Airlines required pilots to enroll in its Intervention Motivational Program which is tied to AA and requires regular AA meetings and have an AA sponsor. The pilot objected to the AA's strong Judeo-Christian monotheistic emphasis, its meetings all being held in Christian churches, and its requirement for prayers to acknowledge God as Supreme Being. Instead, he requested being allowed to attend Refuge Recovery, a similar program with trained sponsors based on Buddhist beliefs. United Airlines repeatedly denied this request and refused to let him return to work unless he violated his religious principles and attended the company's chosen AA program. The EEOC suit charges failure to reasonably accommodate as required by Title VII and an unlawful employment practice "done with malice or reckless indifference." *EEOC v. United Airlines, Inc.* (D. NJ, 2020).

SEX

Adam & Eve Agree to Hire Men The EEOC sued Adam & Eve, a chain of erotic toy stores, due to its refusal to hire male salespeople. Several male applicants were informed that only women were hired for sales; men could only work out of sight in shipping and maintenance positions. The company agreed to settle the case by paying up to $22,000 each to the rejected male applicants and will hire men into sales positions. *EEOC v. Sactacular Holdings, LLC* (E.D. NC, 2020).

SEX PLUS AGE

Discrimination Against Older Female Casino Workers In *Frappied, et al. v. Affinity Gaming Black Hawk LLC* (10th Cir, 2020), the Court of Appeals recognized a dual category discrimination case. In this situation, the company did not discriminate against women. It hired both men and women, perhaps more women. So, no sex discrimination. It did not discriminate against older workers. It hired and employed a good number of men over 40. So, no age discrimination. However, older women were not hired, or found themselves out-the-door when they got older and were perceived as less attractive and desirable. It was this combination of sex and age which operated to create a Title VII sex discrimination case. If they had been men, the age would not have had an adverse consequence. Only women were negatively impacted by getting older.

Fair Labor Standards Act

WARNING: More and more cases are being brought over misclassifying employees as salaried-exempt OR in violating the several "Salaried Basis Tests" and losing the exemption. The result is having to pay a great deal in back overtime (up to 3 years) plus other sorts of damages, interest and penalties.

$8 Million Extra Attorneys' Fee Amount in Salaried Basis Misclassification Suit. When a company loses an FLSA salaried exemption misclassification case, the damages are not just a bit of back OT pay. The plaintiffs are also entitled to an award of attorneys' fees for having to pursue the case. In fact, the fees can sometimes be even greater than the back pay, interest or other damages. In *Straych et al. v. Computer*

Sciences Corp. (DC Conn 2020) a jury found that the company had violated the law and misclassified a group of workers as salaried exempt, who did not meet the salary-duty standards. The jury awarded $18.7 million in backpay, overtime and interest. Then the court granted an additional $8 million to the plaintiff in attorneys' fees against the company, plus interest until paid.

In another case, a company agreed to pay $20 million to settle claims by Assistant Sales Managers that they did not meet the executive exemption from overtime. *Goodman et al. v. Burlington Coat Factory Warehouse Corp.* (D. NJ, 2020).

Work From Home May Exacerbate This Trend. When Executive Exempt employees work remotely, are they still actually "supervisory" enough to qualify? Are they "administrative" or "professional exempt" suddenly now doing too many routine duties to accomplish the work at home to continue to qualify, especially if the business has declined and the people are taking on collateral work to "stay full," etc.?

Labor Relations

Calling the Police Because Receptionists Complained About Overtime Pay and Asked to See Their Personnel Files. Employees have a right to complain about wages, hours and conditions of employment, to see their personnel records, and to not be subject to retaliation. Two receptionists at a veterinary clinic complained to the owner about not being paid properly for meal periods, not getting overtime pay, and they asked to see their time records. The owner reacted by calling the police. He alleged theft from the cash drawer. He then fired both employees for misconduct. They filed a National Labor Relations Act charge for retaliation alleging interference and retaliation. The NLRA protects non-unionized workers who engage in concerted activity – two or more people raising an issue. (They might also have had retaliation cases under the FLSA and state wage laws.) An NLRB judge ruled in their favor, specifically finding that the owner's story of theft and misconduct was filled with "inconsistencies, contradictions, absurdities" and was "simply untrue and unbelievable." The judge found the call to the police and firing were designed to interfere with the receptionists' protected activity and intimidate and scare them away from pursuing their complaints and getting their time records. In *RE Castro Valley Animal Hospital and Padilla & Williams* (2002).