Labor & Employment Law Update

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Legislation And Admininistration Actions

New Year's Regulations

There are a number of rules, guidelines and orders being released in the waning days of the current administration.

EEOC Released Revised Guidance on Disabled Veterans. The EEOC issued three new documents related to veterans. These are intended to update employers and veterans on the interactions between the Americans With Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). The revised guidances are:

- EEOC Efforts for Veterans with Disabilities
- Understanding Your Employment Rights Under the Americans with Disabilities Act: A Guide for Veterans
- Veterans and the Americans with Disabilities Act: A Guide for Employers

EEOC COVID-19 Vaccinations Guidance Many employers want to know whether they can implement mandatory vaccinations as a condition of employment. The EEOC has issued a revised Guidance on Vaccinations. It indicates that mandatory vaccinations can be required in general, but the law gives protection to those who refuse due to disability or on religious grounds. Then the reasonable accommodation requirements of ADA and Title VII apply. Also, the process must not violate the "medical inquiry" provisions of the ADA or GINA. Also, since the vaccine is only provisionally approved, people should be informed they have a choice to abstain. The foundation of this guidance is the EEOC's prior established flu shot advice. However, COVID is not the flu. It has become a highly political issue, beyond mere medical concerns. Some state legislatures are considering passing laws which will prohibit employers from requiring COVID vaccinations. So, the issue is still not clear. It may become so by the time most Americans can actually get the vaccine.

DOL Finalizes Religious "Carve Out" Rule In one of several late term Trump administration efforts, the Dept. of Labor finalized a highly controversial rule which eases government contracting restrictions on religious employers – including private sector businesses owned by individuals claiming that anti-discrimination laws may offend their own personal religious views (such as Hobby Lobby Stores, Inc.). These contractors will be able to make employment decisions to hire, fire, promote, etc., based upon their faith. The DOL claims this will "respect the religious dignity" of these employers and "correct any bias against" religious employers in receiving government contracts. There has been a great deal of opposition to this rule by those claiming it creates "superior rights" and clears the way for these companies to refuse

to hire LGBTQ applicants, to incorporate religious views on "the proper role for women." engage in sex discrimination, to engage in racial discrimination and even the "cleansing" of "non-believers" (other religions) from their companies; all while receiving taxpayer funding for their contracts. The DOL has stated in regard to these private sector contractors... "Requiring religious employers to maintain employees who disregard the organization's religious tenets thus more seriously threatens to undermine the organization's mission and integrity." The ultimate effect will have to await legal challenges and the new administration's DOL/OFCCP appointments. However, once a rule is finalized, it is more difficult to undo or non-enforce than a proposed rule or agency guidance.

DOL Rule on Tip-Pooling The Dept. of Labor issued a rule clarifying tip sharing among hospitality industry employees. It allows for the tips received by waitstaff to be split with cooks, dishwashers, and others integral to the customers' experience. The rule allows employers to reduce pay to a "sub-minimum wage" level, which is then offset by the tips. Expect challenges. The DOL's own internal auditors released a report finding the agency "did not demonstrate it followed a sound process" in formalizing the rule under undue pressure from the administration.

Trends

COVID-19 Has Resulted in Increased Paid Sick Leave for 28% of Private Sector Workers The US Bureau of Labor Statistics reported that over 35 million employees, 28% of the private sector workforce, have had their employers increase paid sick leave in 2020 due to COVID. This was in addition to any other federal or state programs such as PPP or the FFCRA which provided pay for those who were furloughed or suffered work cuts. The type of businesses most likely to have granted the additional sick leave mirrored the hardships faced by the different business sectors. The least likely were arts, entertainment, and hospitality, which suffered the greatest and had no extra money to spare. Most extra pay came from utilities, healthcare, and certain types of manufacturing, which were not as affected by business decreases.

Litigation

Whistleblowers/Retaliation

The Guards Who Couldn't Shoot Straight A Navy security contractor was found to have illegally fired a whistleblower who complained about falsified training which left a major ammunition depot "protected" by security guards "who couldn't shoot straight." The whistleblower tried to get internal attention to defective weapons training and qualification testing which failed to meet federal standards, including test administrators giving re-do's and altering targets to look like they had actually been hit. When this resulted in no action, he went outside the company and warned a Navy base commander about the company's misconduct and inadequate security situation. He was fired. The Protective Services union filed a charge and the NLRB ruled in the fired guard's favor. It also found that the Navy base's civilian contract compliance officer was complicit in the retaliation. He knew about the training violations for well over a year and failed to take any action. He supported the discharge, apparently in an effort to help cover-up this failure. In *Rexcel Protection Services, Inc. and Int. Union of Security, Police, and Fire Professionals Local 5* (NLRB, 2020).

Personal Liability - Prosecution

State Troopers Prosecuted for False Overtime. Two Massachusetts State Troopers are being prosecuted for embezzlement, conspiracy, and wire fraud for filing false shift paperwork which enabled them and several other troopers to collect over $226,000 in OT pay for work they never performed; much of the money coming from federal DOT grants. The two now being prosecuted were supervisors in charge, who enabled the others to file false claims. Among the harms, besides just the money, was the regular

practice of officers claiming time to staff drunk driving checkpoints, yet leaving several hours early – before "bar time" when the most impaired drivers posed the most danger for public safety. When the lower-level officers' misconduct came to light, the two supervisors then allegedly shredded and burned records to cover up their own part of the misconduct. *U.S. v. Griffin, at el.* (D Mass, 2020).

DISCRIMINATION

DISABILITY

Timing is Suspect in Discharge and "Temporary Conditions" Can Be a Disability A regional manager informed Human Resources he was suffering depression and serious physical symptoms and had been diagnosed with an emotional disorder following a difficult divorce. He inquired about taking FMLA for treatment. He was then fired within a couple of weeks. He filed suit under the FMLA for interference and under the ADA for disability discrimination. The company's defense was that the manager was fired for performance problems, poor leadership skills. They also argued that the emotional disorder was only a "temporary condition" which would resolve over time, rather than a long-term "disability" and therefore did not fit within the ADA. The court rejected these arguments and allowed the case to proceed to a jury trial. The company's performance defenses were not well documented and, coming immediately after the FMLA inquiry and emotional condition information, the timing of the discharge was suspicious and suspect. The plaintiff's evidence to refute the performance issues was substantial and credible. Further, the ADA does not require one to have permanent or long-term conditions. The ADA includes language on conditions which last for six months or have significant effects. So, a "temporary" condition which may eventually resolve over time can still be a covered disability. *Wanner v. Under Armour, Inc.* (M.D., TN, 2020).

SEX

You Can Run, But You Can't Hide Georgina's Restaurant tried to escape from a sexual harassment liability by closing down and going out of business. However, a new restaurant opened across town, under a new name; Little G's Fusion Cuisine, operated by the same owner-chef who was the one accused of the sexual harassment. The EEOC pursued the owner and his new restaurant for "successor liability" for the previous charge. The court ruled that the old and new operations were essentially the same, and the move, new corporate name and restaurant name change were simply ploys to avoid legal responsibility. Among the pertinent factors was that prior to the closure, Georgina's told customers of the move, that the menu would be the same, the staff would be much the same, and Little G's would accept all of Georgianna's gift cards. It also kept the same Facebook page, with just a name change. *EEOC v. Georgina's LLC* (W.D. Mich, 2020).

Harassment Among Owners Can Close Business One owner of a real estate company has petitioned a court to dissolve the business due to alleged sexual harassment by his co-owner business partner. The petitioner alleges that she, the other co-owner, made repeated sexual comments and sexual advances toward him and would not desist. This created an untenable, mentally, and emotionally impossible environment in which to conduct and manage the business. Since the partnership is no longer viable, he seeks an order to dissolve and liquidate the assets. If this is granted, then the business closes. The "victims" of any harassment are not confined to the harassed person, but are those other company employees who lose their jobs and livelihoods – and who do not get to receive any share of the liquidated assets. *Tax Concept, LLC v. DeBarr-Johnson* (GA Superior Ct. 2020).

Records Destruction Results in Preclusion of Defendant's Evidence In *Eller v. Prince George Co. Public Schools* (D. MD, 2020) a transgender teacher sued due to harassment she experienced from other

teachers, students, and administrators due to gender identity. However, it seems the District had lost or destroyed much of the evidence the plaintiff claimed would prove the harassment. This included records of investigations and discipline, video surveillance, and multiple significant emails and correspondence. The problem for the District is that it had in place a long-standing policy, and state and federal rules which required it to retain and preserve these records for a much longer time. So, the loss or destruction of these specific items was seen as, at best, gross negligence if not intentional. The judge sanctioned the District by precluding it from presenting any evidence, including witness testimony, in order to contradict the plaintiff's claims as to what these records would show. It can be very difficult to defend a case when precluded from presenting evidence to try to refute the key allegations

RACE

Pipefitters Union Pays $3 Million to Settle Race Discrimination Case Pipefitters Local 597 in Chicago settled a class action Title VII case alleging that it discriminated against its own members by limiting Black pipefitters from its hiring hall process and totally excluding them from the informal word-of-mouth process which accounts for 75% of the union's jobs. Black members were left with the less desirable and often short-term jobs; the last hired and first to be laid off. The union had no oversight process and allowed its hiring agents and foremen to freely exercise their own personal biases and prejudices in selecting who got jobs. The settlement also includes a commitment by the union to implement corrective processes. *Porter et al. v. Pipefitters Assoc. et al.* (N.D. Ill, 2020).

Pension Funds Sue Company for Race and Sex Discrimination – "Public Support" Statement Backfires This case illustrates two points. One, it is not just employees who can sue over discriminatory employment practices. Two, make sure your public statements actually match your practices. Pension funds heavily invest in corporate stocks and depend on these corporations to do well and stay out of trouble. Pinterest Corp had several sexual harassment – retaliation issues that went public. Then the corporation, as did many others, issued a public statement in support of Black Lives Matter and racial justice. This backfired and led to a walkout by many employees protesting their views of the company's non-diverse and unequal actual practices, and in "solidarity" with the women claiming harassment. The company stock suffered due to this publicity and a resulting user boycott. The company was then sued by the Employees' Retirement System of Rhode Island, which had suffered due to this stock value loss. The suit alleges that the corporation breached its fiduciary duty to investors, misled investors about its business employment practices and abused its control by failing to exercise oversight of those practices, resulting in public scrutiny, a user boycott, reputational harm which deterred customers and advertisers resulting in loss suffered by stockholding retirement funds. This "employment" case is a Securities and Exchange Act suit in which damages are not limited by any of the "liability caps" contained in the standard employment discrimination laws. *Employees' Retirement System of Rhode Island v. Silbermann, et al.* (N.D. Cal, 2020).

Labor Relations

White House Maintenance Workers Voting on Union The Trump dominated NLRB has just given a house warming present to incoming President Biden by approving the vote, by mail, for White House facilities workers, plumbers, maintenance techs, carpenters, and locksmiths, to decide whether to be represented by the International Union of Operating Engineers. The facilities workers are not federal employees. Maintenance is contracted out to a facilities management company, similar to many other government contractor arrangements operating on federal properties and military bases. In *RE M.C. Dean, Inc. v. IUOE Local 99* (Dec. 2020).