Labor & Employment Law Update

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Legislation And Admininistration Actions

President Biden Issues Multiple Executive Orders As with many new presidents, President Biden issued a number of Executive Orders and instructions within the first few weeks, some cancelling those of the prior president. President Biden instructed OSHA to bolster COVID protections and ramp up safety enforcement for workers. He issued orders on enhanced minimum wage and prohibiting LGBT discrimination in federal employment and the military. Other employment related orders voided President Trump's restrictions on EEO antidiscrimination training by Federal Contractors; ended immigration curtailments against specific countries and asylum seekers; and, restricted agencies from issuing more advice letters. Most of the other orders focused on the economy and addressing COVID. He has announced intentions for more orders and actions in the coming weeks.

President Biden Freezes Prior Administration's Late-Stage Regulations. President Biden issued a 60-day regulatory freeze on all last-minute federal agency regulations and guidance issued by the prior administration and halted current rule-making activity. This allows the new administration to consider whether to implement the rules, change the rules, or withdraw them completely. In the last weeks of the Trump administration there was a rush to push out regulations and Executive Orders. These "midnight efforts" are not uncommon for outgoing administrations. This freeze is also common for incoming presidents. President Trump put a hold on many Obama regulations and voided a number of them. So, President Biden is following an established practice.

New Biometric Privacy Laws New York is poised to be the next state to adopt a biometric privacy protection act extend which extends rights to consumers and employees regarding consent, control over and protection of their biometric information, such as face scans, fingerprint time clocks, and other common workplace practices. The first such law, the Illinois Biometric Information Privacy Act, has generated vast numbers of cases against employers who use biometrics, or the vendors which store the information, regardless of the state in which they are located. It has a nationwide reach. Other states are considering similar legislation. Congress may also take action.

Litigation

COVID-19

Were COVID Layoffs a WARN Act Exception or a Violation The federal WARN Act (Worker Adjustment and Retraining Notification Act) requires 60 days' advance notice, or pay, for layoffs of 50 or more employees. There are exceptions for situations such as natural disasters and unforeseeable business

circumstances which are beyond the business's control. In 2020, many businesses were faced with drastic business reductions or closure orders and laid off many employees. A sudden government shut down order would likely qualify as an unforeseeable circumstance beyond the business' control. However, many businesses stayed open, but then faced reduced levels and had to lay off employees. Enterprise Leasing was one such company implementing sudden no-notice layoffs. A court has allowed a WARN Act case to proceed against the company by employees claiming they were entitled to the 60-day notice or 60 days' pay. Enterprise cited the natural disaster exception, claiming the COVID pandemic is a natural disaster. The judge did not agree, finding natural disasters under the WARN Act means things like floods and earthquakes which immediately or directly shut down operations. The judge held the pandemic was a one-off which did not directly close the business; it only created an economic business downturn which then led to the decisions to do layoffs. So, the company could have conceivably given more notice, even if not the full 60 days. This ruling allows the suit to proceed to trial. Enterprise still has the opportunity to present a fuller defense of its actions and reasons. This case could influence actions regarding many other similar COVID layoffs. *Benson at el. v. Enterprise Leasing Company of FLA* (M.D. FL, 2021).

ARBITRATION

Arbitration Agreements Cannot Limit Discrimination Suit Timeframes Employment arbitration agreements substitute private arbitration to replace the courts for all employment disputes. Many limit the scope of employees' actions, such as prohibiting employees from joining together in class actions and impose confidentiality on any award against the company. Some have tried to drastically shorten the time period in which employees can raise a complaint. In *Thompson v. Fresh Products, LLC* (6th Cir., 2021), the company's mandatory arbitration agreement required all claims, including discrimination claims, to be filed within six months or be void. This was challenged by an employee alleging age, disability and race discrimination, and by the EEOC. The court voided the arbitration agreement's provision. The court reasoned as follows. The ADA, ADEA and Title VII provide at least 300 days to file cases with the EEOC and allows the EEOC to then take longer to investigate before a person has to file a case in court. The arbitration agreement thwarts the purpose of the law: "Altering the timeframes undermines the statutes uniform application" and "Letting a company manipulate the filing windows gives them reason not to comply with the EEOC investigation, and subjects the federal laws to uneven application depending on each company's specific policy." Arbitration agreements should match the federal statutes of limitations for bringing complaints.

Fair Labor Standards Act

Kohls Pays $3 Million to Settle Assistant Manager Misclassification Claims A class of Kohls Department Store Assistant Managers claimed they were wrongly classified as salaried-exempt because they did not meet the management (executive) exemption standard. They claimed overtime pay for the many extra hours worked. Kohls settled the suit, agreeing to pay $3 million to the claimants. *Collins et al. v. Kohls* (E.D. Wisc. 2021). This case is yet another reminder to carefully make sure people actually meet the legal standards under the FLSA before calling them salaried-exempt. A title with the word "manager" does not mean the person actually meets the "duties" requirements.

Company Gets Sued And Then Sues Payroll Vendor *Plaza Home Mortgage v. Automated Data Processing, Inc.* (ADP) (S.D. Cal, 2021) is a case between a company and its payroll services provider. The company was sued in a class action by its employees who claimed they did not receive proper pay and OT for all hours worked. The company then turned around and sued ADP for all of its costs and liabilities, claiming the vendor was at fault. The suit alleged the vendor breached its contract guarantee because its system created the problem by not accurately tracking the hours, especially meal breaks. The vendor had promised its system would comply with all legal requirements, federal and state. The company claimed

ADP had negligently designed and implemented the system. The court ruled that there were sufficient grounds to allow a trial in the matter. ADP has blamed the company for failing "to give instructions to implement" the system and will get to argue that in the trial.

DISCRIMINATION

SEX

Unexplainable Pay Difference The Baltimore Public Library lost an Equal Pay case. Female librarians were given starting salaries $5,000 to $6,000 less per year than a comparable male librarian. This gap grew wider with each annual increase – based on a percentage of the starting wage. The Library claimed "unique prior experience" justified the higher male salary, however no one could explain exactly what that experience was or how it was unique. No one in management seemed to know who actually set the different wages and why. The city had given management some discretion in wages, but also a clear warning to make sure discretion "did not result in inequity." The court opined that "no one at the library took heed." *EEOC v. Enoch Pratt Free Library et al.* (D. Md, 2021).

RACE

Police Officer's Discipline Over Sexual Harassment Complaint Was Discriminatory. A Black police officer for the Veteran's Administration was suspended and demoted following a citizen complaint of harassment. The officer was assigned to drive a woman visiting the VA hospital to her lodgings. She then complained he had made sexual remarks to her and tried to give her his phone number. This resulted in the suspension and disciplinary action. However, the evidence in the ensuing discrimination case showed that he was treated very differently by the same supervisor than a White officer who was accused of sexual harassment. The White officer was accused of sexual advances toward a citizen, and then stalking her for several years. The woman presented witnesses of the harassment. Nothing happened to the White officer; he was not suspended; he received no discipline, and he was then promoted. In fact, this White officer was allowed to be part of the investigation and decision on discipline regarding the Black officer. The court ruled that the difference in how the supervisor treated two similarly situated employees had every appearance of racial discrimination. *Levy v. Wilkie* (7th Cir, 2021).

RETALIATION

Harassment Among Owners Can Close Business The county received complaints about a White Tax Appraisal Manager creating a racially hostile work environment for non-White employees. The county began an investigation. The Manager then complained that he was actually being discriminated against due to his race by unfair accusations and by being investigated. He was ultimately fired for fostering the hostile work environment and for poor work performance. He sued for retaliation and discrimination. He lost. The court noted an employer must investigate complaints and doing so is not discriminatory. The county found evidence to believe the complaints had validity. The Manager could identify no other similarly situated person who had been treated better than he. Further, the Manager had been under the gun for performance and threatened with termination prior to the complaints. So, there was no evidence of any retaliatory motive in the performance discharge. *Fitzgibbon v. Fulton County* (11th Cir, 2021). This is not an uncommon scenario. A person is accused of harassing or discriminatory actions and investigated. They adopt the "best defense is a good offense" strategy and "accuse the accusers," claiming they are actually the "victims" of unfairness, discriminatory focus and fake claims. This rarely works. Complaining about being investigated over complaints of discrimination is generally not seen as protected activity under the laws. As in this case, prior documentation of performance problems also helps. Waiting to raise performance issues until after someone complains is seen as after-the-fact excuses. Documentation prior to the issue being raised will usually overcome any allegations of discrimination or retaliation.

RELIGION

States Sue to Challenge New OFCCP Religious Accommodation Rule The Attorney Generals of 16 states have filed a suit to halt implementing rules which give both non-profit and closely held for-profit government contractors the ability to cite the owners' religious principles to exempt themselves from certain antidiscrimination requirements, and instead make employment decisions incorporating and accommodating their own faith principles – as they interpret those principles. The suit alleges this will water down crucial protections for a great part of the national workforce. The suit alleges, "The rule transforms the religious exemption from one of a narrow accommodation for nonprofit religious entities to be able to hire co-religionists in the context of an anti-discrimination law of general applicability into a loophole that allows employers of one religion to discriminate against employees of any other religion." *State of New York, et al v. U.S. Dept. of Labor* (S.D. NY, 2021.) This case, and the new rule itself, may be impacted by the president's freeze on implementation of new regulations.

Non-competition /Non-solicitation Agreements

Medical Company Takes a Double Hit For No-Poach Agreements, Criminal Prosecution and Civil Class Action by Employees Collusion to restrict trade is a violation of the Anti-Trust laws. This includes "wage fixing" in industries, which can be accomplished by agreements between competing businesses to not poach or hire each other's employees and to depress wage competition. Some time ago, the Dept. of Justice stated that these Non-Solicitation pacts could be a criminal violation. It has now brought such a criminal action against health care organizations which agreed to not solicit each other's top level employees. The charges could bring fines of up to $100 million and prison sentences. *U.S. v. Surgical Care Affiliates, et. al.* (D.C. TX 2021). A civil class action suit has also been filed alleging that the company's no-poach agreements unfairly harmed thousands of employees in its nationwide operation. The suit alleges the conspiracy operated to restrain their career movement and advancement, and deprived them of significant professional and economic opportunities. *Roe v. Surgical Care Affiliates, LLC* (N.D. Ill, 2021).

Uniformed Services Employment and Re-employment Readjustment Act (USERRA)

Walmart Will Pay $14 Million to Settle Military Leave Pay Case Walmart has agreed to settle a case alleging it denied proper pay to over 10,000 employees who took short term military leave for National Guard or Reserve duty. The company treated the military members differently than other employees who took short, non-military leaves, such as jury duty or bereavement leave. The company continued full pay during these other leaves, but denied any pay to those on short term military duty. USERRA requires equal treatment. If Walmart had denied pay for those other sorts of leave, and forced them to go without pay or required use of vacation time, then it could have denied pay for military leave. However, once it paid for some sorts of short term leave, it then should treat short term military leave the same. *Tsul et al. v. Walmart Inc.* (D. Mass, 2021).