BoardmanClark

Labor & Employment Law Update

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BOB GREGG | LABOR & EMPLOYMENT GROUP | (608) 283 1751 | SIGN UP: RGREGG@BOARDMANCLARK.COM

Legislation And Admininistration Actions

Two More Laws Added to OSHA's Whistleblower Jurisdiction In addition to workplace safety, OSHA oversees a Whistleblower Protection Program which handles complaints filed under more than 20 different "Whistleblower" laws. The laws protect employees and others who report wrongdoing. In February, two new laws: the Criminal Antitrust Anti-Retaliation Act and the Anti-Money Laundering Act were added to its jurisdiction. These laws cover or enhance coverage of a wide array of issues including companies bribing officials, insider trading, and collusion between companies to restrain competition. Recently the Dept. of Justice has begun criminal prosecution of companies with overly restrictive employee non-compete agreements and "anti-poaching" agreements for "collusion." Employees who may challenge or report such agreements may be protected by these whistleblowing laws from retaliation.

PRO Act Reintroduction In Congress. Democrats have reintroduced the Protecting The Right To Organize Act, which would substantially enhance unions' abilities to organize, impose greater penalties on companies which violate workers' rights, and void state laws which let workers refuse to pay union dues. The Act is expected to pass the House (it passed the House in 2020 largely on party lines) but faces stiff opposition in the Senate due to Republican filibusters which would require 60 votes to overcome, or some Democrats who have expressed concerns over the scope of the bill.

Theme of the Month - Appearance

COVID-19 and working from home continues to generate new and unusual situations -- and employment cases. Employers have had to implement new and unexpected dress codes and workplace appearance standards; even though the workplace may be the employee's own kitchen table. Employers have also been met with push-back and lawsuits when trying to curtail employees' wearing of political and social issue messaging. This month's entries illustrate issues of "appropriate appearance." Even after the pandemic has passed, the "new normal" will be an increase in work from home and virtual appearances from the home laptop or other personal devices. This month's Update also covers COVID mask cases regarding disability discrimination and labor relations in enforcement of dress codes.

"At Least Have on a Tie" Warns Judge A Federal Judge seemed concerned about the growing informality among attorneys working from their homes and making virtual appearances. In a Zoom hearing he noted the informal appearance of one of the attorneys and suggested he should at least wear a tie. When the attorney stood up to get a tie, it showed that his shirt was also untucked. In re *Firstar Corp.*

Securities (N.D. Cal., 2021). The Judge also noted that he has cautioned other attorneys about being too casual in virtual appearances and about inappropriate or distracting choices of background settings. In this and other courts, attorneys have appeared with backgrounds of public beaches, pets, family vacation pictures, and even active volcanoes.

Attorney Was Not a Cat Court appearances are virtual during COVID. An attorney representing a Texas county used a home laptop for a Zoom court appearance. However, the laptop had been previously being used by a child who had activated a cat filter. When he logged into the hearing, the attorney appeared before the court as a cat. For some time he could not remove the filter, so he proceeded, as a talking cat, until the filter could be nixed. Following the hearing, the Judge sent a message to other lawyers to emphasize the importance of making sure filters are off prior to a virtual hearing, especially if children have also been using the computer. [For more information on employers' rights and limitations regarding appearance standards, request the article Workplace Appearance Laws and Cases by Boardman & Clark.]

Litigation

DISCRIMINATION

Age

$12 Million to Settle Age Discrimination In Recruiting and Hiring Case PriceWaterhouseCoopers will pay $12 million plus attorneys' fees to settle a class action suit alleging that its practices resulted in the hiring of a "stunningly low number" of older workers into entry level and mid-level positions. The company rarely advertised openings; applicants found out via word-of-mouth. Recruiting was largely confined to college campuses – designed to focus on only younger people. In addition to the payments to class members, the company will change its hiring practices. *Robin, et al v. PriceWaterhouseCoopers LLP* (N.D. Ill., 2021).

Disability

Nike Agrees to Transparent COVID Masks. Nike agreed to settle a case filed by deaf and hard of hearing workers and customers alleging that its mandated COVID masks prevented them from reading lips, and thus created hardships in work or receiving services. The company agreed to provide clear masks for employees to use when communicating with a person who has a hearing disability. It will also post signs at its stores informing customers that this accommodation is available. The clear masks do not replace standard COVID masks. They are an auxiliary accommodation device to be readily available when needed. *Bunn, et al v. Nike, Inc.* (N.D. Cal., 2021).

EMPLOYMENT CONTRACTS

At-Will Statement is Not Enough to Keep Employee Handbook from Being a Contract Many employers strive to maintain Employment-At-Will and employee handbooks feature prominent "*Employment At Will – This handbook is not a contract*" notices on the signature page. This may not be enough. In *Hill v. City of Plainview* (MN Supreme Ct. 2021), the Minnesota court found that provisions in the handbook overrode the disclaimer notice and allowed the former employee to bring a contract case. This case was over a vacation payment issue in which the policy read clearly in favor of the employees and did not sufficiently reemphasize the employer's At-Will discretionary right to alter. A number of other states have made similar rulings, finding that a prominent Employment-At-Will notice at the start of a handbook can be eroded page by page by the various policies which are not consistent with the At-Will statement. Some states, such as Wisconsin, may recognize the At-Will disclaimer in general, but allow

specific policies, especially on compensation, paid time off, and benefits to be enforced as "mini-contracts" or as wage claims. [For additional information, request the article Blundering Into Liability – Unwittingly Creating Contracts of Employment by Boardman & Clark.]

Wages and Hours

Ignorance Is No Defense In an Immigration Nationality Act case, the Judge lost patience with a defendant employer when its attorney argued that the company should not be held liable because it "was not aware the government changed the rule in 2010." The law requires that U.S. workers must be paid at least the same as foreign workers if they do the same work. In this case, the company hired skilled foreign workers, but they spent significant time doing the same, "corresponding" work as the unskilled U.S. workers; yet continued to receive skilled wages for these hours. The Dept. of Labor assessed $143,000 in damages to compensate the U.S. workers. The company appealed and its argument included the "was not aware" claim. The Judge said, "That and 10 cents will get you a trolley ride! ...If the client didn't hire a lawyer to read the rule, that's its problem!" Ignorance of a decade old rule is no defense. *Oderrest Nurseries, LLP v. Scalia & Dept of Labor* (D.C. D.C. 2021).

Amazon Will Pay $61.7 Million to Settle Claim it Stole Drivers' Tips The Federal Trade Commission brought anti-trust charges against Amazon. It alleged the company engaged in a "bait and switch." It hired drivers, promising to pay $18 to $25 per hour plus all tips they received. It then changed the system and began cutting the amount of tips it rebated from customers' credit card payments and syphoned off the tips for itself. It concealed this, continuing to assure drivers and customers that 100% of tips went to the drivers. The 100% tip promise enticed drivers to "flock to Amazon" as opposed to going to other competing companies. This created an anti-competitive practice which allegedly violated the anti-trust laws. In the *Matter of Amazon et al.* (FTC, 2021).

Jimmy Johns Delivers $2 Million to Settle Misclassification Case In a continuing saga, it seems that every day another employer is found to have engaged in wishful thinking in calling people salaried-exempt when their jobs do not fit. Calling an employee a "manager" does not make them a salaried-exempt manager under the Fair Labor Standards Act. They must actually meet the "Duties Test." Jimmy Johns had numerous "Assistant Store Managers" who actually spent the majority of time doing non-exempt work; making sandwiches, cashiering and working in the stock room. The penalty for misclassification is having to pay overtime pay for the past two or three years, plus attorneys' fees and other penalties. *In Re Jimmy Johns Overtime Litigation* (N.D. Ill., 2021). This case, once again, shows the importance of doing a solid review to assure that your salaried-exempt positions actually meet the standards.

LABOR RELATIONS

"Cellar Lives Matter" – Winery Found to Have Violated NLRA by Banning Vest with Logo A winery worker wore a "Cellar Lives Matter" logo to work in support of a labor dispute between the winery and its employees. Management ordered him to remove the logo. The company claimed the logo was "an insensitive rip-off of Black Lives Matter" and mocked and was disparaging to Black Americans and the message of racial justice; it could hold the company up for public criticism. The union filed an Unfair Labor Practices charge. The NLRB ruled against the company finding a logo on the vest "constituted lawful union speech addressing an existing dispute between the winery and its cellar workers." One factor was that the company had previously issued t-shirts to employees with the logo "Straight Out of Woodbridge" (one of its brands); a wordplay on "Straight Out of Compton," a movie portraying a serious racial message. The company did not seem to have thought that conveyed any rip-off or disparagement of a serious racial

message. *Constellation Brands U.S. v. NLRB* (7th Cir. 2021).

No Evidence of a Compelling Interest A county agency banned employees from wearing Black Lives Matter COVID face masks, citing (1) its policy against displaying "political or social-protest" symbols while on duty and (2) concerns that they could "potentially disrupt the workplace" from "competing masks." Employees challenged this action as violating their First Amendment rights. A judge issued an injunction prohibiting the agency from banning the BLM masks. First it found selective enforcement of the "policy," since the agency had previously allowed employees to wear pins and logos in support of other social issues such as women's rights and LGBT Pride. Then it found no evidence of any of the "forecast potential" of disruptive conflict, "not a single employee donned a contrary mask in response;" the agency's defense seemed purely "speculation" without substance. *Amalgamated Transit Union #85 v. Port Authority of Allegheny County* (W.D. PA, 2021).