Labor & Employment Law Update

APRIL 2021

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Legislative And Admininistrative Actions

States Are Passing COVID Liability Immunity Laws - BUT. A number of states (including most recently Wisconsin and West Virginia), passed laws making all organizations, including employers, immune from liability to customers, clients, students, or employees contracting COVID-19 at or due to the organization environment, services or activities. This is an absolute immunity except for Worker's Compensation and for overt, intentional disregard or gross negligence. So, it is not complete immunity. Intentional or gross negligence are not clearly defined, and liability cases will still be brought. Therefore, businesses and employers should continue to engage in COVID-safe practices.

However...

OSHA Implements New COVID-19 Protections. Regardless of what any state law may do, the Federal OSHA standards will pre-empt state laws, and require enhanced COVID-19 safety standards. After a year of the prior administration's OSHA largely ignoring the pandemic, the agency is now starting an active focus on inspection, re-inspection, and enforcement regarding COVID-19 safety and hazardous conditions which can spread COVID-19 and other infectious diseases.

And...

Some States Are Reversing Course. New York passed a COVID-19 Immunity Act. Now it has revised that law to remove nursing homes from the protection. Nursing home facilities can now face suit for COVID-19-related illnesses and deaths.

Biden Administration Enables More Employer-Friendly H-1B Visa Programs. Under the new administration, employers may have more ease in obtaining H-1B visas for foreign professionals. The Trump administration interpreted the H-1B standards, as well as all other immigration rules, in a highly restrictive manner; greatly limiting employers. Many employers and employer associations challenged the administration in court and the courts made several decisions that the Trump administration had overstepped its authority by making unreasonable interpretations and legally unwarranted restrictions under H-1B. The Biden administration appears to be more employer-friendly in this area, in not continuing the highly restrictive interpretations. It seems to be returning to the standards more in line with what seem to be allowed under the laws.

Biden Discharges Staff for Marijuana Use. – Congress Objects. In case anyone thought the new administration was going to engage in "unbridled liberalism," it has discharged several White House staff members due to off-the-job marijuana use. This has drawn a reaction from over 30 members of Congress, urging the White House to ease restrictions on personal usage. There is widespread bipartisan support in many states and at the national legislative level for legalizing marijuana usage. The White House response to the plea to ease the standards was that this would not be done; "If marijuana were federally legal it might be a different circumstance." So, whatever the political or personal philosophy, President Biden's White House will abide by the federal laws. If Congress members want a change, they will need to pass revised laws to bring that about.

Litigation

DISCRIMINATION

Procedure

No Perry Mason Moments Allowed. On TV, Perry Mason never had to follow the standard rules of litigation and discovery. He would spring a surprise witness or some evidence at the last minute and get the "real culprit" to confess. Not so in the real world. In *Blank v. New England Computer Services* (D. Conn 2021), the attorney representing employees in a sex discrimination case tried to introduce a secretly made tape recording of the company's key manager. The recording contradicted the manager's version of facts and might undermine the company's defense. However, the tape had been in the attorney's possession for months, well before the end of the discovery period, when each party was required to exchange all relevant evidence. When the attorney sought to use the tape, the judge not only rejected the evidence, but lectured about trying to manufacture a Perry Mason Moment plot twist in violation of the rules.

Disability

Probation Is No Protection for Employer Under the Discrimination Laws. A food production employee was in his probationary period. He was informed that he may be required to work overtime at the end of shifts or by coming in early. He informed the company he had epilepsy and produced medical information. He said that he would be glad to work overtime, but the medical information showed he was on a regular sleep and medication schedule and would need 24 hours' notice of overtime and 16 hours between leaving and coming back to work in order to manage his condition. The company refused the request, informed him it could not give 24 hours' notice, and terminated his employment. Since he had no union rights to process a grievance or any other rights during the probationary period, he filed an ADA suit for failure to accommodate. The court found that the ADA (as all other discrimination laws) does not recognize a probationary period as limiting an employee's rights to challenge discriminatory treatment. The court found that the company did not take the time to engage in the required Interactive Process to explore possible accommodations, rather than quickly terminate a probationary employee. Further, the company could not show exactly why a 24-hour notice and 16 hours between work shifts was unreasonable. *Gloeckner v. Kraft Heinz Food Co.* (D.D. OR, 2021) [Be aware that "probation" or At-Will employment does not immunize an employer from liability under a wide variety of employment laws. These statuses have their limits. Further, a probationary period within an employee handbook may diminish or even eliminate employment-at-will. See the articles Employment Handbooks and Blundering Into Liability by Boardman & Clark.]

EMPLOYMENT AGREEMENTS

A "Material Change" Can Diminish or Void Enforceability of Non-Compete and Confidentiality Agreements – Renew When Things Change. Employers often require employees to sign Confidentiality, Non-Disclosure and Non-Competition Agreements at the time of hire. Then, long term employees move into positions with greater responsibility, expanded scope of geography or product work, or other material changes which expand the scope the employer wants to protect and which is far beyond the range of the information or territory the original Agreement covered. Even if that Agreement had the generic "and all future information or territory" clauses, courts in many states are reluctant to enforce these old agreements because at the time they were signed, the parties never intended them to cover the vastly different situations by the time the employee left the company. An example is Bradley v. Bradford & Bigelow Inc. (Suffolk Co. Ct, Mass, 2021). The employee was hired as an Account Manager in 2014 with a Confidentiality and Non-Competition Agreement. He was promoted to Business Development Manager in 2015 and required to sign a new agreement reflecting the expanded scope. Then he was promoted to Vice-President of Sales Development and Marketing in 2017, a clear material changes in scope, but with no new agreement. He then left for another company in 2020 and the former employer sued to enforce the 2015 agreement. The court declined to do so, finding the old agreement covered the 2015 job, and could not be enforced for more than two years after the employee left that job and became V.P., and only as to the scope of that prior job. So, the agreement was long past enforceable in 2020. This "material change" principle has been applied by courts in many states. The message is re-up the Agreement when there is a promotion, change in job scope, change of territory, change in technologies or products, etc. List the scope of the new material change in the revised agreement.

THIRD-PARTY LIABILITY

Testing Company Must Pay City's Defense Costs For Defective Drug Tests. A number of police officers were fired due to positive drug tests. It turned out that the test was defective and resulted in false positives. The officers sued the city for their wrongful discharge. The city informed the testing contractor, but the testing company did not step into the case. The city sued the testing company for failing to live up to the contractual indemnity duty. The court ruled that the testing company should be responsible to assume the city's legal defense and costs for the suits filed by the officers. The testing company had argued that the city had not used the correct language to trigger a duty to defend when it gave notice of the suits. The court found that highly technical language or magic words were not required. The city sent the testing company simple and clear information about the defective test suits – sufficient to trigger the duty to defend and indemnify. *Psychmedics Corp. v. City of Boston, et al.* (S. Ct. Mass, 2021).

It May Not Be Over When You Sell The Business. In *Trujillo v. Omni Baking Co.* (Sup. Ct. NJ, 2021) the court ruled that a company failed to correct defects and ensure the facility was safe before the owners sold it to a successor, and thus, was liable to the new owners and to an employee of the new company who had her right arm amputated by defective equipment. The seller had a Duty of Care to the purchaser and its employees to prevent foreseeable harm. The employee caught her arm in a dough conveyer. The sellers had knowledge the equipment was dangerous and unguarded, had failed inspection, but it was still present and unfixed at the time of sale. It was foreseeable that a worker would at some point suffer injury and the seller should have fixed, replaced the equipment, or given clear warning about the danger.

Labor Relations

Enhanced Cleaning Should Be Bargained Before Implementing. A hotel remodeled its rooms, resulting in more detailed cleaning protocols. COVID-19 concerns also necessitated enhanced cleaning. However, the hotel kept the same rooms per hour quotas for the cleaning staff and disciplined them for not meeting the quotas. The union filed a complaint with the National Labor Relations Board for failure to bargain with the union prior to implementing the cleaning changes. The NLRB found that the enhanced cleaning requirements were a significant change in the employment conditions. It rejected the hotel's argument that the cleaning could still be done in the same amount of time and the quotas did not need to be changed. The hotel's witness was a supervisor who did not actually do the room cleaning work, except on rare occasions. Not only did the Board find the hotel should have bargained over the cleaning quotas, but that it should have done so before the remodeling, to disclose how the remodel would impact the cleaning requirements. In RE: *Anchorage Hilton and Unite Here Local 878* (NLRB, 2021).