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LAW FIRM

LABOR & EMPLOYMENT UPDATE

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LEGISLATIVE AND ADMINISTRATION ACTION

OSHA Slip Trip & Fall Rule. The new Walking Work Surfaces rule has been finalized and revised. This is the first change to this rule in 26 years, though the workplace, technology and surfaces have changed greatly. The rules provide more flexibility for employers to design protections based upon their specific environment. The rules begin to "phase in" on January 17, 2017.

The Election Winner IS – Marijuana!! In the most divided national election in decades, one issue with bi-partisan support was legalization of marijuana. In 2016 four more states legalized recreational marijuana: Maine, Massachusetts, Nevada and California. Four other states legalized medical marijuana: Arkansas, Florida, North Dakota and Montana. "Medical" prescription rules are so loose that in several "medical" states marijuana is so easily "prescribed", that it is basically available to anyone. So pot is now legal in a growing part of the nation. Since there is bi-partisan support of these legislative efforts, the new administration and Congress may consider removing marijuana from the controlled substance list. Doing so would also greatly enhance the Federal government's ability to get billions by taxing marijuana sales, rather than spend billions on enforcing the prohibition.

States Continue to Implement Salary Exempt Increases. Though the Federal FLSA salary increase rules are on hold, and may not be implemented, states are moving forward on their own salary increases. New York, for example, has now set a $970 per week ($50,700 per year) minimum salary basis for New York City, and $780 a week ($40,560 per year) for other parts of the state. This will increase in 2018 to $58,500 annually in NYC and by 2020 to $48,724 annually for the rest of the state. Many states now have wage requirements which are higher than the federal minimums.

LITIGATION

Damages

Cover-up and Falsification of Records Results in Jury Awarding Greater Damages than Plaintiff Requested. A company appealed a Title VII retaliation case verdict claiming it was excessive, because the jury awarded the plaintiff substantially more than she had asked for in the case. The Appellate Court upheld the amount. The evidence showed that only two weeks after a complaint about sexual harassment the company fired the plaintiff based on "trumped up charges." The jury found the employer then engaged in a cover-up, creating false records and a false paper trail to justify the termination. The Court ruled that a jury could decide to award compensatory and punitive damages at any level it chose to for this "reprehensible conduct," as long as the jury stayed within the maximum amounts authorized by the law. *Garcia v. Sigmatron International Inc.* (7th Cir. 2016).

Former Penn State Coach Awarded $5 Million in Whistleblower Case. Former Penn State Coach Mike McQueary was awarded $5 million for retaliation against him after he came forward to truthfully report issues of sexual abuse by Coach Jerry Sandusky. He first made a clear report to Head Coach Joe Paterno and University administration in 2001, which was ignored. He then talked to investigators when the matter became more public. He was then isolated, and his employment terminated. The jury awarded $4 million, but the Judge determined that that was "insufficient" considering the evidence of retaliation. The Judge added another $1 million. A jury had already awarded McQueary $7.3 million in October, for his defamation case (his complaint only asked for $4 million) against the University. This brings the total to over $12 million. *McQueary v. Penn State U.* (Ct. of Common Pleas, 2016).

Discrimination

Race and Retaliation

Insurance Exchange Settles Race and Retaliation Case. A California Insurance Exchange has agreed to pay $225,000 and furnish other relief to settle allegations that it fired two Southeast Asian American employees of Hmong descent in March 2009 for improper coding, but failed to take similar action against employees of a different race for the same conduct. The settlement also resolves charges that the company fired a White employee in retaliation for having been a witness during the EEOC investigation of the case. *EEOC v. Farmers Insurance Exchange* (E.D. Cal., 2016).

Sex and Retaliation

Refusal to Work With Harasser Was Not Insubordination – Discharge Was Retaliation. An African American warehouse employee refused to continue working the same shift with a White co-worker who called her the N-word. The White employee had a history of inappropriate behavior and comments, but was allowed to continue his employment, and his work in the same area as those he offended. The African American employee stated that she could no longer work in the same area, and requested that he or she be assigned to a different department or a different shift. The Company refused. She said she could no longer come to work in such a hostile environment. She was fired for refusing to come to work. In the ensuing case the Company defended by claiming she had either been insubordinate or voluntarily resigned by her absence. The Court saw it differently. The employee had engaged in protected activity by raising legitimate concerns about harassment. The Company did not effectively address her continuing concern about a hostile environment and the termination stated a case for retaliation. *Nuness v. Simon and Schuster, Inc.* (D. N.J. 2016).

Age

The "R-word" (No this is not "talk like a pirate" month). Older workers are often asked the "R-word;" when do they plan to retire? This is often a casual question and the worker has made no mention at all about any inclination to retire. It is clearly a signal that they are considered to be old (no one ever asks a 38 year old about "when are you planning to retire?") The R-question becomes very dangerous when managers begin to use the R-word in relation to their older employees. *Dockery v. Tunica City* (N.D. Miss., 2016) illustrates the danger. A 68 year old highway department employee's supervisor made reference to other over-60 aged employees who had or were retiring. He queried the employee on his plans to "R." The employee then said he would retire, but when Human Resources was processing the papers, he indicated that he really wasn't ready to retire, but felt pressured. He did not make any written objection, and did go ahead with the retirement. He then sued for age discrimination, claiming he was pressured into the decision. The court denied summary judgment, allowing the case to proceed to trial. In the ruling the Court stated that the "R" statements "did not create a strong case" of age discrimination. However, "strong case" is *not* the standard to allow a case to go forward to trial before a jury. The statements of a manager take on great significance, (whether the manager claims to have intended them or not). Just a few "R-words" by a manager can result in a viable case, and a jury trial. The employer may ultimately win the trial (maybe), but a "strong" case and a "not strong" case both cost huge amounts, time, effort and money to defend. Managers would be well advised to avoid the R-word, until the employee submits a formal, written retirement request to HR. [For more insight request the article *The Aging Workforce* or the management training seminar/webinar *The Aging Workforce* by Boardman & Clark LLP.]

Disability

Reasonable Accommodation does not Require Giving Preference to Disabled Employees. Under the ADA an employee who can no longer perform the essential function of a job, may be accommodated by placement into another open position for which they are qualified, or can readily become qualified. The EEOC has long taken the position that this is virtually mandatory, the employer must give preference and place the disabled employee into a vacancy, regardless of whether there may be more qualified people available or even "in line" for the position. (An exception is a valid seniority plan – such as under a collective bargaining agreement). In *EEOC v. St. Joseph Hospital* (11th Cir. 2016) the Court rejected the EEOC's position. It ruled that the ADA stated that placement into an alternative position "may" be a reasonable accommodation; it did not mandate such a placement. It also pointed out the ADA provision which states that an employer is not required to ignore a "best qualified applicant" to give disabled workers preferential treatment. "Passing over best qualified people in favor of less qualified ones is not a reasonable way to promote efficiency or good performance." [NOTE: The Seventh Circuit has taken a contrary approach – more in line with the EEOC – holding that employers may need to consider reassigning a disabled employee to a job for which there may be a better applicant. Given this conflict, the Supreme Court may address this issue in the future.]

Religion

Drug Testing Hair Samples. J.B. Hunt Transportation agreed to pay $260,000 to settle an EEOC action regarding failure to allow Sikh employees a reasonable alternative to its hair sampling drug testing policy. Sikhs are religiously required to never cut their hair and alleged that the company's policy violated their religious tenets. Title VII requires reasonable accommodation when religious beliefs or practices conflict with company policy or practices. (EEOC Settlement, 2016).

Witness Fired for not Saying "Merry Christmas". Some Christian activists object, and boycott companies which they allege have "taken Christ out of Christmas." Yet they seem to forget that there are many devout Christians who object to, and refuse to incorporate Christ into a sales holiday, devoted to celebrating commercialism. *Appleyard v. Murphy Oil USA* (W.D. Tenn., 2016) involved a Jehovah's Witness who stated that his religious beliefs prevented him from acknowledging the "Holiday" or wishing others a Merry Christmas in his job as a gas station cashier. He asked for an accommodation such as wishing customers "Seasons Greetings" or continuing the same "welcome" and "thank you for your business" phrases used during the rest of the year. The case alleges that a manager then began to belittle the Jehovah's Witness, made derogatory remarks about his faith and then fired him.

Everything

Shotgun Approach Fails. A terminated warehouse shipping employee filed a case alleging that his discharge was due to discrimination on age, race, color, national origin, the Fair Labor Standards Act and retaliation. He seemed to have alleged anything and everything which he might possibly qualify under. However, he failed to show any evidence of overt discrimination, and no evidence that anyone else received lesser discipline for similar infractions. He could not refute the employer's defense that he was fired for ongoing offenses including viewing pornography on the work computer, repeatedly failing to wear safety equipment, offensive sexual comments to female coworkers, and insubordination. *Zegarra v. John Crane, Inc.* (N.D. Ill., 2016).