Labor & Employment Law Update

OCTOBER 2017

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Legislative and Administrative Actions

A Minimum Wage Increase Under Federal Contracts. The minimum wage will increase to $10.25 an hour on January 1, 2018, for federal contractors ($7.25 for tipped employees). This is part of a scheduled increase put in effect in 2015 by Executive Order 13658.

DOJ Warns Against No-Poaching Agreements As Criminal. The Dept. of Justice Antitrust Division has stated that agreements between businesses not to recruit or hire each other's key employees and/or not to compete with each other in employee compensation are "per se illegal" and can be subject to both civil and criminal prosecution. These "no-poaching" and "wage fixing" agreements between competitors, or even non-similar businesses which hire the same sorts of positions, are a restraint of trade subject to civil and criminal penalties, and DOJ is planning to take more enforcement action. ["Restrictive Covenants" are coming under more scrutiny. Federal agencies, such as DOJ and the NLRB, are taking action. States are imposing new and more restrictions on non-competes and confidentiality agreements. This is the time to review any such agreements your organization may have and be sure they are up-to-date and in compliance.]

Litigation

RETALIATION – WHISTLEBLOWING (SARBANES-OXLEY, DODD-FRANK AND MORE)

Auditor Threatened And Fired. A bank auditor made ongoing reports of irregularities. These included improprieties in the CEO's personal accounts, the bank's hiding of records subpoenaed by the FEC - declaring they did not exist, loans to well-known criminals, questionable activities by other senior managers and money laundering. There were potential violations of banking, mail, wire and securities fraud laws. His reports were met with directions to "don't put these concerns in writing;" "keep quiet" about the CEO's account activity; a warning that "if you keep turning over rocks you're going to find a snake and get bit!" The bank tried to get local police to investigate the auditor, and told other employees that he had "psychiatric" issues. The "get bit" warning made the auditor fear for his safety. The auditor did report the issues to the Treasury Dept. The bank then fired the auditor. The court found valid grounds for a case under the Sarbanes-Oxley and Dodd-Frank Acts, as well as a tort action for defamation. *Erhart v. Bofl Holding, Inc.* (S.D. Cal., 2017).

IMMIGRATION CONTROL

I-9 Violation $305K Penalty Is Not Dischargeable. A company was assessed $305,000 in penalties for continuing employment of illegal immigrants after knowing their I-9 information was fraudulent. The ICE served notice of "suspect documents" and then assessed the penalty. The company filed for bankruptcy. The court refused to allow the penalty to be discharged or reduced, finding an intentional violation of law. *DLS Precision Fab v. U.S. ICE* (9th Cir., 2017).

PERSONAL LIABILITY

Some Sorts Of Employment Have Bigger Consequences Than Others – Military Court Martial For Sexual Harassment. National Guard members are employees. The National Guard is an "employer" which is subject to many of the federal and state employment laws. So it can be liable for discrimination, such as sexual harassment, of both its civilian and military staff. The employees who commit the discrimination, however, may get much more dramatic consequences than in other sorts of employment. In *State v. Remer* (Wis. Ct. App., 2017), a Wisconsin Army National Guard Sergeant First Class ("Top Sergeant") was charged with use of his position to engage in wrongful conduct with junior women soldiers and recruits. Instead of just being fired, as in most employment, he was Court Martialed, given a Bad Conduct Discharge, and sentenced to a period of confinement in the military jail. He appealed the sentence as being too harsh. The court upheld the sentence, finding it was warranted by the seriousness of the violation of overtly "taking advantage of his position to prey on young people." [Be aware that even in other areas of private and public employment there are a number of laws which do provide for a manager's personal liability and even criminal sanctions – see the earlier entry on "Restraint of Trade" or request the article "Are You in the Crosshairs? (Your Personal Liability in Employment Cases) by Boardman & Clark.]

LABOR RELATIONS

NLRB Condones Racial Slurs – Orders Reinstatement Of Fired Worker. During a strike, a company hired replacement workers who crossed the picket line. Some of the replacements were African-American. One striker began yelling racial taunts and slurs toward those replacements. At the end of the contract dispute, the company restored the strikers to their jobs, but fired the one who yelled the racial slurs under its anti-harassment policy. The NLRB ruled that the company unlawfully fired the worker for engaging in protected strike activity. The Appeals Court upheld this decision ruling that the conduct may have justified discipline, but not discharge for the one instance of protected picket line behavior. *Cooper Tire & Rubber v. NLRB* (8th Cir., 2017). The company has issued a statement that this decision places employers in an untenable position between preventing Title VII liability for harassment and claims that overtly racist behavior is protected by the National Labor Relations Act. The company is considering an appeal.

DUE PROCESS AND CONTRACTS

Newspaper Request "Outs" Professor. An award-winning tenured university professor alleged that he was discharged without any due process and was defamed by charges that he had misrepresented his credentials. A number of students had complained about the "obscene language" used in class, arbitrary cancellation of classes, allowing a non-employee to grade their papers, and that the professor did not follow procedure in dismissing two students from a course. The professor was evasive and uncooperative in the complaint investigation, but only mild action was taken. The students went to the local newspaper to report their concerns. The paper then submitted an Open Records Request regarding the professor. This resulted in discovery of "discrepancies" in the professor's past employment, and a conclusion he had misrepresented both his employment and educational credentials. Many of his claimed credentials were "vague" or "otherwise incorrect." The Chancellor made 20 attempts to meet with the professor to discuss these concerns. He kept cancelling or not responding. The university hired an independent investigator, who concluded the professor had committed misrepresentations and recommended discharge. The professor was informed of his right to then request a formal process and hearing. He said he would, but then he terminated the process. He was discharged. He sued, alleging over 26 different cases of action, the main ones involving due process, defamation and breach of contract. The court granted summary judgment to the university. The court found it was the professor who had impeded the due process or contract rights, not the university. He had notice and opportunity to be heard in a meaningful manner, and failed to take advantage of that opportunity. *Grant v. Trustees of Indiana U* (7th Cir., 2017).

Settlement Agreement Was Too Specific – Allowed Additional Suits By Former Employee. A department store entered into a Settlement and Release Agreement to resolve a case. Unfortunately, the agreement was too narrowly focused on the issues in the case – disability and workers compensation. The employee took the settlement and then sued the company for FMLA retaliation based on the same facts and circumstances. The company defended, claiming the employee had settled and released this matter. The court disagreed. It found the Agreement was too narrow. It mentioned disability and WC but not FMLA. It did not have the broad language on release of any and all causes of action regarding the employment, so the employee was not precluded from bringing cases under any of the other, perhaps many other, employment laws. *Zuber v. Boscovs* (3rd Cir., 2017). The lesson is to analyze the situation and include all possible actions in a settlement and release. Have your attorney draft the release rather than the hearing examiner or judge, who are just focusing on that specific case.

DISCRIMINATION

WELLNESS & AGE

EEOC Wellness Regulation Found To Be Without Merit, Arbitrary And Capricious But Not Overruled – For The Moment. The AARP challenged the EEOC's regulations on employer wellness programs and the incentives employers are allowed to offer to those participating in healthcare wellness programs. AARP claimed they were discriminatory against older workers and violated GINA. EEOC first challenged AARP's standing to bring the suit. However, the court found that it did validly represent named employees, and a viable class of older workers. Then the court found in AARP's favor, ruling the EEOC's regulations were more than problematic, they are baseless, "arbitrary and capricious," "neither reasonable nor supported by the administrative record." However, instead of simply voiding the regulations, as is usually done, the court left them in place. The court considered the practical effect. Hundreds of thousands of employers had made great efforts and developed programs in reliance on the rules, to bring their wellness programs into compliance. It would be difficult or impossible for them to suddenly shift back to the pre-regulation status. The court stated that voiding the rules "appears likely to cause potentially widespread disruption and confusion." Therefore, the court remanded the rules to the EEOC for reconsideration and revision – but left them in place until a reasonable revision could be made. *AARP v. EEOC* (D. DC, 2017). [AARP is now arguing that EEOC's proposed time frame for revisions could take three years, and is not "reasonable."]

SEX

Black Entertainment Network And Viacom Sued As Joint Employers For Sex Discrimination and FMLA. In *Mashariki v. Viacom and BET LLC* (C.D. Cal., 2017), the court ruled that the two companies are a joint employer for purposes of a case brought by a former BET executive. The executive alleged that BET harassed and intimidated her and other female employees, had a "misogynistic culture that oppresses women," and that it retaliated against her when she took medical leave for breast cancer. Viacom was found to be a joint employer because it exercises authority over BET. Employment advice was provided by the Viacom HR department and by Viacom's legal department. The court also allowed a cause of action to proceed personally against the BET Network President for Programming, under California state law.

Bulletproof Vest Interferes With Breastfeeding. Federal and many state laws require employers to allow mothers to breast feed or express milk at work. A police officer's doctor informed her that wearing the bulletproof vest was a problem for breast feeding, and that she should avoid wearing it during the months in which she was breast feeding her infant due to the likelihood of breast infections. A supervisor suggested cutting two holes in the vest as an accommodation, but this made the vest unsafe, no longer bulletproof and was not approved. She requested a light duty desk job. This was denied, so she had to quit working. She sued and won, and the Court of Appeals upheld the jury verdict in her favor. The court found that breastfeeding and its health complications are covered under Title VII (the Pregnancy Discrimination Act) as a pregnancy-related condition. The court ruled that if the employer gave light duty to others (which the department did) with medical conditions, it must also accommodate pregnancy and post-pregnancy conditions. *Hicks v. City of Tuscaloosa* (11th Cir., 2017).

RELIGION

Coach's 50-Yard Line Prayer Is Prohibited. A high school football coach always went to the 50-yard line and openly prayed immediately at the end of each game. He was directed not to do so. He refused to stop, claiming he was a devout Christian and was expressing his faith. He filed a lawsuit against the school district claiming a right to continue praying on the field. The court ruled against him. His actions were done in his position as a paid public employee – not as a private citizen. He was sending a message that the school district was endorsing a specific religion and a specific religious practice. The Constitution prohibits employees, while being paid by the taxpayers, in their official capacity, to engage in the promotion of any religion. The school had a duty to order him to cease in order to avoid liability for violation of the First Amendment Establishment Clause. *Kennedy v. Bremerton Sch. Dist.* (9th Cir., 2017). Public displays of religion or social opinion can be complicated and confusing. Students are not paid public employees. So, in some circumstances they may have more rights to express their religion or political views than do the teachers or coaches. Football players who take a knee are private sector employees (not paid by the taxpayers) of a private sector NFL team, so the Constitutional prohibitions or rights do not apply to them and their expression. It is a different legal standard (unless one considers a municipally-owned stadium is a public utility-public forum and the "political statement" part of the pre-game proceedings are outside the scope of their job description and job duties. Then the players may have a much greater Constitutional right as citizens to their freedom of expression for those two minutes).