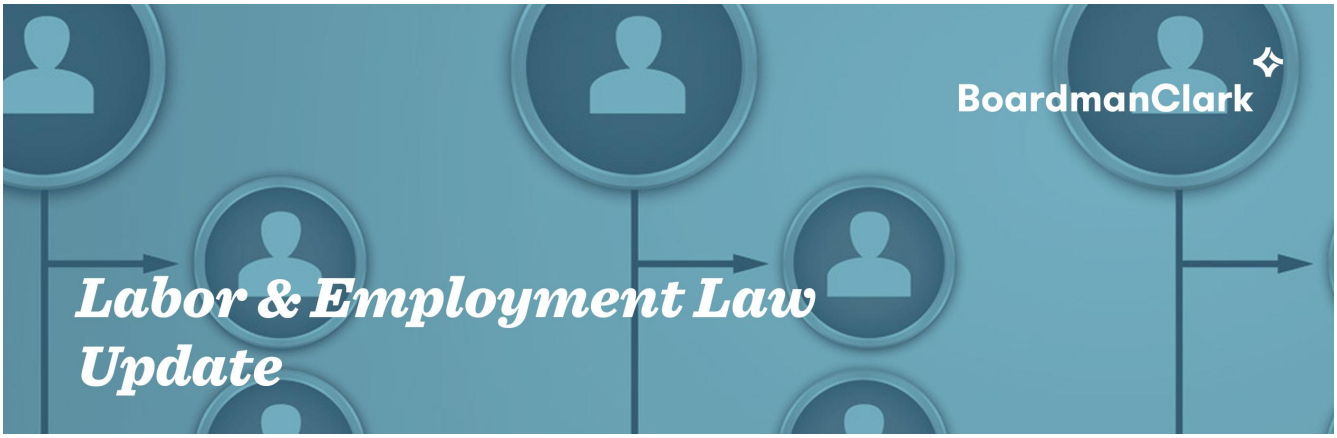

Renewed Surge – New OSHA COVID-19 Guidance

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Renewed Surge – New OSHA COVID-19 Guidance. The renewed surge in COVID-19 cases has resulted in OSHA issuing further guidance, in accordance with the CDC recommendations. These include: masking for all – regardless of vaccination status, in close quarters and public spaces, to protect the unvaccinated; regular testing of the unvaccinated; and, to consider mandatory vaccinations. There are more extensive guidances for specific industries, such as health care and meat, poultry and seafood processing, regarding distances, barriers and materials to be used to block transmissions.

LITIGATION

Safety

COVID-19 Masks – Coffee Filters and Doggy Diapers. A McDonalds franchise owner did not provide proper COVID-19 masks or safety protocols for employees. Instead, they were given coffee filters with strings attached and packets of doggy diapers to put over their faces. The owner told the employees masks had to be used "until they fall apart" before they will receive a replacement. In addition, workers alleged the owner forced people to continue working after testing positive, and that resulted in 25 of them, plus other family members, contracting COVID-19. (There is no

information as to whether any customers contract COVID-19.) The workers staged a walk-out and filed suit alleging the restaurant created a public nuisance. A judge shut down the restaurant and it remained close for some time. In August 2021, the court allowed the restaurant to reopen after the franchise and the employees reached an agreement for enhanced safety protocols; establishment of a workers committee with which the owner has to meet monthly and which will assess the business's efforts to comply with safety; have paid breaks so workers can sanitize themselves and more. Failure to comply could result in reclosure of the restaurant. *Hernandez v. VES McDonalds* (Col. Supreme Ct. 2021).

Asbestos Does Not Stay at Work - It Comes Home to the Family. *Boynton v Kennecott Utah Copper, et al.* (Supreme Court of Utah 2021) alleges that a worker's spouse contracted mesothelioma and then died because her husband handled asbestos on the job. She cleaned his work clothes and was in the same house he came home to. The employer failed to exercise care in preventing a hazardous substance from leaving the exposure site and having the predictable effect of exposing family, friends or the public. The suit was filed against the worker's direct employer and the companies which owned the location where his employer was the contractor performing work. The court rejected motions to dismiss, finding that all parties owed a Duty of Care, since they had exercised sufficient control over the property and the contract. It was common knowledge that asbestos is dangerous and that parties off the job could be exposed. The companies had an affirmative duty to take steps to prevent exposure of spouses and family members such as having on-site changing and laundry service to clean the asbestos from work clothes. However, they left it "solely on the workers' shoulders" to prevent the exposure the companies created. "It makes little sense to require every employee to individually implement personal safety practices, rather than require the employer to make a single determination that protects all employees and their families". This decision does not decide the suit; it allows it to continue to the liability phase.

DISCRIMINATION

Disability

State COVID-19 Immunity Law Does Not Pre-empt Constructive Discharge Case Due to Asthma. Tennessee, along with a number of other states (including Wisconsin) passed laws making employers immune from suits and liability for COVID-19-related illness, injury and other causes of action by employees (and usually customers, clients, the public, etc.) However, a federal court has found these laws do not bar

suits under Federal laws. *Heck v Copper Cellar Corp.* (E.D. TN, 2021) was brought under the Americans with Disabilities Act (ADA) by a bartender with asthma. After several months of COVID-19 closure, the restaurant reopened. She came back to find the facility was crowded and not following the local county distancing/mask recommendations. She requested accommodation of deferred return to work, or more protection for her vulnerability to COVID-19 due to asthma. There was no interactive process consideration, and she was ordered to continue work under the conditions. She felt forced to quit. The restaurant sought to dismiss the case, citing the state's COVID-19 immunity laws on employment suits. The court rejected this defense – noting that a state law cannot deprive a federal court of jurisdiction over federal laws, it "would lead to inconsistent application of federal laws and inconsistent access to federal courts" throughout the country.

Gender/Sex

Administration Ends Suit on Transgender Military Ban. The Biden administration has ended a suit regarding President Trump's directive banning Transgender people from serving in the U.S. military. (Reversing the Obama era practice of opening the services to all who wish to serve their country.) This resulted in suits to challenge the directive. President Biden revoked the directive. Then the Dept. of Defense announced an "updated policy" which now prohibits discrimination on the basis of gender identity. The previously filed federal court cases are now being resolved and dismissed. *Karnoski v Trump et al.* (WD Wash, 2021).

Restaurant Owner/Chef Mario Batali Agrees to Pay $600,000 and Submit to State Oversight. A New York State Attorney General's investigation concluded that chef, Mario Batali and restaurant partner, Joe Bastianich, permitted a culture of sexual harassment and retaliation, including personally subjecting employees to unwelcome sexual advances and explicit comments. The restaurant failed to take action when employees complained. The restaurant also required complainants to make their complaints and be interviewed and cross-examined in the presence of the harassers, thus creating an intimidating, ineffective and retaliatory process designed to discourage complaints. The settlement requires payment of $600,000, changes in procedure, training of managers, and three years of oversight and monitoring by the state for all of the Batali/Bastianich owned restaurants. The Attorney General's office stated, "celebrity and fame does not absolve someone from following the law." This is just the latest in the Mario Batali saga. He previously paid $240,000 to employees in one restaurant to settle a different harassment suit, and $2.2 million to settle a proposed class action for alleged minimum wage, overtime, and tip credit violations.

Race

White Employees Disciplined to Cover-Up Discrimination Against Black Building Engineer. One way to defeat a discrimination case is to show that others of a different protected classification were also disciplined or discharged; thus there is no discriminatory treatment. In *Branch v Temple University* (ED PA, 2021), the court found that this defense did not hold water. A Black building engineer had complained about racial discrimination. Very soon thereafter, the manager instituted a spot check of his work and found discrepancies in his logbooks of building inspections. The manager then fired him. The engineer filed a retaliation and discrimination case under Title VII and 42 U.S. Code Section 1981 alleging that no White engineer had ever been disciplined or discharged for similar errors. The evidence showed that once the manager knew of this case's allegations, he then quickly did checks of White employees' logbooks and issued discipline to them, "to make it appear he was not racist". The court found this appeared to be a pretext to cover up the unequal and retaliatory discharge of the Black engineer. Hasty after-the-fact actions cannot be used to defend a case. Thus, the defense was rejected. Sadly, the discipline for the White employees remains in their personnel files, even if it may have been an after-the-fact ploy to cover-up. This is an example of how discrimination harms all of us. The White employees also were caught up in the negative effects of a discriminatory situation.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

Active Duty Must Be Treated the Same as Other Employer-Provided Paid Time Off. An employer should not dock pay for those on military leave when it pays other employees for other types of absences. USERRA entitles employees taking military leave to "the other rights and benefits their employers give to employees taking similar types of leave." So, one cannot pay for jury duty, bereavement, etc., and other non-voluntary leave and yet not include military leave for at least the same number of paid days. A class action was filed on behalf of all employees who did not receive the same number of days pay as allowed for other types of non-earned PTO. *Travers v Federal Express Corp* (3rd Cir, 2021). This does not mean those on military leave get more vacation or earned sick leave days than they have earned/accrued under company policy. (There are additional USERRA rules regarding use and pay for these accrued days.) This case is about other sorts of paid leave provided by employers. For more information, also see the HR Heads Up article New Paid Leave

Obligations Under USERRA on the 7th Circuit's similar decision in *White v. United Airlines*.

LABOR RELATIONS

Ritz Crackers, Oreo Cookies and Retaliation By Investigation. In *Mondelez Global v NLRB* (7th Cir., 2021), the court upheld an NLRB determination that a plant making Oreo cookies and Ritz crackers had illegally fired three union officers. During a contentious labor dispute, the company implemented an investigation of worker overtime. It found violations by the three employees who were the main union officials. They were fired. Then the company stopped the investigation. The NLRB found the investigation was launched in an effort to find a reason to fire the union officials. On appeal, the court agreed. The investigation did not seem like a real effort to look at the overtime in general. It focused on the three officials and halted once they were fired. While overtime violations did exist, the investigation found even more numerous and worse violations by other employees but took no disciplinary action. Thus, it seemed the three were targeted due to their protected union activities.

Rat Has 9 Lives – NLRB's Resurrection. The most resilient character in labor law is Scabby the Rat. He is a giant inflatable rat figure which shows up at labor disputes all over the U.S., sometimes with his inflatable friends, Fat Cat and a giant cockroach. These inflatables draw a lot of public attention to the labor issue. The targeted employers and business owners, however, find Scabby's presence very disturbing and have spent years trying to get the National Labor Relations Board (NLRB) and courts to deflate the rodent. These efforts have worked temporarily, but Scabby always comes back to life. Scabby has escaped demise seemingly almost as many times as that other cartoon character, the Road Runner. During the Trump administration, the NLRB General Counsel made a concentrated ban Scabby effort. Now, though, the NLRB has maintained its decade old position and ruled for the rat again! Interestingly, the majority, the one Democrat appointee and two Republican members found the display was constitutionally protected speech. No one seems to be able to build an effective rat trap. With two more Democratic NLRB appointees due to come onboard expect Scabby and other pro-union expressions to receive more protection. *In RE Union of Operating Engineers Local 150 and Lippert Components* (NLRB, 2021).

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