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LAW FIRM

LABOR & EMPLOYMENT UPDATE

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NOVEMBER 2015

LEGISLATIVE AND ADMINISTRATIVE ACTION

Credit Check Discrimination Amendment Introduced. An amendment to the Fair Credit Reporting Act has been introduced by Rep. Steve Cohen (D., Tenn.) to forbid use of credit checks in hiring or any other employment process. "Credit scores are not accurate predictions of job performance," states Cohen. Credit reporting agencies would be prohibited from providing credit scores or credit standing to an employer (H.R. 3524).

DOL Offers $14.9 Million In Grants. The U.S. Dept. of Labor is offering Disability Employment Initiative grants to improve employment opportunities for disabled individuals. These grants are available in Alaska, Georgia, Hawaii, Iowa, New York and Washington. DOL has previously made DEI grants in 27 other states.

Wisconsin Grants For Wellness Programs. The State of Wisconsin is offering up to $15,000 grants to small businesses (under 50 employees) to begin Wellness Programs. The grants can be used to cover 30% of the program costs. The grants are made through the Wis. Dept. of Health Services. www.dhs.wisconsin.gov.

Trends

Employers Adding Sex Transition Treatment To Health Insurance. Without governmental mandate or pressure, major companies are adding gender transition treatment and services to their health insurance coverage. The number of companies doing so has doubled since 2009. It has been a relatively inexpensive addition, with only one in about 20,000 people using gender transition coverage.

LITIGATION

Self Defense

Public Policy Right To Self Defense Creates Valid Wrongful Discharge Case. A major exception to Employment At Will is "law" and, in many states, Public Policy. An employee fired in violation of a law or a well-recognized public policy can file a wrongful discharge case. Wal-Mart fired several employees for violating its policy to disengage, retreat and call police if a confronted shoplifter produced a weapon or made a threat of violence. The plaintiffs stated that in their incidents (confronted customer produced a knife or a gun) there was no opportunity to disengage. The shoplifter was already attacking and they had to defend themselves. The Utah Supreme Court found that the state constitution included right to self-defense language, plus there is a "stand your ground" law. Therefore, it was a recognized public policy exception to Employment At Will, and the fired employees could sue for wrongful discharge. *Ray v. Wal-Mart Stores, Inc.* (Utah S. Ct., 2015). [Be aware this is a state court decision. Each state has differing At Will exceptions - i.e., Wisconsin does not recognize a general public policy exception - this ruling may or may not apply in your state, or for every location where a multistate company does business.]

In another "self-defense" sort of case, an arbitrator reversed the termination of a nurse who made a "threatening statement" to a cognitively disabled care facility resident when he grabbed her breast. The arbitrator ruled the statement was an "instantaneous reaction" to a painful physical aggression. There was no malicious intent and no serious abuse of the resident. The nurse was reinstated, to a different facility. *In re Bd. of Commissioners of Montgomery County and AFSCME* (2015).

Fair Labor Standards Act

Home Care Worker Overtime Pay Rule Is Valid. In *Home Care Assoc. of America v. Weil* (D.C. Cir., 2015). The court upheld the Dept. of Labor's new rules requiring full time-and-a-half overtime pay for home care workers who are employed by care companies or agencies. The FLSA had previously been interpreted to exempt these workers from OT, requiring only straight minimum wage regardless of how many hours were worked. DOL adopted new rules to eliminate this exemption for employees of "third party providers." The rules were then on hold pending legal challenges. Now the court has upheld the rules and cleared the way for implementation. Now only those few home care givers hired directly by an individual or family will be exempt from OT pay. DOL has not yet given a time frame for the rule to be in effect.

Discrimination

Workplace Investigations

Biased Statements Void Investigation. An internal investigative report concluded that an African American truck driver had been dishonest during the investigation, and was probably involved in theft of company property. Higher management adopted the finding and discharged the truck driver. However, there was evidence that during the fact finding the investigator made the statement that "Blacks are law breakers who bear watching." Prior to the fact finding there was evidence of other racially stereotyped and biased statements made by the investigator. A court concluded that this tainted the investigation, and created the issue that any decision based upon its results was discriminatory. *Mason v. S.E. Penn. Transport Authority* (E.D. Pa., 2015).

Retaliation By Investigation. A CT scan tech won a retaliation case. He complained about racial discrimination in promotions. Instead of looking into the discrimination issue, the hospital started an in-depth investigation of the employee, and promptly fired him for having provided false information on his employment application. A jury found the employer's sudden special focus on several year old application information was due to retaliation. There was no apparent reason to dig into old issues except because the employee made a discrimination complaint. The court, however, limited the damages to $65,000 and attorneys' fees, due to the employee's own conduct. *Zisumbo v. Ogden Regional Med. Center* (10th Cir., 2015).

In a similar case, *Burton v. Freescale Semiconductor, Inc.* (5th Cir., 2015), the court found retaliation under the ADA, when the company began a sudden close scrutiny of performance immediately after the employee had chest pains and heart palpitations related to exposure to work chemicals. His performance rating suddenly nose-dived. The evidence showed a "retrospective review" and "meticulous categorizing of every short-coming."

Race

African American Employee Wins $1.6 Million Race Case Against Soul Food Restaurant. A state court jury awarded $1.6 million against an African American-owned soul food restaurant chain to an African American employee who alleged he was racially discriminated against by his store's Hispanic managers. The jury found the managers condoned racial slurs by other Hispanic employees, gave preferential treatment to Hispanic employees and then fired the employee after he complained. He filed under the California Fair Employment and Housing Act (which has no "cap" on damages). *Beasley v. E. Coast Foods, Inc. d/b/a Roscoe's House of Chicken & Waffles* (Cal. Sup. Ct., 2015).

Criminal Background Checks – Mixed Results

Record Checks Have Adverse Impact – But Subcontractor Protected Itself. This case covers two important issues; record checks and joint employer liability. The EEOC has issued guidance on the discriminatory effects of criminal background checks, and requires them to be validly job-related and consistent with business necessity. In *EEOC v. BMW Mfg. Co.* (D. SC, 2015), the company required its subcontractors to do background checks. UTI Logistics had a seven year look back record check. BMW, however, required a "forever" rejection period based on criminal records. It denied site access to 100 of BMW's employees, mostly African Americans. Thus they could not work. UTI then ended its contract due to this. The EEOC sued on behalf of the rejected employees. BMW defended by claiming that *it was not the employer*; the workers were all UTI employees. The court rejected this, finding that BMW was the actual decision maker and could be liable under the Joint Employer Standards. UTI protected itself by sticking to its own principles and ending the contract, rather than caving in to keep the work. BMW must now defend the case by showing the validity of its open-ended background checks.

EEOC Ordered To Pay $1 Million To Employer For Unreasonable Pursuit Of Background Check Case. A court ordered sanctions against the EEO for unreasonably continuing claims that a company's criminal background check had an adverse impact against minority job applicants. The court found the EEOC adverse impact analysis was "inexplicitly shoddy." There was no evidence of adverse impact. Yet the EEOC continued to demand the company show the "necessity" of its background checks, and continued to vigorously pursue the case. The court ruled that an employer is not required to produce defense evidence unless there is first a reliable showing of adverse impact. The EEOC put the company through a needless process and exorbitant litigation expenses. *EEOC v. Freeman* (D. Md., 2015).

Religion

Supervisor Ignores Accommodation. A Hindu office employee was fired for late arrivals on Thursdays, due to special religious obligations on Thursday mornings. Her supervisor told her that prompt arrival at 8:30 am was "Non-negotiable." The employee then went to the college Dean, who granted the religious accommodation, and authorized the later Thursday arrival. The supervisor apparently did not like this, reminded the employee of the earlier discussion and then fired her for "habitual lateness" (on Thursdays). The court found ample evidence of discrimination for terminating the plaintiff for doing exactly what the employer told her she could do – arrive late on Thursdays. *Roy v. Board of Community College of Montgomery* (D. Md., 2015).

Sex

Company May Be Liable For Harassing Husband. A store supervisor's husband engaged in ongoing sexual harassment of a cashier. The cashier made several complaints. The supervisor (wife of the harasser), another supervisor and store manager took no effective action, such as banning the husband from the store. The harassment continued and escalated to touching and groping private body areas. The cashier filed a criminal complaint (the husband was found guilty) and then sued the company. The company defended, claiming the husband was not an employee over whom it had control. The court found that the company had a duty of "ensuring a safe environment for customers and employees" and had failed to address harassment of an employee which it knew or should have known about. *Shatzer v. Rite Aid Corp.* (W.D. Pa., 2015).

Cheese Factory Managers Who Tolerate Employees Off-The-Job Obscene Conduct May Make Company Liable For Later On-The-Job Harassment. A cheese factory employee, at off-the-clock company social events with company supervisors, took photos of his genitals and proudly passed them around. No manager present made any objection, nor any report to HR or higher management. Later the same employee engaged in several on-the-job "flashing" incidents exposing himself to female co-workers. The co-workers filed harassment charges, claiming the company "should have known" the male employee posed a threat, and had failed to act to prevent a known danger. The court found the behavior both threatening and possibly criminal. It agreed that there were valid grounds for a jury to decide whether the supervisors at the social function had a "duty to respond" to the obscene behavior, a duty to report and put the company "on notice," that the employee "posed a potential threat to the work environment." *Macias v. Southwest Cheese Co.* (10th Cir., 2015).

Boss Demands Ultrasound - $6 Million Verdict. Three employees of a medical management company were awarded $6 million due to pregnancy discrimination under the New York City Human Rights Act. The company owner made negative comments about pregnancy, and discouraged it among female workers. When he suspected one was pregnant, he accused her of wearing a girdle to hide her belly and demanded an ultrasound to prove whether or not she was pregnant. When it was discovered she and the other two were pregnant, he began more specific negative comments such as "you will get too big to fit into the filing room." All three were fired after discovery of their pregnancy. The court found the employer's reasons for the discharges to be baseless and "manufactured" pretexts for discrimination. *Santana v. G.E.B. Medical Mgmt.* (N.Y. Sup. Ct., 2015).

Workers Comp And Third Parties

Driving Home – Impaired Employee Injures Self And Others. Usually an employer is not liable for accidents commuting to and from work. However, in *Bussard v. Minimed, Inc.* (Cal., App., 2015), an employee felt ill after the company had sprayed the work area for bugs. Her manager said she should see the company's medical provider, but she declined and chose to go home. On the way she caused an accident. She told the traffic officer she was lightheaded. The court allowed the injured driver of the other car to sue the company. The manager should have seen the "foreseeable" impairment, and insisted on a medical check before allowing the employee to drive home. This does not mean that one has a duty to medically check every employee who goes home ill. In this instance the reason for the illness was the chemical bug spraying done by the company, so it was a work-caused issue for which the employer could be held responsible for both workers comp and injury to third parties.

Suicide Attempt Covered By Workers Comp. A back injury at work caused such pain and loss of abilities that the employee had major depression. He attempted suicide, but survived. The W.C. carrier denied coverage, but the state court ruled that all medical and psychological treatment for the suicide and depression was covered. The physical work-related injury caused a mental condition which led to the suicide attempt; so it too was work-related. *Brierley v. State of Wyoming* (Wy. S. Ct., 2015).

Labor Arbitration

Unfair Notice And Third Party Administrator Lose Case. An injured employee was terminated for failure to be able to return to work after 26 weeks of medical leave. An arbitrator reversed the discharge. The company's first notice to the employee and the union about this *unwritten 26 week policy* was in the termination letter. Further, the long leave was in large part due to the company's own workers comp agent repeatedly delaying the employee's corrective surgery in order to get more and more additional medical opinions. *In re Kaiser Aluminum Fabrication Products and United Steel, Paper and Forestry Service Worker Int. Union 1011* (2015).