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LEGISLATION AND ADMINISTRATIVE ACTIONS

Final Independent Contractor Rules. The Department of Labor ("DOL") issued its final rules regarding Independent Contractor (IC) status on January 9, 2024. These rules describe the standards DOL will use in determining whether a person is a non-employee IC *or* if they should be classified as an employee and be due overtime, benefits, etc., under the Fair Labor Standards Act. This has become an increasingly important issue in the growing "Gig economy" in which over 73 million people work as ICs or "freelancers" outside the standard employment relationship. Often, these same people later claim they should have been paid as employees and file claims for back pay and benefits. Many times, they win. The DOL and state agencies have also initiated aggressive audits of the use of ICs, finding employers liable for misclassification. The new rules still use six well-established "factors" but place tighter scrutiny on each. These factors are: 1. Opportunity for profit or loss depending on managerial skill; 2. Investments by the worker and the employer; 3. Degree of permanence of the working relationship; 4. Nature and degree of control; 5. The extent to which the work performed is an integral part of the employer's business; 6. Skill and initiative. Be aware that this is just the DOL factors test. Other agencies like NLRB, the IRS, OSHA, state workers compensation, and Unemployment Compensation have their **own** IC factors tests. The IRS has a 20-factor test with numerous sub-parts. [For more detailed information, see the article *Federal Department of Labor Releases New Independent*

Contractor Rule, or request the more detailed article *Independent Contractors* by Boardman Clark]

LITIGATION

Theme of the Month – Records and Evidence

Cases in this Update illustrate the importance of being able to produce the records or evidence necessary to support your claims or defenses. The inability to locate records, incompletely gathering and assessing the evidence before making a claim, or asserting a defense in a case can mean losing. Cases this month show that failing to keep important documents, failing to fully assess accommodation issues, and failing to see that your evidence may contradict your defenses can lead to an expensive result.

Employer Lost Signed Severance and Release Agreement – Employee Keeps $123,000 and Still Sues Over Her Discharge. This case illustrates the importance of proper record retention. It is far too frequent that an employer cannot locate the records when called upon to do so. This is especially problematic when the issue is having to prove the existence of an employee-signed acknowledgment of policies, pay plans, or formal agreements. *Sanchez v. S&P Global, Inc.* (S.D. NY, 2023) involved a situation in which the company and employee negotiated a Severance Agreement in which the employee released the company from all liabilities in exchange for $123,000 paid over a one-year period, plus outplacement services. She cashed the checks. Then, when the year ended, she filed a suit for discriminatory discharge. The company requested a dismissal based on the signed Severance and Release Agreement. However, it could not find and produce a signed copy. The former employee denied having ever signed any agreement or that she understood it prohibited a discrimination suit. So, the company then argued that she had ratified the agreement by cashing all the checks and should be prohibited from denying there was an agreement. Unfortunately for the company, the court did not agree. Without a copy of the signed agreement, there is no agreement. An unsigned copy is just what one party claims the agreement stated, it does not prove that was the final version or the actual terms, or that the other party received that alleged version and understood it. So, an unsigned copy is of little value in showing the parties had a "meeting of the minds on all terms" and what the final terms – if any – might have been. The suit was allowed to continue. *Another*

growing wrinkle in this area is the need to keep a duplicate of the original of the signed agreement, in ink. Though electronic signatures are legally binding for almost all purposes, there are a growing number of instances in which people deny that an electronic signature or verification was actually theirs. They claim the signature, or even parts of the document, were electronically faked or altered. The growth in Artificial Intelligence (AI) has given plausibility to some of these claims.

Discrimination

Religious Accommodation

Just Saying Something Is Not Enough. Employers often claim there was a valid reason for decisions, especially regarding the inability to meet requests for reasonable accommodation of religious or disability needs. Sometimes the employer cannot then back their decisions with facts. In the *Groff v. DeJoy* decision, the U.S. Supreme Court imposed a tougher standard for Title VII religious accommodation. Similar to the ADA, an employer must now show an "undue hardship" before denying the accommodation. This is a "substantial burden" of proof for the employer to meet. *Smith v. City of Mesa* (D. AZ, 2023) is a case in which the employee's request for an extra day and a half off to attend a religious event was denied. In the ensuing Title VII suit, the employer **said** the department workload was too great to allow extra days off. The employer claimed that absences would leave already reduced, insufficient staff to meet deadlines, and posed an undue hardship. However, just saying something did not show it was so. The court ruled against the city, finding the city must do more. The city did not actually "quantify how an additional 1.5 days of absence would result in substantially increased cost in relation to its business." The bare claim the employee's absence would impact coworkers was "too vague" to show undue hardship and did not spell out exactly how this would impose a substantial hardship on the overall operation. So when one denies an accommodation request, be thorough in the assessment, document the specific facts, and be aware that the employer must meet a "substantial burden" of proof.

Race – Evidence

The Reason Has to Match Reality. In defending a discrimination case the employer must state valid non-discriminatory reasons for its decisions. The

plaintiff then may win if it can show that reason is a "pretext." In *Anigbogu v. Mayorkas* (N.D. CA, 2023) a race and national origin case was filed by a black asylum officer of Nigerian origin, who was passed over for an Immigration Services promotion, while three white applicants were selected. The agency's stated defense was that the three selected "had more immigration experience based on their résumés" than the plaintiff. The problem was that this reason did not match the reality. A view of the résumés showed the plaintiff had more years' experience with immigration law and practice than any of those who were promoted. He received his law degree and was already working in the agency for some time before any of the White candidates had even yet started law school or had any experience. The court found it inexplicable how the agency could assert such a defense and rejected it as a pretext. There may have been some other, more valid reasons for the decision, such as a concern about performance (despite "exceeds expectations" evaluations) or the officer's backlog. However, those reasons were **infected** by and outweighed by the pretextual "more experience" claim. One **lesson from this case** is to check the reality before stating reasons; have documentation that matches your defense; and do not throw in "extra" defenses that may be weak and overcome more solid ones.

Sex

Walmart Settles Sex Discrimination Case Filed by Young Mother – Promotion of Another Woman Was Not Effective Defense. A Walmart employee was rejected for promotion to Department Manager. She was told that she *was a young mother with children at home, and store management assumed she was not interested in a long-term career with Walmart*. The promotion went to an older woman who did not have children. Rejecting one woman – and still promoting another woman did not save Walmart from a sex discrimination case. An employer can still discriminate among members of the same group for impermissible purposes. Basing decisions upon stereotypes is one such impermissible purpose. Title VII's prohibition of sex discrimination includes sex-based stereotypes, such as the one that mothers with young children are unreliable or uncommitted to careers. The court in this case rejected Walmart's "hired another woman" defense, stating that a "*pervasive presumption that women are mothers first and workers second is among the sex stereotypes Congress has explicitly identified as impermissible.*" Walmart decided to settle the case, paying $60,000 to the

employee plus an agreement to implement more rigorous anti-discrimination training for managers. *EEOC v. Walmart* (S.D. IA, 2024)

Transfer During Harassment Investigation Was Not an Adverse Action. A university employee complained that she was sexually harassed by another employee. When she reported the incidents to Human Resources she was temporarily relocated to a different area during the investigation of the complaint. The harasser was disciplined, and the complainant moved back to her regular area. She then sued over the harassment and claimed the relocation was retaliation for her having made the complaint. The court ruled that once informed, the employer had met its duty to promptly investigate and remedy the harassment, so it was not liable for the harassment. Then it ruled that a temporary transfer to separate the parties during an investigation to prevent any further misbehavior was a legitimate non-retaliatory decision. The employer also had the discretion to decide which employee to relocate when there was not yet proof of any allegations and based on its own operational considerations. *Johnson v. Board of Supervision of LSU.* (5th Cir, 2024)

Test is Valid Despite Adverse Impact. Adverse impact is a form of discrimination in which an employer's policy or practices, often unintentionally, create negative results for one group significantly more than others. This is often seen when a hiring practice, such as a test, eliminates women at much higher rates than men. When an adverse impact is shown, the employer can defend itself with proof that in spite of the discriminatory effect, there was a valid job-related reason for the test and no reasonable alternative. *Erdman v. City of Madison, WI* (7th Cir., 2024) involved a physical ability test for the Fire Department. Ms. Erdman, and many other female applicants, were rejected for a firefighter position due to not passing the test. She claimed that Madison should use CPAT, another nationally recognized test used by a number of other Fire Departments, which did not have an adverse impact. The City acknowledged the adverse impact their test has on women but claimed that nonetheless, the screening test it uses is valid, and the suggested alternative did not meet the needs of its operation. The court agreed. It found that the city had considered the proposed alternative but had assessed its own operation and designed a test based on the duties and conditions specific to the Madison operation. It presented evidence as to how the CPAT did not meet these needs. In this case, the City met the heightened burden of proof needed to overcome the

adverse impact. *Be aware* that this is an unusual case. Courts rarely rule in favor of the employer once an adverse impact has been established. The adverse impact creates a presumption of discrimination, which is very difficult to overcome. An employer must do a *lot* of advanced "validity" in developing a test and present a great deal of clear evidence to show its chosen method is better than less discriminatory alternatives. [For more detailed information on this subject request the articles *Pre-employment Testing* or *The Hiring Process* by Boardman Clark]

Off-Work Conduct

Executive Fired Due to Off-Work Podcast Comments. Many private sector employees have a mistaken belief that they have a Constitutional freedom of speech right under the First Amendment and that their employers cannot discipline them for their off-the-job behaviors. These beliefs are not accurate. A company executive had a podcast on his off-work time. He used this podcast to make negative comments about women, his anti-transgender opinions, and his opposition to diversity initiatives. When these comments came to light, many employees at the company who were subject to the executive's management organized a work walkout in protest. The company fired the executive. He then filed a suit claiming 1. The company violated his free speech rights and 2. He was fired due to race because he is white and the protest and firing for anti-diversity comments was "obviously" due to his being white. The court rejected these allegations. First, the Constitutional protection of speech applies only to government actions. A private sector company is not covered. Private employers are free to take disciplinary action based on issues not connected with work *unless* there is a specific law that covers "protected activities." The executive could point to no such law. Second, the executive was fired because of statements he made *about* diversity, women, and transgender people, *not* because of his race. The action was taken due to his behavior, not his race — there was no evidence that his race was considered. Overt derogatory, discriminatory comments do not equate to being of a certain race. There was no evidence that a manager of another race would have been treated differently if they had made derogatory comments that reflected on the people they managed or the company's EEO/diversity initiatives*. Krehbiel v. BrightKey, Inc.* (4th Cir, 2023). Some laws limit a private sector employer from taking action against employees' "protected speech" or from looking into other "off-the-job"

activities, behaviors, and opinions. These limitations are created by a number of federal and state "protected activities" laws which range from the National Labor Relations Act to state laws on the "right to use legal products" (smoking, guns, alcohol, etc.). [For more information, on the variety of protected activity laws, request the article *Retaliation* by Boardman Clark]

Strangest Excuse of the Month

Pilot Claims He Did Not Know He Drove Plane Full of Passengers Off of the Runway. Sometimes people seem to stretch credibility to avoid responsibility. A SkyWest pilot was taxiing out to take off when he drove off the runway and sank into mud. He got back on the runway, did not stop to check if there had been any damage, and just took off into the air. The takeoff irregularity came to the company's attention when airport personnel discovered the large rut where the plane went off the runway. The pilot was asked why he had not filled out an Irregular Operation Incident Report and did not stop for a safety check before proceeding. He replied "We were unaware the aircraft was not on the tarmac. If we were, I would have returned to the gate for a check." He claimed he thought he may have hit a slick area and just run over a drainage grate. The First Officer waffled and said he was not able to observe that side of the plane. The pilot received a warning notice. However, the First Officer later admitted to a Review Board that he was trying to cover for the pilot and that it was clear to both of them that the plane was stuck in the mud. He stated that the pilot had to use the thrusters back and forth and the plane shook from side to side before it dislodged and could be steered back onto the runway. The pilot refused to further discuss the incident and alleged this inquiry was an effort to fire him because of his age and because he had a disabled, diabetic son, and his wife a heart condition, which cost the airline more in medical expenses. The company fired both the First Officer and the pilot for dishonesty. The pilot sued under the ADEA for age discrimination and under the ADA for "associational" disability discrimination. The court ruled in favor of the airline. The pilot presented no direct evidence of either age or disability association, only his subjective interpretations. He could show no other pilot who had similar behaviors and received more lenient treatment. Others had gone off the runway but had *not* tried to cover it up. Both he and the younger First Officer were treated the same for the serious dishonesty infraction.

There was nothing to show pretext in the company's reason for discharge. *Chappell v. SkyWest Airlines, Inc.* (D. UT, 2023)

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