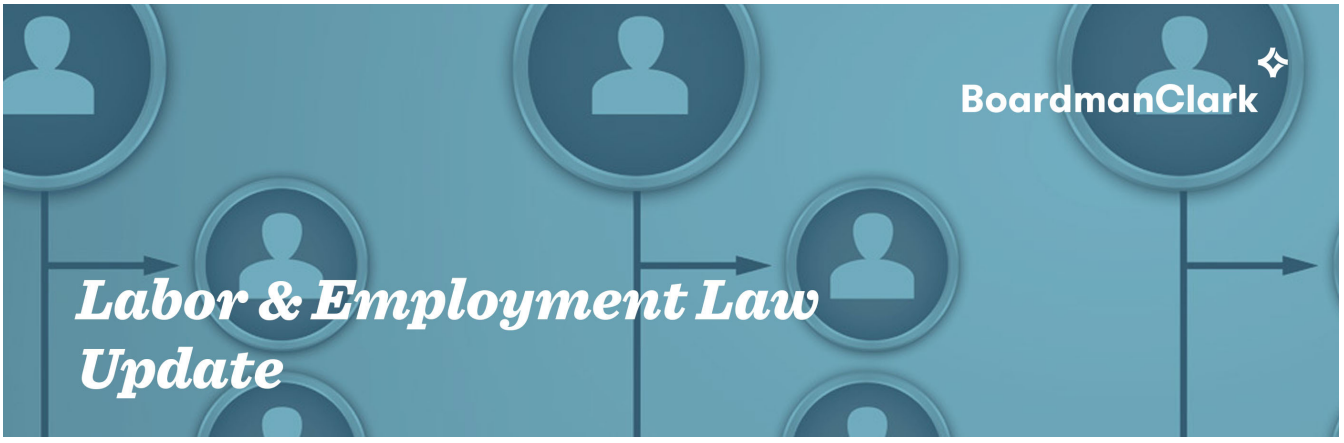

PepsiCo and Payroll Vendor Pay $13 Million to Settle Wage Case

ROBERT E. GREGG | 12.30.22

LEGISLATIVE AND ADMININISTRATIVE ACTIONS

Pregnant Workers Fairness Act (PWFA)/Providing Urgent Maternal Protections in Nursing Mothers Act (PUMP). As part of the last-minute December 2022 Omnibus Budget, Congress passed the PWFA and PUMP Acts which had been held up in the Senate for several months. The laws expand rights during pregnancy and for nursing mothers. Though a workplace right to breastfeed or express milk already existed, it did not cover all employees. This law expands rights of salaried-nonexempt employees and those in the airline and railroad industries. The PWFA expands the existing Pregnancy Discrimination Act to provide a greater right to reasonable accommodation of the condition and complications of pregnancy, similar to the ADA. This may clarify an ongoing question and confusion as to whether pregnancy related conditions should receive the level of protection and accommodation as the ADA provides for disabilities. The law will be enforced by the EEOC, which is now tasked to develop guidelines regarding pregnancy related accommodations.

LITIGATION

Fair Labor Standards Act

Misclassification

Turning Independent Contractors into Employees. Purdue Farms, a national food company entered contracts with various farm owners to supply chickens. The farmers had all responsibility for the process and then sold the chickens to Purdue. This sounds like a traditional independent contractor arrangement between an

independent supplier/seller and a purchaser. However, a class action was filed by a number of the farmers alleging that Purdue exercised so much control and dictated such a large amount of their process, expenses, and operating details that they were actually captive labor and should be considered as employees. The case alleged that Purdue's requirements resulted in them being "cheated out of pay" and violates the Fair Labor Standards Act, plus a cause of action for "misrepresentation." The court agreed that the farmers had stated a valid case and the class action could proceed. *Parkarstal v. Purdue Farms, Inc.* (M.D. GA, 2022)

Wage Payments

PepsiCo and Payroll Vendor Pay $13 Million to Settle Wage Case. When a vendor is hired to perform HR related functions, then both the employer and vendor can be liable for any missteps under the wage and hour, benefits, tax, or other relevant laws. *Emanuele et al v. PepsiCo et al.* (S.D. NY, 2022) involved Pepsi's use of a vendor, New Tiger LLC, and Ultimate Kronos Group. A Kronos cyber security breach resulted in problems with the vendor's timekeeping system resulting in significant pay errors, underpaying almost 24,000 employees of PepsiCo and affiliates nationwide. In an FLSA class action, the employees sued their employer and the vendor. The defendants have settled the case by giving backpay, interest, and attorneys' fees. This is just one of several class actions against employers and their vendor due to the Kronos system failure. At least a dozen other major national corporations have actions pending.

Manager Escapes Personal Liability in Overtime Pay Suit. The Fair Labor Standards Act, along with several other employment laws, can impose personal liability (the damages come out of your personal pocket) on those who are significantly involved in wage decisions and payments (business owners, executives, HR, office managers and sometimes unit supervisors who are tangibly involved in wage and hour determinations). *Ocampo et al v. Brown & Appel*, *LLC et al.* (2nd Cir., 2022) is a class action case by hotel staff about unpaid overtime. Employees sued the company, plus named individual owners and managers in their individual capacity. One manager was able to get himself dismissed from the case due to lack of evidence that he was actually involved in setting wages or making decisions about the pay-setting process or methods. He was primarily involved in sales issues and his interaction with staff was over sales issues and results but not compensation or hours. Thus, he did not have sufficient involvement to incur liability. The other parties settled the case, paying the back overtime and other damages.

DISCRIMINATION

The following cases illustrate how valid defenses can refute claims of discrimination. An employee's own misconduct can overcome an inference of discrimination. Also,

errors or even overtly wrongful acts do not create a discrimination case unless one can show there was either discriminatory intent or that one was singled out and treated differently than other "similarly situated" employees – "wrong" is not necessarily illegal.

Disabled County Prosecutor Tried to Use Position to Get Out of Driving Infraction – Gets Fired. A county prosecuting attorney filed an ADA case, alleging he was fired due to his disability of Parkinson's Disease. The court granted summary judgement to the county, dismissing the case, finding that his own improper actions overwhelmed any inference of disability. The prosecuting attorney was charged for intoxicated driving after a rear-end collision. He allegedly offered to pay the other driver to not report the accident and then drove away. The other person did report, and police came to the prosecutor's home. He attempted to use his prosecutor/law enforcement position to persuade the officers to drop the matter. When they would not, he allegedly became belligerent, made rude comments, and cursed at the officers, who arrested him. When this behavior came to the attention of the county, the prosecutor was suspended pending a review and then fired. The prosecutor requested an accommodation of taking sick leave after being placed on the suspension. He alleged the accommodation was denied and he was fired as retaliation for having asked for the accommodation. The court found otherwise. The accommodation request was after-the-fact of the misconduct. The accommodation request did not nullify the prior conduct and mean the employer could not proceed with investigation and decision. The misconduct itself was a valid reason to discharge anyone regardless of any disability and "called into question public confidence and public trust in the office." Finally, the official making the discharge decision was not involved in the prosecutor's supervision, did not know of the Parkinson's condition or of any accommodation request, thus did not consider that in the decision. *Podlasek v. Office of State's Attorney of Cook County et al.* (N.D. IL, 2022)

Race/Sex

Faulty Performance Evaluation Does Not Equate to Discrimination. Virtually every process has flaws, errors, or supervisors who do not always follow the right steps. However, erroneous does not mean "illegal." In *Kelley v. Howden, GEMA, et al.* (11th Cir., 2022) a state agency communications specialist based her race and sex discrimination case alleging denial of a promotion on the fact that the agency manager failed to follow the required performance evaluation procedures, thus the agency's denial of any discrimination was a pretext since it did not follow its own policies regarding her. This can be a valid argument in some cases. However, in this instance, the court found it to be insufficient. The plaintiff's manager seems to have messed-up on evaluations of all employees, not just her, so the error could not be seen as discriminatory. The plaintiff was similarly situated to and treated the same as

everyone else. The federal courts have often opined that there can be errors, wrongs, and unfairness in the employment process. However, the court's role is not to address every wrong unless it actually violates a law. There was no evidence in this case of any illegal discriminatory effect – only of a faulty process.

Family And Medical Leave Act

When Has an Employee Given Sufficient Notice of Need for Intermittent Unforeseeable FMLA Usage. In *Render v. FCA US, LLC* (6th Cir., 2022), the court addressed the discharge of a Fiat Chrysler assembly line worker for unauthorized absence. The employee called in to say he would not be in due to a "flare-up." He did not request FMLA, so the absence was deemed unexcused, and he was discharged. He filed an FLMA suit. In its decision, the court gave some guidance regarding what is "adequate notice" for unforeseeable FMLA leave. The employee had previously taken FMLA and provided certification that his condition could "flare-up" unexpectedly two or three times a month. The FMLA provides, "When an employee seeks leave for the first time for a FMLA qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason for which the employer has previously provided the employee FMLA protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave." The decision opined that an employee must provide reasonable information apprising the employer that a FMLA condition is involved. Just calling in "sick" or even "sick again" is not clear enough. However, an employee does not have to use any "magic words" or even actually mention the FMLA. Since in this case the company had already received medical certification that the condition could be expected to "*flare-up*" unexpectedly, it had notice that a call about a "flare-up" was associated with the prior FMLA notice and was a reference to that prior notice and should have been a protected leave. Also, employees received differing and confusing information on providing notice from both the company and its FMLA administrator vendor. An employer cannot simply turn over its responsibility to a vendor. The company remains responsible for monitoring what is going on, actually dealing with the employees, and is responsible for the liability for any FMLA violations (or under any other wage & hours, benefits, or other employment law it contracts out to an agent). The court provided further guidance on intermittent, unexpected FMLA.

1. The foreseeability of FMLA leave, and corresponding notice requirements, depends on knowing or not knowing when the actual leave will be needed before the time comes to request it. Foreseeability, in turn, guides the employee's obligations to provide the employer with notice of the employee taking FMLA leave.

2. If leave is unforeseeable, and it is the first time the employee is seeking leave for an FMLA-qualifying reason, they are not required to assert FMLA rights or even mention the act. If the leave is foreseeable and employer already provided the employee FMLA leave, the employee must expressly reference the qualifying reason for the leave or the need for FMLA leave.
3. An employee may not need to expressly state that they are taking intermittent FMLA leave in order to comply with notice obligations if the employee references his or her ailment or symptoms that were listed as the prior reason for leave notice.
4. While outsourcing leave administration, the liability for FMLA claims generally remains with the employer. Call-in procedures for reporting the need for leave to the employer or third-party administrator should be consistent and clear, and the employer should maintain open channels of communication with third-party administrators to ensure compliance with the act.

Whistleblower

$38 Million Award to Former Employee Under False Claims Act. In settling a FCA case, a mortgage company will pay over $38 million to a former underwriter who reported the company was authorizing ineligible Federal Housing Administration loans which were guaranteed by the FHA. The company got the profits from the loans and the government and taxpayers paid out multi-millions to cover defaults on the unqualifying loans. Those who report wrongdoing under the False Claims Act can receive a percentage of the government's recovery in FCA cases. *United States ex rel. Thrower v. Academy Mortgage Corp.* (N.D. CA, 2022)

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