BoardmanClark

Labor & Employment Law Update

APRIL 2019

BOB GREGG | LABOR & EMPLOYMENT GROUP | (608) 283 1751 | SIGN UP: RGREGG@BOARDMANCLARK.COM

Legislation & Administrative Actions

DOL Releases Proposed Exempt Salary Rules On March 19, 2019 the Dept. of Labor finally issued its rules to raise the minimum Exempt Salary Basis to $35,308 per year ($679 a week). This is far less than an earlier proposal, yet a significant increase from the current level which has been frozen at $23,660 annually for years. There is a 60-day comment period before the rules can go into effect and DOL has suggested they will take effect on January 1, 2020. For more information, see the HR Heads Up on the new rules at www.boardmanclark.com

DOL Proposed Rules On What Is Includable In Regular Wage Rate – After 50 Years On March 28, 2019 DOL announced proposed clarifications in "regular rate" requirements. These define what form of non-dollar "payments" can/must be included – or can be excluded in calculating the regular wage and OT. Non-dollar items include housing, wellness programs, health club memberships, non-ERISA benefits (legal services/discount clubs, tuition or educational reimbursement, employee discounts on company products/pay for unused vacation or sick leave). Items employers often do not even think of as constituting "wages," until the DOL audits. The rule also covers pay for stand-by or call-in time, bonuses and other actual paid dollars. The rules have not been revised for 50 years and no longer fit the 21st century. There is a 60-day comment period. See www.dol.gov/whd/overtime/regularrate2019.htm.

BIPARTISAN EFFORTS

Subminimum Disability Wage In a highly divisive Congress, parties have come together in a bipartisan effort to end the subminimum wage rate for disabled workers. Rep. R. Scott (D-Va) and C. McMorris-Rodgers (R-Wash) and Sen. B. Casey (D-Pa) introduced the Transformation to Competitive Employment Act to phase out the low wage over a six year period.

Protecting Older Workers Against Discrimination Act – Broadens Standard Introduced by Rep. J. Sensenbrenner (R-Wis), the POWADA would reverse the Supreme Court's *Gross v. FBL Financial* decision requiring age to be the sole reason for an adverse action in order to prove age discrimination. The new law would allow "mixed motive" cases to succeed, just as under Title VII and the ADA. This is a bipartisan effort co-introduced by Rep. B. Scoll (D-Va) and Sen. B. Casey (D- Pa) and C. Grassley (R-Ia).

U.S. Supreme Court

Dead Judge Cannot Decide Case The Supreme Court vacated and remanded a Circuit Court's Equal Pay Act

(EPA) decision. A split circuit court had ruled that considering prior pay in setting starting salary was inherently discriminatory toward women and violated the EPA. The Supreme Court did not rule on the principal of the case, the vacator and remand was procedural. The decision was issued 11 days after the 9th Circuit's Judge Stephen Reinhardt passed away. He had voted with the majority and even wrote the decision. However, a decision is not effective until actually issued. Reinhardt was no longer there, and his deciding vote could no longer count. The Supreme Court ruled, "A judge cannot exercise judicial power after his death" and "Federal judges are appointed for life, not for eternity." *Yovino v. Rizzo* (S. Ct., 2019).

Federal Employees Entitled To States' Special Tax Exemptions The Intergovernmental Tax Immunity Act allows states to collect state income tax from Federal employees as long as they are treated the same as similar state employees. *Dawson v. Steager* involved West Virginia's provision of a special tax exemption to law enforcement officers when they retired, but did not allow it to Federal Marshalls or other Federal enforcement officers. When challenged, the West Virginia high court upheld the state's position, and refused to grant the tax exemption to Federal employees. The U.S. Supreme Court ruled otherwise, holding that the Federal officers were similarly situated and must receive the same tax benefit.

EMPLOYMENT CONTRACTS

CEO Who Founded Company Was An At Will Employee – No Contractual Rights. A CEO was fired by the company he founded. After founding HydraMetrick, a company engaged in engineering and installing water efficiency and conservation systems for businesses, industrial facilities and public institutions, the company was successful, and attracted and was bought by investors. The CEO was retained under lucrative terms and still had a minority stock ownership. After six years, the investor owners terminated the CEO's employment. He sued, claiming that as founder and still having stock, he could not be fired without substantial cause. He also claimed tortious interference with his employment rights. The court ruled that he had no employment rights. His post-sale retention arrangement was not a contract which made any guarantee of continued employment. Employment-at-will was the general rule – without an explicit contract otherwise. Further, stock ownership is a completely different matter, separate from employment. He still retained his stock ownership; just not his job. In spite of being founder and the CEO he had no case. *Roberts v. HydraMetrick, LLC* (Minn. App., 2019).

PERSONAL LIABILITY

Executives All Get Fired – And Prosecuted The Securities and Exchange Commission charged Cognizant Technologies Solutions Corp. with violating the Foreign Corrupt Practices Act – bribing government officials in India as inducement in order to receive contracts, permits and licenses. As a settlement, Cognizant will pay $25 million in penalties, it will terminate top executives, including the President, General Counsel and the heads of several divisions. The Dept. of Justice is criminally prosecuting two of the executives. (*In Re SEC and Cognizant Technologies Solutions Corp*., 2019).

FAIR EMPLOYMENT STANDARDS ACT

Failure To Track Lunch Breaks. The Dept. of Labor is giving increasing focus to lunch breaks. Employers are supposed to keep accurate records. In a growing number of cases, DOL has found employers were lax and simply noted an automatic lunch period, even though employees periodically did work during lunch time. Employers should know these incidents occur, and have a duty to monitor and correct if these instances keep happening. In *Arnold Palmer Golf/Walt Disney World* (2019), the DOL assessed $20,000 for overtime pay due to failure to record lunch time work. It also found workers improperly classified as salaried-exempt and assessed back overtime pay.

DISCRIMINATION

DISABILITY

<u>Manipulating Evaluation Process To Get The Desired Outcome</u> A railroad employee was diagnosed with Parkinson's disease. The company refused to allow him to return to work due to safety concerns, following a medical evaluation. The problem was that the employee had medical work clearance from his doctors. The company then sent him to another evaluation, which concluded that he could safely do the job, if he paid attention to his balance in some situations. <u>Then</u> the company revised its essential function list to give special emphasis to "balance." The employee was required to go through more medical and field tests – which he passed, and received a medical conclusion of "very good condition in regard to balance." So, the company put him through more field tests and claimed an observer thought the employee was somewhat "shaky" and had a "tremor" following the test. So he was denied return to work as a "direct threat" to safety. In the ensuing ADA case the court focused on the *"reasonable process"* required for medical evaluations. The court found that the company's change of standards mid-way through the process and repeated testing until it could find a reason to deny return was evidence that the process was not reasonable and was discriminatory. *Nall v. BNSF Railway Co*. (5th Cir. 2019).

SEX

<u>False Rumors Of Sleeping With Boss Creates Harassment Case</u> A female employee was promoted to Warehouse Assistant Manager. This did not please some men who did not get the job, nor the Warehouse Manager. So some men, including the Manager, circulated a false rumor that she got the promotion due to sex with a company executive. The rumors stated she "used her womanhood, instead of merit" and "seduced a promotion." This resulted in hostility and open disrespect toward her by those she supervised. The employee complained to HR. However, the result was negative focus on her, including the Manager slamming doors in her face to keep her out of staff meetings. The rumors continued. She was fired, and then filed a Title VII case. The court ruled that the rumors were clearly based on gender and gender stereotypes and created an ongoing hostile environment. *Parker v. Reema Consulting Serv.* (4th Circ. 2019).

<u>Show More</u> A sports bar and restaurant settled a sexual harassment charge for $41,000. Management pressured female waitstaff to "show more cleavage" and enhance the appearance of their buttocks in order to get more business from male customers. This resulted in hostile comments, texts, and touching from customers. The waitresses who complained suffered changes to undesirable shifts, or hour cuts. *EEOC v. Ojos Locos Sports Cantina/Reach Restaurant Group* (D. NM, 2019).

<u>Employer Liable For Sexual Harassment Of The Public By Its Employees</u> Title VII only covers the employer-employee relationships. Non-employees cannot file a case. However, many states (including Wisconsin) have Fair Accommodation Acts or other laws which require companies providing services to do so without discrimination toward customers, patients, clients or the public. Those non-employees may file cases under those laws. *Floetry v. Group Health Coop* (Wash. S. Ct., 2019) was filed under the Washington State law. A patient filed a claim that he had been repeatedly sexually harassed by a GHC employee during medical appointments. <u>The court ruled that the consumer protection laws were actually more expansive than the EEO laws</u>. The employer was "strictly liable" for the actions of its employees and agents, it could not take advantage of the "knew or should have known" standard to correct a problem before it had liability. Also, the Washington law did not have liability limits or "caps" as do most employment discrimination laws. So the employer has a greater Duty of Care and greater liability. Be aware that this was under the Washington law. Each state is different, in coverage and liability. However, this case is fair warning to check your laws, especially if you operate in several states. Harassment/respect training should also be more comprehensive, to include the duty to third parties.

<u>Preference For Female Leadership</u> A male coach of a private high school women's softball team had a successful record and good performance. His contract was not renewed. He was told that the school had a "preference for female leadership." The EEOC maintained that employment decisions cannot be based on gender stereotypes or gender preferences which are not shown to be a bona fide occupational qualification "consistent with business necessity." A general "preference" for males, females, certain races or ethnicities is discrimination. The school will pay $41,000 and other equitable relief to settle the case. *EEOC v. Park School of Baltimore* (D. Md, 2019).

"Women Complain And Make Trouble…" *EEOC v. American Freight Mgt. Co.* (N.D. AL) is a Title VII case alleging systemic discrimination, in that the company refused to hire women for sales and warehouse work, refusing to even consider their applications. The suit alleges that corporate executives told local managers that "women can't sell like men," "Women are too much of a distraction" to the male employees, "can't lift" and "women complain and make trouble." The case seeks back pay for all those affected, and corrective relief and monitoring for the future.

RELIGION

Employer Does Not Have To Accommodate Religious Expression Of Hostility A company began receiving complaints about a new Marketing Manager's abrasive style and unprofessional conduct. She was counseled to adopt a more respectful demeanor. Then there were complaints that the Manager was making hostile comments to Jewish employees, including comments on Good Friday that this was the day they had killed Jesus. The Manager received disciplinary warning to cease. Her attorney then wrote a letter claiming the discipline was discrimination against the Manager as a Catholic; she had been expressing her sincere religious belief, and had a protected right to do so. The company did not agree and did not take away the discipline. The employee stated her disagreement with the company's directions for change and continued her behavior. She was fired. She sued for Title VII religious discrimination. The court found in favor of the company, ruling that the discharge was not due to the Manager's religion, but due to her offensive comments and behaviors in violation of the company's own anti-discrimination policies. Accommodation does not require allowing one to be offensive toward people of other religions. *Rightnour v. Tiffany & Co.* (S.D. NY 2019).