Labor & Employment Law Update

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Legislative and Administrative Actions

Private Sector Employers Must Provide EEO-1 Workforce Data to EEOC by March 31.
The EEO-1 is an annual survey that requires all private employers with 100 or more employees and federal government contractors or subcontractors with 50 or more employees, **and** a contract/subcontract of $50,000 or more to file. The EEO-1 report provides employment data by race/ethnicity, gender and job categories. The filing of the EEO-1 report is not voluntary and is required by federal law. The EEOC's Survey website at https://www.eeoc.gov/employers/eeo1survey contains reference documents such as a EEO-1 User's Guide, sample form, instructions, FAQs, a fact sheet and a EEO-1 Job Classification Guide.

Recent Articles

The following new Labor and Employment articles are available at boardmanclark.com Reading Room or by request:

1. NLRB Pendulum Begins to Swing Back in Favor of Employers by Doug Witte
2. Poaching Made Easier: Wisconsin Supreme Court Holds That Non-Solicitation of Employee Provisions Are Subject to Strict Requirements for Non-Competition Agreements by Rich Bolton
3. Leaves of Absence as Disability Accommodation by Jennifer Mirus
4. Sexual Harassment – The #METOO Explosion by Bob Gregg (accompanies this Update)

Day On The Hill – The Wisconsin SHRM Legislative Conference. The Wisconsin SHRM Legislative Conference is February 21, 2018 in Madison. Learn about important legislative insight and legal developments and get a chance to meet the lawmakers. Registration information can be found at WISHRM.org.

Litigation

HARASSMENT IS THE ONGOING TOPIC

There has been an explosion of sexual harassment allegations in both the press, and in complaints to employers. Famous media figures, politicians, judges, executives, and public and corporate managers have suddenly had careers damaged or ended due to their improper behaviors. Harassment is certainly not new. Yet **now** there is a new environment, new support and new motivation to come forth. Organizations, Congress and Legislatures are paying attention. Expect New Developments. Congress and state legislatures are taking a renewed interest; both in policing their own bodies, and in legislation to address the "new" concern. Expect new laws and expanded liabilities, as organizations which once seemed blasé about the issue are now scrambling to expand coverage, reverse prior practices, create new liabilities, and make special concessions in order to show they take harassment seriously. The article on Sexual Harassment – the #ME TOO Explosion (on boardmanclark.com) has more advice on being prepared.

Carving Out Special Exceptions. Epic *System v. Lewis* is one of the most significant matters pending before the U.S. Supreme Court. It involves a company's ability to limit rights and force employees to accept individual arbitration for all employment issues, rather than using courts on class actions. HOWEVER, *Sexual Harassment* publicity and concerns are taking companies in a different direction. Congress and companies are moving to expand rights for sexual harassment. The recent TCJA tax reform penalized secret/confidential settlements of sexual harassment complaints by eliminating such expense as a business deduction. Microsoft has just eliminated its requirement for arbitration when it comes to sexual harassment matters, after revelation of improper behaviors in its operations.

Judge Retires Due To Sexual Harassment Allegation. A Federal Judge, Alex Kozinski, 9th Cir., announced his immediate resignation following allegations of sexually inappropriate behaviors toward staff. Kozinski stated that he had no intent to make others feel uncomfortable, *"I've always had a broad sense of humor and a candid way of speaking to both male and female law clerks alike. In doing so, I may not have been mindful enough of the special challenges and pressures that women face in the workplace."* [For more insight on the Judge's statement, request the seminar Is It Humor or Harassment, or the Boardman & Clark article It Was Just a Joke. You will find that "I Was Just Joking" is the *worst* excuse you can make as a manager or professional. It actually increases liability. The sexual harassment laws have been in effect for decades. It is *"inexcusably deliberate disregard of the law"* to not be aware and to still be engaging in this "humorous" behavior in the workplace.]

Workplace Romance Gone Sour – Breakup Results In Discharge. A manager broke off a two-year consensual romantic relationship with her supervisor. Within a few months she went from excellent evaluations to being placed on a Performance Improvement Plan for a $250 expense overage, and then being fired. She filed Title VII *quid pro quo* harassment and retaliation complaints. The court found valid evidence to support the case. The timing, so soon after the breakup, was suspicious ("temporal proximity"). Several other employees had frequent and larger expense overages with no critique at all. The supervisor had expressed a great deal of upset over the breakup, and when asked by others about why he criticized her work, stated "Why shouldn't I, after the hell she put me through this summer" (during the breakup). *Pung v. Regus Mgt. Group LLC* (D. Minn., 2018).

Joint Employment Expanded To Third Party With No Direct Contractual Relationship – But Supervised Construction Site. The joint employment concept has often been used to cover leased or contracted employees. Both the leasing/placing employer and the company which leased/contracted for the services can be liable for harassment or other discrimination occurring at the place the employees are placed. *In Salvat v. Construction Resources Corp.* (CRC) (S.D. NY, 2018), the court went an extra step to hold yet another entity liable as well. Empire Outlet Bldrs. (EOB) was a general contractor for a construction project. EOB sub-contracted for CRC workers to build the project. EOB also brought in LP Corp. (LPC) to manage the subcontractors on the site. LPC had no contract with CRC or its workers. A female CRC construction worker was sexually harassed by another CRC worker, who took pictures of her in the porta-john, through the broken door, showed them to others, and made repeated sexual advances. LPC provided the porta-johns, and had day-to-day direct supervision of CRC's workers, including communication with CRC's union representatives. When the worker complained, LPC did not repair the broken door or address the advances, allowing the unsafe-harassing situation to continue. After she continued to complain to LPC and CRC, the female worker was fired. She filed Title VII claims against all three entities. The court ruled that though LPC had no direct contract with CRC, it was EOB's agent in control. LPC executed sufficient control over the workers, the equipment/facilities and the supervision to be ruled to be a Joint Employer for Title VII liability.

OTHER DISCRIMINATION CASES

SEX AND RACE

Discrimination At The Top - $5 Million Settlement. One usually thinks of discrimination occurring at lower levels of an organization, rather than affecting executives. However, a number of female and African-American Vice Presidents and Managing Directors of a large investment firm will split $5 million for unequal pay claims in a settlement reached with the OFCCP. An OFCCP audit concluded that White male Vice Presidents and General Managers were paid substantially more for the same work. *OFCCP and State Street Corp.* (2018).

DISABILITY

Not Qualified For The Job – But Still Has Case For Interviewer's Improper Medical Questions. A person who cannot do the job is not a "qualified person with a disability," and has no case, no damages under the ADA for not being hired. The employer is clean. However, a supervisor can blow this protection by improper inquiry. The ADA has a separate provision which strictly prohibits any inquiry into medical conditions (except a professional medical evaluation after the job offer). *In Mir v. L-3 Communications Integrated Syst.* (N.D. Tex., 2017), the rejected applicant had a severe hip condition, walked with a pronounced limp and used a cane. The court found that he was not qualified to perform the essential functions of the mechanical engineering position due to his lack of the required "NC programing knowledge" (not due to his hip condition). However, the hiring manager violated the non-inquiry ADA provision. On the walk from the receptionist to the interview room the manager asked several questions about his ability to walk. The applicant answered, talking about his hip operations and condition. During the interview the manager made more inquiries about when the condition began and about the short-term and long-term prognosis of the condition. The court ruled that the plaintiff could still pursue a case for violation of the prohibited inquiry section of the ADA, and seek damages for distress, anxiety, and attorneys' fees.

Multiple Psych Exams Warranted In Spite Of Repeated Fitness For Duty Opinions. An office administrator began to exhibit unusual "aggressive, abrasive and threatening" behaviors and sometimes "mumbled incoherently." A number of other employees complained. The employer sent her for a Fitness for Duty evaluation. The doctor opined that there "might be" a bipolar condition, but that she was able to return to work. The behaviors reoccurred. She was again placed on leave and sent for an evaluation. The same fitness to return was given. The behavior reoccurred and worsened. Other employees expressed concern for physical safety. Ultimately there were four such evaluations, each followed by an ok to return to work, and then more overtly disruptive behaviors, even screaming at people and rude, angry, threatening actions. The fifth evaluation finally resulted in an unfit for duty conclusion, and she was not allowed back on the job. She sued, claiming the repeated exams, after the original fit to return to work opinion, violated the ADA; the employer had no right to subject her to continual medical scrutiny. The court disagreed, and granted Summary Judgment to the employer. The ADA allows evaluations which are "job-related and consistent with business necessity." Continuing and reoccurring disruptive behavior, and complaints by other employees, warranted continuing evaluations. A fit to return evaluation does not immunize one from all future evaluations. Reoccurring problems warrant reoccurring evaluations. *Painter v. Ill. D.O.T.* (7th Cir., 2017).

Obesity Is Not A Disability Without Another Underlying Causative Condition. The issue of whether obesity itself constitutes a disability, or perceived disability, has been a matter of confusion with courts reaching conflicting conclusions. It is becoming clearer that obesity on its own is not a disability under the ADA. There must be an underlying condition which causes obesity. *Richardson v. Chicago Transit Authority* (N.D. Ill, 2017) involved a 594 lb. bus driver who was removed from service because he could not do hand over hand turns due to the size of his stomach interfering; could not consistently keep from having his foot on both gas and brake at the same time due to the size of his legs; and, could not effectively do inspections pre-trip or for problems during a trip due to his size. He sued, claiming he should have been accommodated due to his obesity disability. He claimed no underlying factors, only the "condition of obesity." The court ruled that "Not all abnormal physical characteristics" are disabilities under the ADA. The EEOC's ADA Guidance distinguishes between conditions that are impairments and physical characteristics that are not impairments, and that weight is a "physical characteristic." There must be some other additional medical condition which creates obesity; that condition would be the disability. (State EEO laws may differ. So check your state law as well.)

FAMILY AND MEDICAL LEAVE ACT

Timing – Policy Violations, Not Hemorrhoids, Was Cause Of Discharge. A discharged second shift supervisor claimed he was fired due to requesting FMLA. He called in to report he needed a sudden hemorrhoidectomy and would not be coming to work until recovered. He was notified of his discharge a few days later. The week prior to the call-in it was discovered that the supervisor had run out of gas on the way to work, called an on-duty employee to spend significant time to bring gas. He instructed the employee to not clock out, and did not either report this or adjust the time record, as required. In fact, he used his supervisor badge to let himself in, and have the employee "sneak" in the manager entrance to avoid any detection of the time out of the facility. He was confronted with this, and admitted he had similarly used employees for personal reasons several other times. That same day, following this due process meeting, managers decided to terminate the employment. The call-in regarding need for FMLA occurred the next morning. The court ruled that there could be no FMLA nor disability discrimination, since the firing decision was made before he called in for FMLA and before management even knew he had hemorrhoids. *Ennin v. CNR Ind. LLC* (7th Cir., 2018). A crucial factor in this decision was the managers documenting the termination decision – then - at the time. An after-the-fact documentation would have seemed to be a pretext, and the decision might have been different. Documentation is worth the paper (or email) it is printed on. A "verbal reprimand" or an oral decision is not provable. So tangible decisions should be immediately documented. Even if the email just states: "today we decided to terminate Jack's employment, though we are delaying telling him until Friday – since it is more convenient for payroll purposes." It documents the actual date of the decision. Also see the article We Have the Straw that Broke the Camel's Back, But Where is the Rest of the Camel? by Boardman & Clark.

LABOR ARBITRATION

Dueling Doctors' Notes Results In Discharge (The Doctor Was Trying To "Help"). An employee was discharged for dishonesty. He submitted a note from his doctor stating that he needed an accommodation of limitation to an 8-hour shift, with no overtime. Unfortunately, for the employee, the doctor had also mailed his note to Human Resources – to help facilitate the employee's return to work. The actual doctor's note made NO mention of any 8-hour limit, nor of overtime. The employee had added those on his own. This warranted discharge for falsification. *In Re Georgia Pacific Consumer Op. and USPFRM Service Workers* (2017).

Loafing. An employee grieved his termination for loafing on the job. However, a security camera showed him playing computer games, smoking (in violation of policy), and going out for a Burger King run, all on work time. The employee's job was self-directed, so trust was crucial. The Arbitrator ruled that the intentional and blatant violations warranted discharge, even though the employee had worked 48 years for the company. *In Re Kloeckner Metals Corp. and Teamsters Local 100*.