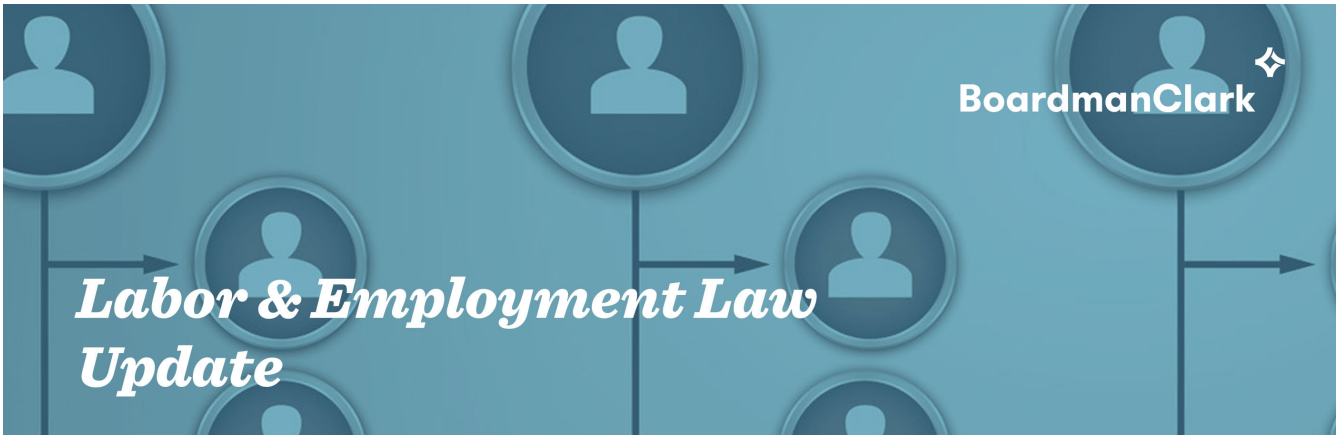

Congress Prohibits Mandatory Arbitration Agreements for Employee's Sexual Harassment, Sexual Assault Claims

ROBERT E. GREGG | 03.03.22

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Congress Prohibits Mandatory Arbitration Agreements for Employee's Sexual Harassment, Sexual Assault Claims. In a bipartisan vote, the House and Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. Many larger corporations have demanded employees sign Mandatory Arbitration Agreements which require all employment disputes to go to private arbitration and, among other things, prohibit filing in a public court or combining with others in a class action. Such Agreements often require that results of the arbitration remain secret ("gag provisions"). These agreements have been criticized for preventing employees from addressing systemic discrimination affecting groups of people, and for enabling companies to keep wrongdoing secret; thus enabling its continuation. This law addresses these issues. An employee can choose to pursue arbitration or go public by filing in court. It enables joint, class, or collective actions and allows the plaintiffs to speak publicly about their claims. This law only applies to claims of sexual assault or harassment, not other sorts of employment issues. Several states have passed similar laws with a broader scope regarding any form of EEO discrimination, or any form of state employment law violations.

Climate Change Generates Request to OSHA to Set Heat Standards. A group of six states have asked OSHA to establish national standards regarding both outdoor and indoor work due to the ongoing record-setting heatwaves caused by climate change. Heat is the leading cause of weather-related deaths in the US and it has been

increasing along with rising average annual temperatures in recent years. The states claim heat is especially dangerous for those performing active work or having lengthy workday exposure. Several states have already implemented heat safety standards and records requirements. OSHA is now being asked to set uniform national standards.

LITIGATION

Theme of the Month – Managers Get Fired

This month's theme seems to be the consequences of managers paying the price for not properly addressing serious issues. These include going on vacation before following up on a discrimination complaint that caused the company serious harm, and the store manager his job. Also how putting production goals and the pressure to file "good reports" ahead of worker safety caused serious injury, got the CEO and all the managers fired, and resulted in criminal prosecution and conviction.

Criminal Liability – Safety

Criminal Conviction and All Managers Fired for Utter Disregard of Safety – Putting Production Goals Before Employees. A Montana coal mining company has plead guilty, will pay $1 million, and have several years of probation for utter and willful disregard of employee safety and for fraud in falsifying safety reports. The company president/CEO and mine managers directed employees to illegally pump toxic waste into unused sections of the mine, and pressured employees not to report injuries. Workers suffered significant injuries, including an amputation, but managers falsified safety reports in order to meet their "reporting standards," production goals, and keep equipment operating. In addition to the $1 million fine, all of the involved executives and managers have been fired. *USA v. Signal Peak Energy, LLC* (D.C. Mo, 2022).

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Tardiness is Different than Absence In Alleged Military Bias Case. A jury decided that an Army Reservist's discharge for poor attendance was not due to her absences for military leave. The company presented evidence that it had consistently granted her leave for days of active duty military service during her several years of employment. She received several warnings, progressive discipline, and was then discharged for ongoing instances of tardiness. The court noted that military leave has no relationship to tardiness during times when one is not on military leave. One is absent for military service in full days or full weeks. A person does not do part days

of military leave, which could result in tardiness. The employee was not on any military leave during the instances of tardiness and could show no evidence that her military absences were ever considered in the attendance discharge decision. *Arroyo v. Volvo Parts North America, LLC* (N.D. Il, 2022).

DISCRIMINATION

Race

Manager Fired for Letting Customer's Harassment Complaint Fall Through the Cracks. An older Sam's Club store manager alleged his firing was a pretext for age discrimination when he was replaced by a 26-year-old. However, he was unable to overcome the company's defense that the firing was for the non-discriminatory reason of mishandling a racial incident involving a customer. A White employee called the child of a Black customer a monkey and then asked if the child liked bananas. The customer complained about the racist monkey reference. The store manager delegated the matter to an assistant manager but gave the assistant manager the wrong information as to who to contact at the corporate office. Then a couple of days later, the store manager went on vacation without having done any follow-up to check on the complaint or contact the customer about the incident investigation being in process. The customer posted the incident on Facebook. This went viral resulting in substantial negative PR for Sam's Club and loss of business for that store. The company fired the store manager for the abdication of responsibility. The court found this to be a valid nondiscriminatory reason for discharge. The manager could show no evidence to refute this defense. *Duncan v. Sam's Club* (S.D. OH, 2022).

Joint Employment – Racial Harassment of Subcontractor's Employee. In *Phillips v. Major Concrete Construction, LLC* (W.D. Wis, 2022), summary judgment was denied, ruling that there was ample evidence that a construction company did not adequately discipline or curtail a supervisor who made a number of racial slurs toward a Black employee of one of its sub-contractors at a construction site. When the Black employee of the subcontracted carpentry company complained to higher management of being called the N-word several times in front of a dozen other workers, the concrete company supervisor not only refused to apologize, he doubled down and repeated the slur. His company did not take action against him. They left him in charge of the work being done by the Black employee. That employee's company did not seek to get any separation between its employee and the offending supervisor or move him to another job site. It left him there for the potential of further abuse. It also sent a signal to the rest of the workforce that Black people were not wanted on the site, and that people could engage in racially harassing behavior with no consequences.

Disability

Doctoring the Doctor's Letter. A judge granted summary judgment dismissing a former airline technician's ADA termination case, finding he presented fake evidence. The technician was fired due to attendance. He sued, presenting medical documentation of heart surgery to justify the absences, which should have been reasonably accommodated. However, it came to light that the medical evidence was falsified. In a deposition, the doctor testified that he had not written the letter that was submitted by the employee and he had performed no heart surgery. *Friesen v. Delta Airlines* (N.D. GA, 2022).

National Origin – Immigration

IRS Sanctioned for Stonewalling Immigration Raid Case. The IRS obtained a warrant to search a meat-packing company on the pretext that it was looking for tax evasion evidence on the company's owner. Then, it proceeded to add 100 officers from US Immigration & Customs Enforcement (ICE), US Border Protection, and state and local police to the search, who targeted plant workers rather than the owner's financial records. The officers targeted only Hispanic workers, including those who were US citizens. They allegedly roughed up the employees, punched a number of them, and stuck guns in the faces of several employees. Over 100 Hispanic employees were subjected to the agents' aggressive actions. Only 11 were arrested and charged as illegal aliens. Non-Hispanic employees received no focus at all (even though there are also numerous illegal immigrants from the rest of the world in the U.S.) Those affected filed a violation of rights case under U.S. Code sections 1985 (3) and 1986. The IRS then stonewalled discovery requests and Freedom of Information Act requests until the one-year statute of limitations passed; then moved for dismissal due to the plaintiffs not having perfected the court filing by providing enough specific details as to the names of the officers, etc. The court found this argument duplicitous, in bad faith. The IRS could not be allowed to deliberately hide information then try to blame the plaintiffs for not including it in their suit. Thus, the court held that the statute of limitations did not begin to run until two years later when the IRS finally produced the information. *Zelaya et al v. Hammer et al* (E.D. TN, 2022).

SHAREHOLDER SUITS OVER CORPORATE EMPLOYMENT PRACTICES

Judge Skeptical of Settlement – Is It Just Cosmetic? A new trend is stockholder suits over corporations' poor practices regarding addressing employment discrimination and establishing effective diversity practices. Stockholders have claimed that these poor practices result in bad PR, major class action liability losses, and the resulting

loss in dividends and stock value to them. Most major corporations have widely publicized their "commitment" to equal opportunity and diversity, but shareholders claim it seems to be purely cosmetic lip service with no real tangible effects. In *Pentarest Derivative Litigation*, (N.D. Cal, 2022) stockholders sued the company over its alleged employment environment of systemic sex and race discrimination. The claimed "broken culture" and resulting liability constituted a breach of fiduciary duties by the Board toward its stockholders. The company's public pronouncements on diversity, without real action, misled investors about Pentarest. The company has now sought to settle the case for $50 million and promises to implement effective anti-discrimination/diversity practices. However, the judge expressed skepticism about approving the settlement. The $50 million is just money to the stockholders; it does not guarantee the actual correction of the problems. The judge says he has seen "cosmetic settlement after cosmetic settlement"... The judge approved the agreement in part but said that he would like to see actual results before final approval. The settlement payments to the class attorneys and final release may be spread over several years to help assure there is action to actually implement changes.

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