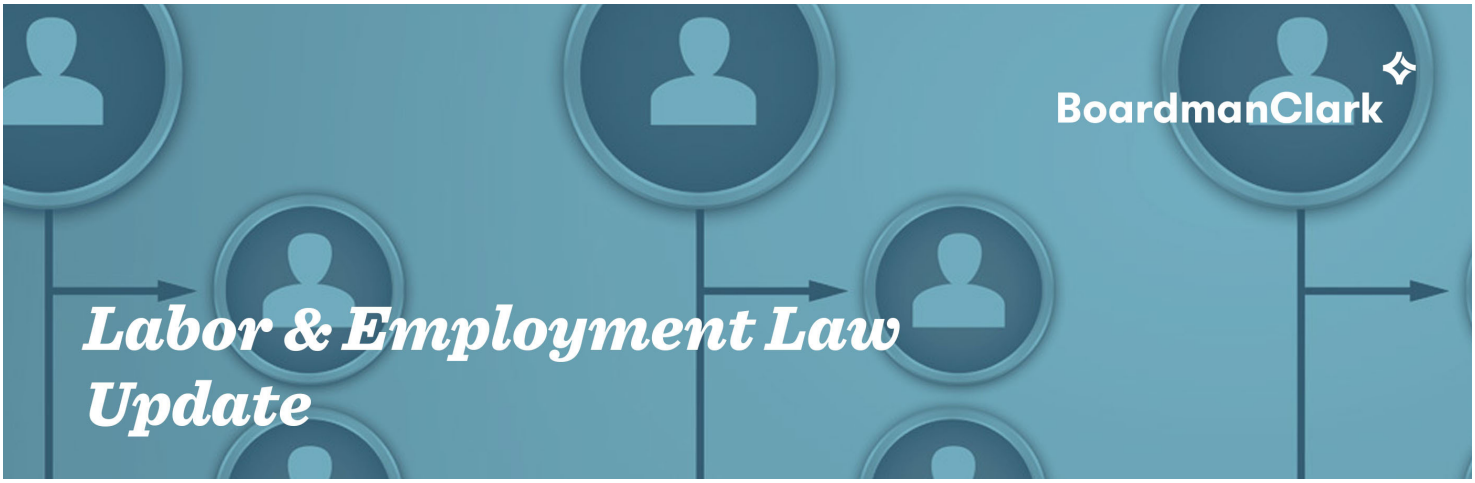

Dept. of Labor withdraws OSHA COVID-19 ETS vaccination/testing rule

ROBERT E. GREGG | 02.07.22

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Dept. of Labor withdraws OSHA COVID-19 ETS vaccination/testing rule in light of the Supreme Court decision putting it on hold pending more lengthy litigation. Employers may still adopt their own vaccination/testing practices but are not mandated to do so by OSHA. However, the ruling did not go away. OSHA has now converted it to a Proposed Rule and will try to cure the criticism of the courts regarding not following the proper process and not garnering more supporting information before implementation. Now the Proposed Rule will start through that commentary and information process to see if it might reemerge later.

Supreme Court Justice Stephen Breyer is Stepping Down. After 27 years as a Supreme Court Justice, Breyer will retire at the end of June or when his replacement is confirmed. He is one of the longest-serving members of the court. President Biden will move quickly to nominate a replacement.

TRENDS

Large Investor's Insistence On Diversity Results

New York Pension Fund Files Shareholder Proposals for Amazon and Other Corporations to Conduct Independent Audits of Diversity and Equity Practices. The New York State Common Retirement Fund, which controls $270 billion of investments has joined a growing number of public and private sector pension funds in demanding the corporations they invest in have robust Employment Equity practices, and to demonstrate these to the stockholders. The investors' position is that a corporation's fair employment practices have a direct effect on the

bottom line of financial profitability, investment results, and stock values. The NY Fund has filed proposals with Amazon, Chipotle, Match Group, Inc., Dollar Tree, and Dollar General Corp. to require independent audits and regular reporting to stockholders of each corporation's Diversity and Equity practices and results. In announcing the proposals, the New York State comptroller noted that after the murder of George Floyd, many corporations pledged to adopt Diversity and Equal Justice practices. "Many companies have taken steps to back their promises, but many have not. Companies are responsible for their business practices and must ensure that they do not harm their bottom line. Our state's pension fund is committed to ensuring the companies we invest in address racial equity." Amazon seems to already be proactive in this area. It has adopted a variety of diversity goals and publicly posts certain of its diversity statistics and openly publishes its EEO-1 report on its website. In addition to stockholders' proposals, large pension funds have sued a number of corporations whose lack of attention to sexual and racial equality in employment, and the resulting bad publicity or large liabilities, caused tangible losses to investors. This trend provides Human Resources Managers and EEO Officers an opportunity to reach beyond legal compliance and become active diversity/equity advisors regarding stockholder concerns and increasing the organization's appeal to investors and the public.

LITIGATION

Strangest Cases of the Month

Police Ignore Robbers-in Hot Pursuit of Pokémon. In *Lozano & Mitchell v. City of Los Angeles*, (Cal Ct. App, 2022), two police officers lost the appeal of their discharges. The two officers were avid players of Pokémon Go, an augmented reality game in which virtual characters pop up in real locations. Players go to the location and try to "capture" the characters. The two officers were in their squad car chasing down a Snorlax when they received a dispatch call that a robbery was in progress near their location; they were the only squad car nearby and should proceed to the robbery location. Instead, the officers continued after the Snorlax. The squad car recording caught them reacting to the dispatch call by saying, "Screw it", then discussing the quickest way to get to the Snorlax location. In the next 20 minutes, a Togetic also materialized at another nearby location, so they went after it. In the meantime, the robbers successfully completed their job and simply drove away unimpeded. However, both the Snorlax and Togetic were successfully apprehended! The officers were fired for dereliction of duty. They appealed, claiming that the department should not have been able to use a recording of their "private" conversations, and also claimed they did not hear the dispatcher's call. The recording belied this claim, and the privacy argument was rejected by the court. All officers are aware of video and audio recordings of their activities. Officers also should now be aware that they should not play Pokémon Go while on duty.

Billionaire Media Owner Continues His Quest to Generate More Liability – Cannot Threaten Plaintiffs. Rarely in employment law history has one person managed to continually dig himself into a deeper and deeper hole of liability. Hologram USA owner, Alki David, has lost multiple sexual harassment and retaliation cases, resulting in millions in liability. He has become a fixture in courts and legal news. His obnoxious, disruptive, bombastic, profane behaviors and verbal attacks on plaintiffs, witnesses, and attorneys have alienated juries, resulting in multi-thousand-dollar sanctions by judges, and even got him banned from personally being in a courtroom during his trials. Each time it appears he must have hit bottom, he seems to continue to dig. Now, in *Taylor et al v. David et al* (Sup. Ct of LA Cal, 2022), he has taken a $7 million verdict against him and turned it into an additional retaliation case for making threats and other overtly intimidating behaviors toward the plaintiff during the trial. Mr. David allegedly did this while the plaintiff, Ms. Taylor, was in the courtroom. He approached her during non-testimony times, called her names, and threatened to "bury her." He posted out of court comments and a photo of Ms. Taylor with a red X on her face and a bloody knife picture. He also commented on her mental state with obscene insults and images including an alleged picture of a penis sent to her. She then filed this new *Taylor v. David* case for retaliation. Mr. David tried to have the case dismissed under the state Anti-SLAPP Act which creates an "absolute privilege" and immunity for any statements made by the parties about each other "during the course of a trial." The court rejected this argument and allowed the suit to proceed. The Anti-SLAPP Act is to protect things said in the official proceedings. It does not protect verbal attacks or threats made personally during breaks in the courtroom, courthouse halls, or on social media, outside of the official proceedings. The alleged threats, personal insults, and social media posts are not protected by any litigation privilege. The court opined that Mr. David was stretching beyond the limits of defensibility. "Agile thinkers always can create some kind of link between a statement and the proceeding. All you need is a fondness for abstraction." (citing *Woodhill Ventures, LLC v. Yang*). Mr. David's response to the decision was to accuse the judge of prejudice and illegality.

DISCRIMINATION

Equal Pay – Government Contractors

Security Company Will Pay $1.2 Million to Settle Pay Discrimination Claims. A security company with federal contracts has agreed to resolve an Office of Federal Contract Compliance Programs (OFCCP) investigation of claims it underpaid numerous female, Black, and American Indian security guards. The OFCCP found evidence that white male guards were paid more for the same work. The Conciliation Agreement will provide back pay to approximately 2,000 security officers and will also address concerns of assigning women and non-white guards to less-favorable work locations and the company will revise its analysis of pay practices and its recordkeeping. One cause of the disparities seemed to be that officers were assigned, transferred, and received pay increases based on the subjective "whims" of their supervisors,

rather than on any assessment of performance, merit, or even seniority, with no overview by Human Resources. Re: *OFCCP and AlliedBarton Security Service*. (DOL, 2022)

FAIR LABOR STANDARDS ACT

Company Will Provide Private Rooms for Nursing Mothers. A Dept. of Labor complaint cited a medical laboratory for failure to provide a private, secured space where nursing mothers could nurse or express breast milk. DOL found that when employees requested a private space, the company provided a common space, used by it and another tenant of the building, and where the nursing mothers were interrupted by other employees of both organizations. Federal law requires employers to provide a space to nurse or express milk privately, without intrusion. The company settled the matter by agreeing to implement changes in that facility and for 2,000 other company locations across the US. The DOL, in announcing the actions, cited the long-term benefits to facilitate breastfeeding for both employees and employers. "Mothers who breastfeed generally take less time off work due to childhood illnesses." *DOL v. Laboratory Corp of America* (DOL, 2022).

FALSE CLAIMS ACT

$7.5 Million to Whistleblower and U.S. Dept. of Health and Social Services for Improper Billings. A group of medical providers will pay $7.5 million to resolve a case brought by two whistleblowing employees. The medical clinics billed the federal government for numerous electro-acupuncture procedures which were not covered by Medicare or Medicaid. The treatments were wrongly coded to make it seem that they were for different, covered procedures. The two employees became concerned about the exceptionally high number of these procedures which were being prescribed and then found the misbilling practices. The employees filed the False Claims Act case in which DHSS then intervened. Under the FCA, whistleblowers receive a percentage of the amount recovered by the government. *DHSS et al v. New Jersey Interventional Pain Management Center, PC, et al* (E.D. NY, 2022) The medical center blames the manufacturer. IPMC is trying to shift the blame to the electro-acupuncture manufacturer and marketer. It states it will sue those companies because they "pushed the providers to bill federal healthcare programs for the use of the devices and provided incorrect billing guidance."

LABOR RELATIONS

UConn Basketball Coach Wins $11 Million in Unjust Termination Arbitration. Former University of Connecticut coach, Kevin Ollie, has been awarded $11 million by an arbitrator who decided that he was wrongfully discharged. The UConn Huskies won the 2014 NCAA Basketball Championship under Ollie's direction. In 2018, he was fired for alleged recruiting and training practice violations of NCAA rules. The arbitrator, however, determined that those were not sufficient for discharge. They were "low-level" infractions, "minor in scale" and widely

"scattered over a seven-year period" (the University did not seem to care so much about these while the coach was winning national titles). Further, there was evidence that these were comparable in number, frequency, and level as other coaches in other major UConn athletic programs, yet those other individuals suffered no such adverse consequences. Coach Ollie filed a termination grievance under the UConn agreement with the American Association of University Professors (AAUP). The arbitrator found the University violated the collective bargaining agreement, did not have serious misconduct just-cause, and had not engaged in the required due process in the firing. In Re: *UCONN AAUP v. Board of Trustees of U of Connecticut* (Arbitrator's decision, 2022)

CONSTITUTION – FIRST AMENDMENT

University of Florida Cannot Ban Professors From Testifying Against State Policies. A federal court blocked the University of Florida from enforcing a policy forbidding professors to serve as expert witnesses in any suit against the state. Three Political Science professors were stopped from testifying on behalf of voting rights groups "because the testimony could pose a conflict with the governor's office." The policy allowed the University to censor testimony "based on the viewpoint expressed in the testimony." Ostensibly, it would have been OK if the professors were testifying in support of the state or governor's position. The University had previously allowed the professors to be expert witnesses in all sorts of other cases. The prohibition was based on controlling their First Amendment freedom of speech when the state disagreed with the content or viewpoint. *Austin et al v. U. of Fla Board of Trustees, et al* (N.D. Fla, 2022)

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