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LEGISLATION AND ADMINISTRATIVE ACTIONS

EEOC Issues LGBT+ Harassment Guidance. The U.S. Equal Employment Opportunity Commission has recently issued several rules on various areas of the EEO laws. In May 2024 it issued a Guidance specific to LGBT+ harassment in the workplace. Guidances do not have the legal force of a statute or rule, so Employers are not required to follow their provisions to be in compliance with the law. However, it is important to understand guidances as they advise how the EEOC interprets issues. Guidances are used by EEOC in making determinations as to whether it believes harassment or other forms of discrimination have occurred and courts can recognize and give preference to the EEOC's interpretive guidances. Knowing the way the EEOC will view issues helps employers design their policies to have best practices and avoid adverse consequences under EEOC's scrutiny.

Department of Labor New Salary Levels Become Effective July 1, 2024. The new Fair Labor Standards Act rules for salaried employees and highly compensated employees (HCE) to be exempt from overtime pay becomes effective July 1, 2024. The new salary level is $43,964 per year or $844 weekly. The HCE level is $132,964 per year with a minimum base of at least $844 per week. The rule has been challenged by several lawsuits asking the courts to void the rule and grant an injunction to put it on hold until the cases can be decided. However, an injunction has not been granted yet, so employers should be prepared for the new pay levels to become effective.

LITIGATION

Fair Labor Standards Act

Company President Personally Liable for OT Wages for Employees Who Did Not Meet the Salaried Exempt Test. Just calling someone "salaried" and paying them

a salary of $70,000 per year (well beyond the minimum requirement) does not mean they are "salaried" and exempt from overtime pay. A key production employee was given a high salary, but often worked 60 hours per week. After he left the company, he filed an FLSA claim for overtime pay *plus* extra liquidated damages. The Court found that he had not been properly classified as salaried exempt. He did not hire, fire, supervise, promote, set pay for anyone, or have authority to make or recommend any employment decisions. He did not do high-level analysis or make recommendations impacting the company's operation; his job involved mostly skilled manual mechanical work. He did not fit any of the executive, administrative, or professional FLSA salaried exemptions. The court found the company liable, and its president could also be personally required to pay the damage awards since he had direct control over setting up the pay arrangement. The company contested the employee's claim of how many overtime hours he actually worked. However, since the company did not keep any records of its "salaried" employees' hours, it had the burden of proof to show he did not work the amount claimed. Absent such records, the court would accept the employee's word for the amount of overtime due. *Carson v. Ever-Seal Inc., et al.* (M.D. Tenn., 2024). This is an *important warning* at a time when the Department of Labor is implementing new standards for Salaried Exempt compensation. In evaluating and setting that compensation, it is crucial to focus not only on the amount paid but also on whether the employee *actually meets* the Salaried Duties Tests to be exempt from overtime pay.

Child Labor

$5 Million Penalty Plus Disgorgement of Profits for Child Labor Violations. A poultry processing company has agreed to pay hefty wages, liquidated damages, and penalties of $5 million for employing underage workers in deboning poultry, and other dangerous tasks. The company will also "disgorge" (pay the Department of Labor) the $1 million profit it made from selling the "hot goods" produced by child labor. This money will also be used for the benefit of underage workers. During the DOL's investigation, the Company engaged in obstruction, falsified records, and coerced the child workers not to talk to the investigators. *DOJ v. A1 Meat Solutions Inc., et al (C.D. Cal., 2024)*

Constitution

Deputy Fired for Not Supporting County Clerk's Reelection Campaign. The First Amendment protects public employees from retaliation for refusing a request for political support. *Vogt v. McIntosh County Board, et al. (10th Cir. 2024)* involved a sheriff's deputy who was asked to endorse the county clerk in her reelection campaign. The deputy declined, saying that she wanted to remain neutral. The clerk

reacted angrily and began ostracizing the deputy; then she fired the deputy two weeks after winning reelection. The fired deputy filed suit against the county and the clerk personally. The clerk asserted a Qualified Immunity defense and asked for the case to be dismissed. However, the Court declined to do so. It ruled that the clerk should know that declining a request for political support is an exercise of the First Amendment Right of Political Affiliation, and the clerk should be aware she could not make an employment decision based on this factor.

Discrimination

Age & Race

Too Old and "Too Black" – Fired Coach Can Show Age and Racial Discrimination. A community college's 59-year-old basketball coach's contract was not renewed, and his employment was terminated. Prior to this action, the Athletic Director had made statements that it wanted a "younger coach" and that the coach was "too Black" and "did not talk and act like other coaches." The college then hired a coach who was 30 years old and also Black. The former coach filed age and race discrimination claims. The college's defense included citing "incidents of concerns" about the coach as reasons for its decision, and defended the race allegation by pointing out the replacement was of the same race, and this should eliminate any discrimination claim. The Court was skeptical of the "incidents" defense since the college seemed to produce this reason only after the coach sued, long after the employment decision had been made. Plus, the supposed "incidents" were not seen as matters of "concern" when they occurred and may well have been expressions of protected rights. The "younger coach" comment was enough to support the age discrimination charge. In rejecting the same race replacement defense, the Court ruled that there are exceptions when the evidence can show the employer acted upon a racial stereotype and was seeking Black applicants who seemed "White enough." The Court opined that an "employer's decision to disfavor one black employee or candidate because he subjectively perceives him as 'talking' or 'acting' in a manner which is 'too Black' seems like the sort of decision which Title VII was enacted to prevent." Further, "it would not be living in the real world" if the Court sought to deny that "there are some employers who are fine with hiring an African-American applicant so long as they are not perceived as being too Black. This is the sort of racial stereotyping Title VII was meant to address." *Howell v. Northwest Mississippi Community College* (N.D. Miss., 2024).

Race

Black Employee Racially Harassed by Black Supervisor. A Black UPS driver supported a White coworker who he believed was unfairly disciplined. The

Supervisor, who was Black, then allegedly began a campaign of frequent hostile comments, calling the driver "a sellout Negro," "Uncle Tom," and "Not Black Enough." When the driver complained, the supervisor confronted him about "going to the White people" in HR and being disloyal in "doing this to" a Black supervisor. The supervisor then fostered other Black employees in making these comments as well. The driver filed a racial harassment case. The Court found sufficient evidence for a jury trial due to an overtly hostile environment based on racially charged comments.

Contracts

Handbook Can Create Enforceable Contract and Void Employment-At-Will. Many employers put prominent Employment-At-Will language in their employee handbooks stating that nothing in the handbook creates a contract or alters the Employment-At-Will relationship. Sometimes courts see these prominent statements at the start of a handbook, but then rule that the company diminished or even voided the At-Will, page by page, with the policy provisions it then included. This occurred when an employee handbook contained a "Speak Without Fear" policy which stated that no adverse action or retaliation would result from raising concerns in good faith, even if one makes an honest mistake about the issue. An employee did raise a concern about the discipline he had received. The concern reached the company CEO, who agreed with the employee and overturned the discipline. However, the employee was promptly fired by his manager who the employee alleged did so in retaliation for his having raised the concern and getting the CEO involved. This resulted in an unfair discharge case for breach of contract (the handbook policy) and promissory estoppel (suffering harm for relying on a clear promise which was not fulfilled). The Company responded with the Employment-At-Will defense, asserting an At-Will employee could not bring either of these claims. However, the Court disagreed. It found that the "Speak Without Fear" policy voided any At-Will disclaimers in the handbook. It was a clear, unequivocal guarantee which any employee could rely upon and enforce as a contract prohibiting retaliation. The same facts supported the promissory estoppel claim. Employees had a right to rely on the "Speak Without Fear" policy's promise. The plaintiff was reasonably enticed by that promise to raise his concern. Thus, the company can be legally bound to honor its promise not to retaliate for having done so. The plaintiff can sue for damages under both the contract and estoppel claims. *Rowden v. Walmart Inc.* (N.D. IN, 2024). *This case is a warning* that an Employment-At-Will disclaimer in applications and handbooks is *not* a blanket protection or a magic shield against liabilities. After the disclaimer, one must be careful about the language used in the policies which follow. There are also other handbook policies on wages and benefits that can be enforced under other laws regardless of any At-Will status as well as

other legal exceptions to AtWill. For more detailed information on this and information on how to draft a handbook that does not void the At-Will status, request the article *Employment Handbooks* by Boardman Clark.

Company Cannot Enforce Arbitration Agreement for ERISA Complaint — or for Any Other Suits. Many companies and their benefit plans have implemented mandatory arbitration agreements, which require all employment actions to be decided by private arbitrations rather than filed in a court. They also often require individual arbitration, prohibiting employees from joining in class actions. The courts have frequently enforced these agreements, declining to allow the employee(s) to maintain standard lawsuits. However, these arbitration agreements are subject to challenge. In *Cedeno v. Strategic Financial Solutions* (2nd Cir., 2024), the Court found an arbitration agreement too broad in its coverage. The employee filed an ERISA class action suit against the employer and the Employee Stock Ownership Plan provider for plan-wide losses. The defendants tried to enforce the Plan's mandatory arbitration agreement and dismiss the case. However, the Court ruled that the arbitration agreement conflicted with ERISA's provisions allowing mandatory "Plan-wide remedies," and class action suits. The arbitration agreement could not nullify that law and was thus unenforceable. *Even worse*, the arbitration agreement had a *non-severability provision* that stated that if a court found any provisions "unenforceable, then the entire agreement shall be rendered null and void in all respects." **So**, there is no longer any arbitration requirement for anyone in the ESOP plan for anything they wish to legally challenge.

Fair Credit Reporting Act

Acting Too Quickly Violated FCRA. The FCRA, as with many other employment laws, specifies forms and a procedural sequence of notices. One such requirement is providing a job applicant information about any negative information in a background search and a Notice of Rights before deciding not to hire the person. In *Grob v. Walgreens Boots Alliance Inc.* (N.D.IL, 2024), the company got ahead of itself. It received a report from the screening agency that it could not verify Ms. Grob's Social Security number. Rather than inform her of the issue, the company automatically adopted this information and deemed her ineligible for hire. Unfortunately, a manager had already told Ms. Grob to report to work when this information was reported. She was immediately terminated on day one, without being told why. *Then*, the company sent her the required copy of the adverse background check and the Notice of Rights. This resulted in the FCRA case. The Court found that the company's rush to judgment violated the FCRA requirements. Further, it held that Ms. Grob could seek extra punitive damages since the company's action seemed to be a "willful violation" of the law and "objectively unreasonable conduct under the FCRA."

Trade Secrets and Personal Liability

Competitor and its Executives may be liable for Aiding and Abetting Pirating of Trade Secrets. The usual method of protecting trade secrets or enforcing confidentiality/nondisclosure agreements is to sue the former employee who has taken or revealed that information. However, the competitor company that benefits from that information may also be liable; and since it has deeper pockets, it is often the preferred target for the former company to sue for damages. *Solar Optimum Inc. v. Elevation Solar LLC, et al.* (D. AZ, 2024) alleges that Elevation recruited a key Solar employee. While still at Solar, he downloaded Trade Secrets and transferred them to his new employer. After he left, he used the login of a former coworker to access more information. Elevation executives accepted the pirated secrets and urged him to continue accessing Solar's files to get more. Solar discovered this and sued Elevation and also the individual executives personally, for violation of state and the Federal Defend Trade Secrets Act; Civil Conspiracy; Tortious Interference; Aiding and Abetting the breach of fiduciary duties; and Unfair Competition. The Court found ample grounds to support a jury trial on all of these causes of action against both Elevation and the named individuals stating, "each of the defendants, who were executives, participated in persuading the former employee to misappropriate the plaintiff's information, having control over the employee and therefore over the information … just because they did not access the information themselves does not absolve them of having acquired the information." The potential damage awards against Elevation and each of the executives are likely to be far more collectible than could be achieved by simply suing the former employee who provided the likely information.

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