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LITIGATION

Fair Labor Standards Act

Penalty For Leaving Job Early Violates FLSA. Some companies have their employees sign agreements committing to a certain term of employment. If an employee leaves before the end of their term, they are liable to pay certain penalties or costs. In *Su v. Advanced Care Staffing, LLC* (E.D. NY, 2024), the company asked their employees for a three-year employment commitment. Leaving early would result in the employee paying the company damages, including loss of anticipated profits, attorney fees, expenses, arbitration costs, and interest. The Department of Labor sued, claiming that this violated the FLSA. All of the potential damages, costs, penalties, and fees, when applied back to the wages the worker had received, would effectively retroactively reduce those wages to below the required minimum wage and overtime levels. Thus, the employee was not receiving wages for work; only a *loan* which might then be recovered from their own pocket. The court agreed with the Department. It found the arrangement could violate the FLSA's minimum wage and overtime provisions, and could constitute a "*kickback*" scheme in violation of the FLSA, improperly shifting the company's potential lost profits, and cost of legal fees to the employees. **A message from this case is: Be careful with any agreement or policy that imposes financial penalties on the employees**. It is fairly safe to give a retention bonus or extra benefit to employees who stay with the company for a certain period, but trying to collect expenses, damages, or other amounts from employees is becoming riskier. This issue is not confined to just terms of employment agreements. Federal agencies and courts are more closely examining all sorts of employment agreements that have "**restrictive covenants**" and impose penalties against the employee. Noncompetition agreements are a prime example at present. So, be cautious when drafting any employment agreement, policy,

commission/bonus arrangement, or compensation plan that provides for potential penalties, paybacks, or other costs to the employee.

Discrimination

Citizenship

Court Rules That 42 US Code Section 1981 Prohibits Hiring Discrimination Against U.S. Citizens. This case is a new extension of an old antidiscrimination Civil Rights Law. 42 U.S. Code § 1981 was passed in 1866 to prohibit racial discrimination, but the statute's language was not specifically confined to race. Over the years its coverage has been expanded to prohibit the treatment of one class of people differently than another defined class of people in several areas, including employment. Mr. Rajaram, a naturalized U.S. citizen, sued the technology company, Meta Platforms, Inc.-Facebook. He claimed he was not hired because Meta preferred to hire noncitizen H1-B workers which it could pay lower wages. Though courts had long ruled that Section 1981 protected non-citizens against most employment discrimination, this had not been extended to protect U.S. citizenship in general. In this case, the Ninth Circuit Court of Appeals took that step, finding that U.S. citizens are an identified class as opposed to non-citizens or even a defined subset of non-citizens. Thus, the coverage of Section 1981, should apply to Mr. Rajaram's claim. *Rajaram v. Meta Platforms, Inc. AKA Facebook, Inc.* (9th Cir., 2024) This is an extension of the law by one circuit court of appeals. As with many new developments, there may be contrary decisions in other circuits and the matter may not be "settled law" yet.

Age

"It Would Not Be Smart" to Appoint an Older Person and "If You Go Running Your Mouth It's Going to Get Back to Me!" Were Not Smart Statements. A 66-year-old female Deputy Fire Marshal had successfully been the Department's operational officer for a number of years. She was a 30-year veteran of the Department and held numerous certifications. When the Fire Marshal position became open, she applied. However, the Department Director, looking at her age, stated, "*It would not be smart*" to appoint someone "*who won't stay here for the next few years*." So, the 66-year-old was passed over in favor of a 46-year-old man who had never served in a Deputy position, had less experience, and had fewer certifications. *Then* the 66-year-old Deputy was instructed to train the new person in the operational duties needed to become a Fire Marshall. When she complained about the apparent age and sex discrimination, the Department Director warned her, "*If you go outside running your mouth, it's going to get back to me*." The Deputy was then issued a write-up when she persisted in her complaint. She filed suit under the Age Discrimination in

Employment Act and Title VII for discrimination and retaliation. The court found sufficient grounds for the case to proceed to a jury. The Deputy appeared more qualified than the younger male who was selected. The Director's comment that a 66-year-old would not likely stay in the job for a few years was exactly the sort of stereotyping that the antidiscrimination laws are intended to prohibit. It was one of the least "*smart*" statements a manager could ever make. The "*If you go running your mouth…"* statement clinched the retaliation issue. It appeared to be a clear threat to curtail protected activity. *Lawrence v. Metro Government of Nashville & Davidson County* (M.D. TN, 2024) *Be Aware* that people are staying in the workplace, active and effective much longer. There is an increase in "Boomerang" employees, who retired and are now coming back to work. The stereotype that an older employee will soon retire is proving less and less viable. So, failing to promote or hire someone due to an unfounded fear about longevity is less and less defensible. This has also played havoc with companies' succession planning when the focus is on planning for when the older people retire, then getting caught short when the major departures are by younger or mid-career key employees. So, succession planning should be focused on planning to back up and replace key positions, not on specific people who happen to be older.

Race/National Origin

Go to the Dentist, Get Engaged and Get fired. COVID-era cases continue to be decided (actually 3 or 4 years is common in the court system). A U.S. Civilian Intelligence Analyst of Cambodian origin was employed by the U.S. government on a military base in Qatar. During COVID, the base was closed off – no entry, no leaving without authorization. The Analyst received authorization to leave base to see a dentist. He had arranged for his Qatari girlfriend to meet him at the dental office, where he proposed marriage. She accepted. He then posted pictures of the happy event showing them kissing without masks; a violation of the base's COVID social distancing rules. He had also failed to notify the Agency that he had a relationship with a foreign national, a violation of security rules. He was then fired. He filed a Title VII national origin and race discrimination suit, claiming that his friend, a Caucasian analyst had also gone to the dentist, and arranged for his Qatari girlfriend to be present to witness his proposal, yet the Caucasian analyst received only a reprimand for having participated in misuse of the dental appointment as an excuse for the engagement event. The court ruled that the two analysts were not "s*imilarly situated,"* which is a key element in comparative discipline cases. The Caucasian analyst had a previously clean record, there was no evidence of maskless kissing, and he had disclosed his relationship with a Qatari girlfriend when it began. The fired analyst, however, also had prior warnings and discipline including for misuse of an expense account and violating a directive to stay away from a female co-worker who

had made a sexual harassment complaint against him. The court determined the difference in situations and prior records could validly warrant more severe treatment than the reprimand given to the other analyst and dismissed the case. *Waan v. FGS, LLC* (D. MD., 2024)

Objecting That Bias Training Promotes Stereotypes Based on One's Unfounded Stereotype is Not Protected Activity. This seems like a convoluted heading, however, that was the issue before the court. A company implemented mandatory Diversity-Unconscious Bias Training for all employees; they were to complete a video module. A White manager stated that he refused to watch the video because he believed it "*preached racial bias*" and "*No one can tell me I have unconscious bias…the training turns all Whites into villains*" and diversity training is all stereotyped bias against White people. He failed to find any information about the content of the training. He persisted in his stereotyped characterization of the training, even after he was informed that part of the video module showed examples of how bias worked against White people. As a result, he was fired for insubordination after several warnings to complete the training. He then filed a Title VII retaliation case claiming he was fired for objecting to racial discrimination, a protected activity. The court rejected this claim, finding that the manager had no actual knowledge of what the training did or did not cover. His case was based purely on stereotyping, speculation, and conjecture. Since he never accessed the video module, he had no objectively reasonable belief that any racially discriminatory content existed. In order to have a case, an employee must have some knowledge of the conduct he is opposing for his belief to be objectively reasonable. The court granted summary judgment dismissing the case. *Vavra v. Honeywell International, Inc.* (7th Cir., 2024)

Family and Medical Leave Act

Two cases this month illustrate opposite sides of *what is sufficient notice* for FMLA protection. A third addresses the thorny issue of level of proof needed for an employer to show a falsification of FMLA leave.

Feeling Sick Is Too Vague to Trigger FMLA. Employees do not have to go through a precise formula or use "magic phrases" to put employers on notice that they have an FMLA-qualifying situation. The employer is supposed to recognize reasonably clear information that would indicate a serious health condition, and then *assist* the person in getting the proper forms and understanding the FMLA process. However, the employee still must provide "*sufficient notice*" that would indicate a serious health condition. This was not the case when an employee called in absent for several days, simply stating "I'm sick," "I won't be in today" or "I'm feeling ill." The employer counted these as unexcused absences and proceeded to discipline the employee. The employee then provided a late, after-the-fact request for FMLA, and

filed an FMLA suit when the discipline was not rescinded. The court found that the call-in information was too vague to place the employer on notice that an FMLA-qualifying situation existed or that the employee wished to take FMLA. Once the employee submits a request, future absences might then be subject to FMLA protection. *Hubbard v. Illinois State Board of Education* (C.D. IL, 2024)

Nurse Provided Sufficient Information for Hospital To Know FMLA Could Apply. A nurse texted her supervisor that she had been diagnosed with pneumonia and could not come to work. Her doctor OK'd her return after 10 days. However, the hospital had already fired her for these unauthorized absences. She filed an FMLA suit. The hospital's defense was (1) she did not specifically say "FMLA" when she called in her inability to attend work, and she did not send in FMLA paperwork while sick with pneumonia; (2) The nurse had not provided a specific length of the absence when she called in sick. The court found these defenses inadequate. The FMLA does not require one to specifically state the words "FMLA." Any employer should *know* that pneumonia is a serious health condition that qualifies for FMLA leave. An employer should also provide FMLA forms to those who take leave for identified medical conditions and not expect someone, who is already too ill to work, to locate, fill out, and submit the forms independently. Finally, the court stated, "The regulations clearly provide flexibility for employees who do not know the necessary duration of their leave initially." So, the employer's defense was based upon an unreasonable foundation given the situation. *Kania v. CHSPSC, LLC* (S.D. WV., 2024)

An Investigative Video Meets Standard for Discharge Due to Falsifying FMLA Leave and No Secondary Medical Evaluation Needed. An underground truck driver for a mining company claimed he suffered an injury when the vehicle hit a mine wall and his chest was thrust into the controls. Though a medical examination showed no bruising or outward signs of injury, and x-rays and scans showed no internal abnormalities, he complained of severe chest pain and inability to use arms and upper body. The doctor diagnosed chest wall contusion and muscle spasms and prescribed a five-day leave with anti-inflammatories. The driver claimed the severe pain and inability to use his upper body continued and the leave was extended to 18 days. During this time, another worker reported that the driver was faking the injury to get time off in order to do repair work on rental properties he owned. The company hired an investigator who, over several days, took video of the driver climbing ladders, repeatedly lifting heavy loads, using his arm to work in all positions including lots of overhead work, driving a truck, and using a variety of tools. All are inconsistent with his claim of injury, severe pain, and inability to work. The driver was confronted with the evidence and refused to answer. He was then fired for falsifying his leave. He sued claiming that his FMLA rights were violated. The theory was that the FMLA provides that "In any case in which the employer has reason to doubt the

validity of the certification, it may require that the employee, at the employer's expense, obtain the opinion of a second or third health provider…" The company did not get a second, contrary medical opinion. So, the driver claimed the discharge was in violation of this FMLA requirement. The court disagreed. The language is "may require," which does not specify the only course of action. When there are concerns about the adequacy of a certification, the diagnosis, etc., then a second opinion is often the proper course. However, when there is direct evidence of fraud, and even deceiving his own doctor to get a false diagnosis, then the second opinion is not required. The videos of the employee doing strenuous upper body work while claiming to be too injured to do so was a clear and concrete foundation to show FMLA falsification. *Perez v. Barrick Goldstrike Mines, Inc.* (9th Cir., 2024) This case illustrates the level of evidence needed to show an FMLA falsification. There must be clear proof. The initial report by another worker would not be enough, it was hearsay, or worse, workplace gossip. So, the videos were crucial. Prior Updates (see July 2024 *Mook v. City of Martinsville*) have shown how lesser evidence, conjecture, or a rush to judgment are not enough and backfire against the employer.

Genetic Information Nondiscrimination Act

Pre-Employment Questions About Family Medical History Violates GINA – Even When No Harm Results. Federal and several states' Genetic Information Nondiscrimination Acts prohibit employers from gathering or using family medical history information in any employment decisions (except for granting FMLA for the care of a family member). Any past family propensity for medical conditions cannot be applied to the individual in an effort to predict that person's ability to do work, the likelihood of illness, medical insurance costs, etc. An employer may not directly ask or gather this information and may not have its agents do so. In pre-employment medical fitness evaluations, the examining doctor and clinic are "agents," and the employer is liable if the doctor overreaches. Unfortunately, many doctors do ask about family history in pre-employment evaluations, just as they do in a regular personal medical exam. The employer has a duty to educate the clinic on the GINA (and ADA) limits of an employment-related exam or risk liability. *Taylor, et al. v. Union Pacific Railroad Co.* (N.D. IL, 2024) is a class action under GINA and the Illinois Genetic Information Privacy Act (GIPA) alleging that the doctors used by the company for pre-employment physicals routinely asked whether one's *parents* had cardiac conditions, cancer, diabetes, and several other conditions. However, both of the named plaintiffs in the case *were then hired*. So, no actual adverse action resulted. The question before the court was whether a case can be maintained when **NO** tangible harm resulted; can a plaintiff who was hired claim to be an "*aggrieved person,*" "*no harm-no foul.*" The court found that the company's doctors were not engaged in isolated "inadvertent" inquiries. Rather this was an intentional pattern or practice of

violations. Regardless of the hiring, the individual's privacy rights were violated, and this was sufficient to create a standing as an aggrieved person. The class action could continue. The court did not opine as to what damages might be allowed in this situation. [For more information and insight, request the article *GINA II. Cautions for Employers on Inadvertent Obtaining of Genetic Information* by Boardman Clark.]

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