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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Federal Court Voids DOL's 2024 Salary Exempt Pay Increases Rule. A federal court has found that the Department of Labor lacked authority to impose the salary increases in the 2024 Rule. See the article Federal Court Strikes Down the 2024 Salary Level Rules listed at the end of this Update.

LITIGATION

Theme of the Month — HR's Investigations

An investigation of employment issues does not cease to have an effect once a decision is made on addressing work issues or a discharge. It can have a long life, becoming a principal focus in aftermath litigation. The quality of the investigation can make or break the case. This month's Update features two cases that illustrate both of these outcomes.

HR Declined to Investigate Harassment Because Employee Did Not Put Her Concerns In Writing. Under Title VII, employers can be liable for not addressing harassment that "they knew or should have known about." There is nothing in this standard that mentions that knowledge has to be submitted by an employee in the form of a written complaint. In *Juarez v. Midwest Division-OPRMC, LLC* (D. Kan., 2024) a hospital food service employee verbally informed Human Resources and the Director of Food Services that she was being sexually harassed by three male co-workers. The HR Manager asked her to submit a written complaint. The employee stated that she had difficulty with writing and could not adequately do so. Human Resources did not take action to address the situation due to lack of a written complaint. The harassment continued. Worse, the Food Service Director told one of the harassers about the verbal complaint. That person then angrily and aggressively

confronted the female employee, and she retreated to hide in a supply closet until the shift was over. She verbally informed HR of this confrontation and then took medical leave due to this trauma. HR still did not investigate. The employee ultimately resigned due to the uncorrected situation. In the ensuing Title VII suit, the Court found the company's insistence on having a written complaint before acting violated the Title VII obligation to address harassment once it was *informed* of the situation. Human Resources and the Food Service Director clearly "knew" due to the verbal report and had an immediate duty to take corrective action. *Be aware* that there are a variety of situations in which employees may not put concerns into writing. Language barriers and various physical, cognitive, or emotional disabilities are often factors. Nonetheless, there is a duty to act once management has been informed.

Interviews and Fact Checking by HR Save the Case. This case is a good reminder of the importance of a *thorough* investigation before any discharge decision. Too often, termination decisions are based on the word of a frustrated supervisor or interviews of a couple of witnesses who later turn out to be inaccurate or unfairly biased. Then, the fired employee wins the ensuing lawsuit. *Iweha v. State of Kansas* (10th Cir., 2024) involved a hospital pharmacist of Nigerian origin who was discharged for violating several work rules, such as excessive personal computer use and phone calls, napping, leaving early, and rude behavior. The pharmacist claimed that reports of her transgressions were false and motivated by prejudice against her race and national origin and management had simply accepted prejudiced employees' discriminatory versions, and the discharge was a pretext for discrimination. However, in examining the evidence, the court found that the Human Resource Manager had not stopped at simply interviewing the other employees who had made the reports. She went further to fact-check what the witnesses said, review other records, and closely review the department's overall computer use to compare the pharmacist to others. The court found that the thoroughness negated the pharmacist's claims and that the hospital had a valid non-biased foundation for the discharge. So, taking the extra time to not rush to judgment, dig deeper, verify, and double-check pays off in the long run.

Fair Labor Standards Act

A Hotel Is Not a Home. The Fair Labor Standards Act does not require pay for time spent in a reasonable commute from home to work and back again. Some employees go to different local job sites every day and then return home, but this is still within the standard unpaid commuting. However, in *Walters v. Professional Labor Group, LLC* (7th Cir, 2024) construction workers who went to a remote project site, lived in a hotel for days or weeks, for the duration of the project, then might travel directly to

another hotel and project before ever returning home. These longer trips to remote work sites generally involved travel during what would be the regular working hours. The company did not pay for commute time, just the same as when they worked locally from home. When the employees filed an FLSA action for the pay and overtime for the commute, the court found that the regulation, 29 CFR Section 785.35, specifies that an unpaid commute is to and from *home* each day. Once the employee is in travel status away from home, and not returning home that night, then all travel for work during the usual work hours to the remote location and on the day of travel home must be paid (once at the remote location, then each day's commute from the hotel and back can be unpaid).

Foreign Workers Must be Paid at U.S. Rates – $1.5 Million Settlement. A shipbuilding company with facilities in Mexico and the U.S. sent 36 Mexican engineers to the U.S. facility for some time on L-1B visas. It continued to pay them their Mexican salary, in pesos, the same as if they were continuing to work in their home location. The Department of Labor charged that this violated the FLSA and the L-1B visa program. The Mexican wage was less than the FLSA's required minimum wage in dollars for work done in the U.S. The company tried to claim the pay was greater, by categorizing the engineers' travel and lodging expense reimbursements as "wages." This too violated the FLSA. The company settled the claim by paying $1.5 million to the engineers in wages and penalties in *RE National Steel and Shipbuilding Co*. (DOL settlement, 2024). In this era of increasing international business and companies operating in several countries, this case is a good reminder that even a temporary assignment of employees to another country must conform to that country's laws, wages, hours, and terms and conditions of employment. Simply continuing to pay the person's regular pay and depositing it in their regular bank account at home may not be sufficient.

Discrimination

Age

Years of Grandmother's Positive Performance Outweighed by Buying Beer for Teenage Grandson. A 77-year-old long-term Trader Joe's grocery store employee with consistently good performance reviews claimed she was discharged due to her age. However, her purchasing beer at the store for her teenage grandson, who was also an employee, was the incident that led to her discharge. She argued that she did not violate the letter of the store's policy or the law because she did not "*sell*" alcohol to a teen; she took it home to him. The court granted summary judgment dismissing the case. Violation of the store's alcohol policy and state law by providing alcohol to underage individuals was a major violation sufficient to overcome all of the

prior years of good performance. It was a legitimate non-discriminatory reason for the termination. *Cocuzzo v. Trader Joe's East, Inc.* (1st Cir., 2024)

Sex

Contagious CEO. A company's CEO knowingly came to work with a case of active COVID-19 and infected 30 other employees. Six executive-level employees complained about this to the company's other officers and board. Five of those complaining were male. One, the company's Chief of Staff, was female. No action was taken regarding the CEO. Nothing happened to the five male executives who complained. The female executive, though, was transferred to a lesser position. The CEO urged other executives and managers to curtail their interaction and communication with her, and the CEO became hostile in his communications with her. She resigned and filed a Title VII suit. The court found sufficient evidence to support a case of sex discrimination for the adverse treatment she received compared to the male executives, and for constructive discharge due to the isolation, hostile treatment, and more difficult working conditions she was subjected to. *Back v. Bank of Hapoalim* (2nd Cir., 2024). This was not a retaliation case, since reporting coming to work with a COVID-19 infection was not a "protected activity" under the EEO laws. This is a basic sex discrimination case of differing treatment of the female employee compared to the similarly situated men. If some of the men had also suffered adverse consequences for their complaint about the CEO, there would have been no cause of action for the Chief of Staff. The EEO laws do not give an outlet or remedy for every wrongful act. There must be a showing of some difference in treatment based on a specific protected category, like sex.

Beware of Job Titles – Bestow Them with Care

Loose Job Titles Create Cases. **What's in a Name? A Rose is a Rose – Except When it Costs You a Lot of Extra Money**. *O'Reggio v. Commission on Human Rights & Opportunities* (Conn. S.Ct. 2024) was a harassment case. However, the implications go well beyond Title VII. Employers too often title a position without much thought to its practical or legal significance. Too often, that title uses the term *Supervisor* or *Manager* but may not reflect the actual scope or responsibility. Is the 18-year-old "Assistant Stock Manager" really a "*Manager*", when their job is confined to checking the store shelves, restocking, and cleaning up spills? Mislabeling can have serious consequences. O'Reggio was an Unemployment Compensation Adjudicator. She complained that she was racially harassed and subjected to ongoing hostile racial comments and stereotypes by her unit "Manager." The "Manager" was disciplined but not removed. O'Reggio felt this was insufficient and felt compelled to transfer to a lesser job. She then filed a Title VII and state discrimination suit. Under the EEO laws, the acts of a Manager create more liability and are to be treated more seriously

than those of co-workers. Ms. O'Reggio's case claimed the employer failed to take the serious action required for misconduct by a Manager. The Court, however, found the unit "Manager" was actually only a Lead Worker who had *no* management authority at all. She was a fellow union member and co-worker. Thus, the greater standards did not apply, and the employer was not required to do anything more than it did. This case follows the U.S. Supreme Court rulings in *Vance v. Ball State U.* (2013) holding a cafeteria line "Supervisor" was a lead worker without any real supervising authority. However, the job title confusion resulted in both *Vance* and this case being litigated, at great expense to the employer, clear to the highest Court. Another common issue creating similar confusion and liability is Anti-Harassment policies which instruct one to "*report harassment to a manager.*" The 18-year-old Assistant Stock *Manager* cleaning the spill has no authority, no training, and no idea what to do and lets the matter drop, resulting in a case being filed. Fair Labor Standards Act cases often focus on people given "Manager" titles and paid as salaried-exempt. Yet they do not meet the FLSA duties test for a salaried manager. So, the employer is liable for great amounts of back overtime pay. *The lesson* is that job titles can create cases. So be careful when giving a job title to a position. *Be sure* the title matches the actual duties. *Be sure* you understand the legal standards and implications of what that title level might mean under the various employment laws. *Be sure* your managers and supervisors actually understand their extra duty of responsibility and liability under the employment laws – including their personal liability. [For more information request the article Are You in the Crosshairs -Managers Personal Liability Under the Employment Laws by Boardman Clark.]

OTHER RECENT ARTICLES

These additional, recent articles can be found at BoardmanClark.com in the Labor & Employment section:

Federal Courts Strike Down 2024 Salary Level Rules

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