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BY BOB GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

EEOC Abandons Gender Identity. The EEOC has requested the dismissal of all the gender identity discrimination cases it filed against employers prior to January 2025. It cited President Trump's Executive Order on "Gender Ideology Extremism" which prohibits federal employees from activities related to this "extremism." So, the EEOC has abruptly about-faced from pursuing gender identity cases to abandoning any activity related to it. This may mean the EEOC will also not investigate complaints of gender identity discrimination. It may seem to be a conflict with the agency's legal mission, however. The U.S. Supreme Court, in its 2020 *Bostock/G&GR Harris Funeral Home* decisions, ruled that sex-based discrimination includes claims of sexual orientation and gender identity-based discrimination. So, gender identity continues to be a protected category under Title VII, and thus, the EEOC has a responsibility to accept and process those discrimination complaints. This may now be a perfunctory "pass-through" process to issue a standard Right to Sue Notice to the complainant. The EEOC has always had discretion to decide which cases to pursue through litigation and has given priority at times to some categories of cases over others. As a result more gender identity cases will likely be filed in court, rather than have the EEOC mediate, investigate, or resolve complaints before litigation. This may also be a signal at other EEOC cutbacks under a "Gender Ideology Extremism" position. These may not be limited to just gender identity. The federal government has already ordered other agencies to cease activities related to programs encouraging women to train for construction, trades, engineering, and other nontraditional professions and to pull its presence from job fairs focusing on women in nontraditional jobs. As a result, the EEOC may eventually diminish enforcement regarding several traditional sex discrimination issues.

80+ Cases Filed Against New Administration. In only one month since the inauguration, over 80 cases have been filed challenging President Trump's Executive Orders and directives. These include cases over summarily halting already awarded or contracted government funds; massive, sudden firing of federal employees; removal of commissioners before expiration of their terms; ordering federal agencies to selectively stop enforcing laws or regulations; threatening to punish businesses which engage in "unapproved viewpoint expressions" especially DEI, **and more**. This level of suits is unprecedented, no president in US history has ever issued such a massive number of Orders and directives in such a short time, with such disruptive effects. In fact, there are so many cases that legal reporting services and public interest organizations are setting up special tracking systems just so they can keep up. By the time this is read, there will probably be over 100 such cases – and growing.

LITIGATION

Contracts – Severance and Release Agreements

White Sox Head Trainer Can Sue Despite Signing Severance and Release Agreement – Concealed Information. The Head Trainer for the Chicago White Sox baseball team took medical leave. He was assured the job would be waiting for him upon his return. However, on his return, he was told that his position now "did not fit in" with the club's plans and was being eliminated. He was offered and signed a Severance and Release Agreement providing a year's pay, medical coverage, and a release of all liabilities for any claim "known and unknown," which he may have against the organization, including discrimination claims. Several months later a high-level Sox management employee told him that the real reason he was let go was because he is gay. The former Head Trainer then filed a Title VII and state law discrimination case. The White Sox requested a dismissal based on the Release signed by the Head Trainer. He had taken the severance money, and the Release should be enforceable. The court disagreed. It found that the Head Trainer had been misled about the reason for termination, concealing the real reason and falsely inducing him to sign the Release, and ruled, "*The law does not condone deception.*" Thus, the discrimination suit was allowed to continue. The court did not rule as to whether he could keep the severance payments he had collected or must return them; that was for the trial court to determine. *Ball v. Chicago White Sox, LTD* (IL Ct. App. 2025) This is a Federal Title VII discrimination case but a state court decision on the enforceability of a contract, an employment agreement. It is in line with a growing number of state decisions. Employment agreements, including Non-Compete

Agreements, Non-Disclosure Agreements, Arbitration Agreements, and Severance and Release Agreements, are coming under increasing scrutiny by both state and federal courts. This particular case on Release Agreements may or may not yet be the law in your state, but be aware and prepared. Deceptive practices, adhesion agreements, rushed requirements to sign during a new employee orientation session, lack of clear language (or in the language the employee understands), and misleading explanations by management or Human Resources ("false inducements") are leading courts to invalidate those agreements. So, now is the time to assess your agreements and practices. **Artificial Intelligence is Complicating the Issues**. We thought technology would liberate us from paper files. However, the growth of AI and its ability to alter reality is being used by employees seeking to void agreements. They claim they never signed the agreement —it is a fake AI creation. They say they never signed *those* terms, the document was altered, i.e.: *Huff v. Interior Specialists, Inc.* (Cal Ct. of Appeals, 2025) The courts are paying attention and requiring the employer to produce the actual original agreement, with a pen and ink signature. Which means continuing to have a metal file cabinet with **original paper** documents for critical agreements.

Wages and Hours

Hair Salon Cannot Deduct its Own Business Costs from Stylists' Wages – Beware of Deduction for Expenses. "Everyone Does It" Does Not Make It Legal. A hair salon paid its cosmetologists commissions for the various services and treatments they "sold" to customers. However, the salon then charged the cosmetologists for the products used in those services and treatments, deducting the cost from their pay, hence taking back a portion of the commissions. In one year, the salon deducted $12,000 from one person's wages (it seemed the customers paid for the products as part of the treatments and then the employees also had to pay for those same products). *In Buenger and Div. of Labor Standards v. 303 Beauty Bar LLC d/b/a Salon Lohi* (CO Ct. of Appeals, 2025), the salon claimed this was "*standard industry practice*" and "*everyone does it.*" However, the court ruled that it was impermissible to charge employees for the business's general overhead and cost of doing business. It was no different than taking the cost of office heating, air conditioning, office supplies, or the equipment needed to do their jobs and charging each employee a share of that overhead from their paycheck. The employees were paying the company for the privilege of working, rather than the reverse. The court held that any charges to an employee must be directly for the personal benefit of the employee (such as employee purchases, *personal* use of vehicles or equipment, discretionary company logo clothing, etc.)

and not part of the general overhead or supplies used in the standard course of business. This was a Colorado state wage case, but most states have similar wage deduction practices. Beware of adopting "industry practices" without assessment of your operation. It may not fit. "*Everyone does it*" may mean they have not been sued yet and had to pay. *Also, beware of charges and deductions under the Federal Fair Labor Standards Act*. Charges to the employee for uniforms, cleaning of uniforms, lease of company lockers, etc., or even requiring employees to make their own outside purchases of the tools or safety shoes or apparel used in their work have been the subject of suits. If these expenses are necessary to do the job, and when balanced against pay, would have the practical result of "realized pay" below the minimum wage/OT level or below the exempt salaried level, this can violate the FLSA. Any deductions should be made with a clear written explanation, an employee signature, and an assessment of its effect on the realized pay.

No Records – No Clear Defense. *Guevara v. Lafise Corp., et al*., (11th Cir., 2025) involved an employee who was paid $1,365 biweekly or $35,490 per year, which is just under the Salary Basis threshold. He sued for overtime wages, claiming he was paid a deficient salary and should now receive overtime pay for all the extra hours he worked. The company argued that his pay represented an hourly rate and full-time-and-a-half for overtime. The company did not keep records of hours worked, so it had no evidence of how many OT hours it had or had not been incorporated into his biweekly pay. The Appeals Court sent the case back for a jury to decide, but the employer will have a difficult defense. It is the employer's burden of proof to show the pay arrangement and to produce an accurate record of hours worked. Further, there can be additional penalties for the failure to keep accurate wage/hour records, and if the court finds in favor of the employee, that recordkeeping violation can result in even more exemplary damages. A failure to keep accurate records can have a snowballing effect on liability; an "extraordinary disregard" of an employer's duty to do so.

Religion and FLSA

Ecclesiastic Immunity. *Markel v. Union of Orthodox Jewish Congregations of America (OU)* (9th Cir., 2025) is a wage and hour overtime pay suit. Mr. Markel was employed by OU as a Mashgiach, an inspector ensuring kosher compliance in food processing facilities. He was supervised by an OU Rabbi. The food processing facilities paid OU for the service of having a kosher inspector present. Markel filed an FLSA suit alleging he was not properly paid for all overtime hours. The court dismissed the case based on the Ministerial or Ecclesiastic exemption. The First Amendment forbids the government from undue interference regarding religious

organizations in matters of faith. If an employee is in a faith-based position or has faith-based duties, then there is an exemption from the employment laws. The exemption does not generally apply to regular non-ministerial employees, without faith-based duties, who work for a religious organization. Mr. Markel argued that in his case the OU was engaged in commerce because it was paid fees by the food processors for his services. He argued that he was not in a ministerial role, but was no different than any other food inspector. The court, though, found that Mashgiach is a faith-based position, assuring kosher compliance, which is a matter of promoting faith and integral to the faith. So, Mr. Markel fell within the exemption and he could not pursue an employment case. Religious beliefs and practices receive greater protections than some other forms of expression or discrimination, under more laws. The First Amendment, Title VII, and the Religious Freedom Restoration Act all apply. Religious beliefs and practices for non-ministerial employees in all employment settings are subject to reasonable accommodation requirements. [For more information, request the article, *Religion in The Workplace* by Boardman Clark.]

Discrimination

Sex

Appeals Court Allows Challenge to Pregnant Workers Fairness Act (PWFA) Regulations. Seventeen Republican State Attorneys General filed suit to void the 2024 Rules on enforcement of the PWFA. The Attorneys General were challenging the Rules' provisions for leaves of absence due to pregnancy-related factors including leaves for abortion. The Rules conflict with state abortion bans. A lower court found the AGs had no standing to challenge the rule. On appeal, the 8th Circuit Court of Appeals ruled that the case could proceed. *Tennessee, et al. v. EEOC* (8th Cir., 2025) This case is not limited to just the abortion accommodation provisions, it could void the entire PWFA rules providing for reasonable accommodation for all pregnant employees. In the meantime, the EEOC is unlikely to aggressively defend the case or enforce the PWFA Rules under President Trump's Order to cease activity on "Gender Ideology Extremism."

Diversity, Equity, Inclusion

Court Blocks Administration in DEI Assault Against Businesses. A Federal Court has issued an injunction blocking President Trump's Executive Order on Diversity, Equity, and Inclusion (DEI) which threatens action against private sector businesses that have or continue to have DEI programs. The court ruled that the order seems to violate the First Amendment by penalizing protected speech. It

violates a business's right to decide how it should operate and seeks to substitute the government's views of what is considered politically correct in place of rights to expression and punish those who dissent. The court ruled "*That is textbook viewpoint discrimination*" and appears to be "*unlawful on its face,*" a "*chilling of unquestionable constitutionally protected speech*." This decision is in line with last year's Federal Court decisions voiding Florida's similar efforts to ban DEI programs in private sector businesses. Decision after decision ruled that Florida was engaged in unconstitutional efforts to thwart free speech. Just as in the new Executive Order, Florida attempted to cloak its viewpoint discrimination effort to trample and stifle free speech in the language of "promoting non-discrimination and equality" without any evidence that any DEI program had actually discriminated in any way. In those cases, the state could not articulate exactly what DEI really was – except that it was "*something bad*" and not in line with the state's official political views. So far, multiple challenges have been brought against corporate DEI programs, and no programs have been found discriminatory or to violate any laws.

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