EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Federal Contracting – OMB Orders Labor Advisors for all Federal Agencies. The Office of Management and Budget has directed all federal agencies to designate Labor Advisors to overview government contracts. The purpose is to ensure that federal contractors comply with labor laws and regulations. The Advisors will seek to increase contractors' awareness of the laws and regulations to help prevent violations, develop training for other federal contract compliance staff, and foster better communication and consistency among the various agencies in their contract granting and monitoring.

TRENDS

Title Inflation

Some time ago employers began to "puff-up" or aggrandize job titles. Thus, hourly trash collectors become Sanitary Engineers, etc., usually without any enhanced wages to accompany the enhanced title. Clever titles were hoped to increase morale and make people feel more like "team members" rather than part of the lower level of the Organizational Chart. Now this title inflation has seen a large increase due to the greater difficulty in recruiting and hiring. Many employers are trying to make their positions stand out, draw attention by very creative, ever fanciful titles. The teenager putting together your lunch is now a "Sandwich Artist" or even "Sandwich Master." The receptionist job is advertised as "Director of First Impressions." An "Alternate Associate VP" is very far down the Org Chart. The journal, The Economist, suggested that companies may now need a Chief Title Officer (CTO) to review all positions. Though seemingly humorous, this trend appears to have a harmful downside. The Economist reports that the puffery can actually discourage qualified women and minority applicants since the inflated title may seem above their experience and skill level, when the reality is the job is well within their abilities.

LITIGATION

Theme of the Month – Documentation

Several cases this month illustrate the importance of effective documentation. The ability to later produce wage documents, FMLA notices, and even original signatures versus electronic versions were critical in the employer either winning or losing the case. These cases reinforce the old sayings that when it comes to valid evidence, "a verbal reprimand is worth the document it is printed on" and "I told them and told them doesn't mean anyone really heard you" and at trial their version may contradict yours. A written memo sent at the time of the incident would create clearer documentation.

Arbitration Enforceability

E-Signature Did Not Create Enforceable Agreement. Usually, electronic signatures are considered as valid as a pen and ink writing. They have become the norm. However, in *GR OPCO, LLC v Murillo* (3rd Cir., 2023), a large nightclub had employees sign an agreement to arbitrate all disputes rather than file suits in courts. An employee did file a suit and the company sought to compel arbitration and have the court case dismissed. It presented a copy of the Agreement with the employee's electronic signature. The employee, however, denied the validity of the document, stating that she had not signed the agreement. The court believed the employee and refused to enforce arbitration and allowed the suit to continue in court. This case may be a caution that significant documents, agreements, and key policies should have a written signature and the employer should be able to produce the originals.

First Amendment

Teacher's First Amendment Union Dues Objection Rejected by Court. The 7th Circuit Court of Appeals ruled that the Constitution's First Amendment does not void a contract and allowed a teacher's objection to having to pay union dues. A teacher objected to having to pay dues to the union, claiming she had a First Amendment right to drop out of the union and not pay. In *Janus v AFSCME*, the US Supreme Court had ruled that a public employee who had declined to join the union could not be forced to pay dues, even though the union contract did set wages and terms for the entire employment unit. However, the court found this case to be different. The employee had signed up as a union member. Then she later decided she now objected to that membership and wanted out. She had in fact joined and her signed membership form was itself a contract. So, she had "waived her rights" to not be in the union and pay required dues. The opinion stated, "The First Amendment protects our right to speak. It does not create an independent right to void obligations when we are unhappy with what we have done. It does not create a waiver before a valid contract with the union can be enforced." *Baro v Lake County Federation of Teachers #504 et al* (7th Cir., 2023)

Supreme Court Rejects City Workers' Objection to COVID-19 Vaccination Mandate. The U.S. Supreme Court has declined to review the appeal of 100 Chicago city employees (mostly fire-fighters and EMS personnel who care for vulnerable and immune compromised residents) of

the 7th Circuit Court of Appeals dismissal of their action requesting an injunction which would prohibit enforcement of the city's COVID-19 vaccination requirement. The city rule allowed exceptions for medical and religious reasons, with weekly COVID testing. However, the employees objected to the religious exemption requirement since it required them to actually identify their religion and the specific religious aspect upon which the vaccination objection was based. The plaintiffs claimed this requirement violated their First Amendment Constitutional rights and enabled the city to decide which religious beliefs were or were not valid. The 7th Circuit disagreed. It found credible evidence from health authorities that justified the vaccination requirement. The policy provided reasonable accommodation of medical and religious issues. It was unlikely the plaintiffs could prevail in the argument that actually having to provide supporting information regarding their request for an exception would violate their First Amendment freedom of religion. *Troogstad, et al. v City of Chicago, et al.* (U.S. S, Ct., 2023)

Discrimination

Sex Discrimination – Sports

National Women's Soccer League Bans Four Coaches Due to Sexual Misconduct and Toxic Work Environment. Following extensive investigations, the NWSL issued a permanent ban preventing four head coaches from ever again working in the League. Investigation found a variety of "malfeasance" including sexual and racial improprieties and emotional abuse of players and staff. The bans were applied to now former coaches of the Portland Thorns, Chicago Red Stars, Racing Louisville, and Washington Spirit teams. In addition, a number of other League employees received suspensions or sanctions. It seems a breach of ethics and integrity that this sort of behavior would occur among professional coaches in a sport devoted to women and their ability to succeed. Such an organization should model non-harassing and non-abusive behaviors.

Locker Room Culture Case Against University Baseball Coaches. Former male baseball team players who played at University of San Francisco (USF) in 2020 and 2021 filed Title IX and negligence suits against the school, two now former coaches, and the NCAA alleging harassment and a sexualized environment. A court dismissed the NCAA from the case, finding it did not have sufficient ties to or control over the environment to have any liability. USF and the coaches, though, had all the control. The case alleged that the coaches subjected the players to an "intolerable sexualized environment" by being naked, using abusive language, miming and discussing sexual acts, and giving out sex toys. The players said that if they didn't participate, they were insulted and punished by playing less and receiving less coaching. The head coach regularly exposed himself to players, encouraged female students to flash the male players, and required sexualized skits before practice. The court's decision stated that the coaches' alleged conduct met the standards for discrimination under Title IX. "It was abusive, bullying, and offensive behavior that is actionable under the law, especially given the head coach's conduct and the assistant coach's tolerance of it and was directed against the plaintiffs because of their gender." The head coach is accused of being the main instigator of the hostile environment; the assistant coach of "playing along with" and enabling. The assistant coach told players he was afraid he would be fired if he did not go along. The university received a number of complaints

from players and parents, and belatedly investigated. It fired both coaches in 2022, after the suit was filed. *Doe, et al. v NCAA, UFS, et al* (N.D. Cal., 2023)

Disability

Hospital Did Not Have to Allow Nurse's Service Dag. A nursing intern's failure to reasonably accommodate case under the Americans with Disabilities Act (ADA)was dismissed by the court. The nurse requested accommodation of her Anxiety Disorder/Panic Attack disability by having her calming service dog accompany her at all times, including all interactions with patients. The hospital initially granted the accommodation. However, the dog shed. The shed fur caused severe allergic reactions in both staff and allergic and immunocompromised patients. One nurse had such a severe reaction, she was off work for a time receiving medical treatment. With the allergens also affecting patients, the hospital stopped the accommodation. It sought to find other solutions, such as a "shed defender" jacket worn by the dog, however, the nurse claimed that there were none that fit her particular dog. Then the hospital allowed the dog to be present at work, in a kennel, while the nurse was interacting with patients, but it could not be in patient areas. However, this was not satisfactory to the nurse, and she filed the ADA suit claiming failure to grant the accommodation. The court found that the hospital had properly engaged in the required "interactive process." It had been established that the service animal created a serious, direct threat in a medical setting. The hospital had explored alternate accommodations. The nurse did not suggest any other alternatives. The hospital was not required to unreasonably expose others to a medical threat in order to accommodate. *Bennett v Hurley Medical Center* (E.D. MI, 2023) This case illustrates the importance of the interactive process. There must be an in-depth and meaningful, documented communication and exploration of accommodation issues with the employee; a mutual approach to explore a solution. The hospital could demonstrate this process with documentation of its good faith efforts. Without this in-depth and documented process, the case could have had a different outcome.

Race and National Origin

Background Check Discrimination. In *Ramos v Walmart, Inc.* (D.C. NY, 2023) the court found sufficient evidence that Walmart's conviction record background checks have a discriminatory adverse impact against Black and Hispanic job applicants and could warrant a class action Title VII suit. The background checks allegedly broadly reject those with a conviction record without consideration of time since the offense, evidence of rehabilitation, and good record since the offense. This serves to deny jobs to qualified people. The policy has a greater adverse impact upon Black and Hispanic applicants due to their higher rates of arrest and convictions as compared to the White population – often for the same offenses. The EEOC has also issued guidance on the use of conviction records in hiring. They recommend consideration of the conviction age, evidence of rehabilitation, years of subsequent good record, and especially the relevance to the job at issue. A number of states and municipalities also have prohibitions limiting the use of arrest and conviction records in employment; many of which, such as in Wisconsin, require a conviction to be directly and substantially related to the position in question before it can be considered in an employment decision.

$1.1 Million for H-2B Bait and Switch. A Wisconsin forestry company promised Guatemalan and Mexican workers forestry jobs at a prevailing wage rate. Upon arrival in Wisconsin, it placed them at different companies, doing other, far lower wage work, including food processing, painting, and landscaping. Those workers who were doing forestry jobs for the company were also paid less than the promised prevailing wage and did not receive overtime pay. This was not the first time the forestry company had been found in violation of H-2B rules. It was cited for other infractions in 2011 and 2013. The company will pay $1.1 million in backpay and penalties and is now banned from the H-2B program. *U.S. v Aguilar (Northwoods Forestry, Inc.)* (W.D. WI, 2023)

Family and Medical Leave Act

Employees Non-Response to Notices Voids FMLA Protection. The January 2023 *Employment Law Update* emphasized the importance of promptly providing the required FMLA Notices to employees. If you properly do so, then the employee must also follow the notice requirements. In *Munger v Cascade Steel Rolling Mills, Inc.* (9th Cir., 2023), the court found the employee had not done so. The company provided prompt notice that the employee's FMLA request did not have sufficient information and notice of what was needed to meet the FMLA eligibility requirements. The employee failed to respond. He was discharged from employment for unauthorized leave. He filed an FMLA case. The court ruled that his failure to respond to the notice rendered the leave as non-FMLA and he lost any protection under the law. The company's documentation of having given clear and timely notice and the employee's failure to respond prevailed.

Fair Labor Standards Act

Signed Pay Description Wins Case. A packaging technician challenged being paid under a fluctuating workweek wage method instead of a standard hourly rate plus time and a half overtime. Fluctuating workweek is one of the several FLSA allowable methods of computing pay and OT. It gives the employee certain guaranteed payments in slow weeks but a lesser OT rate. After a couple of years, the technician claimed he should have been receiving full time-and-a-half OT pay, and the company owed him a lot more for two years' backpay. He claimed the company was violating his FLSA rights by having imposed the fluctuating wage method. (He did not challenge the guaranteed pay he received in the weeks he worked less than 40 hours.) The court found that he did not have a case. The fluctuating workweek method is a valid pay method under the FLSA. The technician had signed a pay description which clearly described the wage and how it worked. The court ruled that he understood the wage when he signed the document and was thus bound by its terms. (The court also found that the company's own method of calculating the pay actually resulted in the payment of more OT than would actually be required under the fluctuating workweek FLSA standard.) *Hernandez v Plastipack Packaging, Inc.* (11th Cir., 2023) The message from this case is *documentation*. The company produced a wage description signed and dated by the employee. Absent such an individually signed document, the technician could well have won. The Department. of Labor wants the individual employee signature on any wage plan which does not follow the standard hourly/time-and-a-half OT method. It may consider anything else to be invalid. So, a general pay policy in an employee handbook does not work (even if the employee signs off at the end of the multi-

page book). A general memo to employee on pay changes will not work. Even an individual letter to the person may not work --- unless it has a signature block with the employee's signature of understanding. An actual signature, because an electronic one may be challengeable. (See earlier *GR OPCO* Case.) So, the ability to have and produce solid documentation is essential. Don't shortcut the steps to protect yourself. In this situation, rather than a dismissal of the technician's case, the lack of a signed document could have resulted in a class action requiring backpay to many additional employees as well.

Strangest Case of the Month

Sleazy Going-Away Party Puts Hold on Final Bonus Pay. You are leaving the organization and all that is left to do is your going away party, then clean out the office and collect your final bonus. Or so you think. Then word gets out on Facebook, with pictures, of the over the top, bawdy going-away party, with strippers, raunchy behavior, the doctor's indecent pictures of himself including large posters of male strippers with his own face pasted on. The organization decided to deny his final (and large) bonus. In *Hwang v. Carras, et al.* (NC Ct. App. 2023) this is what occurred when a doctor departed the University of NC Health Care System. The doctor still had not quite departed, so the Health Care System implemented its employment policies to open an investigation and withhold the bonus. The doctor sued claiming a violation of his rights and of his contract. The court, however, dismissed the case, finding the employment relationship still existed at the time of the party and the employer still had a right to investigate and make employment decisions, such as bonus pay. Further, the doctor's contract specified that the right to a bonus depended on meeting standards and was "dependent upon appropriate professional behavior." The organization did eventually decide to pay the bonus but after a lengthy delay and with no requirement to do so. So, people should remember on their last day of work, that it's not over until it's really over.

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