EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATION ACTION

***Dept. of Labor Issues Joint Employer Interpretation Guidance*.** On January 20, 2016, the DOL issued an Administrator's Interpretation #2016-1 on Fair Labor Standards Act Enforcement of Joint Employment – which could impact staffing agencies, third party management companies, contractors/subcontractors, franchise operations, etc. The DOL has prioritized enforcement of FLSA rules in Joint Employment and is aggressively pursuing cases against staffing agencies, contractors and large National franchisors such as McDonalds, whom it alleges should be responsible for wage and hour violations of its locally-owned franchised locations.

TRENDS

Gender Pay Gap Grows. The Dept. of Labor's new statistics show an unexpected increase in pay disparity between women and men. During 2015, women's overall pay rose 0.7% while overall men's pay rose 2.8%. Women's pay was 80.4% of what men earned; compared to 82.1% in the prior year. This is contrary to the trend; the earning gap has significantly narrowed since 1977, when women overall earned only 39% of what men received. Is it discrimination? It is difficult to draw a concrete conclusion from one year's statistics. Occupation matters, with financial, management and business administration paying the most, and service positions the least. There are many more women in service positions, and this may skew the overall results. (One could ask "why" more women are in service vs. management and finance?) The "dip" may or may not be due to discrimination. Following the 2008 recession, women had a sudden, and short-term, upswing. Many manufacturing jobs, mostly held by men, suddenly disappeared. Women, in "pink collar," "white collar" and "service" jobs had more stability and were now the primary family

breadwinners. So, short-term ups or downs may not show a long-term trend. Life choices may play a role with more women than men electing to take family time away from full-time work. Regardless of reason, the figures have greatly improved since 1977, but continue to show a disparity; and show a recent and surprising "dip" increasing that disparity.

LITIGATION

Supreme Court (Settlement & Releases)

Supreme Court Declines Review Of FLSA Settlement Confusion. Generally, parties can choose to privately agree to settle disputes and release each other from liability – i.e., the standard separation and release agreement in a layoff or a termination of employment. However, the Dept. of Labor has taken the position that FLSA wage and hour issues cannot be settled without DOL or court approval, even if the employee(s) have legal representation. Without DOL approval, any such settlement of issues or possible issues would be void, and would not stop later litigation. The Federal courts are split on this issue. Some have found DOL's position to be wrong, and have allowed private settlement. Others not. In *Cheeks v. Freeport Pancake House Inc.*, the 2nd Circuit ruled that parties must seek DOL approval of any settlement involving wages and hours. On appeal, the U.S. Supreme Court declined to take the case. This leaves the *Cheeks* decision as-is, continues the confusing split among the Federal Circuits, and leaves employers in confusion.

Discrimination

Age

Damages Cannot Include Death Benefit When Plaintiff Is Still Alive. A 65-year old fired pharmacist won an age discrimination case. He complained that his manager had a pattern of discrimination against older workers. The company did not look into the complaint. The store manager falsely accused the pharmacist of a medication error, fired him, and reported him to the State Pharmacy Board for violating the law. When it came to light that a younger pharmacist made the error, there was no discharge and no report to the state, and the older pharmacist was not reinstated. The jury found intentional age discrimination and awarded double damages for a total of $2.13 million. However, it also awarded him $900,000 for the loss of his life insurance benefit – the full death benefit. On appeal, the court validated the overall award, but took out the death benefit. First, the general award also included $12,000 to cover the premiums to replace the company life insurance benefit so he had insurance. Second, the pharmacist was still very much alive. It made no sense to award damages for an event which did not occur. Had he remained employed, the death benefit was still not something he would have received as long as he continued to be alive. He could not get both back pay to compensate for time he would

have worked and a death benefit at the same time. *King v. CVS Caremark Corp.* (N.D. Ala., 2016).

Disability

Independent Contractors Can Sue For Interference With Employment Under Rehab Act. Unlike the ADA, Title VII and other Equal Employment Opportunity laws, the Rehabilitation Act allows suit for a broader array of disability discrimination by non employees. In *Flynn v. Distinctive Home Care* (5th Cir., 2016), a pediatrician, who was an independent contractor, could sue when she was removed from her job after a diagnosis that she had a mild autism disorder.

Failure To Engage In Assessment And Interactive Process Loses Case. This case may have turned out differently had the employer followed the ADA's mandate to engage in an interactive process and carefully assess before denying an accommodation request. A deaf nurse requested a full-time sign language interpreter as an accommodation at a cost of $120,000 per year (greater than the salary of the nurse). Having two expensive employees for one job would at first blush seem to not be a "reasonable" accommodation. However, the nurse had recently graduated from the same hospital's nursing degree program, and had been provided a full-time interpreter while she was a student. She had done well, so was qualified. The hospital did not do an individual assessment. It made a flat statement that it could budget "a threshold of zero for interpreter costs." It claimed undue hardship because the $120,000 out of the department budget would necessitate layoff of another employee. However, the hospital jumped to conclusions too quickly. The court ruled that it did not take time to adequately do the required individualized assessment and "interactive process." Further, it limited its consideration to the accommodation's percentage of the single work unit budget, rather than how it compared to the 1.7 billion overall hospital budget. It could not adequately explain how it could afford the full-time interpreter when the nurse was a student on the same unit, yet now find it unreasonable. So, this may have been a case in which the hospital could have shown undue hardship, but it did not seem to follow the necessary process to reach and justify that conclusion. This is a good caution about the need to take time, and carefully assess before reaching a conclusion. *Searls v. Johns Hopkins Hospital* (D. Md., 2016).

Retaliation

Complaint Backfires – Training Director Fired For Bullying. A hospital's Director of Training filed a complaint with Human Resources, alleging that she was subjected to hostile remarks and derogatory comments made about her by other employees. The HR investigation found that employees were indeed making negative comments concerning the Director's pattern of bullying, threatening and intimidating others when they disagreed, or when she did not get her way. The investigation found the Director engaged in retaliatory behaviors, threats to have others fired, and had established a hostile environment for the

other employees. The hospital discharged the Director. She sued, claiming sex and age discrimination and retaliation for having engaged in the complaint process. The court dismissed the case, and awarded attorneys' fees against the plaintiff. It ruled that it is not retaliatory to fire someone, if significant wrongdoing is discovered during the investigation of their complaint. The "derogatory comments" of which she complained, were the results of her own inappropriate behavior. *Gladue v. St. Francis Med Center* (8th Cir., 2016).

Sex/National Origin

Vail Resort Pays $1 Million To Settle National Origin/Sexual Harassment Case. In *EEOC v. Vail Run Resort Assoc.* (D.C. Co., 2016), a company will pay $1 million to settle charges that a manager harassed and sexually exploited undocumented Mexican employees. The manager allegedly targeted the women because of their vulnerability; threatening to fire them, report them and have them deported if they did not put up with his sexual advances. Complaints met with no higher management action. When one woman filed a police report for assault, the company then fired her and other complainers. The EEOC noted that all workers, including the undocumented, are protected by the laws against sexual harassment. In addition to the $1 million, the company will take a number of remedial actions, and will pay the salary of a bilingual monitor to assure compliance and employee safety.

Race

Drunken Supervisor's Comments Overcome Fist Fight. A supervisor's angry racial statements cemented a case by a fired African-American welder. The welder and supervisor had a dispute over a job duty in a storage tank. The supervisor was drunk on the job, and started referring to the welder as "boy" and "dumb ghetto N---." The welder climbed out of the tank to object. The supervisor "bumped" the welder. The welder slugged the supervisor in the jaw, and the two had a fist fight until others broke it up. The supervisor continued using the N-word. The supervisor fired the welder. Then the supervisor quit, and promptly called the welder's cousin (also an employee) and called him the N-word as well. The company refused to reinstate the welder. The court found that though fighting is usually a sufficient cause for discharge, in this work environment "fighting was not uncommon" and usually did not result in discharge. So, the discharge with racial slurs gave ample foundation for a discrimination case. *Heaven v. Skinner Tank Co.* (D.C. Ok., 2016).

Labor Arbitration

Double Bind. A male employee made repeated sexual comments to a female co-worker, which caused her to "hide to avoid him." When this was reported to HR, the female employee then declined to cooperate in the investigation of her male fellow union member, stating nothing needed to be done. HR investigated anyway, and fired the male employee.

The union filed a grievance contesting his discharge for lack of cause. Then it also filed a grievance on behalf of the female worker, claiming the company failed to act promptly enough in protecting her from the man's sexual harassment. The arbitrator denied both grievances. The company acted as promptly as it could. It had to complete an investigation before it could take any action against the harasser. The male employee's behavior warranted discharge. He had received training on harassment and should have known his actions were improper. *AFSCME #1155 and Ashland Memorial Medical Center* (2016).

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