EMPLOYMENT LAW UPDATE

June, 2014

by
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LEGISLATIVE AND ADMINISTRATIVE ACTION

Executive Orders Prohibit Pay Secrecy and Requires Federal Contractors to Collect More Pay Data. The President signed an Executive Order prohibiting federal contractors from retaliating against employees who choose to discuss their compensation, and issued a Presidential Memorandum instructing the Secretary of Labor to establish new regulations requiring federal contractors to submit to the Department of Labor (DOL) summary data on compensation paid to their employees, including data by sex and race. The pay data requirement directs DOL to "avoid new recordkeeping requirements"; the data should be gathered from existing compensation and payroll information. The "pay secrecy" provisions do not seem to impose anything which does not already exist. It has long been an illegal practice under the National Labor Relations Act to even "discourage" employees from openly and publicly discussing, comparing or questioning their compensation.

Wisconsin Conforms Wage Records Law to Federal FLSA. Wisconsin Act 286 has eliminated some of the recordkeeping confusion between state and federal Labor Standards laws regarding exempt employees. Also, outside sales people can now be paid purely on commission earned, rather than also having to be paid minimum wage. Employers no longer have to keep time records (start, stop, meal breaks, etc.) on salaried-exempt employees. It is probably still a very good idea to have salaried employees report their overall weekly hours. This can be an employer's saving grace in the all too frequent event that a DOL audit rules a group of exempt employees should really be hourly and are due back pay. The record of hours worked will at least establish the reasonable amount of damages, rather than a sky-high claim.

Trends

Not Just States – Major Employers are Joining the Trend to Exceed Minimum Wage. In the face of Congressional deadlock and inaction, over half of the states have raised minimum wages to greater than the federal level. Now a number of major employers are announcing that they also believe $7.25 an hour is an unlivable wage, and are unilaterally raising the rate. The Gap will raise its own minimum to $9 in June, 2014, and $10 in 2015. This also effects the Gap Corporation's other retail brands, Banana Republic, Athleta and Old Navy.

LITIGATION

Theme of the Month – HR Managers Behaving Badly

HR Manager's Restroom Incident Creates Case. A female HR manager at an auto dealership allegedly became angry when a male employee made a critical comment about a work issue. She started yelling at him. He walked away and went into the men's restroom. She followed him in and continued yelling as he used the restroom, fully exposed. There were also other male employees standing there exposed in the process of using the restroom. The male employee made a complaint of sexual harassment and improper behavior. He was then fired soon after. He filed a case of harassment, retaliation and whistle blowing. The court found no sexual harassment. The HR manager's behavior was due to inappropriate anger, but was not based on the gender of the employee who criticized her. However, a harassment complaint is a protected activity, and given protection from retaliation. Also, the complaint about the HR manager's restroom behavior fit within the Hawaii state whistleblower statute. The discharge so soon after his complaints created a viable case for both Title VII retaliation and whistleblower retaliation. *Onodera Vikuhio Motors Inc.* (D. Ha., 2014).

Two Wrongs Do Not "Even Out,"HR Manager's Racial Bias and Unequal Treatment Create Case. *Willis v. Cieco Corp.* (5th Cir., 2014) involved two people (plaintiff and defendant) who engaged in inappropriate racial behavior. Rather than "equalizing," the situation created a case for comparative discriminatory behavior and retaliation. An African-American Human Resources specialist reported that the white HR department manager stood by, without any effort to correct or even comment, while a company employee commented that black applicants and the company's black employees were all "dumb and lazy." Thereafter, the HR manager told other employees that he was p'd off that the conversation had been reported, and he would find a way to fire "that N____," for trying to "burn him." Subsequently, the African-American HR specialist made a racially improper statement of his own, when telling another African-American employee that she should spend more time with other black employees rather than white. She was offended and reported his comments. The HR specialist was fired. In the resulting case the court found that the HR manager's comments were retaliatory. The HR manager's tolerance of comments may have been equal to the specialist's comments, but the

manager went to a far worse level in his own use of a racial slur. Rather than the specialist's behavior justifying discharge, it just illustrated the disparity between the non action against the white manager who had apparently engaged in worse behavior, with no consequences.

Affirmative Action Rules

Court Upholds OFCCP Disability Goal. A construction contractors association challenged the new OFCCP requirement for a 7% goal to hire disabled people. The court rejected the suit, finding the rules were valid. *Associated Builders & Contractors Inc. v. Shiu* (D. DC., 2014). The OFCCP did not exceed its rulemaking authority. The OFCCP goals do not require 7% hiring. They are a "goal" not a quota. It requires only a reasonable good faith effort to try, which should not impose an undue burden on an employer. (The EEOC's increasingly broad definition of what is a "disability" should make it easier and easier for a contractor to hire disabled people.) [For comprehensive training on the affirmative action and compliance under the new rules attend the American Association for Affirmative Action Professional Development & Training Institute (PDTI) starting July 21 in Madison, Wisconsin. For more information see www.regonline.com/aaaapdtijuly2014 or boardmanclark.com]

Discrimination

Age

Job Elimination Was a Sham. A company reorganized and eliminated the position of a 62-year old worker, stating it was unnecessary. It claimed it did not replace the position. However, the evidence showed that it took a younger employee – kept his original job title, *but* changed the actual duties to fill the older worker's position and day-to-day responsibilities. This created a *prima facie* case of age discrimination and pretext under the ADEA and Tennessee Human Rights Act. *Pierson v. Quad Graphics Inc.* (6th Cir., 2014).

Religion

***$1.6 Million for Religious Harassment*.** A lesbian chef has won $1.6 million under state discrimination laws. The restaurant owner imposed his personal religious values on employees. Weekly prayer meetings were required. He gave sermons on homosexuality as a sin, and "gay people are going to hell." The chef objected and refused to attend the meetings. The owner told her she needed to change her lifestyle and continued to preach at her as she worked, outside of the prayer meetings. She quit and sued for constructive discharge and harassment, and won. *Salemi v. Glorias Tribeca Inc.* (N.Y. App. D., 2014) [stay tuned for the U.S. Supreme Court's decision on the Hobby Lobby case challenging the Affordable Care Act based on corporate owners' religious objections to health care coverage of contraceptives. If the Court rules in favor of Hobby Lobby, the gates may be

opened for employers to make hiring or firing decisions or to harass based on their religious values and disapproval of people with other religious values – i.e., no Christians need apply to a non-Christian-owned company. No Muslims, Jews, gays, interracially-married people, etc. etc. need apply depending on the religion of the owner].

Disability

Withdrawal of Late Arrival Accommodation was Unreasonable. A disabled chemical engineer's medications rendered her less than able for the first few hours of the morning. She could not adequately function at the standard 8:00 am start time, and was given a 10:00 am start accommodation. She then worked later than others. Her performance met or exceeded expectations during the two years the accommodation was in effect. Then a new supervisor insisted on a standard work schedule for all employees. The chemical engineer again requested the 10:00 am accommodation. She was granted a 9:00 am accommodation, but that did not allow sufficient time for her medications. She was then fired due to not being able to show up and function on time. The court found violation of the ADA. The company could show no "undue hardship" regarding the 10:00 am accommodation, since it had a two-year history of accommodating with no evidence of any hardship at all. The court found the 9:00 am accommodation as an "ineffective half step" which it knew did not meet the employee's medication situation. *Isbell v. John Crane Inc.* (N.D. Ill., 2014).

Was "Grazing" a Theft or an Emergency Necessity? A diabetic employee, with 18 years service, was fired for violating the "grazing" policy when he ate a small bag of potato chips off the shelf. Walgreens loses over $350 million a year from worker theft – often in very small amounts per instance, and has a zero tolerance policy. The employee alleged he had a hypoglycemic emergency and believed he needed something to eat before he passed out. He also states that he immediately then tried to pay for the chips, but there is a special process for employee payment and no one was there to approve the pay. Walgreens did not credit his "excuse" and fired him. The EEOC took the case claiming the company failed to engage in the interactive process and consider reasonable accommodation for a good faith disability reason for rule violations. The court agreed, finding a valid basis for allowing the case to go to a jury for decision. *EEOC v. Walgreens Co.* (N.D. Cal.). Walgreens considers the matter "theft." EEOC considers it an unreasonable application of the policy and failure to reasonably accommodate. The jury will decide.

Full-Time to Part-Time May Violate ADA. A medical center cut the hours of a long-term employee with Crohns disease, from full-time to part-time, making her ineligible for medical insurance benefits. She claimed this was an ADA violation, in an attempt to limit the medical expenses due to her disability. The court agreed, allowing the case to go to a jury. There was evidence of pretext. The medical center claimed it needed to "reorganize" and a full-time position was not needed. However, both the supervisor and the CFO testified that the job required a full-time employee. The supervisor stated strong

disagreement before the decision was implemented. (Then that supervisor was disciplined for not supporting the company's position.) *Quilan v. Touchstone Medical LLC* (M.D. Tenn., 2014).

Lawyer Can Not Require a "Shadow." A state civil service attorney with cerebral palsy was denied the accommodation request of a full-time personal assistant to function as "his shadow." The agency had granted 30 requests for accommodation in the first year of employment before he requested a full-time assistant to help him with many of the legal duties of analysis, legal writing and working with others. Under the ADA and state law, the court found the request to be unreasonable. An employer is generally not required to hire and pay two people to do one job. Further, the attorney is supposed to do essential functions of the job, and the assistant is not supposed to substitute for the role the person is hired to accomplish. *In Re EH.* (N.J. Superior Ct., 2014).

Family & Medical Leave Act

Doctor's Advice to "Go Fishing to Reduce Stress" Did Not Include Taking FMLA to Compete in Professional Bass Tournaments. A state Department of Natural Resources deputy director had a stress disorder. His doctor told him to relax more and engage in relaxing activities to reduce stress, including fishing. The deputy director then started scheduling FMLA (3 months in all) so he could go and compete in professional bass fishing tournaments. He won $31,000 overall. This was discovered by the press and reported to the state. The deputy director claimed that the department knew he had been advised to "go fishing" and other relaxing activities, so it was a valid use of FMLA. The state asked for his resignation for abuse of FMLA. This included violation of its FMLA policy provision which forbid engaging in other employment while on FMLA. The court ruled for the Department. "Go fishing" was not a prescription to engage in professional competition on paid sick leave. The amount of winnings constituted "other employment." It is questionable whether highly competitive multi-state professional events fit the category of "relaxing" within the meaning of the doctor's advice. *T.L. and Ill. DNR* (2014).

May Not Request Doctor's Note for Each Instance of Intermittent Leave. A company policy violated the FMLA when an employee was required to give a doctor's excuse for each instance of leave for his daughter's medical condition and for his own gastric ulcer and bleeding medical conditions. The doctors had provided the initial FMLA medical certifications, but the company insisted on a note each time verifying the cause. (The policy was based on prior instances of other employees abusing FMLA with a pattern of Friday/Monday absences.) After 11 notices, the employee's doctor refused to give more notes, claiming the policy was abusive, disruptive of the medical practice, and contrary to best treatment – forcing the already ill employee to have to go through extra stress. The employee was then subjected to a series of disciplinary suspensions for unauthorized absence. The court found that the policy and practice violated FMLA. Recertification or verification of a medical condition may not be required in less than every 30 days and

then only if there is tangible evidence to doubt the validity of the certification. *Oak Harbor Freight Lines v. Antti* (D. Ore., 2014).

Fair Labor Standards Act

Sports seem to be the FLSA theme (sports bars and baseball). There have been a series of football cases. NFL cheerleaders have sued for minimum wage and overtime violations – no pay for practice sessions, no pay for mandatory appearances, and low pay overall. The latest case is *Brenneman v. Cincinnati Bengals* (S.D. Oh., 2014). Now baseball is becoming the focus area. In spite of the headlines about star players, most professional major league athletes make a middle class income, for a short time. Other minor league players and staff make a lot less.

Minor League Baseball Players Sue. Several minor league baseball players have sued over failure to be paid minimum wage and overtime. The suit alleges a 50 to 70 hour week with no pay at all for spring training and a total season pay of only $3,000 to $3,500 for a five month season. *Senne v. Office of the Commissioner of Baseball* (N.D. Cal., 2014).

Sports Bar Pays $6.8 Million for Violating Tip Rule. A Philadelphia sports bar with nine locations has agreed to pay a huge settlement for violating the "tip pool" rule regarding some 1,200 employees. Tip pools (where all employees put tips into a common fund) are to be distributed to hourly-tipped employees – wait staff, bussers, cleaners, bartenders, etc. who provide the services. In this case the company retained up to 60% of the pool for the company. Tipped employees can be paid a special $2.13 per hour minimum wage if tips raise the rate to at least the $7.25 minimum wage. The 60% seizure of the tip pool resulted in some employees receiving less than even the $2.13 per hour for their work. The bar paid a flat $15 per shift "plus tips," for a full day shift. *COL v. Chuckie and Pete* (Administrative Settlement, 2014).

National Labor Relations Act – Arbitration

Late For Date Was Not a Valid Reason for Bus Driver to Abandon Route. A bus driver refused to finish his route, drove back to the bus barn and left work early. As he left the route the dispatcher kept directing him to finish and pick up the waiting riders on the rest of the route. He launched an abusive tirade against the dispatcher. The driver was fired. He grieved, claiming a legitimate reason for leaving the route – he was running late for a date! The arbitrator found this to be an invalid excuse and upheld the discharge. *Nassau Inter-County Express and TWU Local 252* (2013).