EMPLOYMENT LAW UPDATE

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by
Bob Gregg, Legislative Director
Jefferson County HRMA
rgregg@boardmanclark.com

Boardman Clark LLP
www.boardmanclark.com

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Workforce Mobility Act Introduced – Would Ban Non-Compete Agreements. A bipartisan group of Republican and Democratic senators have introduced the Workforce Mobility Act (WMA) which would ban most non-compete agreements. The bill states "*Non-compete agreements are blunt instruments that crudely protect employers' interests but place a drag on national productivity…they reduce wages, restrict mobility and impinge on freedom of a worker to maximize potential and slow the pace of innovation in the United States.*" The WMA's restrictions are very close to the Federal Trade Commission's recent Proposed Rule restricting non-competes. That Rule has been met with a great deal of resistance by business interests and many predictions it will not become a final rule. However, this development may change that prediction, and the future of non-compete arrangements. A bipartisan bill has a much greater chance to become law.

Department of Labor Issues Telework and FMLA Guidance Letters. DOL's Wage and Hours Division has issued Field Assistance Bulletin (FAB) No. 2023-1 Telework Under the Fair Labor Standards and Family and Medical Leave Acts. This FAB addresses hours for work from home and re-emphasizes reasonable break time and privacy issues for pumping breast milk or nursing under the recent PUMP Act. An accompanying Opinion Letter FMLA No. 2301-1-A explains that an employee with a serious health condition may use FMLA to indefinitely reduce a regular work schedule to limit their workday. The 1-A letter also warns that an employee who has been working more than a 40-hour week or works mandatory overtime accrues more than the standard 480 amount of hours to use for FMLA. This is not a new position by DOL but rather a reminder of how to calculate time off.

From DOL to NHL. Secretary of Labor, Marty Walsh, is leaving as the head of the Department of Labor to become the Executive Director of the National Hockey League Players Association, representing all NHL players. The resignation is effective mid-March 2023. Assistant Secretary, Julie Su will be acting head the DOL. President Biden has nominated her to be the next Secretary. Ms. Su was previously the head of California's DOL and her nomination as Secretary is expected to meet significant opposition from a number of congressman and business organizations.

LITIGATION

Fair Labor Standards Act

Supreme Court Upheld FLSA Salaried Basis Test – Form Is as Important as Substance. In a period in which the U.S. Supreme Court has voided a number of federal agency regulations, it has upheld the Fair Labor Standards Act's Salaried Basis Test for overtime exempt positions. The Salaried Basis Test requires an exempt employee to be paid a salary on a weekly basis of at least $684 per week ($35,568 per year) which does not fluctuate based on working less than or more than 40 hours. It is not dependent on shifts or number of days worked in the week. Yet in *Helix Energy Solutions v. Hewill*, an "executive exempt" employee received over $240,000 a year but did not meet the formalities of the test. So, the Court found he was entitled to overtime pay for weeks he worked in excess of 40 hours. The manager was paid by the shift or by day rate, rather than having a guaranteed weekly salary. His pay could fluctuate downward if he worked fewer days or shifts. Even though he always earned more than the required $684 weekly salaried minimum, the Court found that he was not paid according to the required weekly basis formula of the Salaried Basis Test. So, adherence to the specific formalities of the FLSA regulations is important.

Privacy Rights

Did Dobbs Decision Also Void Employees' Rights to Their Own Bodily Autonomy in Other Areas? (City Argues That Employees No Longer Have a Right to Their Own Bodily Autonomy Due to Dobb's Decision). The U.S. Supreme Court's *Dobbs* decision overturned *Roe v. Wade* and removed Federal Constitutional protection for abortion and allowed state governments to impose whatever rules or restrictions they choose. *Dobbs* then resulted in the non-abortion related Respect for Marriage Act, protecting same sex and interracial marriages and intimacy. Now Chicago has used *Dobbs* to defend against employees' challenges to its COVID-19 vaccination requirement. Though the city accommodated religious and medical requests for exceptions, the anti-vaccination advocates charged that the city's mandate violated their bodily autonomy and right to determine their own medical care and right to refuse medical care. The city is arguing that *Dobbs*' voiding a woman's right to bodily autonomy in abortion also applies to all other areas, including employees' ability to resist employers' policies. Interestingly, in a number of cases brought by anti-vaccination groups, the plaintiffs have argued that *Roe v. Wade* gave them bodily autonomy to refuse COVID-19 and other vaccination requirements. Now Chicago claims that *Dobbs* has removed any such rights and the employees' challenges should be dismissed. *Troogstad et al. v. City of Chicago et al.* (ND IL, 2023)

Safety - Preservation of Evidence

Walmart Cited for Destroying Evidence in Amputation Case. A judge ruled that Walmart destroyed evidence following a contracted delivery driver's injury on a Walmart loading dock, which resulted in amputation of both legs. He sued Walmart, but significant evidence was missing. Walmart quickly repaired the alleged faulty equipment, replacing parts without keeping the old ones and could not locate the equipment maintenance logs. However, it did seem to have

kept documents which were beneficial to it in an accident investigation and suit. The judge found it *"inexplicable that a large, sophisticated company that is constantly involved in litigation should have known not to lose some of the most crucial evidence but immediately moved to preserve the evidence they wanted to use in their defense."* The judge declined to grant summary judgment against Walmart, but did order it to pay all of the plaintiff's attorneys' fees to date and imposed sanctions to limit what evidence Walmart could use at trial. *Trapp v. Walmart* (MD FL, 2023). All employers should know that there are federal and state requirements mandating preservation of all evidence which may be relevant in any situation likely to lead to litigation. Failure to do so can result in sanctions, fines, or even the court finding a presumption of guilt, and granting judgment against the employer.

Discrimination

Age

Age Is Just a Number – And a Quota Is Just a Quota. In *Obrien v. Amazon.com, Inc.* (ND CA, 2023) the court found that requiring older workers to meet standard production quotas is not age discrimination. A 49-year-old Amazon warehouse employee had difficulties meeting the company's production quota for processing a certain number of items per hour. She stated a belief that the quotas had a negative impact on older workers, were harder for older people to meet, and could result in more injuries to older workers. She asked for lower production standards. This was refused. When she was discharged for not meeting the quota, she sued for age discrimination, charging that the quota had an adverse impact on older workers. The court granted summary judgment against her, dismissing the case. The quotas applied uniformly to all workers of all ages. There was no concrete evidence that older workers were discharged more often, suffered more injuries, or that the quotas were the cause of injuries. The opinion stated, *"The court knows of no authority that permits a plaintiff to rely on stereotypes that older people are more fragile or prone to injury and then assume that certain physical requirements just must have a significant adverse impact."*

Most Stretched Defense of the Month

Court Rules That When Things Add Up, They Can't Be Divided into Bits and Pieces. In *Cuervo v. Amazon.com, Inc*. (WD WA, 2023), a former Area Manager of a warehouse alleged that she was subjected to a lengthy series of offensive sexual, sexist, and anti-Hispanic comments. She was terminated after complaining about the treatment. Amazon defended by claiming that none of the incidents actually were severe enough to be illegal harassment when viewed individually and divided into each separate incident. Amazon claimed since no incident on its own was sufficient, the situation did not create a viable case. The court did not buy this defense. The Title VII harassment standard is "*severe or pervasive*" and defendants ignored the pervasive part of the complaint as a whole and instead attempted to focus on bits and pieces. The continuing insults or antics could add up and create a viable case.

Disability

Failure To Have Interactive Process Violates ADA. The Interactive Process is an affirmative duty of the employer under the Americans with Disabilities Act (ADA). The employer must demonstrate that it considered reasonable accommodation for employees with disabilities and communicated with the employees in a good faith problem-solving process, and document valid reasons if it cannot make a reasonable accommodation. *Makekau v Charter Communications, LLC* (D. HI, 2023) involved a customer service representative who requested accommodations due to diabetes and hypertension-related post-surgery medical issues. She requested an extended leave for treatment which was denied. She then requested either work from home or to modify her break schedule to enable her to work in the office. The company "flatly denied" the requests, stating that the company could not make accommodations for her, or it would have to do so for everyone. Charter then terminated her employment, and the employee filed the ADA case. The court found that Charter "Never worked to determine whether an accommodation would have allowed Makekau to perform her job. A company has an affirmative duty to engage in the interactive process and there is no evidence that defendant did so or even attempted to do so." An employer can defend an ADA case by showing that a requested accommodation is not reasonable. However, one must first actually interact with the employee and examine the issue before deciding. Even if Charter could show the requested accommodation would have been unreasonable, it can be precluded from that argument, since it never examined that at the time in question. Charter's view that "*if we do it for you we have to do so for everyone*" also goes nowhere. The whole concept of reasonable accommodation is that it is a special effort designed for the specific situation and needs of a particular person.

Workers Compensation

Philadelphia Eagles Player Can Get Workers Compensation. The Philadelphia Eagles lost the Superbowl and lost in their attempt to deny Workers Compensation benefits to a former linebacker, Emmanual Acho. Acho broke his hand twice and after surgery was unable to play in the NFL since 2015 and was awarded Workers Compensation benefits. However, the Eagles objected and appealed, claiming that Acho was not eligible, citing that he had reportedly expressed the "*hope*" to return to play and had attempted to tryout, unsuccessfully with a couple of other teams. The court denied the Eagles' appeal, ruling that "*hoping to*" and "*attempts*" to return did not change the reality of the inability to play at the NFL level due to injuries. Acho is entitled to WC payments. *Philadelphia Eagles, Inc v. Acho* (Commonwealth Ct. of PA, 2023)

National Labor Relations Act

NLRB Rules That Non-Disparagement and Overbroad Confidentiality Clauses Are Illegal. In *McLaren Macomb* (NLRB, 2023), the National Labor Relations Board (NLRB) ruled that a hospital committed an unfair labor practice when its severance agreements contained clauses prohibiting the signers from disparaging the company. The Board held that this clause restricted the employees' exercise of their National Labor Relations Act rights. Since the NLRA covers non-unionized employees as well, this ruling would apply to most private sector employers (but will not apply to statutory supervisors). This ruling may not mean that non-disparagement clauses as a whole are banned. The NLRA covers a wide, but still limited scope, regarding

wages, hours, terms, and conditions of employment. So more carefully worded clauses could still cover non-disparagement of company products, services, customers, etc. These should probably be specifically listed since a general clause could be seen as too broad and including NLRA issues. Also, be aware that other laws prohibit use of non-disparagement "gag order" provisions which prohibit people from reporting concerns to various federal or state government agencies or discussing their concern about infractions of various laws, such as Title VII sexual harassment. The Board also held prohibiting employees from disclosing the existence of or terms of the agreement to any third person would interfere with employee's Section 7 rights to assist coworkers or discuss the agreements with union representatives. Employers should seek advice before including such provisions in separation agreements.

Union Liable for Retaliation Against Members. In *National Labor Relations Board v. Laborer's International Union Local 91* (2nd Cir. 2023), the court ordered the union to pay two years' backpay and other damages to two of its members. The members had made comments and Facebook posts criticizing the union's Business Manager for granting special favors to a local politician. As a result, the Business Manager and other officers removed the members from the union's job referral list, effectively preventing them from working. The members filed an unfair labor charge with the NLRB. The NLRB found the criticism was protected activity, and that the two members had suffered illegal retaliation and it ordered backpay and penalties. The union failed to pay, and the NLRB sued in court to enforce its Order.

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By Attorneys Mai Chao Chang and Nicole S. Schram, Boardman Clark LLP, February 15, 2023

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