EMPLOYMENT LAW UPDATE

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TRENDS

Artificial Intelligence Regulations. Artificial Intelligence (AI) is getting more intelligent. It can do more and more and is being increasingly incorporated into employment systems. Ninety-nine percent of Fortune 500 companies are using AI for hiring, performance, pay, and worker surveillance (e.g., "Bossware"). AI, however, can be prone to biases. Amazon ceased using an AI program in hiring and promotions when it recognized there was a significant bias adversely impacting women.

New York City is implementing a law on July 5, 2023, which regulates the use of AI by employers and employment agencies in making employment decisions. The new law defines AI as: a group of mathematical, computer-based techniques that:

1. generate a prediction, meaning an expected outcome for an observation, such as an assessment of a candidate's fit or likelihood of success, or that generate a classification, meaning an assignment of an observation to a group, such as categorizations based on skill sets or aptitude; and
2. for which a computer at least in part identifies the inputs, the relative importance placed on those inputs, and, if applicable, other parameters for the models in order to improve the accuracy of the prediction or classification.

The new law restricts use of AI screening systems in hiring and promotion unless they have been first subject to review by an independent auditor for any discriminatory impacts. Further, applicants or promotion candidates must receive notice of AI in the process and have the option of requesting an alternative process or accommodation. Why is the New York City law significant? It is a signal of what to expect in other jurisdictions. Four other states have adopted some sort of AI regulations; Vermont even established a Division of Artificial Intelligence to conduct a survey and make recommendations. The New York law seems to be the most employment focused so far. A few years ago, Illinois passed the Biometric Information Privacy Act (BIPA) which has detailed notice and use requirements when employers use fingerprints, eye scans, voice ID, or other biometrics for clocking in, access, security, or any other employment purpose. Then a number of other states followed suit with their own laws. These laws often have a reach beyond the state if the information is stored in or passes through the state, so Illinois BIPA suits have been brought against employers far from the state. Technology vendors are now requiring employers everywhere to adopt BIPA policies and notices before providing biometric systems or devices. So, just as with biometrics, be prepared for more AI employment laws.

The EEOC is also taking a close and skeptical look at AI at the federal level and issued a Guidance regarding use of AI and the Americans with Disabilities Act. Recently the Federal Trade Commission,

the Consumer Financial Protection Bureau, and the Department of Justice, along with the EEOC announced they are focusing on how to use existing laws to more closely examine and combat AI bias.

LITIGATION

Employment Agreements

Two cases this month illustrate the importance of clear agreements and good recordkeeping. A third case on the perils of poor records is in the FMLA section.

Company Cannot Prove That Executive Signed Non-Compete Agreement. A fired aerospace executive formed a new competing company. The former company sued to enforce a Noncompete-Non-Solicitation Agreement. However, the former executive claimed that there was no such agreement and "no covenant restricting future employment." He claimed that he never signed any agreement he may have been given. The company has not provided a signed copy. Without a signature, there was no "meeting of the minds in agreement" and thus no enforceable contract. *Ho-Ho-Kus, Inc. v. Sucharski*, *et al.* (D. NJ, 2023) Employers who are concerned about any agreements with employees should take heed. There are situations in which it is assumed everyone signed the standard agreement(s) during orientation but did not always ensure this. The employee turned the form back in, *unsigned*, with a stack of other orientation paperwork. In other instances, the issue got lost in the shuffle of who was responsible, and no one followed up. In a few cases, the employee signed and was then given the only signed copy, without anything but the blank one kept in the company files. Then the employee denied ever having a signed copy. So, the process should have safeguards to actually confirm signatures and agreements and the signed original should be kept in the file. This is one situation in which an electronic copy may not be adequate proof in a challenge.

Commissions Limited by Compensation Agreement. A salesperson for an equipment leasing company disputed the amount of commission due. The company revised its commission pay plans periodically, and did so one year, lowering the commissions for certain items. The new plan was given to sales staff with notice of the date it would go into effect. Then the salesperson claimed he was owed greater amounts than he received on several sales because the sales contract had been entered prior to the new plan's effective date. He filed a contract case. The court ruled in favor of the company because the new commission agreement was clear and signed by the employee. Under the agreement, a sale was considered completed and commission due only after the customer paid. The court stated it doesn't matter when a sale document is signed, "the salesperson does not earn the commission until the customer pays for the service." The agreement's clear definition of when a commission was actually "earned" was crucial. *Ross v. First Financial Corporate Services, Inc.* (7th Cir., 2023) If the definition had not been clearly stated and the new pay arrangement signed by the employee, the result could have been different. Any vagueness is held against the employer. If a pay arrangement is unclear, not signed, or is not in a document, the courts have forced employers to pay full commissions on sales which fell through, and the company did not receive a dime. The Fair Labor Standards Act, State Wage Claim Laws, and general contract law place great emphasis on clear, (without a lot of industry jargon) written pay plans signed by the employee, in any sort of compensation other than the straight hourly with overtime method. So, pay heed. In this case, the employer covered the crucial factors and won.

Discrimination

Disability

Guitarist Sues Motley Crue. ADA Applies Even to Rock Bands. Motley Crue is one of the most well-known and long-surviving rock groups. Original band member, guitarist Mick Mars, has been a steady presence for all those 40 years. Then he developed Ankylosing Spondylitis, and after the band's 2022 tour this disability rendered him unable to again go on rigorous band tours. However, he could continue stand alone appearances, recording sessions, or residency shows where performers reside and do nightly shows at one location such as a Las Vegas venue. Nonetheless, the band then attempted to end Mick's relationship, remove him from his employment, take away his share of the corporation, and cut off his band revenues. Mr. Mars has filed suit to prevent this, informing the band corporation that firing someone with a disability violates the Americans with Disabilities Act. Mr. Mars states that he has faithfully stuck by the other band members throughout 40 years and the several difficulties of the other members' "heroin addiction, alcoholism, arrests, criminal convictions" and indiscretions. He stood with the band consistently while others dropped out for periods. He also claims that he was the only member still playing live music on stage while the others were now "gaslighting," pantomiming to prerecorded music," and not playing a single chord. Audiences noticed other members fist pumping while their instrument sounds kept playing or the drum starting before the drummer actually got to the drum set. Mr. Mars is seeking an order preventing the band from taking any actions to end his employment or diminish his stock pending his challenges. *Mars v. Motley Crue, Inc.* (Supreme Ct. of CA, LA County, 2023)

Sex

McDonalds' Board of Directors Drawn into Sexual Harassment Litigation. Boards of Directors are increasingly being implicated in employment cases. McDonalds must provide corporate documents in a suit against franchises. *Fairley, et al. v. McDonalds Corp., et al.* (N.D. IL, 2023) is a sexual harassment action seeking to hold local franchised restaurants and McDonalds corporation jointly liable for harassment employees experienced working at the restaurants. The case alleges that the corporate Board of Directors knew there were harassment problems at its franchised stores and allowed harassment to "run rampant." The court found sufficient basis to order McDonalds to turn over all information as to what its Board knew about allegations of sexual harassment in its franchised stores and its discussion of these situations. [Boards of Directors of smaller companies and nonprofit organizations are actually more often drawn into these situations. Boards are generally focused on other sorts of business or operational metrics and employment issues are not on their radar, or in their scope of knowledge. So, Boards stray into the employment law arena and even potential personal liability due to unawareness or lack of attention. It is important that Board members have an understanding of HR and basic employment laws and responsibilities.]

Race and Damages

Nuclear Verdict is Reduced. Several courts have recently been "reining in" very large "nuclear" jury awards in employment cases as excessive. Some juries have expressed shock or indignation over what they consider to be wrongful acts by employers and express this in awards which seem to far exceed the scope of actual damages. Last year a jury made a $137 million award to one employee against Tesla in a racial harassment case. The judge found this to be excessive for a one party, non-class action suit, and reduced the award. He gave the plaintiff the option of taking $15 million or having a second jury rehear the issues and decide how much to award. The plaintiff rolled the dice and opted for a second jury. That jury decided to award only $3.2 million, mostly still in punitive damages against Tesla. *Diaz v. Tesla, Inc. et al.* (N.D. CA, 2023) Though this case may show a trend toward reduction of huge "nuclear" or

"balloon" verdicts, the reduction of the award to only $3.2 million is also a message that employment cases still can bear a very high cost to employers. The best advice is to implement good practices and proactively monitor to find out what is actually going on within the organization and prevent problems, rather than relying on a complaint process to bring them to your attention after the problem(s) have already occurred.

Personal Liability

Refused to Provide Payroll Information – Contempt of Court Can Land Company Owner in Jail. *Painters Dist. Council 58 v. MJ Interior Finishers Construction, LLC* (E.D. MO, 2023) involves issues with a painting company's union pension and benefits fund. The pension agreement required the company to submit periodic payroll reports to the union's pension fund and have an annual payroll audit. The company did not provide timely reports and did not cooperate with an annual audit. So, the union sued for compliance. The court ordered the company to provide the payroll information and submit to the audit. The company did not comply; the company president stating he had paid all amounts due and did not believe he owed anything else to the pension fund. However, that could not actually be verified without payroll information and an audit. So, the court held a Compliance Hearing. The company did not show up. The judge held the company and its president in Contempt of Court. The Contempt Order called for the arrest of the company president and that he be held in jail until he complied and also imposed a $200 per day fine until there was compliance. The message of this case is that obstinance has consequences, including personal liability and jail. Many employers may believe lawsuits are unwarranted, baseless vexations. They may be angry, want to resist or "blow off" discovery requests they feel are unwarranted or overreaching. There are legal means to properly raise objections. However, stonewalling, obstruction, and noncompliance only make things worse. [Another good example of the danger of obstinance is the ***Defiance of Discovery Orders and Snarky Comments Result in Default Judgement for Other Side*** case described in the April 2023 Update.]

Wages and Hours

The Fair Labor Standards Act covers all sorts of interesting jobs which are not often known about. Some of these in agriculture are crucial to our food supply. Some of these positions work very long hours at low pay and become the topic of wage and hour suits.

Turkey Catcher Claims Butterball Failed to Pay Proper Wages. Turkey catchers go to turkey farms, round up the turkeys (sometimes thousands) and transport them to the processing plants. Without turkey catchers, no Thanksgiving turkey, no turkey burgers, no big smoked drumsticks at the county fair. A turkey catcher claimed that Butterball failed to pay him the agreed upon wage and premium for overtime for his work, from 6:00pm to 9:00am six days a week. He filed FLSA and state wage claims and presented witnesses who supported that numerous people were not paid for all work performed. Butterball has denied any pay violations. *Figueroa v. Butterball, LLC* (E.D. NC, 2023)

Shepherds Claim They Are Being Fleeced by Association. Not all livestock are raised in industrial feed lots. Some still roam and graze and require the care of shepherds. A federal court has found sufficient evidence for a claim by sheep shepherds against an association of some 200 ranchers. The suit alleges collusion to fix wages at an artificially low level. The case alleges that shepherds, often foreign workers on H-2A visas, worked 80 to 90 hour weeks at $4 to $5 per hour with no overtime pay. It claims the Association coordinated with its members to keep wages at this level, and not hire each other's workers. So, shepherds could not go to another ranch for better pay, resulting in pay so low shepherds end up "in effectively permanent indentured servitude." The court cited evidence from the Association's communications recommending that ranchers pay the lowest allowable wage, and further evidence that

plausibly could indicate "a tacit agreement" between the Association and its members regarding fixing the wages. The suit seeks several million dollars in damages. *Alvarado, et al. v. Western Range Assoc.* (D. NV, 2023)

New H-2A Wage Rules Are Challenged. The Department. of Labor (DOL) recently implemented new rules regarding wages for H-2A guest workers aimed at assuring higher wage rates. These rules are being opposed by the Florida Growers Association claiming higher wages raise the cost to farms and consumers. The suit alleges DOL exceeded its regulatory authority when adopting the rules. *Florida Growers Assoc., Inc. v. Su, et al./Dept. of Labor*, (M.D. FL, 2023)

Family and Medical Leave Act

"Records Were a Mess" *Gonzales v. The GEO Group, Inc* (W.D. WA, 2023) is a good lesson in paying attention to employment records. A private security company terminated an officer due to excessive leave. The company notified the officer that all FMLA had been exhausted. The officer believed he should have more available FMLA time for the medical needs of his family and took more leave. After warnings about excessive leave and "abusing FMLA" the officer was fired. He filed an FMLA case claiming that an HR specialist had told him the original notice of leave exhaustion was in error; he could ignore it and had more leave available. So, he continued to take intermittent leave, submitting the proper FMLA paperwork each time. The company's records of leave were confusing as to how much leave had formally been designated as FMLA, and what HR had or had not said to the officer. The company's attorney admitted the records were probably not very accurate, "No one was watching it closely." The judge was blunter, stating, "*The records are a mess*!" and ruling that the officer had a valid case for discharge on violation of FMLA. The FMLA is highly technical. This case illustrates the importance of keeping detailed and accurate records of leave and of communications with the employees. An all-too-common error is simply granting FMLA without giving or getting the formal notices and documentation because "everyone knows there is a serious medical condition." Then there is confusion later over the actual details, timing, and the employees' rights. The formal applications, designations, statement of rights, notices, and all other FMLA documents should be required and recorded in all situations. All communication with employees about the leave should be documented; clearly describing the content, not just "*Talked to John today about how much leave he has left*." [For information on avoiding another FMLA danger area, see the article *FLSA AND FMLA – What are "regular weekly hours"?* by Boardman Clark, LLP.

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