EMPLOYMENT LAW UPDATE

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Administrative Actions - Wages; Litigation; Trends – Pressures on Diversity Programs

LEGISLATION AND ADMINISTRATIVE ACTIONS

Higher Wages for American Workers Act (HWAWA). A group of Republicans in Congress have introduced the HWAW Act which would raise the federal general minimum wage from $7.25 per hour to $11.00 per hour over four years. It would have an immediate raise to $8.00 and then a $.75 increase each year until it reached $11.00 per hour. Under the Bill small businesses, under 20 employees, would have a raise of $.50 per hour to $7.75 and $.50 per year until the $11.00 mark. In addition, the Bill would mandate the use of the government's E-Verify system for all hires by all employers in the US. The Bill has met criticism for its "paltry" increase, which will still leave many families below the poverty line. The HWAWA is the Republicans' response to the Democrats' Raise the Wage Act Bill which would raise the minimum wage to $17.00 per hour by 2028.

***EEOC Issues Harassment Guidance*.** On September 29th, the EEOC released draft enforcement guidance on Harassment in The Workplace. [https://www.eeoc.gov/harassment] This is the first revision of guidance on Harassment since 1999. There have been many developments in the law since then, and the new Guidance will incorporate those changes. The lengthy draft will be open for public comment for 60 days.

LITIGATION

Strangest Case of the Month

Retirement Ought to Involve Actually Leaving the Job. *State ex rel. Intl. Assoc. of Firefighters #1536 v. Sakacs, et al.* (S. Ct. OH, 2023) involved a Fire Chief who formally "retired" from his Chief position and began drawing retirement benefits, yet never left his desk and continued working full time as Chief; continuing to draw his full-time salary from the city, i.e., double-dipping. He never intended to quit. He and the city engaged in a fiction that once the Chief's retirement became effective, then he was "*instantly rehired*" to fill the position. The problem is that one cannot be hired or rehired into a position unless there is a vacancy. The city's own policies require that all vacancies be advertised for open applications and a competitive hiring process. The Firefighters Union filed a suit to enforce the city's policy, and the opportunity for its members and others to have a chance at the Chief position. The city's defense was not very effective. It claimed that there was no intent to create a vacancy; the "retirement" was "*only a paper*

retirement," not a real one, and was actually "*an administration change*" (whatever that meant) rather than a "*vacancy*." The problem, according to the court's analysis, was that the retirement pension payments being received by the Chief were real, not an administrative change; and retirement does require leaving employment, even if for a short time; creating a vacancy. The city officially listed the Chief as being re-hired, which can only be done if there is a vacancy. Thus, the city had an obligation to follow its required competitive process for filling a vacancy and the Chief's "rehire" is void.

Fair Labor Standards Act

"Guestimates" on Wages Does Not Constitute Accurate FLSA Recordkeeping = $1.3 Million Award. The Fair Labor Standards Act requires employers to keep and retain accurate records of wages paid and hours worked. In *Dept. of Labor v. Mosluoglu Inc., et al.* (3rd Cir. 2023) a restaurant was found to have underpaid its workers, misappropriated their tips and "*simply made up numbers*" about tips received. The court awarded $675,600 in backpay and overtime to the affected employes. Then the court doubled the amount to $1.3 million under the FLSA's provision for intentional, willful violations and held both the restaurant and its owner personally liable for payment. The defendants claimed they had not intentionally violated the law and had promptly corrected their faulty recordkeeping once the DOL notified them of their errors. However, the court found this to be unpersuasive, stating "*A guestimate untethered to any actual effort to keep track of tips does not constitute accurate recordkeeping*" and clearly shows a willful disregard of the law. Further, when the DOL began investigation of the wage issue the restaurant ownership asked employees to lie about wages and overtime and gave them instructions on what to say. The business could next be in trouble with the IRS. Wages also have tax payment issues. If "guestimates" do not work with the DOL, they certainly don't fly with the IRS, which can issue even greater penalties.

Small, Very Local Business May Escape FLSA Coverage. It is almost impossible for a business to be outside the coverage of the FLSA's wages and hours requirements. However, one small diner may have that jurisdictional defense to a claim by the restaurant's employees about non-payment of wages and overtime prior to the diner going out of business. In *Villagran, et al. v. La Herradura LLC, et al.* (W.D. LA, 2023), the court denied summary judgement to the employees. They have failed to establish "enterprise coverage" under the FLSA, which requires the business to make at least $500,000 in annual income and that the workers were "engaged in Interstate Commerce, handling, selling or otherwise working with goods or materials that had been moved or produced for interstate commerce." If there is no jurisdiction, then the employees have no federal remedy. There may or may not be state laws which provide wage claims coverage, but the federal court would dismiss the case. Again, this is a highly unusual situation. It is very difficult to avoid handling some sort of goods that came through interstate commerce. Only very small and highly local businesses or non-profit charitable organizations generally fit. Perhaps a farm-to-table restaurant might qualify; if the farmer was close by and the tables were locally made.

Discrimination

Sex

Vasser College Sued For Pay Discrimination Against Women. Vasser was established in 1861 to promote higher education and equity for women; "giving" women an education equal to that of the best men's colleges." Now it is subject to a class action lawsuit by female professors alleging that the college sexually discriminates by paying male faculty more and promoting men at higher rates. The plaintiffs point to a growing pay disparity. In 2014 there was a 7.6% gap in pay in favor of men. The gap has grown to 13.4% more pay for male faculty, on average, than for women. The plaintiffs also alleged that

as concerns were raised about this disparity Vasser then became less and less transparent about salaries and how they are set. The college has stated that it believes pay is fairly established, and not discriminatory, but is "working diligently" to see if it can resolve concerns. *Graham et al v. Vasser College* (S.D. NY, 2023)

Disability

Mandatory Overtime and Long Shifts Were Essential Functions of Detention Officer Position. A private company contracted to operate a federal prison facility. One of its Detention Officers requested shorter shifts for an indefinite period in order to manage his Sleep Apnea disability. The normal routine was for 16-hour shifts with additional overtime when needed. The officer submitted a doctor's certification stating he could work no longer than 12 hours for an indefinite period. The company refused this request. The officer sued for failure to reasonably accommodate under the ADA. The court determined that due to staffing levels, the 16-hour shifts and OT were essential functions, and the requested indefinite accommodation would seriously jeopardize the security of the prison facility. The fact that the company temporarily accommodated some officers with shorter schedules did not mean it had to provide an indefinite accommodation. Further, the court rejected the officer's argument that he had not asked for a "permanent" accommodation. The court found that the request for an "indefinite" period means long term, which can be permanent. The ADA does not require employers to grant indefinite duration accommodations of essential functions. *Cuellar v. GEO Group, Inc.* (5th Cir, 2023). This case does not mean that long shift requirements and OT can be categorized as essential functions in other jobs. This decision was based on the specific circumstances of this one situation. The ADA requires an "individual assessment" of each situation, the particular job and the particular disability.

Safety

Dept. of Labor Seeks to Ban Mine Owner from Coming on To His Own Property. The DOL has asked a federal court to ban a company owner from his mining property until he completes mandated safety training. The Mine Safety and Health Administration (MSHA) had cited the mine, and its owner, for safety violations. It issued an order that the owner should not operate equipment until he had completed required safety training and provided proof of that to MSHA. Instead, the owner chose not to attend any training, and continued to operate the mine's equipment on multiple occasions, until he injured an employee by his misuse of an excavating machine. Witnesses told MSHA that the owner had a "number of near misses" of seriously injuring employees before there was the injury in question. The MSHA has asked for a permanent injunction against the owner until he complies with safety training, and for other sanctions for violating the original order. *Secretary of Labor, et al. v. Duckels Construction, Inc.* (D. CO, 2023)

TRENDS

Pressures on Diversity Programs

Since the US Supreme Court's ruling in *Students for Fair Admissions v. President and Fellows of Harvard* (*Harvard*), there have been aggressive efforts to also eliminate Inclusion, Diversity, Equity, Access (IDEAS) programs from both public and private sector workplaces. The *Harvard* decision involved the use of race as a consideration factor in student admissions. Workplace IDEAS programs generally have nothing to do with that. However, some wish to equate any mention of "Diversity" as somehow being all about race and promoting "racial preferences" in the workplace and are mounting efforts and threatening legal action to eliminate Diversity, Inclusion, and Equity efforts, or even the use of the words "Diversity" or "Equity" or "Inclusion." In reality, IDEAS is much broader, and those pushing

the bans seem to have little idea of the true scope and seem to engage in a good deal of stereotyping, undefined labeling, and loose rhetoric in their legal filings and demand letters.

Five Attorneys General Send Threatening Letters. Five Republican Attorneys General from Montana, Kentucky, Iowa, Arkansas and Kansas, have sent letters to large law firms and corporations stating that any company programs using the labels "Diversity," "Equity," or "Inclusion" are *illegal* in light of the US Supreme Court *Harvard* decision, and demanding they be eliminated. The letters state "*if you do not do so, you will be held accountable sooner, rather than later - for treating individuals differently because of the color of their skin.*" This is a good example of the Attorneys General lack of understanding of IDEAS programs, and seems to be a myopic focus on one small element. One wonders what these Attorneys General have against disabled people. What do they have against Veterans? Why do they wish to eliminate inclusion of older workers? What do they find offensive about having equal pay and career opportunities for gender equality? Why do they wish to eliminate discussion of access for the disabled and accommodation of religious beliefs? All of these are the focus of IDEAS programs. In fact, they form the majority of IDEAS initiatives, while race is an "also included" element, but not by far the major issue. Some recipients of the letter and also some Attorneys General of other states have labeled the letters as hollow scare tactics, and pointed out that the *Harvard* student admission decision has no relationship whatsoever to corporate workplace IDEAS programs or to employment practices. Several courts have dismissed government attempts to stifle corporate IDEAS programs, finding these efforts are attempts to violate corporations' First Amendment expression and unwarranted interference with a company's right to decide how to best run its own business.

Judge Dismisses Suit Challenging Starbucks' Diversity Policy. The National Center for Public Policy Research (NCPPR), the same organization which mounted the Harvard Student Admissions case, purchased 56 shares of Starbucks stock and then filed a shareholder derivative suit against the corporation and executives to halt the company's Diversity, Equity, and Inclusion initiatives. The suit alleged that the company's wish to be more open and inclusive of people of racial and ethnic groups violated Title VII and exposed the stockholders to unnecessary risk to profitability. The federal judge dismissed the case without trial, finding the case "*has no business being before the court and resembles nothing more than a political platform."* In the decision, the judge also criticized the NCPPR for its repeated reference to Starbucks' WOKE culture and WOKE policies without providing any definition of what that term meant, except that it "was somehow negative." It appears that WOKE is undefined, without meaning, and is used broadly as a pejorative to include whatever the user happens to disagree with. The judge went on to state that the NCPPR's legal challenge was a "*blatant, vindictive attempt to put its own political interests ahead of all stockholders,*" and "*If plaintiff remains so concerned with Starbucks' DEI initiatives and programs, the American version of capitalism allows them to freely reallocate their capital elsewhere." National Center for Public Policy Research v. Schultz, et al.* (W.D. WA, 2023)

Florida Judicial System Eliminates "Fairness" and "Diversity". The Florida Supreme Court, which sets the certification and legal education requirements for judges and lawyers, has banned the use of the terms "fairness" and "diversity" from legal education courses. It will not allow credits for courses which cover fairness and diversity. This appears to be in accord with Florida Governor DeSantis' mandated "War on WOKE," which seeks to ban a number of topics, materials and the use of certain words in public education and government. Evidently, fairness and diversity seem to be WOKE concepts. The Florida Supreme Court states that courses which cover "nondiscrimination" will still qualify for credits and that term can still be used. The new rules generated several opposition petitions from legal associations in the state, claiming that "our judges have a state sanctioned monopoly on dispensing justice and are to do it fairly, equitably, ethically, and professionally, and are required to do it in a world growing increasingly diverse." The petitions claimed the Court's move now undermines public trust in the legal process. The Florida Supreme Court, however, rejected the petitions, with only one justice dissenting.

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