SEPTEMBER 2024

BY BOB GREGG AND THE BOARDMAN CLARK LABOR & EMPLOYMENT LAW GROUP

LEGISLATIVE AND ADMINISTRATIVE ACTIONS

FTC Non-Compete Rule Blocked. The Federal Trade Commission rule prohibiting non-competition agreements will not go into effect in September 2024 – for now. For more information, see Boardman Clark's HR Heads Up article, FTC Non-Compete Rule Blocked.

NLRB Halts Newest Version of Joint Employer Rule. In October 2023, the National Labor Relations Board (NLRB) issued a new rule greatly expanding the definition of Joint Employer, which makes related companies considered the same for labor issues and unfair labor practices. For instance, national franchisors could more easily be held as Joint Employers with a locally owned independent store of the chain and be liable for the local owner's actions. The rule was widely opposed and challenged. As of August 2024, the NLRB has decided to withdraw the rule and revert to its pre-2023 standard. There is still a Joint Employer rule, however, it requires much more interaction and control between two entities to be considered joint employers. **Be aware** that Joint Employment is not just an NLRB issue. The DOL Wage and Hour Division, EEOC, IRS, and other agencies also have joint employer standards and can hold two separate entities liable for the financial obligations, discrimination, or "sins" of the other. This is common not only between related corporations but also when a company and a placement agency are both held liable for the treatment of agency workers who are placed at the company.

LITIGATION

Safe Place

Heat-Related Injury. Employers must maintain a safe place of employment. Heat is becoming a greater workplace performance and safety issue as the climate changes,

and the last few years have been the hottest in recorded history. Human work performance begins to decrease at 80°F and deteriorates at an even greater rate with each degree above 90°F. These temperatures also create safety risks, including serious injury or death from dehydration, heat stroke, or other causes. *Lupia v. N.J. Transit Rail Operations, Inc.* (2nd Cir., 2024) involved a locomotive engineer who reported that the train's air conditioning was malfunctioning. The temperature in the locomotive was 114°F. His managers ordered him to operate the train anyway. On his run from Philadelphia to New York, the engineer collapsed from heat exhaustion, suffering a serious, permanent injury that ended his career. In addition to a Worker's Compensation claim, the engineer sued the company under the Federal Employers Liability Act (FELA) which covers every railroad company and allows employees to sue for additional damages due to job injuries for failure to maintain safe operations. The court found that the defective air conditioning and excessive heat met the unsafe environment and equipment operations criteria. It allowed the engineer to sue for both economic damages and **non**-economic damages, which could include awards for pain and suffering and exemplary/punitive damages for disregarding the 114°F heat and directing him to work in that temperature.

Fair Labor Standards Act

Inside Sales Reps Were Not Exempt for Overtime Requirements – Company Must Pay. A company misclassified its Customer Service Inside Sales Representatives as salaried-exempt Administrative employees. It paid a salary and did not keep records of hours worked. However, the Department of Labor (DOL) sued when it determined that employees' duties were mostly in sales work and did not meet the high standard required for the Administrative exemption. The court agreed and ruled against the company finding that it owed overtime wages and penalties for violating the recordkeeping requirements. *Su v. F.W. Webb Co.* (1st Cir., 2024) Inside sales positions are among the most frequently misclassified jobs. Some employers, like the above, have the mistaken belief that if they pay salaries, then the employees are "probably" salaried-exempt from overtime requirements. Others believe they only need to pay base wages and then give their employees bonuses or commissions for sales. Neither approach is accurate. Often, the added commissions or bonuses must later be added to the base wage, and the overtime pay recalculated and paid at a much higher level, sometimes years later, with interest. Some Inside Sales positions **can** qualify as exempt from overtime requirements. However, there are rules which have to be followed. It must be followed in certain retail sales work, where commissions are over 50% of the pay and the commissions must consistently result in a certain level of pay for all hours worked. This requires a carefully drafted pay plan and recordkeeping with attention to all the legal requirements.

FLSA Overtime Claims "Can Be Based on Workers' Reconstructed Memories" When Employers Fail to Keep Accurate Records. In too many cases, employees claim they are owed large sums in unpaid overtime. The employer denies they ever worked that many hours. However, the company failed to keep good records. So, since the employer violated the federal and state wage record requirements the court may accept the workers' word for how many hours they worked and when, then rule that backpay is due. In *Farina v. Metalcraft of Mayville, Inc.* (7th Cir, 2024), the court validated this concept that "*FLSA claims can be based on reconstructed memories when an employer's recordkeeping is inadequate*." However, in this case, the court did not rule in favor of the plaintiffs since their memory evidence was not specific enough, unclear, speculative, and insufficient. Though this company escaped without liability, it did have to spend large amounts of time and money to go through the trial process. Employers should keep thorough records – including records of the hours worked by exempt employees – since there may be a challenge to their exempt status (*see above F.W. Webb* case) and the court could order back overtime pay. Will that be based on a clear record of what hours the employees *actually* worked, **or** on the great number of hours they now *claim* to remember working?

Investor or Employer? Too Much Involvement Creates Personal Liability for Unpaid Wages. Investors are generally not liable for the employment-related liabilities of a company, **as long as** they keep their noses out of the employment operation. They invest and hope to make a profit from the business. However, that is not what all investors do, especially in small businesses when the investors are local, friends with, or related to the owner. Sometimes the investor comes by, observes things, and starts telling staff and supervisors what to do. The investor may get involved in pressing the company on who to hire or insert themselves in the hiring and wage setting. Instead of saving these concerns, ideas, or advice to give to the Board or owners privately later, the investor inserts themselves into parts of the operation. When this happens, they may later be held liable under the FMLA, FLSA, 42 U.S. 1981, or other laws that can impose **personal liability** on owners or managers. *Mejia v. Cathedral Lane, LLC* (D. D.C., 2024) is one such FLSA case in which the question was whether a person was just a passive investor in a restaurant, **or** an employer/owner and personally liable for the staff's unpaid wages when the restaurant failed and closed. The investor had no formal Board or Officer or Manager title and received no salary except return on investment; a passive investor. However, there was some degree of evidence that he was a regular presence in the business – not just a customer. There was evidence he was involved in recruiting and pressing for who got hired. He made scheduling recommendations and had input in setting operating hours. He attended several staff meetings and took an active part in expressing his opinions. In short, he had a role in approving employment policies. There was

enough evidence of entanglement with operations to have a jury decide whether the investor could be held liable for having to personally pay the back wages.

Constitution

Businesses Have First Amendment Rights

Florida Accepts Ruling That its Individual Freedom Act (IFA) Violates the Principles of Freedom. In the name of "Liberty" and "Freedom," Florida's Individual Freedom Act (IFA) made it illegal for businesses to conduct employee training on a range of anti-discrimination, anti-harassment, gender equality, and diversity concepts. The law was challenged by businesses, claiming it violated their Constitutional Freedom of Speech and excessively interfered with their right to run their business. The courts have agreed and issued decisions against the law, which the state has appealed. Now a federal court has issued a permanent injunction. The state has accepted that and will no longer appeal. The court ruled, *"The IFA exceeds the bounds of the First Amendment. Allowing the government to set the terms of debate (training content) is poison rather than an antidote," and "It turns the First Amendment on its head."* The court accepted the argument that the law **stifles** liberty and freedom to impose the state's views and works to destroy and punish freedom of speech, *Honeyfund.com Inc., et al. v. DeSantis, et al.* (N.D. FL, 2024)

Discrimination

Disability

Confluence of Conditions – Employee Failed Heart Test Because of Knee. Concentrating on the disability issue of the moment may lead to ignoring the fact that many of us have more than one medical condition. Sometimes these "collateral" other conditions may also have to be considered and even accommodated to effectively address the primary issue. *In Sanders v. Union Pacific Railroad Co.* (8th Cir., 2024), the employer seemed to forget this confluence of conditions obligation.
A railroad foreman had a heart attack. He had a successful operation but was off work for a time. To return to work the company required him to undergo a cardiac fitness for duty which included a treadmill test for aerobic capacity. The test required jogging on the treadmill to raise and measure his heart rate. However, the foreman informed the company and testing facility that he had osteoarthritis affecting his knee (which did not affect his job duties), and he could not endure the pounding and pressure of jogging. Instead, he requested to be tested on a stationary bicycle. The request was refused, since the company had always used the treadmill test, and would not recognize any other. So, the foreman could not pass the treadmill test required and was terminated for not being able to return to work. He filed an ADA

case for failure to accommodate. A jury awarded the foreman $1.23 million, which was upheld on appeal. Though the prime focus was the cardiac disability, once the arthritis/knee condition had an impact, the company had a duty to also consider accommodating it in the testing process, even though it was only "collateral" to the main issue. The bicycle test would also effectively measure the same aerobic factors and the court found the refusal to consider this alternative "was not based on any medical principle at all." The company ignored its duty to engage in the interactive process and consider accommodation of the collateral disability. **The lesson:** Don't get so focused on what seems to be the main concern of the moment that other relevant factors are ignored.

Religion

Long Skirt Not Acceptable in a Sports Bar. A Buffalo Wild Wings restaurant is being sued by the EEOC for religious discrimination. The restaurant refused to consider an applicant for a waitstaff position because she wore a long skirt due to religious beliefs and practices. The manager stated that the long skirt *"looks unusual"* and *"would not fit in"* at a sports bar. Title VII prohibits religious discrimination and requires reasonable accommodation of religious beliefs and practices. The long skirt would have no impact on the ability to serve customers. There was no valid job-related, business necessity for not allowing the skirt. A manager's personal bias that it "*looks unusual*" is not grounds to refuse to consider the dress accommodation. *EEOC v. BWW Resources, LLC* (N.D. GA, 2024)

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By Storm B. Larson | 8.21.24

Author

Bob Gregg
(608) 283-1751