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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

OSHA Issues Workplace Injury & Illness Data. The Occupational Safety and Health Administration has released a data compilation on work injuries and illnesses in 2023 in over 90,000 workplaces in the U.S. The data includes details on injury/illness, circumstances of the incidents, identity of the employers, locations, causes of harm, and more. The information is released to enable researchers to identify injury trends and hazardous conditions in order to improve workplace safety. It is also available to the general public.

Nevada Enacts Workplace Heat Standards. In the wake of the hottest years ever on record and escalating heat-related injuries and deaths, states are starting to take action to protect workers. Nevada saw a *130% increase* in reported heat-related workplace safety/injury incidents between 2022 and 2024. So, the state now has rules regarding "occupational exposure to any working conditions that create the reasonable likelihood that heat illness could occur." The rules focus on temperature, humidity, radiant heat, conductive heat, air movement/ventilation, protective clothing, and duration of work in hot working conditions. The Federal OSHA is unlikely to adopt and enforce heat-related standards, so states are taking the lead. This may result in an assortment of differing focuses and standards across the country for companies operating in different states. Some states and municipalities are moving to enact more rigorous standards. Others, like Florida, have acted to block the enactment of heat safety standards or

protection for employees. So, be prepared for new, but differing rules in different locations.

TECHNOLOGY AND PRIVACY

OSHA Inspectors Will Use Smart Glasses. OSHA announced that its inspections will be using VUZIX M400TM smart glasses in workplace visits. Smart glasses are equipped with cameras that can record video and audio, take photos, and stream live footage. When connected to the internet, they can provide the wearer with real-time access to augmented reality, which overlays digital information such as images, videos, or other data. Inspectors would have real-time access to regulations and remote consultations with other OSHA personnel that only they could see. The glasses wearer would be able to take video and audio recordings without anyone knowing they were being observed or recorded. This announcement raises privacy concerns, as well as concerns for the security and confidentiality of manufacturing processes and trade secrets, and who may be able to access the recordings once they become public agency records. Though many states have laws regarding privacy and consent or notice before recording, Federal agents are not subject to or limited by these state laws. **Be aware** that OSHA is not the only issue. These smart glasses are available to the public. They are unobtrusive so you may not know who is wearing them on your premises: employees, supervisors, visitors, delivery people, contractors. Privacy, security, and confidentiality issues are increasing with new technologies.

LITIGATION

International Business

U.S. Court Applies Chinese Employment Law to Non-Competition Agreement. International companies have become common. Many workers move from nation to nation, holding positions in successive companies. Ms. Zhang took a job as a Supply Specialist in the Beijing home offices of Beijing Abace Biology/Creative Dynamic (Abace), which has locations in Beijing and New York. She signed a Non-Competition Agreement, which specified that it would be enforced under Chinese law. A few years later, Ms. Zhang left Abace and returned to the U.S., where she promptly went to work and

became part-owner of a competing company. Abace filed suit in the U.S. courts to enforce the Non-Compete. The U.S. court ruled that it had jurisdiction since Abace has a U.S. operation, which it is interested in protecting from competition. However, the court decided it must enforce the Chinese law specified in the Agreement. Chinese law prohibits non-competes for most non-management jobs. Ms. Zhang's position did not include any management duties. So, under Chinese law the Agreement was unenforceable and the court granted summary judgment in favor of Ms. Zhang. *Beijing Abace Biology Co. LTD v. Zhang* (1st Cir., 2024) International business is complex. Like a chess game: One must think several years ahead when drafting policies and agreements, given that you don't know in what country the agreement may be challenged in court and how that nation's courts may enforce its terms.

Discrimination

Retaliation

Having a Clearly Written Policy is Not Enough; One Has to Show it Was Consistently Enforced. Organizations sometimes have antiquated policies on the books that have long since ceased to be enforced. Employees and supervisors disregard them. However, they sometimes come back to life, selectively. *Simpson v. Adam McCoys Hauling & Grading Inc.* (W.D. NC 2024) involved a female truck driver who filed a complaint about a male worker walking around undressed on a hot day in the company's warehouse when she had to spend several hours there. That worker was disciplined. However, afterward, the female driver then appeared to be targeted for scrutiny for violating work policies and was fired for violating the policies. In the ensuing Title VII retaliation suit, the evidence showed that suddenly, after her sexual harassment complaint, the company dusted off several old policies on driving, loading, and log keeping. No one had been following these dormant policies. Most drivers had never been informed of them. There was no notice these dormant policies were now in effect. The driver was then written up for violation after violation. The evidence showed she abided by every policy once told about it. Yet the company would write her up for breaching another unannounced policy. She was fired for cumulative violations. There was also no evidence that other drivers were being monitored or written up under these same policies. This painted a picture of

pretext and selective enforcement to retaliate for engaging in a protected activity. Takeaways from this case include: 1. Suddenly reactivating dormant policies after an employee engages in protected activity will appear suspicious and pretextual in any retaliation case. 2. Review policies and clear out those which are antiquated, or no longer enforced. They can be misused. Further, they tend to have collateral "overflow" effects, creating a perception that other policies can also be disregarded.

Sex

Promotion Process Fails the Objectivity-Validity Test. The Equal Employment laws require that hiring and promotion processes are based upon "validity," which includes a fair process, and upon objective criteria and managers using reasonably clear standards for judging applicants. In *Parlato v. Town of East Haven* (D. Conn, 2024), the court found that a fire department's promotion process with highly subjective criteria, no standards, and a process that shifted at the whim of the Fire Chief did not meet the test. A 20-year veteran female firefighter and Battalion Chief applied for the Assistant Chief position. She was the only female applicant. A male candidate with only 11 months of department service was selected. She filed a sex discrimination case, in which the court found the entire selection process could be seen as a pretext for discrimination, with "*an unacceptably large degree of subjectivity and irregularity*." The Fire Chief, after the female firefighter applied, changed the process. He designed the interview questions and did not provide correct answers or criteria by which to judge the applicants' responses. Each of the multiple interviewers on the panel was left to guess at whether to give a 1-to-10 rating based on their personal, subjective feelings or biases. Then the Fire Chief changed the process. Instead of two rounds, with all applicants having a second interview with the Board of the Fire Commission, he directed that only three male candidates should proceed. The process seemed to violate almost every element of validity under Title VII. [For a more detailed understanding of the Validity requirements under Title VII and the ADA, request the articles "Validity" and "Pre-employment Inquiries and Testing" by Boardman Clark.]

Lose – Win – Lose – Win-Lose and Still Not Over. This case illustrates the often long and convoluted rounds of employment litigation which can involve appeals, reverses, more appeals, etc. In 2015, Ms. Lindsley, a hotel Assistant Food & Service Director, filed a sex discrimination case under the

Equal Pay Act and Title VII, alleging sex discrimination in her pay. The District Court granted Summary Judgement to the company, dismissing the case. She appealed, and the Court of Appeals reversed the decision, sending the case back for trial. A jury awarded over $25 million to Ms. Lindsley. Then, the District Court ruled the damages were too great and overturned the verdict, giving new jury instructions and ordering the jury to reconsider. The jury again found in favor of Ms. Lindsley and again awarded $25 million. The judge accepted the jury's liability decision but reduced the damage award. Both Ms. Lindsley and the company appealed. This time, the Court of Appeals ruled that there were flaws in the jury's findings and vacated the entire judgment — sending the case back for an entirely new trial. So, another year (a decade, so far) and then maybe more appeals. *Lindsley v. Omni Hotels* (5th Cir., 2024) This description is not a comment about the facts or law of this case. Rather it is about the process. Regardless of who eventually wins and loses, this case and many others go on for years, costing both sides huge amounts of money, time, and administrative and personal resources. It ties everyone to the past for a long time, impairing moving on. Parties should be aware of this potential before entering into litigation, or before taking entrenched positions. This is also why so many claims result in settlement, even when each party may believe the other to be invalid. In the *Lindsley* case, each side now has so much invested in the process that it is likely beyond the point in which any settlement might be possible.

Employment Contracts

Husband Not Bound by Wife's Arbitration Agreement. A Starbucks employee signed the company's standard Agreement to Arbitrate any employment disputes, including allegations of ERISA violations. On termination of the employment, Starbucks sent allegedly deficient COBRA Notices, harming the continued insurance coverage for both the employee and her husband. The husband filed suit in Federal Court. Starbucks moved to dismiss and force the case into arbitration pursuant to the Arbitration Agreement. However, the District Court and Court of Appeals ruled that the Agreement to Arbitrate was between Starbucks and its employee. The husband was not a party to the Agreement. He had not agreed to anything. Starbucks could not limit or curtail the rights of non-employee spouses who might be

affected by the company's actions. They have the right to pursue any available legal remedies in court. *Lubin v. Starbucks Corp.* (11th Cir., 2024)

Family and Medical Leave Act *In Loco Parentis*. The "*In Loco Parentis*" (standing in the place of a parent) FMLA provision is generally used to allow leave for care of foster children, stepchildren, grandchildren, or other young non-immediate family members living with or under the guardianship of an employee. It does not generally provide leave to care for adult siblings. In *Chapman v. Brentlinger Ent*. (6th Cir., 2024) the employee was told the company policy did not allow FMLA to care for her adult sister. She was then fired when she took leave. In the ensuing case, the court found that the company failed to consider that an adult sibling could also fall within the In Loco Parentis leave category. One can become the primary caregiver of an adult residing in their home and/or can have guardianship, power of attorney, or other indicia creating that status. Thus, the company's denial of leave and the discharge can constitute a violation of the FMLA. The FMLA is a complex law. It often requires more than a surface assessment of the situation and awareness of the provisions that provide leave outside the general child, spouse, or parent framework.

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