EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTION

Be Careful – More Close Scrutiny Of Independent Contractors – Half The States Have Signed On. Alaska became the 25th state to sign an operator agreement, and receive funds, from the Dept. of Labor to "crack down" on misuse of Independent Contractors. This means that there will be closer examination of any 1099 a company gives to anyone. If the Independent Contractor does not meet the standards, then not only will the state and DOL re-characterize the people as "employees," entitled to back pay and benefits, the issue will be reported to other agencies (i.e., IRS for back taxes and penalties) and other states so that they too can examine multi-state "employers" and also cash in. Each agency and each state has differing standards for Independent Contractor status. So, just because one is ok under one rule or in one state, does not make it ok anywhere else. So, be very careful and engage in extra assessment of whether your Independent Contractors actually pass muster. Also, be aware that these laws often impose personal liability on the managers, CEOs, company presidents, and board members who authorize use of Independent Contractors that do not meet the standards. This is one of the key issues in current company and personal liability. Do not treat it with disrespect, a "gloss" or "wishful thinking." [For more information request the articles Independent Contractors and Are You in the Crosshairs-Personal Liability by Boardman & Clark LLP.]

Illinois Does Not Require Payment For Pot. The Illinois Use of Medical Cannabis Pilot Program Act has been amended to provide that nothing in the law is intended to require an employer to reimburse a person for costs associated with the medical use of cannabis.

Oregon Limits Noncompete Agreements. Noncompetition agreements entered into after January 1, 2016, may not exceed 18 months from the date of an employee's termination. An "excessive" term will be voidable and will not be enforced by an Oregon court. Why is

this relevant? Each state is setting very different standards; anywhere from three years to one year (to almost unenforceable in others). Any employer wishing to curtail an exiting employee's taking of current clients cannot rely on the law of the state the employee worked in. The moment the person moves to another state, then that law applies. The employee can then solicit clients by phone, email, etc. – with impunity, if the no compete is "excessive" for that new state. So, be careful in overreaching with a no compete; it could be voided. Be aware of what the other state's laws are in the region in which you wish to prevent competition.

LITIGATION

Colorado Court Upholds Discharge For Use Of Legal Medical Marijuana. Though Colorado has legalized marijuana use, the state Supreme Court upheld a company's discharge of an employee who tested positive for THC after medical use. The Court ruled that marijuana is still an illegal drug under Federal law, and an employer may still use a positive test for discharge. "Employees can choose between using medical marijuana and work," if their company prohibits use. This decision also provides more clarity for multi-state companies operating in Colorado. *Coats v. Dish Network* (Col. S. Ct., 2015).

Theme of the Month – Joint Employer Status

Two cases illustrate the expanding liability issue of joint employer status. They also show the differing standards under the different laws.

National Labor Relation Act

Leased employees are ruled to be employees of the lessee for organizing and collective bargaining purposes. The NLRB has expanded the definition of employee/employer to hold lessees of placed workers responsible under the NLRA. Though formally "employed" and paid by the placement company (Leadpoint), the workers were under the standards of the recycling center or under the "overall authority" of the center where they worked. Thus, the recycling center had to recognize the workers' rights to unionize and bargain the same as and be covered by the same contract as its own regular employees. *In re Browning-Ferris* (August 27, 2015). The NLRB adopted a new expanded standard for holding another party liable as a co-employer; the "right to control" any employment terms, *whether or not* that other party actually exercised the right.

This decision is being touted as the gateway for holding national franchise companies, such as McDonalds, responsible for the labor issues, wages, etc. for employees in all of the local, independently-owned franchised stores. Thus, a union could mount a national campaign to organize the whole operation rather than dealing with each separate locally-owned independent corporation. Also, the national company could be held liable for any unfair labor act at any local, independent store. This may be more of a leap than the

Browning-Ferris case supports. Local franchises are not subject to the national company's placement of anyone into their store. They do their own hiring. The national company provides a product, quality standards and advertising, to the locally-owned stores, it does not set wages, employment policies, or terms of employment. So there may not be sufficient employment "direction and control." Further, such a leap would be in conflict with standard corporation law on independent entities, and with state franchise laws which give the locally-owned businesses rights against the national company, and the often exercised right of the local franchisee to sue the national company. It may be difficult to show a "unity," when the national and local so often sue each other as separate corporate entities.

However, expect the NLRB and DOL to "push" this new standard and strictly scrutinize all franchise agreements to see if they can establish a joint employer liability.

Title VII Discrimination

The Title VII test for discrimination cases still requires actual direction and control rather than just a "paper authority."

Joint Employer Test For Harassment. In *Butler v. Drive Auto Industries* (4th Cir., 2015), the court ruled that an employee of a staffing agency can pursue a Title VII sexual harassment suit against the company at which she was placed. She can collect damages against that company, as a Joint Employer. The court cited a test for determining whether the placement site is also an "employer" for liability purposes. The three most significant factors are: 1. Which entity hires/fires/pays the worker; 2. Which entity supervises the person's work; 3. Where and how does the work take place. The plaintiff worked side by side with the Drive Auto regular employees, and was supervised by the same person as the regular employees. Two-thirds of the factors showed the company using the placed employees controlled the environment and could be held liable for any harassment occurring in that environment. (Perhaps even the third factor was met, if Drive Auto managers recommended discharge of leased worker.) All organizations which use "temps," or other "placed" or "leased" staff should pay attention to this test. In fact, it is often short-term placed workers who are more vulnerable to harassment than "regular" employees – who "know the ropes" about their rights.

Genetic Information Nondiscrimination Act

$2.22 Million Verdict For Mouth Swab. GINA prohibits use of genetic information in employment decisions. It is usually focused on use of family health background to deny people medical insurance, discriminatory hiring (which may be related to higher medical insurance, or perceived risk of injury based on family history or genetics). In *Lowe v. Atlas Logistic Group* (N.D. GA, 2015), the company actually took genetic samples – mouth swabs – in a disciplinary investigation. The company had physical – bodily fluid – evidence of serious wrongdoing. It suspected two employees. It ordered them, under pressure, against their will, to undergo a mouth swab, to see if there was a match. It gave them no information about their GINA rights to refuse. Neither of the employees' DNA

matched the evidence. They were cleared of wrongdoing, but they then sued. Even though they had no back pay or other economic damages, the court awarded $2.22 million for "malicious or reckless interference" with GINA rights. Most of the award was punitive damages.

Discrimination

Disability

Reward For Valor? A California jury awarded $8.8 million to a former drugstore manager for disability, retaliation and racial discrimination. *Leggins v. Rite Aid Corp.* (Cal. Superior Ct., 2015). In 2007 the 27-year career employee was injured while preventing a robbery at his store. He had to have multiple surgeries with a resulting restriction on heavy lifting. Instead of accommodating, his higher managers assigned more lifting, and accused him of being a "slacker" when he took longer to do these painful tasks. When he objected, one of these higher managers told him, "All Black people do is complain." His slower work of painful lifting tasks was met with comments of "you are on Black time." His complaints about disability and racial discrimination were met with more requests to do painful work and write-ups for poor performance. The jury awarded $3,768,129 in compensatory damages and $5.5 million in punitive damages. Unlike Title VII and the ADA, state law does not have a "cap" on damages.

National Origin/Sex

African-American Funeral Manager Harassed By Somali Male Subordinates. In *Stewart v. Rise, Inc.* (8th Cir., 2015), the court found sufficient evidence of sexual and national origin harassment. The African-American funeral manager complained that her male employees of Somali origin were disrespectful, would not follow her directions, and made overt comments that African-American women "have no value" and the problem with American women is "they are not beaten enough." She also complained that the subordinates physically threatened and intimated female workers. The company allegedly did not take action to address the issues. Other African-American women also complained, without apparent action. The company tried to defend by claiming the manager only made verbal complaints, instead of a formal written complaint. The court rejected this. The legal standard for liability is did the company "know or should have known." A verbal complaint is a "known" complaint, about a now "known" serious issue.

Race

Favoritism In Police Hiring. The court approved a class action settlement for racial discrimination in police hiring. *Foster, et al. v. Pittsburgh* (WD PA, 2015). The City's process started with written and physical testing. Then the final decision was made by a Roundtable of senior police officials who voted on which candidates were hired. The evidence showed that the Roundtable members looked up the applicants' races and

whether the applicants were relatives or friends of current (overwhelmingly White) police officers. They then gave preference to those relatives or friends. Though there was a good racial balance of those passing the tests and moving on to the Roundtable stage – out of 400 hires only 17 were African-American. The settlement involved approximately $1 million to former applicants, $600,000 legal fees, and changes to and monitoring of the hiring process. In this period of national attention to the friction between police and the African-American community, this case is one illustration of why there are tensions. When a city appears to adopt a practice which is designed to eliminate non-White police applicants, then the force cannot possibly reflect the whole citizenship it is supposed to serve and protect. It seems designed to create friction, distrust and resentments.

Family & Medical Leave Act

Importance Of Clear Information To Employee – Employer Can Not Be Passive. An employee requested intermittent FMLA leave and the accommodation of working from home to care for her disabled child. These are separate issues under two separate laws. FMLA gives one time off from work to care for a child (not for working). The ADA covers accommodation while continuing paid work time, for disabled employees. It does not require accommodation for other disabled family members. The employee's request and the FMLA certification form were unclear. The employer denied the work from home accommodation and told the employee to be present for work. The employee then stayed off work for a few days to care for and arrange alternate care for her child, thinking she was using FMLA. She was fired for not being at work. In the ensuing FMLA case the court found the company should have clearly, in writing, informed the employee of any deficiency (or unclarity) in her FMLA certification form, specifically describe the clarification needed, clearly inform her of the consequences for not providing clarity and provided her a time frame for presenting the clarification (7 days under FMLA rules). It is not the employee's role to figure out how to navigate the complexities of the FMLA – and other laws. Companies have professional HR staff who are supposed to do that and provide the information to employees. *Wink v. Miller Compression Co.* (E.D. Wisc., 2015).

In a similar case, *Hansier v. Lehigh Valley Hospital Network* (3rd Cir., 2015), the court found the employer failed to give the required clear written notice that an employee's certification submission was vague or incomplete, to specify what was of concern, and give the seven days to clarify.