EMPLOYMENT LAW UPDATE

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LITIGATION

U.S. Supreme Court

Arbitration Provisions Upheld. In *Epic Systems v. Lewis* the Court upheld the enforceability of mandatory arbitration provisions in which employees, as a condition of getting a job, sign away the right to file employment cases in court and to join in class actions to challenge alleged wrongful employment practices. The Court ruled that the Federal Arbitration Act (FAA) allows such agreements, and that the National Labor Relations Act and other employment laws cannot supersede the allowed scope of the FAA. A more detailed description of the scope and the effects of this decision for employers and employees is in the Boardman & Clark HR Heads-Up Article Supreme Court Approves Arbitration Agreements That Preclude Participation In Class Action Suits.

Occupational Health & Safety Act (OSHA)

Mr. Good Vape. An e-cigarette manufacturer has been ordered to pay $110,000 to a former manager it fired after he raised concerns that the production facility air contained excessive levels of chemicals from the flavoring liquids used in the e-cigarettes and vapor inhalers. He was fired two days after reporting the concern to the Dept. of Environmental Protection. The retaliation liability was under the Toxic Substances Control Act and the Solid Waste Disposal Act and California law. In Re *Mr. Good Vape LLC* (OSHA, 2018). (This case was only about worker exposure to chemical fumes while manufacturing a product. It made no findings or opinion as to whether the flavoring agents had any negative effect upon those teens and adults who use and inhale the products, or the relative health effects on use of these products compared to smoking cigarettes.)

Discrimination

Disability

Rejected Applicant Cashes In At Happy Jacks Casino. A casino will pay $45,000 after withdrawing a job offer to an applicant who tested positive for a prescribed medication in the pre-employment drug test. The EEOC found a violation of the ADA in this and in the company's policy of requiring its employees to report to management all prescription medications they were taking, regardless of any effect on work, safety, etc. A blanket requirement to report all prescriptions violates the ADA's provision that an employer's inquiry into medical information must be "job-related and consistent with business necessity." The requirement to report prescriptions will also often identify the specific medical condition or disability the employee has. Such a "curiosity inquiry" is not consistent with business necessity and is unlawful. *EEOC v. Happy Jacks Casino/M.G. Oil Co.* (EEOC settlement, 2018).

"Very Tolerant Zero Tolerance Policy" – Rush To Discharge. In *Bland v. Carlstar Group LLC* (W.D. Tenn. 2018) a court agreed that a 55 year old technician with Peripheral Artery Disease had a valid case of disability and age discrimination. Supervisors had previously discouraged him from returning from disability leave, discouraged his continuation in his job, and pressured him to move to a lesser job. He did not do so. Then he was discharged just two hours after he failed to lock out a piece of equipment during an adjustment procedure. The company claimed it had a Zero Tolerance Policy regarding lock out – tag out. The court found this reason seemed to be pretext. The problems with the company's claim were: 1. the supervisor working beside the employee, and in charge of the procedure, received no discipline nor critique and was not even investigated for the incident; 2. the company could not produce any actual written Zero Tolerance Policy; and 3. several other younger, non-disabled employees had failed to do lock outs, but had received nothing more than a reprimand under what the court termed a "very tolerant Zero Tolerance Policy."

Leaving Body Out Overnight Not Sufficient Grounds To Fire Funeral Home Employee. A funeral home employee was fired two days after requesting time off for treatment of Meniere's Disease. The reason for discharge was that a deceased body had been left out in a visitation room overnight instead of refrigerated, as required by the home's policy and state rules. The court found the termination suspicious and a possible pretext for disability discrimination. There were two employees involved in the incident. The other employee was actually more in charge and responsible for following protocols. Yet that employee received no discipline at all for the incident. *Everson v. SCI Tennessee Funeral Services* (M.D. Tenn. 2018).

Race

Fear Of Voodoo. The Race and National Origin cases of three Nigerian-born nurses were found to be valid under Title VII and 42 U.S. Code §1983. *Ninadozie et al. v. Genesis Healthcare Corp.* (4th Cir., 2018). All three nurses had good work records until a new supervisor took charge. The evidence showed the new supervisor expressed a fear of Africans and "their voodoo." The new supervisor kept a "voodoo catcher" in her office and performed protective rituals outside the office door before entering. She told other employees that she believed the African nurses had made her sick with voodoo, and there were "too many Africans here," and she wanted help getting them all out of the building. Non-African employees had reported the new supervisor's hostility and unfair treatment of the African nurses to corporate management. However, the new supervisor was able to continue, and terminated the three African nurses.

Sex & Retaliation

Fire Them All! – Is Not The Best Approach. A company apparently reacted to a sexual harassment complaint by one employee by deciding to clean house. The employee complained that the General Manager made ongoing sexual and sexist comments. When she complained to HR, the GM then fired her and fired her son and fired her fiancé, both of whom also worked for the company. The EEOC pursued a Title VII retaliation case on behalf of all three. The company has agreed to pay $242,799, plus implement new policies, give training and enter a three-year monitoring program where it will pay for an expensive compliance professional to monitor its nationwide employment practices and environment. *EEOC v. Candid Litho Printing* (D. Nev., 2018). Be aware that illegal retaliation can affect not only those who actually complain, but taking adverse action against other people, close to the complainant, can also be retaliation. Targeting other family or loved ones can be even more destructive, more of a harmful "get-back," and more "chilling" on people's exercise of protected rights, than simply firing the person who complained. Those other people then have the right to sue for the "collateral damage" they suffered; as established by *Thompson v. American Stainless* (U.S. S. Ct., 2011).

Fair Labor Standards Act – Wages & Hours

Personal Liability

Overtime & Records. A company's two owners will pay $144,177 in back pay and damages to 20 employees due to failing to keep proper records of hours worked, and paying straight time instead of overtime for work in excess of 40 hours per week. The Fair Labor Standards Act (and several other employment laws) can impose personal liability. The damages can be taken from the owners' or managers' personal bank accounts or personal assets. *DOL v. Onyx Marble & Granite LLC* (DOL settlement,

2018). [For more information see the article Are You in the Crosshairs? (Your Personal Liability in Employment Cases) by Boardman & Clark.]

Independent Contractors

Employer Had No Good Faith Justification For Treating People As Independent Contractors – Jury Awards Millions To A "Small" Class Of Workers. Using Independent Contractors saves a company a lot of expense by not having to pay employment taxes, benefits or comply with employment rules – except for when it does not! This backlash of very expensive liability is becoming much more frequent. Companies engage in shortcuts and *wishful thinking* and *lax interpretation* of the standards in order to save a few bucks by categorizing people as Independent Contractors. Then it all falls apart under examination, when a former IC, or small group of ICs complains. Then the company, and its individual owners or executives, must pay a lot more than was ever saved, in corporate and personal liability. In *Bowerman v. Field Asset Services, Inc.* (N.D. Cal., 2018) the company contracted property preparation for work on homes it planned to resell. It failed to follow the required standards, and the "ICs" were ruled to be employees entitled to overtime, benefits, expenses, employment taxes, legal fees, and extra damages due to an absence of any good faith basis for use of the IC method. The workers were not actually previously independently in businesses of their own, the company dictated and closely supervised the work, the workers were disciplined for violating company rules, required to attend company training, and the ICs were placed on "probation" for not taking on enough assignments. All of this violated the standards for an independent contractor. The evidence was that the company ignored or did not even bother to seriously study the IC standards before adopting the "vendor" (IC) practice in order to save money. The "small class" consisted of only 11 people. The jury awarded over $2 million, plus attorneys' fees, taxes and penalties for violation of several state and federal laws. Imagine the damages if there had been a larger number of ICs. This case should be a reminder to those who use Independent Contractors that a serious effort must be made to comply with the IC standards. [For more information on the several laws and their IC standards request the article Independent Contractors by Boardman & Clark.]

Independent Contractors May Sue For Retaliation. Independent Contractors are not employees, and cannot bring employment law cases. However, the anti-retaliation provision of some laws cover both employees and Independent Contractors. In *Haqenah v. Berkshire County ARC, Inc.* (D. Mass., 2018) a home care provider's contract was ended after she advocated for changes and improvements in the ARCs rehabilitation and training programs for the disabled adults under her care. She also assisted the disabled adults to file complaints about the programs. When her contract was terminated she filed a Federal Rehabilitation Act claim for retaliation. The court found that the Rehabilitation Act has no language restricting an Independent Contractor from filing a retaliation case.

Labor Relations

Dress Code Is Too Broad. The NLRB ruled that a health facility's appearance policy prohibiting non-company-approved badges or insignias on uniforms was too broad. The policy did not delineate between patient areas and employee break areas, effectively prohibited the wearing of pro-union insignias or badges in employee break rooms or other non-patient/non-operating areas. This unduly restricted or chilled employees' rights to concerted activity and union promotion under the NLRA. A less restrictive policy was required. *Long Beach Memorial Medical Center* (NLRB, 2018). [For more information on the sometimes complex and changing area of employment dress codes see the article Appearance Laws and Cases or the webinar Spandex Is a Privilege Not a Right – Dress Codes and Work Appearance by Boardman & Clark.]

[HR Heads-Up Article on Supreme Court
Arbitration Case is on Following Pages]

BOARDMAN & CLARK LAW FIRM
HR HEADS-UP

SUPREME COURT APPROVES ARBITRATION AGREEMENTS THAT PRECLUDE PARTICIPATION IN CLASS ACTION SUITS

The United States Supreme Court has just resolved an important dispute among lower federal courts involving mandatory arbitration provisions in employment contracts. In a case involving Epic Systems Corp., the Court held that contract provisions are enforceable that require individual or one-on-one arbitration, while precluding employee participation in class action suits. Lower federal courts had reached inconsistent decisions on this issue, including the Seventh Circuit Court of Appeals, which previously held such arbitration provisions to be unenforceable. The Seventh Circuit is significant because appeals from Wisconsin federal trial courts are decided there.

The Supreme Court recognized as a starting point in *Epic Systems Corp. v. Lewis*, decided May 21, 2018, that federal law and policy strongly favor arbitration as an alternative dispute resolution procedure. The Federal Arbitration Act, in particular, provides that arbitration provisions in contracts should be enforced, according to their terms, just as any other contract provision would be enforced. Agreements to arbitrate, according to Section Two of the Act, are "valid, irrevocable, and enforceable, save upon such terms as exist at law or in equity for the revocation of any contract." Under this standard, the only recognized exceptions to enforcement have involved arbitration provisions procured by impermissible means, such as fraud, duress, unconscionability, etc.

The Supreme Court then held that enforceable arbitration provisions may exclude participation in class actions, whether in court or as a collective arbitration. The Court reasoned that the procedures necessary for a class action are inherently inconsistent with the fundamental attributes of arbitration. The Court identified some of the defining attributes of "bilateral" arbitration as including stream-lined procedures, efficiency, procedures tailored to specific disputes, confidentiality, etc.

The Supreme Court also expressly rejected the argument that prohibiting class action participation violated the right created by the National Labor Relations Act to engage in collective and/or concerted activity. The Supreme Court concluded that the right to engage in collective activity under the National Labor Relations Act is limited to organizing or unionizing activity rather than litigation of employee disputes.

The takeaway from the Supreme Court's *Epic Systems* decision is that arbitration clauses in employment contracts will be rigorously enforced, even if they include prohibitions on participation in class action litigation. The Court's decision is clear and emphatic, with no apparent ambiguity or nuance.

The Supreme Court's decision suggests significant reasons for employers to include arbitration provisions in their employment agreements. Most compelling is cost advantages. Defending a class action in an employment dispute, such as over wages or overtime, can be extremely

expensive, even if the employer is ultimately successful. The cost of defending such actions is inherently substantial and the liability risk, if unsuccessful, can be devastating. The amount that may be owed to a large class of employees can obviously be considerable, and most wage claims are brought under statutes that include fee-shifting provisions, meaning that the opposing parties' attorneys' fees must also be paid. The cost advantages of an arbitration provision that prohibits class action participation by employees, therefore, may be significant.

Employers should be aware, however, that arbitration is not cost-free. The parties to arbitration will be obligated to pay the arbitrators for their time, usually on an hourly basis. Costs may also include the expense of professional court reporters to transcribe evidentiary proceedings. The obligation to pay arbitration costs exists independent of the outcome of the arbitration, and usually is borne disproportionately by the employer. As a practical matter, moreover, most arbitrators require an up-front deposit for their estimated costs. By contrast, the cost of a judge's time in a court proceeding is not imposed directly on the parties.

Drafting effective arbitration provisions suitable to an employer's particular circumstances should be done with careful consideration. While courts now may scrupulously enforce arbitration clauses, their utility as actual dispute resolution procedures depends on a variety of factors. Among the items that should be included are the following: (1) procedural rules to be followed, such as arbitration rules promulgated by the American Arbitration Association; (2) procedure for selecting arbitrators; (3) time limits for completing arbitration; (4) limits on discovery and other litigation practice; (5) specifications of arbitrator qualifications specific to the employer's circumstances; (6) choice of law and venue provision; (7) strict confidentiality requirements; and (8) limitation on appeal rights.

In the end, the advantages to employers of avoiding entanglement in class actions with employees cannot be overstated. Almost all of the statutory bases that underlie employee class actions involve potential attorney fee-shifting, multiple damages or exemplary damages, with potentially large numbers of individual employees bringing aggregate claims. The Supreme Court's *Epic Systems* decision opens the door for employers to utilize arbitration provisions that will effectively protect against class action involvement. Employers that are not presently incorporating such provisions into their employment agreements should consider such provisions, including the details of how arbitration will be effectively and efficiently conducted, but also limiting class action participation.

Employers who do not otherwise utilize written employment agreements may, nonetheless, request new employees to sign a stand-alone agreement to arbitrate disputes relating to the employment. The enforceability of agreements to arbitrate under the Federal Arbitration Act does not require incorporation into a more comprehensive written agreement. Employers may require new hires to sign a separate and discrete agreement to arbitrate employment disputes at the commencement of employment. Employers may also require existing employees to sign an agreement to arbitrate as a condition of continued employment, but the employer should provide some additional consideration for such a mid-term requirement.