EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Comp Time Bill Moves To Senate. The House of Representatives passed the Working Families Flexibility Act on May 2, 2017. It would enable private sector employers to allow workers to bank overtime and use it later, for extra time off – at time and a half – similar to what is now allowed in public sector employment. The law would give the employer the ability to have this "comp-time" system, or not. The comp-time bank could not exceed 160 hours per year, and must be paid out if not used by the end of the year. President Trump has stated that he will sign the bill, if it is also passed by the Senate.

Parental Bereavement Act Introduced. A bi-partisan bill has been introduced in the House to add leave following the death of a child to the 12 weeks of FMLA entitlement. A bill has also been introduced in the Senate.

LITIGATION

Family and Medical Leave Act

Employer Cannot Be Passive – Must Actively Ask For Clarifying Information. This case is yet another reminder that the employer has a duty greater than just putting out an FMLA policy; there is more of an "interactive process" required. In *Coutard v. Municipal Credit Union* (2nd Cir., 2017), an employee requested FMLA to care for his grandfather. The employer simply rejected the request, stating that care of grandparents is not covered by FMLA. The employee, who had been raised by his grandfather, took leave anyway, and was fired for unauthorized absence. The employee later found out that FMLA can also apply for *in loco parentis* relationships (stepparents, foster parents and relatives who raised you like a parent). He then sued the credit union for improper denial of FMLA. The employer defended by claiming that the employee never mentioned *in loco parentis* and these words were in its policy; it was not obligated to inform

employees of any details once it gave out the policy and the federal forms. The court disagreed. The employer should have asked about the nature of the grandparent relationship before simply rejecting the leave. Once the employee applies "it is up to the employer to request additional information." Extended families are now common, and grandparents or others often raise children in the place of parents. Further, most employees do not speak Latin, and have no clue what obscure legalistic Latin term such as *in loco parentis* may mean in a policy. The employer is the more sophisticated party, and is expected to provide help and guidance, rather than be passive and expect the less aware worker to figure it all out. The FMLA regulations state "the employee need not expressly assert rights under the FMLA, nor even mention the FMLA . . . the employer will be expected to obtain any additional required information . . ." by interacting with and asking the employee (29 CFR §825.303).

Discrimination

Age

License To Sell Pot Does Not Mean You Can Sell It At Work. A restaurant employee was also a Licensed Medical Marijuana Caregiver, authorized to sell the drug to patients under Michigan law. The restaurant had a policy prohibiting use, possession or sale of controlled substances on its premises. In an investigation of five other employees for possession or use at work, it came to light that the licensed employee was supplying marijuana to at least one of the employees. All five employees, plus the seller, were discharged. The seller sued, claiming age discrimination, and that she had a valid legal license to sell, one of the other employees was a patient, and the discharge violated state public policy. The court ruled that there was no age discrimination. There were several people, of a range of ages, fired. Further, a license to do legal activity in one setting, medical treatment, does not override company policy in a totally different setting such as the workplace, (i.e., a legally licensed bartender cannot dispense drinks to co-workers while working at a hardware store or a construction company). *Henry v. Outback Steakhouse* (E.D. Mich., 2017).

Disability - Conflicting Courts Continue Confusion Concerning Temporary "Disabilities."

Disability was originally defined as being an ongoing condition, though not necessarily permanent. The original ADA also used a six month period to define temporary conditions as not covered by the ADA. Several years ago the ADA Amendments stated that temporary, "transitory and minor," conditions were not covered disabilities. However, this language created a whole new area of confusion and litigation, since the new language could be read to suggest that a short-term, less than six month impairment could be a "disability" if it was transitory but had a **major** impact on the employee's life activities. Can a two-week major incapacity qualify? Can a three and a half month major incapacity – after all FMLA is exhausted, still create continuing "disability" rights under

the ADA? What is a "major" incapacity? The following two cases illustrate the continuing confusion courts create concerning this conundrum.

Five And Two-Third's Months Broken Ankle Is NOT A Disability. A nurse broke her ankle and was on leave, unable to walk. She returned to work at five months and three weeks wearing a walking boot and with a cane and not fully "stable." The employer asked her to undergo a further fitness evaluation and would not reinstate her until that was done. She filed an ADA case over the refusal to reinstate. The court dismissed, ruling that the nurse's condition was a short-term "transitory" condition and did not qualify as a disability under the ADA. *Purvis v. Lutheran Hospice* (D. S.C., 2017).

Three Months And Ten Day Lifting Restriction IS A Disability. An employee had an injury which created a 10 lb. lifting restriction. The injury healed and all restrictions ceased at three months and 10 days. During the three months the employee was denied light work duties and "forced to remain off work." However, his job was then filled after three months (the 12-week FMLA expiration period). When cleared to return without restriction 10 days later, he was told there were no positions. He filed an ADA case. The court found that his condition, though temporary, involved a major impairment. "The 10 pound lifting restriction substantially limited one or more major life activities." Thus, though "transient," it was not "minor." Therefore, the employee could maintain a case for disability discrimination. *Mesi v. Cardinal Shower Enclosures* (D., Haw., 2017).

You can see the confusion in this area. The nurse could not walk (walking is generally seen as a major life activity), yet her condition was found to be "transitory and minor." Yet a 10 lb. lifting restriction, which still allows the person to do most daily life activities, was found to be a major impairment. The courts are all over the place on this issue. The EEOC guidance states that the definition of disability is not meant to be a demanding standard. "The effects of an impairment lasting less than six months can be substantially limiting" (29 CFR 1630(2)). So, employers and employees continue to be confused and confounded by the conflicting court rulings on this issue.

Sex

Hot Springs Settles Another Harassment Case For $300,000. The City of Hot Springs has settled a case alleging an employee was fired after reporting a city deputy manager's groping of female employees. She alleged that he groped breasts, required kisses, and referred to female employees using sexual slurs. *Hillstad v. Burrough* (W.D. Ark., 2017). This follows another $175,000 settlement of a case "arising out of the same facts and circumstances" of the manager's behavior with a different city employee.

Requesting Exotic Dancer To Expose Herself Backstage Can Be Sexual Harassment. The job of an exotic dancer is to reveal all in front of an audience. However, a court ruled that a supervisor's request for a dancer to privately reveal to him, off-stage, could be "unwelcome attention" in violation of the sexual harassment laws. The fact that an employee is willing to engage in sexually revealing behavior for an audience as a job

duty does not mean she is open to the personal advances and requests of a supervisor for his own personal gratification. Willingly doing something in one context should not open one up to an expectation for all other contexts. There is an element of impersonalization and "safety" in a public audience setting – with bouncers. Yet a private meeting with a prurient supervisor can be creepy, intimidating, possibly *quid pro quo*, and unwelcome. *Clark v. Top Shelf Entertainment d/b/a Club Onyx* (W.D. N.C., 2017). Though some may think it odd that an exotic dancer would complain about such a request, it is no different than many other jobs in which a person is willing to do something, publicly for pay, but not privately for a supervisor's personal wishes. Actors and actresses engage in passionate romantic scenes on stage, kissing and touching, as part of the script. That does not mean they should be expected to engage in such kissing or touching with the stage director – backstage and outside the script.

Coming Out Of The Closet. Employment cases can take strange turns. A female employee filed an internal harassment complaint with Human Resources alleging a male co-worker inappropriately touched her and continued stroking her hair and touching her leg after she strenuously objected. He denied any touching or physical contact at all, except touching her hair in a public setting to point out that she had split ends. He was suspended with pay pending investigation. He then called HR and claimed that the female co-worker had in fact previously lured him into a large closet at work, initiated touching, pulled up a stool, sat on his lap, disrobed and said "let's have sex." He declined. He stated a belief that her harassment complaint was in reaction to his rejection of her advances. When confronted, the female employee admitted the closet incident and her initiation of the behaviors. Both the employees were then fired. She was fired for falsification of a complaint. He was fired for initially lying about what had occurred regarding never having any intimate physical contact, and also not reporting the overt closet incident earlier. He then sued for Title VII retaliation, claiming he was fired for having reported sexual harassment regarding himself. The court ruled that it was a close call, and allowed the case to proceed to be decided by a jury. Though the employer stated seemingly valid reasons for the discharge (lying during the investigation), the close timing between his "complaint" and the discharge triggered the *temporal proximity* presumption under the anti-retaliation standards. *Endalin v. Adventist Glen Oaks Hospital* (N.D. Ill., 2017).

Religion

Grow A Thicker Skin And Get Used To It! A Jewish employee alleged that a co-worker made hundreds of ongoing hateful comments about Jews, "the Holocaust was deserved because Jews killed Jesus," "Hitler was right," "Jews carry disease," "Jew Boy," "Christ killer" and worse. The co-worker also reportedly engaged in grabbing private parts and other physical behavior which left bruises. The employee complained to management, but was told to "grow a thicker skin" and "get used to it." He complained again this time to Human Resources. HR only advised the Department Manager to give a generic talk to employees about "co-workers respecting each other." The Jewish employee was instructed to stop wearing his Star of David necklace around the abusive co-worker

because "it was like waving a red flag in front of a bull." The behavior continued unabated. A year later the employee went to top management. Then an investigation was ordered. The abusive co-worker was given a verbal warning, but continued in an even worse fashion. The Jewish employee resigned due to the ongoing, unabated harassment, telling the company that he "could not take it anymore." Then a second investigation was done, and the abusive co-worker was fired. The Jewish employee then requested reinstatement, since the environment was now changed. The company refused, since he had quit. He filed suit. The court found ample evidence of harassment and "constructive discharge" and of retaliation (refusal to reinstate) for having made the complaints. *Somers v. Express Scripts Holdings* (S.D. Ind., 2017).

Labor Relations

Are Independent Contractors Allowed To Unionize? Uber drivers are supposed to be Independent Contractors, they are not "employees." Each is a separate, independent company. Thus, they are not covered by the employment laws, including the Labor Relations laws. They cannot organize or collectively bargain. However, the City of Seattle passed an ordinance which allows Uber drivers to form a union, if they wish. In *U.S. Chamber of Commerce v. The City of Seattle* (W.D. Wash., 2017), a Federal court enjoined the ordinance, and blocked the requirement for the company to turn over a list of its Independent Contractors to the unions seeking to organize the Uber drivers. This is an interesting development in the ongoing Uber saga. The company has been sued in several jurisdictions, by thousands of drivers claiming they do not fit the Independent Contractor standards, and should be paid as employees. Uber has settled several cases, for multi-millions, agreeing to pay employment wages, overtime, taxes, SSI, etc., and hoping to revamp to figure out how to have truly Independent Contractors. Should they be allowed to organize, like any other employees? Time will tell, but the injunction is in place now. It should be noted that this case was not brought by Uber. It was brought by the U.S. Chamber of Commerce, which was concerned about a broader principle. It was not seeking to protect Uber. It was seeking to prevent "overreach" regarding business-Independent Contractor relationships in general. No company should be required to release its Independent Contractor contact information to unions or other third parties until and unless a court has made a final determination regarding "Independent Contractor" v. "employee" status. [For more information on the complexities of this issue, see the article Independent Contractors Standards and Liabilities by Boardman & Clark Law Firm.]