EMPLOYMENT LAW UPDATE

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

Mandatory Use of Revised Form I-9 Starts September 18, 2017. As a reminder, the United States Citizenship and Immigration Services (USCIS) released a revised version of the Form I-9 in July 2017, which must be used beginning no later than September 18, 2017. This revised form comes on the heels of a revision released in 2016, which was required to be used starting this past January. We highlighted those changes in "I-9 Reminder and Update on Non-solicitation Agreements in Wisconsin." [https://www.boardmanclark.com/publications/hr-heads-up/i-9-reminder-and-update-on-non-solicitation-agreements-in-wisconsin] Many of the newer changes to the Form are subtle, focusing on revising the Form's instructions and wording, and clarifying the list of acceptable documents. In addition, the USCIS also revised the Handbook for Employers (M-274) and the Instruction for completing the Form I-9, which are available on the USCIS website (https://www.uscis.gov/i-9)

Daniel Gade Named As New EEOC Commissioner. President Trump has chosen Daniel Gade to fill the open EEOC Commission position term until July, 2021. Mr. Gade is a disabled veteran who lost a leg in Iraq, but continued Army service until this year. He co-founded the Independence Project, a veterans' employment and business creation initiative.

EEOC Seeks Comment About Revising Regulations. Executive Order 13777 requires Federal agencies to assess which existing rules are outdated, unnecessary or ineffective. The EEOC has established a task force to look at its rules and guidelines. It is seeking public comment at *Regulatory Reform Task Force@eoc.gov*. No timeline has been established for the comment period.

TRENDS

Fake Doctor Excuses

Websites are now in existence which provide realistic fake doctor excuses for employees seeking to fraudulently cover absences. These not only have the clinic logos, etc., they provide a fake phone number which invites the employer to call if the employer has any questions about the note. They probably answer that number for a few weeks and then put the number out of service. So, it is more important than ever to scrutinize doctors' notes, and if you suspect fraud do not just rely on the number given. Look up the real general number for the health care provider and call to confirm the validity of the number given on the note and that the employee was actually seen.

LITIGATION

Theme of the Month - Confusion

There is often uncertainty in the law when different circuit courts make differing rulings on an issue. This eventually gets resolved when the cases work their way up to the Supreme Court for a final decision. When different agencies of the same Federal government take opposite positions in employment litigation, it creates even more confusion. Finally, states can have very different standards from each other, and even from the Federal agencies, creating confusion for those who have multi-state operations.

Confusing Federal Actions - DOJ And EEOC Take Opposite Position On Sexual Orientation. The U.S. EEOC is a separate agency independent from the U.S. Dept. of Justice. They are taking independent and contradictory stands. In *Zarda v. Altitude Express* (2nd Cir., 2017), the DOJ has filed amicus briefs arguing that Title VII does not include sexual orientation as a protected sex discrimination category. The EEOC, in contrast, takes the position that sexual orientation is a covered Title VII sex discrimination category. See, e.g., *Hively v. Ivy Tech Community College* (7th Cir., 2017).

Massachusetts Disability Law Prevents Discipline Or Discharge Of Medical Marijuana Users. The Federal government lists marijuana as an illegal drug, and may mandate termination of those who test positive (i.e., DOT transportation rules). States, however, are all over the map on both medical and recreational marijuana. Even those who have legalized pot usually allow termination of those who test positive for it. Not so everywhere. In *Barbuto v. Advantage Sales & Mktg. LLC* (Mass. S. Ct.), the Court ruled that legal medical marijuana use was protected. An employee fired after a positive test, but with a legal medical prescription, won damages and reinstatement. Under state law she showed she was a qualified person with a disability and the prescribed medical marijuana was a reasonable accommodation. The employer made no effort to engage in an "interactive process" before it fired her, in order to determine whether the prescription use had any effect on her performance, safety, or anything else at work.

Uniformed Services Employment & Re-Employment Rights Act (USERRA)

Veteran Wins Back Pay, Front Pay, Punitive Damages. An Iraq war veteran with PTSD won almost $1 million in damages due to her termination in violation of USERRA and ADA. The court found the company willfully, intentionally violated her USERRA rights, after she had taken leave for 900 days of military service over time, and awarded $275,415 punitive damages under that law. It also awarded front pay, because reinstatement to a hostile acrimonious situation was not feasible. The case illustrates how damages can add up when two or more different laws apply. The ADA damages were approximately $600,000 for front pay and back pay. However, the original $7.8 million jury award for punitive damages was reduced to meet the ADA "cap" of $300,000 for compensatory/punitive damage awards. *Arroyo v. Volvo Group, North Am* (N.D. Ill., 2017).

Contracts & Joint Employment

Employers ask employees to sign all sorts of agreements – non-competes, confidentiality, ownership of inventions, commission plans, agreements to arbitrate and more. Even in at-will employment, these separate agreements are enforceable as limited contracts. However, they are generally binding on only the parties which actually signed them and cannot overreach.

Staffing Agency's Arbitration Agreement Cannot Protect Its Clients From Harassment Suit By Leased Worker. This case is yet another reminder that leasing workers from a staffing agency does not eliminate employment law liability. Both the lesser and lessee can be liable. *Scheurer v. Fromm Family Foods* (7th Cir., 2017) involved an employee from a staffing agency who alleged sexual harassment by a supervisor at the pet food company where she was placed. She alleged that after she complained about the harassment, the client food company ended her assignment and this resulted in the staffing company terminating her employment with it as well. She sued the client food company for Title VII harassment and retaliation. The food company and the staffing agency moved to dismiss the court case based on an agreement all workers signed with the staffing agency requiring all disputes to go to arbitration, rather than government agencies (EEOC) and the courts. The court disagreed. The arbitration agreement was between the workers and staffing agency. The client was not part of it. The worker had no personal agreement with the pet food company to limit her from suing it in court. The court looked to Wisconsin contract law in the decision, but the law is similar in most other states.

Discrimination

Disability

Restroom Use Can Also Be An "Essential Function." "Essential functions" of work are not just what the employer lists in a position description. The appropriate, safe and

functional work environment and arrangement for the employee can also be essential elements for performing a job. A Walmart employee with colitis, spinal stenosis and herniated disks had periodic flare-ups requiring urgent trips to the restroom. She requested assignment to one of the check-out cash register stations close to the restroom on those days she could tell she was having a flare-up. This request was not granted (in spite of the registers closest to the restroom being routinely the least busy even on heavy sales days). She was eventually terminated for leaving her register without authorization (for restroom use). The court found the employer did not engage in the required interactive process. In fact, store management failed to follow the company's own process of informing corporate HR of a request for accommodation, giving the employee an ADA information packet, and immediately opening an interactive communication. It ignored her request. Being able to use the restroom is essential for any employee to work. It is imperative for one with such a disability. *Rayford v. Walmart* (S.D. Ala., 2017).

No Reasonable Accommodation Required When Tests Show No Allergens. A technical designer believed that her new workplace was exacerbating her condition. After the company moved to a new location, she stated that she developed asthma, skin irritations, fungal infections, headaches, and lung lesions. She tested positive for mold and mycotoxins, and informed her supervisor of her belief the new workplace was the problem. The company tested and retested, but found no evidence of any mold or mycotoxins. In spite of this, it moved her workstation to a more ventilated area. The problem persisted. The new area was tested, with no finding of any allergens. The employee then demanded that if the company could not find anything it should transfer her to another building until it could find a remedy for the issues. There was no such other location where she could perform her job, nor was there an open position elsewhere. She then quit and sued under the ADA, claiming constructive discharge/failure to accommodate. The court found for the company. It had thoroughly engaged in testing and attempts to accommodate. It was not reasonable to accommodate for what it, with diligence, could not identify as needed remediation. There was no evidence of a viable position in a different location. The employee may have had serious health issues, but the employer could not reasonably take any further action to resolve those. *McGlothien v. Karman Inc.* (D. Col., 2017).

Job Fitness Test Does Not Match Reality Of Successful Performance. A temp-for-hire employee successfully worked five months as a general production worker through a placement agency. He was offered the regular position, and then sent for the company's standard pre-employment medical evaluation. The evaluation concluded he could not perform the essential functions of the job due to a rotator cuff condition, so he was not hired and his employment ended. He filed an ADA case. The court found that the evaluation conclusions were not plausible. The company knew of the rotator cuff condition the entire five months of temp-to-hire work and when it offered him the permanent position. The five months of successful performance clearly established the ability to do the job functions. The evaluation conclusions did not validly meet the reality of actual performance. *Iselin v. The Bama Companies Inc.* (10th Cir., 2017). [This

case also raises a question as to whether a medical evaluation after a period of temp-to-hire work is truly a "pre-employment test" under the ADA, though the court did not specifically address that issue in this matter.]

Sex

Physical Fitness Test Fails Validity Challenge. A police department fitness test had a Title VII adverse impact on female officers in evaluating fitness for continuing duty. In a sex discrimination case challenge, the court concluded that the test had no correlation with actual job duties or performance. The scoring system cut off scores used by the department were "meaningless." The test was not "job-related and consistent with business necessity," and failed officers who were performing excellently in the actual work. *Arndt v. City of Colorado Springs* (D. Col., 2017).

Retaliation

You Never Know Who You Are Talking To – Cousin Tells. Managers often ask "How will the applicant ever know why we didn't hire them? That's inside information. We never reveal that!" *Bains v. Walgreens Co.* (7th Cir., 2017) involved Ms. Bains, a Pharmacy Technician who previously made EEOC complaints about racial discrimination. She then left the company, but a couple of years later reapplied for an open position at another location. She was not hired. Months later the person who was hired, Ms. Martin, was conversing with the store's pharmacy manager. The manager mentioned that Bains had been the best candidate and her preferred choice, but for some reason corporate management had intervened and directed that Bains not be hired, and then named the upper level managers involved. The store manager found this mysterious, because corporate had never before got involved. The new employee, Ms. Martin, happened to be Ms. Bain's cousin. She called Bains and informed her of this conversation. One of the named higher managers was the person who had been involved in Bains' earlier EEOC complaints. Bains sued. The court found a valid case for retaliation. The company manager involved in the prior discrimination allegations altered the normal procedures and specially intervened in order to cause rejection of the most qualified applicant. This created a presumption of retaliation. Another significant factor was that the record of Bains' application and the notes and scores from her interview were "mysteriously missing" from the company records.

Labor Arbitration

Arbitrator Rejects Settlement – And Recommends Prison Terms For Both The Grievant And Management. Federal arbitrators seem to have broader powers than other standard arbitrators. A Federal attorney grieved his five-day suspension for "disrespectful conduct" and "inappropriate use of government property." On the hearing date, the parties notified the Arbitrator that they had resolved the matter and the matter had been withdrawn. However, the Arbitrator had reviewed the parties' documents in preparation for the hearing. He had concluded "inappropriate use of government

property" actually involved violation of the Hatch Act – using government time and equipment for political purposes to influence an election. This is a criminal action. There was evidence that a number of other department employees had been involved. The Arbitrator concluded that the grievant and the department management were settling the case in order to cover up the Hatch Act violations and that this created an illegal conspiracy to keep the matter secret. The Arbitrator then proceeded to refuse to close the case, and to issue an order that the attorney-grievant be fired. He ordered the Dept. to conduct a thorough investigation and then also fire any other employees who had engaged in similar acts and to deny them benefits, including pensions. He then ordered the U.S. Attorney to commence a criminal prosecution and recommended prison terms and fines for all of those employees and managers involved in the wrongful acts or in the cover-up attempt. *In Re: U.S. Dept. of Education and American Federation of Govt. Employees* (2017).

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