Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

TO VIEW OUR LATEST ALERT(S), PLEASE VISIT OUR WEBSITE AT www.wimlaw.com.

VOLUME XXXX, Issue 4 APRIL 2022

ADVICE ON RETENTION OF YOUNG HOURLY WORKERS

The above subject is No. 1 on many employers' lists, and Harvard Business Review in recent years surveyed young workers to understand how employers can improve engagement and retention in a wide variety of industries. The survey found that the job satisfaction survey was driven in large part by how they thought their manager treated them. Being treated fairly and with respect was more important than income. For example, one pizza company sends all front line managers to "The School of [Company Name]" within the first three to six months of their tenure. It is a management training program that coaches new managers on communication, people management, and building a good workplace culture. Another major employer has a Engagement Training Program to help front line managers provide recognition to employees, listen to and solve problems, and deliver specific, actionable feedback.

The second criterion pertains to offering professional development opportunities. The idea is to offer a job as a career or a stepping stone to a career. Chipotle offers a clear career path for entry-level employees on its website and directs new hires to it. Over 90% of Chipotle's managers are promoted from within. Employers can also support educational attainment for young people. Starbucks recently expanded its College Achievement Plan to offer free tuition for online classes and individualized guidance to those that want to know more about college.

The vast majority of young people surveyed said that they would be more likely to stay in their current job if they had more control over their work schedules. The most important aspects of scheduling were predictability and flexibility. Young people want to know the days and times they are going to work in advance, but they also want their managers to be flexible when unexpected events occur outside of work arise. Through such flexibility, employers like QuikTrip and Trader Joe's report annual turnover rates below 15% versus a nearly 60% average for the retail industry.

Offering access to key benefits is not surprisingly a plus, but what is a little surprising is offering opportunities to work more hours. While young people value benefits like overtime pay, 401(k) retirement-savings plan, and paid time off, the most important benefit by far is health insurance. Companies like UPS, Lowes and Starbucks are in high demand in part for offering some form of health insurance to part-time employees. In an interesting survey development, more than 50% of the young people surveyed wanted to work more hours, or the opportunity to do so.

Another source of advice states a simple principle, the need to assess, plan and modify any negative impact of employee experiences. Such efforts show employees that they are valued.

One area mentioned by some experts is onboarding. Employees reportedly are retained in companies that have a formal onboarding program at a much higher rate than those that do not. Techniques include a video about company culture and giving each employee a mentor who tells them what to expect. Assigning someone to take each employee under their wing may help, including taking the new employee to lunch. Introducing the new employee to those on

the organizational chart or who to call about payroll and the location of facilities are quite helpful. Many companies have designated persons to check with a new employee to see how they are doing. Some companies even have special "ambassadors" for this purpose. During those regular check-ins, specific questions about job satisfaction are asked.

IMPORTANCE AND RESULTS OF NEW FEDERAL LAW BANNING FORCED ARBITRATION FOR HARASSMENT

There is a reason why more than half of U.S. companies have adopted individual arbitration and class action waivers to resolve worker complaints as an alternative to litigating in court. Civil rights groups cite certain studies showing that employees prevail only about a third as often in mandatory arbitration as in federal courts, and the damages awarded are only about 20% of what it is in court cases. Further, these groups complain that the privacy of such actions limits the deterrent effect of having effective enforcement.

A new federal law, signed by President Biden on March 3, 2022, called Ending Forced Arbitration of Sexual Assault and Sexual Harassment, prohibits pre-dispute arbitration agreements and class action waivers concerning a sexual harassment dispute or a sexual assault dispute. It gives prospective plaintiffs, but not defendants, the right to choose whether to litigate their sexual assault of harassment claims in court or through arbitration. Such individuals may also choose to bring suit individually or as a class action. The new law applies to any dispute or claim that arises or accrues on or after the date of enactment of the law.

Questions have already arisen as to what the law means with respect to sexual harassment cases which also include other allegations, such as race discrimination or wage-and-hour claims. The question is whether under the statute which reads "with respect to a case" means that the entire lawsuit remains in court, or portions considered unrelated to sexual harassment or sexual assault be referred to arbitration, with only the harassment claims remaining in court. It is likely that more plaintiffs will add claims of sexual harassment or sexual assault in an attempt to avoid having their cases sent to arbitration.

Sens. Lindsey Graham (R. - S.C.) and Joni Ernst (R. - Iowa) put in legislative history supporting a narrower reading of this ambiguous language, as Ernst said the measure "shall not be the catalyst for destroying pre-dispute arbitration agreements in all employment matters." Senator Graham warned lawyers trying to "gain the system" by mixing sexual harassment and assault claims with other allegations, stating: "So if you've got an hour-and-wage dispute with your employer, with a sexual harassment or sexual assault claim, the hour-and-wage dispute stays under arbitration unless it is related."

Editor's Note - This new federal law will likely result in more sexual harassment claims being brought, and greater settlement demands on the part of plaintiffs. Employers also have to decide whether to amend their pre-dispute arbitration and class action waiver agreements with respect to sexual harassment claims. It would probably be a good idea to do so, although it is unlikely that the failure to make such an amendment would void the other pre-dispute provisions. In any such amendment, attention should be given to addressing the issue of keeping the non-sex harassment portions in arbitration, as the existence of this provision may encourage a judge to enforce these provisions under the Federal Arbitration Act.

MOST PRO-UNION ADMINISTRATION EVER CONTINUES TO PURSUE AGENDA

Probably the most radical change in policy with the new Administration pertains to the National Labor Relations Board (NLRB) and other related Administration initiatives involving organized labor. In January a report was issued

by President Biden's Taskforce on Worker Organizing and Empowerment. The mission is seeking to expand worker and union rights. Most immediately, the NLRB's General Counsel Jennifer Abruzzo instructed the staff to swiftly adopt the White House recommendations to boost union organizing. Abruzzo said she would coordinate with the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), Occupational Safety and Health Administration (OSHA), and other worker-protection agencies to carry out the recommendations. She said she would also pursue relationships with the Internal Revenue Service (IRS), the Department of Justice's Anti-Trust Division, and the Federal Trade Commission (FTC) to identify employee misclassification that prevents workers from unionizing. She also said she would strengthen the relationship with the Department of Homeland Security to prevent immigration officials from violating workers' labor rights, "regardless of immigration status." She announced among many other measures that the NLRB will begin pursuing court injunctions in cases where employees have supposedly been subject to "threats or other coercive conduct" on the part of employers during union organizing efforts.

The above is just a small portion of the announcements that seem to be coming from the NLRB at least monthly, announcing initiatives to overturn prior NLRB doctrine and take other initiatives to promote not only union organizing, but expanding workers' rights to "mutual aid or protection," even in the absence of a formal union or union organizational campaign.

In some respects, unions are riding "high" right now. In 2021, there was a significant increase in work stoppages in both union and non-union facilities. Some 68% of the public in polls support unions. In spite of these positive developments for unions, the share of private-sector workers who belong to a union actually fell during 2021, to 6.1%. The rate of union membership including both public and private sectors was at 10.3% in 2021, matching the record low in 2019.

In February, President Biden issued an Executive Order requiring large federal infrastructure projects to use project labor agreements, concerning all federally-procured construction projects above $35 million in value. Project labor agreements require a contractor to enter into a collective bargaining agreement for the duration of a specific project, even though only about 10% of the construction industry is union.

"NUCLEAR PUNITIVES" IS NEW TERM FOR RUNAWAY JURY VERDICTS IN EMPLOYMENT CASES

In December, a California jury awarded $150 million punitive damages in an employment discrimination/ retaliation case brought by an individual plaintiff. Another California jury found Tesla liable for $137 million in punitive damages after a worker was subjected to racial harassment. In both cases, the attorneys for the plaintiffs received millions of dollars awarded in attorneys' fees. The term "nuclear punitives" is now being applied to cases where the plaintiff's verdicts vastly exceed any losses to the plaintiff. It is an outgrowth of the term "nuclear verdicts," which was often used to describe massive plaintiff verdicts in certain personal injury accidents.

Some call a punitive damages ratio of 4-1 to actual damages "close to the line of Constitutional propriety," referring to the due process clause of the Fourteenth Amendment, which prohibits grossly excessive or arbitrary punishments. Many of these cases deal with very bad fact patterns creating a desire by jurors to punish the employer.

The existence of such "nuclear punitive" cases with runaway juries are one of the reasons why so many employers require individual employment agreements with mandatory arbitration clauses prohibiting court litigation and class

actions. In some ways, potential plaintiffs are benefitted in the sense that arbitration is much cheaper and quicker than other forms of litigation.

SUPREME COURT GIVES GREEN LIGHT TO MORE RETIREMENT PLAN LAWSUITS

Over the last couple of years, more than 150 lawsuits have been filed by employees claiming that their employer's pension plans include poor investment options, charge excessive fees, or otherwise violate fiduciary obligations in prudent management of retirement plans under ERISA. Plan fiduciaries have attempted to defend these cases by arguing that they offer an array of investment options, and that the plan should not be liable for offering poor performing or expensive funds if the plan also offers prudent, inexpensive options. In an unanimous ruling in January, however, the U.S. Supreme Court ruled that plan fiduciaries must conduct their own independent evaluation to determine which investments may be prudently included in a plan's menu of options. "If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty," Justice Sotomayor said in the Court's opinion. *Hughes v. Northwestern University*, No. 19-1401, 1/24/22. Justice Sotomayer did say: "The courts must give due regard to the range and reasonable judgments a fiduciary may make based on her experience and expertise."

Be sure to visit our website at http://www.wimlaw.com often for the latest legal updates, Alerts, and Firm biographical information!

WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
ADDRESS SERVICE REQUESTED