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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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BIDEN'S LABOR POLICY SHOWING UP IN ANTI-TRUST ENFORCEMENT

The pro-labor and pro-union philosophy of President Biden is making its mark in anti-trust enforcement. In a 2021 executive order dealing with promoting competition, special emphasis was given to anti-trust issues in labor. In fact, the issues arising in labor markets was first of the anti-trust policy objectives in the anti-trust executive order. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) used this approach in their recent actions.

The most recent manifestation of this policy is the FTC's proposed rulemaking to curtail non-compete clauses and other clauses or agreements that may limit worker mobility. Enforcement has also increased in wage-fixing and no-poach situations. In the latter situations, enforcement authorities generally have to show the effect on the relevant labor market. While past emphasis was on wage-fixing and no-poach situations involving highly skilled employees, the newer approach also focuses on low-wage workers. For example, in a case involving a meat company, the DOJ argued that the ability to endure more difficult working conditions was worker-differentiating, thus allowing harm to competitive conditions to be shown in a more narrow defined market. The President's executive order also requires the DOJ to consider whether to revise the Anti-Trust Guidance for Human Resource Professionals of October 2016 to "better protect workers from wage collusion." The DOJ has already signaled its intent to reconsider part of its Anti-Trust Guidance for Human Resource Professionals. One of those areas that may be of interest concerns limitations on exchanging competitively sensitive information through a third party, even if the data was anonymized, aggregated and historical.

Ironically, in other ways the Biden Administration in practice promotes less competition in labor markets, seemingly inconsistent with its pro-competition approach in general. Examples include prevailing wage determinations, project labor agreements in the construction industry, and government contracting rules in a variety of industries. These pro-union or pro-labor measures lead to less competition, not more. The same concept shows up in the federal government's inflation-fighting mechanisms. The most dangerous form of inflation is wage-price spirals, in which higher wages bring on higher prices which in turn brings on more inflation. The federal government's policy of higher interest rates and the like is an attempt to decrease workers' bargaining power, thus allowing lower wages and lower inflation.

AI IS ANOTHER RELEVANT AREA OF EMPLOYMENT LAW ISSUES

The use of artificial intelligence (AI) is becoming increasingly utilized, including matters pertaining to employment. Perhaps the most common related use pertains to the screening of resumes and applications of job applicants. Some employers have developed sophisticated AI computer algorithms designed to make hiring decisions. The concept is admirable, in that supposedly computers are less prone to bias, and the hiring process becomes more simple, systematic, and objective. Unfortunately, the situation is not that simple, and legal risks can be created for employers.

To begin with, the risk of bias in AI can create a discriminatory hiring system. The decisions made by AI is dependent upon the information upon which it is trained, and the input can in essence be based on input adversely affecting minority groups, or any group for that matter. For this reason, the use of AI in connection with employment decisions must be carefully and legally reviewed.

The Equal Employment Opportunity Commission (EEOC) is increasingly focusing on the AI issue. In addition, state and local governments are in some cases passing laws restricting employer use of AI.

There has been some federal legislation on the subject, in the 2021 National Defense Authorization Act, which outlines considerations that employers should use in assessing AI. It is designed to focus on concepts business can use to mitigate risks from AI. Unfortunately, the principles detailed in the guidance are so vague and abstract to have limited practical use. One of the more significant points in the guidance is the suggestion to identify all third-party software and data the AI system relies on, a suggestion to allow employers to identify risks. The framework is coming from the National Institute of Science and Technology and is currently voluntary. In addition to employment discrimination concerns, other potential issues pertain to privacy concerns and security threats. The guidance at best helps employers identify issues and employers wishing to protect themselves from legal claims may wish to follow the suggested government framework as a defensive measure. It is highly likely that more government directives will come out on AI during the term of the current administration.

LABOR BOARD LIMITS COMMON SEVERANCE AGREEMENT PROVISIONS

The National Labor Relations Board (NLRB) seems to be on a mission to make the life of employers more difficult. The latest is a ruling prohibiting employers offering employees a severance agreement that prohibits them from making disparaging statements about the employer and from disclosing the terms of the severance agreement itself. *McLaren Macomb*, 372 NLRB No. 58 (2/21/23). The Board majority in its ruling found that broad non-disclosure and non-disparagement provisions in severance agreements violate the Labor Act, reversing prior rulings during the Trump Administration. The result of the ruling is to render such broad provisions unenforceable, particularly if an employer decides to enforce the severance provision that is considered illegal under the new standards. The ruling does suggest narrower provisions that can protect employers, and some employers may also consider using disclaimers to improve the legality of the provisions. It is likely, however, that the existence of such overbroad and illegal provisions would not adversely affect enforceability of the remainder of the severance agreement itself, particularly if there is a severability clause.

Editor's Note: It should be noted that this ruling will not apply to managers, supervisors, managerial employees, or others exempt from coverage of the National Labor Relations Act (NLRA). Such controversial clauses can often be a deterrent to appropriate conduct, even if they are potentially illegal. It is suggested that the provisions be drafted narrowly and appropriate disclaimers be included, and employers may choose to run a minor risk anyway.

OSHA'S MOST CITED HAZARD LIST IN CONSTRUCTION AND OUTSIDE CONSTRUCTION

The Occupational Safety and Health Association (OSHA) has released its Top 10 violations of its rules for fiscal year 2022, and the top four all relate to the construction industry - fall protection general requirements, ladder safety, protecting workers on scaffolds, and training workers to avoid falls. Those hazards not primarily related to construction on the Top 10 list include respiratory protection, hazard communication, lockout-tagout, powered industrial truck/forklifts, eye and face protection, and machine guarding.

PERFORMANCE REVIEWS AND OTHER ALTERNATIVES

Performance reviews have become increasing disfavored in recent years, but reports indicate that the vast majority of employers still do formal annual assessments. As a matter of fact, a few of the companies that discontinued such assessments have brought them back. But increasingly, employers are looking for other ways of providing feedback to employees.

So what are some companies doing in lieu of a formal annual assessments? Commentators often suggest that more regular and timely performance discussions are necessary, such as every quarter or after a project is completed. Suggestions have been made to the focus in these discussions more on how people work, since a majority of even HR officials say performance reviews rarely accurately assess employee performance. Such discussions also avoid the "halo" effect, where almost everyone gets a good rating, sometimes awkwardly making it easier for plaintiffs to win cases later on. There are software platforms such as Bamboo HR and Work Day, which remind managers to have ongoing discussions and include coaching, comments on recent work, and setting expectations.

A few companies have experimented with including co-workers in appraisals, but questions have been made about this approach. This writer remembers vividly during military basic training the "buddy rating" system used by the U.S. Army at that time.

A more successful approach has been to let employees reflect on their own performance, which managers can then comment on.

HOMELAND SECURITY AND IRS PAY OVER $1 MILLION TO SETTLE LAWSUIT OVER IMMIGRATION RAID

Back in 2018, ICE conducted a raid at a Tennessee meat packing plant, which was the largest workplace immigration raid in nearly a decade. A lawsuit was filed following the raid at the Southeastern Provision facility in Bean Station, Tennessee, contending that the raid illegally targeted Latino workers, arguing that immigration officials used race as a proxy for immigration status and violated the workers' Fourth Amendment right to be free from unreasonable searches and equal protection. The case was brought under the Federal Tort Claims Act alleging, among other things, false imprisonment and false arrest. The case was ultimately settled for $1.17 million, and Homeland Security agreed to grant immigration relief to the six named plaintiffs in the case, including cancelling removal orders. Zelaye v. Miles, No. 3:19-cv-0062 (E.D. Tenn. 10/19/22).

TRANSGENDER WORKERS MAY BE PROTECTED BY ADA AS WELL AS SEX DISCRIMINATION RULES

The U.S. Supreme Court ruled in 2020 that transgender workers were protected by Title VII of the Civil Rights Act. While the Civil Rights Act protects against discrimination, the Americans with Disabilities Act (ADA) not only protects against discrimination, but requires reasonable accommodations for disabled workers that do not constitute an undue hardship on the employer. For the first time, a federal appeals court has ruled that transgender workers can be covered by the ADA as well as Title VII. *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022) rehearing denied 50 F.4th 429 (4th Cir. 2022).

The theory behind transgender workers being protected by the ADA is that many transgender employees suffer from gender dysphoria, the stress caused by a person's gender identity not matching that person's biological sex. If a person has gender dysphoria, it may require an employer to provide reasonable accommodations on request, such as granting leave for medical procedures or hormone therapy, or modifications to bathroom or dress-code policies.

The reason the application of the ADA to gender dysphoria is so controversial is that the ADA excludes gender identity disorder from coverage, along with "transvestism, transexualism, pedophilia, exhibitionism, voyeurism, and other sexual behavior disorders." The Fourth Circuit distinguished between gender identity disorder, which was not considered a disability when the ADA was passed, and gender dysphoria, which has been added to the Diagnostic and Statistical Manual of Mental Disorders. The Fourth Circuit also said that gender dysphoria could not be excluded from the ADA to avoid the "serious Constitutional question" of whether the law's exception violates the Equal Protection clause of the Fourteenth Amendment. The Fourth Circuit stated that the legislative history suggests the discriminatory nature of the exclusion.

Editor's Note: Obviously, the Fourth Circuit ruling is controversial, and there was a dissenting opinion in the ruling. While there are a number of district court rulings consistent with the Fourth Circuit ruling, there are some district court rulings to the contrary. Whether reasonable accommodation is required for a transgender worker is obviously the type issue that legal counsel is necessary.

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