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EMPLOYMENT LAW LETTER

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Vol. 30, No. 4
June 2018

What's Inside

What's Online

Podcast
Focus on driving your business outcomes
ow.ly/Kcuc30jUrY0

Diversity
How HR can legally use social media to improve diversity
bit.ly/2rkkHLx

Bonuses
How annual bonus payments affect overtime wages
bit.ly/2vESDY3

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ARBITRATION AGREEMENTS

Epic decision: SCOTUS OK's class waivers in arbitration agreements

by Lisa Berg
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

In a landmark decision issued on May 21, 2018, the U.S. Supreme Court ruled 5-4 that class or collective action waivers in mandatory arbitration agreements are valid and enforceable. In short, that means you can limit your exposure by requiring employees to arbitrate employment disputes in one-on-one arbitration proceedings rather than as a class or collective action.

Court's decision

In *Epic Systems Corp. v. Lewis,* the Supreme Court consolidated three separate cases involving different employers: software company Epic Systems, accounting and consulting firm Ernst & Young, and oil company and gas station chain Murphy Oil. In each of the cases, the employer had entered into contracts with its employees providing for individual arbitration proceedings to resolve employment disputes. Nevertheless, employees sought to litigate Fair Labor Standard Act (FLSA) and state-law claims through class or collective actions in federal court. The result was a split in the U.S. 9th, 5th, and 7th Circuit Courts of Appeals over whether those class or collective action waivers were enforceable.

Although the Federal Arbitration Act (FAA) generally requires courts to enforce arbitration agreements as written, the employees—and the National Labor Relations Board (NLRB) on behalf of some of them—argued to the Supreme Court that the agreements shouldn't be enforced because they violated the workers' Section 7 rights to engage in "concerted activity" under the National Labor Relations Act (NLRA). The Supreme Court rejected that argument, finding no conflict between the FAA and the NLRA.

Writing for the Court's majority, Justice Neil Gorsuch noted that although Section 7 grants employees the "rights to organize unions and bargain collectively," Congress didn't express any disapproval of arbitration or confer a right to class or collective litigation when it enacted the NLRA. The Court followed established precedent in holding that the FAA requires courts to enforce the terms of private arbitration agreements, including class action waivers. *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (May 21, 2018).

Employer takeaway

If you were considering requiring such agreements but were waiting on the sidelines for the Supreme Court to decide this case, you can now limit your exposure to potential class or collective actions by requiring employees to sign arbitration agreements with class and

AGENCY ACTION

DOL issues opinion letters on FLSA. The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in April announced three new opinion letters related to the Fair Labor Standards Act (FLSA) and other laws. The letters released on April 12 concern (1) what counts as work time under the FLSA when employees travel for work, (2) whether 15-minute rest breaks required every hour by an employee's serious health condition must be paid or may be uncompensated, and (3) whether certain lump-sum payments from employers to employees are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act. An opinion letter is an official document authored by the WHD on how a particular law applies in specific circumstances presented by the person or entity requesting the letter. Opinion letters represent official statements of agency policy. (For more on these opinion letters, see "WHD issues more opinion letters" on pg. 4)

DOL issues bulletin on tip pools. Since provisions related to tipped workers were included in the Consolidated Appropriations Act, the DOL in April issued a Field Assistance Bulletin (FAB) to address enforcement of tip credit rules under the FLSA. As a result of the legislation, employers may establish tip-pooling arrangements between "front of the house" and "back of the house" staff such as cooks and dishwashers. The Act vacated the WHD's 2011 regulations that barred tip pooling when employers pay tipped employees at least the full minimum wage. Additionally, Congress gave the DOL authority to prevent employers from taking employees' tips in all circumstances. FAB 2018-3 confirms that employers that pay the full federal minimum wage to tipped workers may allow nontipped workers to participate in tip pools. (For more information, see "Congress pins down tip-pooling requirements" on pg. 6 of our May 2018 issue.)

USCIS unveils new E-Verify website. U.S. Citizenship and Immigration Services (USCIS) in April announced a new website, E-Verify.gov, to be a source for information on electronic employment eligibility verification for employers, employees, and the general public. The site provides information about E-Verify and Form I-9, Employment Eligibility Verification. E-Verify.gov allows employers to enroll in E-Verify directly and permits current users to access their accounts. Individuals with myE-Verify accounts also can access their accounts through E-Verify.gov.

New guidance addresses multiemployer pension plans. The Pension Benefit Guaranty Corporation (PBGC) announced in April it was issuing guidance to assist multiemployer pension plans that request PBGC review of alternative plan rules for satisfying employer withdrawal liability. The guidance explains the PBGC's review process, the information needed, and factors the PBGC considers in reviewing plan proposals. ✤

collective action waivers. If you already require employees to sign arbitration agreements but without class and collective action waivers, you can now amend them to add such waivers.

Despite all the excitement, arbitration may not be the best choice for every employer. Some of the benefits of arbitration include:

- The parties have the ability to choose the arbitrator.
- The discovery process (i.e., the exchange of evidence) is streamlined.
- The proceedings are confidential and create no legal precedent.
- There's a reduced risk of a "runaway" verdict by a jury.
- Employees cannot pressure you with the threat of a very public lawsuit.
- Arbitration awards are expedient, final, and binding, and grounds for appeal are very limited.

However, arbitration agreements also have some drawbacks, including:

- You have very limited grounds for appeal if you don't like the arbitrator's decision.
- Although discovery might be cheaper, you may not be able to learn sufficient facts about the strengths and weaknesses of the employee's case.
- Some arbitrators are unwilling to grant requests for summary judgment (dismissal of the claims without a formal proceeding).
- Arbitrators often are inclined to "split the difference" when making an award to appear more neutral statistically.
- The arbitrator's fee can be high.

Class or collective action waivers also have some drawbacks, including the possibility that you will have to defend hundreds of mini-arbitrations rather than a single class action.

Deciding whether to implement mandatory arbitration agreements, including agreements with class or collective

action waivers, is a complex undertaking. Therefore, it's prudent to consult with experienced employment counsel about the pros and cons of arbitrating employment disputes.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

EMPLOYEE BENEFITS

New tax credit rewards companies that offer paid FMLA leave

Employers that offer paid family and medical leave may get an unexpected tax benefit next year at tax time. The tax reform law that passed earlier this year contains a little-noticed tax credit for employers that provide qualifying types of paid leave to their full- and part-time employees. The credit is available to any employer, regardless of size, if:

- *It provides at least two weeks of qualifying leave annually for employees who have been with the company for at least 12 months; and*
- *The paid leave is at least 50% of the wages normally paid to the employee.*

The IRS recently issued a series of FAQs on the credit that are designed as a temporary measure to help employers understand (and hopefully take advantage of) the credit while waiting for official guidance in the form of regulations. Let's take a look at some of the key things employers need to know to claim the credit on their 2018 taxes.

What types of leave qualify for the credit?

The credit is available when an employer pays for leave that would fall into the same categories for which leave is available under the federal Family and Medical Leave Act (FMLA). That includes both the FMLA's original reasons for leave (pregnancy, childbirth, and serious health conditions) and leave that relates to the military service of an employee's family member (military caregiver and qualifying exigency leave).

In addition, however, employers can claim the credit when they offer paid leave for *any* of the listed (FMLA-like) reasons. For example, an employer that offers paid parental leave would be able to claim the tax credit even if it doesn't offer paid leave for the other types of qualifying leave. Employers that offer self-funded disability benefits should discuss whether they can claim the credit for those benefits with their attorney.

The credit isn't available for paid sick leave, paid vacation, or paid time off unless it's specifically offered for one or more of the qualifying reasons listed. Nor is it available for paid leave that is otherwise required by law.

Who must offer (and be offered) leave?

Employers don't have to be subject to the FMLA to take advantage of the credit. In other words, employers with fewer than 50 employees may claim the credit if they offer a qualifying type of paid leave.

The credit may be claimed when paid leave is offered to employees who (1) have worked for you for at least 12 months and (2) made less than $72,000 in the previous year. There is not yet any guidance on how the salary amount is calculated.

How much is the credit?

For employers that offer paid leave in the amount of 50% of an employee's wages, the credit is 12.5% of the amount paid. The credit is increased by 0.25% for each percentage point by which the paid leave exceeds 50% of the employee's normal wage, but it is capped at a maximum credit of 25%.

Ordinarily, employers would claim paid leave as a general business deduction for wages or salaries paid or incurred. To claim the credit, that deduction would have to be reduced by the amount of the credit claimed. So it's possible that you would claim the credit for some employees (those who make less than $72,000 per year) and the deduction for others (those who make $72,000 or more).

The maximum period of paid leave for which the credit may be claimed is 12 weeks.

Final thoughts

The law specifically requires employers to have a written policy describing the paid leave offered. In addition, employers are required to provide part-time qualifying employees a proportionate amount of paid leave (based on their expected work hours).

At this time, the credit is available only for wages paid in 2018 and 2019, which may make it unlikely that employers will adopt new paid leave policies just to

claim the credit. If you've been considering paid leave, however, the availability of the credit (and a conversation with your attorney and/or accountant) may help you in your decision. ✤

PROTECTED ACTIVITY

Can't blow the whistle on just anything: Court offers guidance on protected activity in Florida

by Jeffrey D. Slanker
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In past issues of Florida Employment Law Letter, we have reported on the different laws that protect whistleblowers in the state of Florida. There's a law that protects public-sector employees from retaliation for blowing the whistle on illegal activity by their employer and a law that's specific to private-sector employees.

The laws have important differences, but each of them makes one thing clear: To have a viable whistleblowing claim, an employee must actually engage in whistleblowing activity as defined by the law. Both laws define exactly what blowing the whistle is and when an actionable claim of retaliation will arise.

The U.S. District Court for the Middle District of Florida recently issued a decision in favor of an employer in a private-sector whistleblower case in which it clarified an employee's burden of establishing that she engaged in valid whistleblowing activity. The case provides guidance for Florida employers on what constitutes blowing the whistle.

Background

Deisy Garcia worked as a custodian at Parkside Elementary School for seven years. Her supervisor's wife accused him of having an affair with her and allegedly tried to confront Garcia about it. According to Garcia, the wife threatened her, both at home and at the elementary school.

The supervisor told Garcia not to call the police or file a police report, but because she was afraid, she did so anyway. She also reported the wife's threats to the school. She was later transferred to a different school, and she eventually quit her job.

Garcia filed a lawsuit against her former employer, alleging she was retaliated against for engaging in whistleblowing activity under the Florida Private Sector Whistleblower Act (FWA). She also claimed she was constructively discharged from her job—i.e., her working conditions became so intolerable, she was forced to quit. The employer asked the court to dismiss her claims without a trial. (It should be noted that the facts in this article are derived from the allegations in Garcia's complaint. When a court is considering a request to dismiss very early in the proceedings, it must take the employee's allegations as true.)

Court's decision

The trial court dismissed Garcia's FWA claim, finding that she didn't actually blow the whistle. In other words, according to the court, she didn't complain about something the law defines as whistleblowing activity.

The employer's argument for dismissal of the case focused on the fact that the incident at the center of Garcia's complaint had no connection to the workplace. Although it might be technically true that she was complaining about a violation of the law when she reported the incident with her supervisor's wife, she wasn't complaining about any conduct the supervisor committed within the course and scope of his employment.

The court stated that the FWA "was intended to encourage the reporting of violations by any employee acting with the scope of [his] employment or at the direction of the [employer]." Garcia's report of her supervisor's wife's behavior clearly wasn't the type of complaint the FWA was meant to protect. The court noted that although the incident might have occurred at work, the supervisor's request that she not report it to the police wasn't made to further any interest of the employer but rather to further his own personal interests. *Garcia v. GCA Services Group, Inc.*, Case No: 2:18-cv-12-FtM-99CM, April 23, 2018,

Employer takeaway

Retaliation claims can come in many forms and arise under many different statutes. For instance, several federal and state laws include whistleblower provisions and antiretaliation clauses, and employees routinely include retaliation claims in their discrimination complaints. And, of course, the whistleblower laws protect employees who report violations or suspected violations of the

law by their employers. But not all complaints are protected. As the court held in this case, complaints that don't involve allegations of wrongdoing committed within the course and scope of employment simply don't suffice to protect a complaining employee from retaliation even if she blew the proverbial whistle.

You may contact the author at jslanker@sniffenlaw.com or 850-205-1996. ✤

ELECTRONIC WORKPLACE

If a picture paints a thousand words, what's wrong with emojis?

What do a pair of scissors and an eggplant have in common? At first glance, the answer would appear to be "nothing." But what if I told you that in combination, they can constitute a threat of bodily harm?

If you're confused, you might want to have a chat with your kids or grandkids. It shouldn't take them long to figure out that the common link between a pair of scissors and an eggplant is that they are both emojis. You know, the cute little pictures you can add to a text or e-mail either in place of words or to clue the reader in on the intent or "tone of voice" of your message. And when you put them together, these two particular emojis could be interpreted as a threat to cut off—well, let's just say the eggplant is commonly used to represent a part of the male anatomy.

Over the past few years, emojis have increasingly become a mainstay of texts, social media posts, and, to a lesser degree, e-mail. As texting and social media have become more prevalent in the workplace, it was only a matter of time before emojis started showing up in harassment claims and other workplace disputes. Let's take a quick look at some of the problems associated with emojis and some possible strategies for preventing them in your workplace.

What's the problem?

Written communications are inherently difficult because it's frequently impossible for the reader to determine the intent of a message. Sarcasm and parody, for example, are notoriously hard to detect in an e-mail or social media post. It can also be challenging to tell when a comment (such as a threat, insult, or sexual advance) is intended to be taken at face value as opposed to a joke. In this respect, emojis can actually serve a valuable purpose by making sure communications are received in the spirit in which they are intended.

For employers, however, problems tend to arise when the content of the message and the emoji are in direct opposition to each other. For example, what would you think if you received a text that said, "I'm going to hunt you down and kill you," followed by a "big cheesy grin" emoji? Should you feel threatened? These types of issues are already showing up in courts, including one that made it all the way to the U.S. Supreme Court. In that case, a man's conviction for threatening his estranged wife on Facebook was overturned partly because he followed up his (very graphic) threats with the "tongue sticking out" emoji.

Similarly, what if an employee responds to a coworker's lewd comment with a "rolling around laughing" emoji? If the

WORKPLACE TRENDS

Women more likely to see pay disparity, survey finds. Nearly a third of women (32%) participating in CareerBuilder's Equal Pay Day survey in April said they don't think they are making the same pay as men in their organization who have similar experience and qualifications. That compares to 12% of men who think that way. The survey also found that men are more likely to expect higher job levels during their career, with 29% of men saying they think they will reach a director level or higher, compared to 22% of women. The survey also found that 25% of women never expect to reach above an entry-level role, compared to 9% of men. Almost a third of the women in the survey (31%) said they think they've hit a glass ceiling within their organizations, and 35% don't expect to reach a salary over $50,000 during their career, compared to 17% of men who expect that salary.

Study finds banning use of salary history easier than anticipated. The total rewards association WorldatWork has released data showing that 44% of employers that have implemented a ban on asking job candidates about their salary history say imposing the ban was either very or extremely simple. Just 1% reported implementing the ban was extremely difficult, and 8% said it was very difficult. The survey of WorldatWork members found that 37% of employers have implemented a policy prohibiting hiring managers and recruiters from asking about a candidate's salary history in all U.S. locations, regardless of whether a local law exists requiring the practice. Thirty-five percent of employers reported prohibiting the practice only when laws are in place. The data show that for employers that have yet to implement a nationwide salary question ban, 40% are somewhat likely or extremely likely to adopt a nationwide policy in the next 12 months.

Brand familiarity found important to attracting talent. Employers with low brand awareness are more likely to be overlooked by jobseekers, according to research from job site Glassdoor. A survey showed that candidates are 40% more likely to apply for a job at a company in which they recognize the brand compared to a company they have not heard of. The survey, conducted among 750 hiring decision makers (those in recruitment, in HR, and responsible for hiring) in the United States and the United Kingdom, also found 60% of those surveyed said their employer brand awareness is either a challenge or a significant barrier to attracting and hiring candidates. Seventy-five percent of those surveyed agreed that if a candidate is aware of their brand name and products or services, the recruiting process is easier. ✤

UNION ACTIVITY

Teamsters president slams threat to public-sector unions. Teamsters General President James P. Hoffa spoke out against the U.S. Supreme Court case *Janus v. AFSCME* during an April conference, saying the case is about politics and "people who hate unions." The case could remove the requirement that nonunion members pay certain union fees to cover costs of collective bargaining. In March, Hoffa also met with Senator Bernie Sanders (I-Vermont) to discuss the threat the *Janus* case poses to public-sector unions.

Unions demand disclosure of how companies use gains from tax cut. Leaders from the Communications Workers of America, the Service Employees International Union, the American Federation of Teachers, and the Teamsters in April sent letters to several corporations requesting detailed information about how they are using their gains from the recently enacted corporate tax cut. The request is to determine how much the companies are benefiting from the tax cut, what portion of those benefits they are using to raise wages and create jobs, and how the tax cut legislation has affected their decisions to send and keep jobs overseas. A union statement said failure to disclose the information could subject the companies to an unfair labor practice complaint under the National Labor Relations Act (NLRA).

Laborers' union praises changes to permitting processes. Terry O'Sullivan, general president of the Laborers' International Union of North America (LIUNA), spoke out in April to praise the Trump administration's action to streamline the federal review and permitting processes for major infrastructure projects. "LIUNA members are America's builders, but costly and time-consuming review processes are holding us back from rebuilding our nation's great roadways and bridges, unlocking our domestic energy reserves, and making crucial repairs to our aging drinking water systems," O'Sullivan said.

Workers call for wage theft investigation. The Communications Workers of America announced in April that workers at five federal contract call centers operated by General Dynamics Information Technology filed wage theft complaints with the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD), calling for an investigation of allegations of misclassification and underpayment of workers. The complaints were filed on behalf of current and former workers in Phoenix, Arizona; Tampa, Florida; Corbin and London, Kentucky; and Waco, Texas. The new allegations follow other recent wage theft complaints made by the union on behalf of workers at four of the company's other call centers: Lawrence, Kansas; Bogalusa, Louisiana; Hattiesburg, Mississippi; and Alexandria, Virginia. ✤

employee later complains about harassment, does her use of the laughing emoji mean her coworker's lewd comments weren't "unwanted," which is required for a hostile work environment to exist?

Another problem is that there is no accepted dictionary for emojis, and many of them have evolved over time to represent a concept or message that may not be readily apparent to everyone. While some are obvious (e.g., using a dog emoji to call someone a bitch), others are not (e.g., using a frog emoji to call someone ugly).

Even worse, the same emoji can mean different things in different contexts. A red rose, for example, could represent either romantic love or democratic socialism! In short, emoji's present ample opportunities for the types of misunderstandings that lead to workplace conflicts and complaints.

What to do about it

So what should you do? There are a wide range of options depending on your workplace, including the following:

(1) Prohibit work-related communications by text. This may seem extreme, but emojis are far more likely to be used in a text message than in any other type of work communication.

(2) Prohibit the use of emojis (or their "ancient" cousin, the emoticon) in all workplace communications. This also may seem a bit extreme, but you could choose some lesser variation, such as prohibiting them only in communications with customers or clients.

(3) Review your social media/electronic communications policies to make sure they are clear about what is and isn't considered appropriate. In short, they should provide that your discrimination and harassment policies (and other policies regarding workplace behavior) apply to an employee's activities on social media the same as if they were in the same room with another person.

(4) Provide simple training on how to write a business e-mail, including some training on e-mail etiquette.

Perhaps most important, set a clear expectation of professionalism in all communications, whether internally or with a client. While emojis provide a sort of shorthand for intent, they should never take the place of good, clear writing. ✤

SEX DISCRIMINATION

Handling sexual orientation discrimination in confusing legal landscape

In 1998, the U.S. Supreme Court recognized that sexual harassment could be perpetrated by a man against another man or a woman against another woman. When that decision was issued, many commentators pondered whether discriminating against or harassing someone because of her sexual orientation also violates Title VII of the Civil Rights Act of 1964. Who would have thought that 20 years later, there still wouldn't be a clear answer to that question?

There has been a lot of activity regarding sexual orientation discrimination in the courts recently. While most federal courts of appeals that have considered the question have concluded that Title VII doesn't prohibit sexual orientation discrimination, in the past year, both the 2nd and 7th Circuits have overturned their previous rulings to hold that it does. It now seems just a matter of time before the U.S. Supreme Court takes up the issue on appeal.

In the meantime, the laws on sexual orientation discrimination vary from one state to another and, in some cases, even among different cities within the same state or county. Let's take a big-picture look at the laws that could apply to you and the steps we recommend you take while we wait for the Supreme Court to sort things out.

Overview of laws

Even with the confusion over what Title VII does or doesn't prohibit, large numbers of employers are clearly subject to at least one law that prohibits discrimination on the basis of sexual orientation and/or gender identity.

Title VII. If you have 15 or more employees and are located in one of the states that fall under the jurisdiction of the 2nd Circuit (Connecticut, New York, and Vermont) or the 7th Circuit (Illinois, Indiana, and Wisconsin), you should proceed under the assumption that Title VII prohibits you from discriminating on the basis of sexual orientation. The only way that is going to change is if the U.S. Supreme Court decides to consider the issue and rules that Title VII doesn't protect against sexual orientation discrimination.

Executive Order 13672. Federal contractors and subcontractors, regardless of where they are located, are prohibited from discriminating on the basis of sexual orientation or gender identity under an Executive Order issued by President Barack Obama. President Donald Trump has left this Executive Order in place for now. In addition, federal employers such as government agencies have been prohibited from discriminating on the basis of sexual orientation since 1998.

State and local laws. More than 20 states prohibit sexual orientation discrimination by private employers, and an additional 10 to 15 prohibit discrimination by (1) public employers and/or (2) private employers with public contracts. Some of these laws also prohibit gender identity discrimination.

Even in states that are viewed as solidly conservative, individual cities and counties may prohibit LGBT discrimination by some employers (e.g., all private employers, only public employers, or private employers with public contracts).

What to do now

Your first step should be to identify whether any of the laws described above apply to you. For employers that do business in multiple states or municipalities, you will need to get up to speed on the protections offered to LGBT employees under the laws that apply in all locations. Depending on how many different states you do business in and which ones prohibit sexual orientation discrimination, it may be safest and simplest to add sexual orientation to your nondiscrimination policies for all locations, regardless of the laws that may or may not apply to a specific one.

In addition, because sexual orientation discrimination is a "hot" topic and is being prohibited by more states and municipalities all the time, you need to keep a close eye on any changes that may be in the works at the state or local level.

As for employers that aren't currently subject to any sexual orientation law, we generally recommended that you offer the same protections to LGBT employees as

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other protected classes unless there is a compelling reason not to. The Equal Employment Opportunity Commission (EEOC) takes the position that Title VII prohibits sexual orientation and gender identity discrimination and will accept charges on those grounds. In other words, you could still get sued for sexual orientation discrimination.

Ultimately, it's your decision whether to prohibit sexual orientation discrimination when there is no clear requirement to do so. However, you should make such a decision only with a firm understanding of the potential risks and liabilities and in consultation with your employment attorney.

One final word

While the law is not yet decided on whether religious beliefs provide a legal justification for excluding sexual orientation from your nondiscrimination protections, there is an argument that churches and religious nonprofits should be allowed to discriminate on the basis of sexual orientation. Religious employers that are located in a jurisdiction that prohibits sexual orientation discrimination should consult their attorney on how to proceed. ✤

FLORIDA EMPLOYMENT LAW LETTER (ISSN 1041-3537) is published monthly for $447 per year plus sales tax by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

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