ALL ABOARD THE HR EXPRESS:

FEDERAL LEGAL UPDATE

Notable Federal Cases

WRITTEN BY:
Amy Robinson

***Kennedy v. Bremerton School District*, No. 21-418, 142 S. Ct. 2407 (2022)**

Bremerton School District high school football coach Kennedy alleged that his rights were violated under the First Amendment and Title VII when the District prohibited him from praying at the conclusion of football games in the center of the field, where he was often joined by Bremerton students and members of the community. The District contended it was responding to complaints from parents who reported their students felts pressured to participate in order to get playing time, that the coach's actions violated District policy, and that if they allowed it to continue they would be endorsing his activities in violation of the Establishment Clause. Kennedy declined to stop the prayers, asserting they violated his First Amendment rights to free speech and free exercise. The District did not rehire him for following season.

Kennedy sued claiming his individual right to exercise his religion trumped the School's concerns about the Establishment Clause. The district court sided with the District and the Ninth Circuit agreed and upheld the district court's decision.

The United States Supreme Court applied strict scrutiny and found the opposite. Notably, the Court found that his activities did not involve his "official duties" such that it would be considered "government speech" and overstep the Establishment Clause concerns were the District to allow it. Instead, it held that his prayers were purely "private" and "personal" and should have been allowed given his rights to free exercise. It also found that the District's policy which prevented such activities was not neutral or generally applicable, and therefore overstepped his rights.

KEY TAKEAWAY

This case did not change the general rule that that public employers may not interfere with an employee's free exercise of religious expression where it is entirely on their own personal time and outside of their "official duties." However, what constitutes "official duties" may be less clear and subject to increased scrutiny given this decision. Public employers would be wise to review any policies or practices implicated by this decision, and update them accordingly.

***Shields v. Credit One Bank*, 32 F.4th 1218 (9th Cir. 2022)**

Shields alleged that her former employer violated the ADA by failing to accommodate her disability and instead terminating her from her human resources job after she underwent a bone biopsy surgery of her right shoulder and arm. The lower court concluded that Shields failed to plead a "disability" because she did not adequately allege any permanent or long-term effects for her condition, and dismissed her case.

Employers, and Courts, are to construe the definition of "disability" in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADAAA. Shields' evidence that she had physical impairment both during an immediate post-surgical period and during an extension period in which her surgeon concluded that her injuries had not sufficiently healed to permit her to return to work was enough to do so.

KEY TAKEAWAY

Whether an employee is entitled to accommodation for a disability does not depend on whether they can show the employer that the impairment at issue is long-term.

***Buchanan v. Watkins & Letofsky, LLP*, 30 F.4th 874 (9th Cir. 2022)**

Buchanan sued her employer for, among other things, disability discrimination under the ADA. The lower court dismissed her ADA-related claims, finding that her employer did not have the requisite 15 employees to come under the ADA's jurisdiction because she could not show that the employers' California and Nevada entities were sufficiently integrated to be recognized as a single employer.

The Ninth Circuit reversed and remanded given what it saw as potential evidence of integration between both entities, namely:

- A shared website, 800 number, email template footers which identified both offices, shared operational administrative work, a single IRS taxpayer ID and a joint employee roster;
- Two partners who managed both offices; and
- The same two partners owned both companies.

KEY TAKEAWAY

This case is a good reminder of what not to do when trying to ensure that two entities are truly considered separate for a range of reasons.

***Hill v. Walmart*, 32 F.4th 811 (9th Cir. 2022)**

Hill, a model, appeared in ten photo shoots organized by Walmart between July 2016 and August 2017 for a total of fifteen days, in non-consecutive periods of one or two days. She sued Walmart under the California wage statute for its failure to pay her immediately after each photo shoot ended and sought more than $540,000 in penalties.

Walmart had indeed proven the necessary elements for a defense to applicability of the statute. Through a good faith dispute as to Hill's employment status, Walmart showed sufficient facts to support that its belief that she was an independent contractor was reasonable.

KEY TAKEAWAY

While the decision itself is fairly constrained to the California wage payment statute context, it illustrates the significant risks of misclassification of workers as independent contractors—which are subject to numerous (and often differing) tests and weighted heavily in favor of "employee" status.

Federal Legislation

Act New Limits to Arbitration Agreements and Class Action Waivers

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. This law amended the Federal Arbitration Act (FAA) to provide that a person pursuing a dispute based on sexual harassment or sexual assault allegations may elect to have any mandatory arbitration provisions rendered unenforceable.

Additionally, if an employee's claims involve sexual harassment or sexual assault, employers can no longer enforce joint-action waiver provisions in which the employee waived the right to participate in joint, class, or collective actions (whether a lawsuit, arbitration, or other forum).

Another provision is that whether the Act applies at all will be determined by a Court, not an Arbitrator.

This law applies retroactively so long as the claim or dispute arose on or after March 3, 2022.

KEY TAKEAWAY

It is now entirely the employee's option to pursue such claims in state, federal or tribal court rather than in arbitration—even if they signed a mandatory arbitration.

Federal Agency Guidance

EEOC Updates COVID Guidance

After August, employers now have to prove that testing requirements are consistent with a "business necessity" and are job-related, rather than relying upon the prior guidance that it was always permissible. While there is no single factor to assess such a necessity, the U.S. Equal Employment Opportunity Commission (EEOC) has outlined a number possible considerations including:

- The level of community transmission;
- The vaccination status of employees;
- The accuracy and speed of processing for different types of COVID-19 viral tests;
- The degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;
- The ease of transmissibility of the current variant(s);
- The possible severity of illness from the current variant;

- What types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals); and
- The potential impact on operations if an employee enters the workplace with COVID-19.

When making this assessment, employers should also consider updated CDC guidance (along with other relevant sources) to determine whether screening testing is appropriate. (EEOC, A.6.)

Given the current CDC guidance on antibody tests (that these tests cannot determine if someone is currently infected with COVID-19 or immune), the new guidance now prohibits employers from requiring an antibody test from employees returning to the workplace.

For job applicants or potential employees, employers can require screening for symptoms of COVID-19, as long as there is a conditional job offer and the policy is applied uniformly.

Additionally, an employer can rescind a job offer after a positive COVID-19 test if the job requires an immediate start date, the current guidelines applicable to the employee prohibit close proximity to others, and the job requires close proximity to others. The EEOC notes that given the short period for isolation or quarantine, while rescission may be permissible, employers should first consider adjusting the start date or permitting telework (for job duties that could be performed remotely) where possible.

DOL Field Advisory Bulletin Reflects Agency Enforcement Focus on Retaliation

A new Field Assistance Bulletin (FAB) from the Department of Labor (DOL) seeks to provide guidance to its enforcement agents regarding worker protections related to retaliation under the full range of statutes enforced by DOL. This includes the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Worker Protection Act (MSWPA), and a number of Visa Programs (H-1B, E-3, H-2). For more information, visit FAB 2022-2: Protecting Workers from Retaliation (dol.gov).

DOL Rolls Out New Independent Contractor Rules

Under the prior administration, the DOL had rolled out an updated rule for when a worker qualifies as an independent contractor under FLSA that focused significantly on the degree of control, instead of the prior "economic realities" balancing test. After the change in administration, the DOL first delayed and then attempted to withdraw the rule, however, a federal court found that the prior new rule had taken effect as of March 8, 2021.

After gathering some initial input, the DOL proposed a new rule that essentially restores the multifactor, totality-of-the-circumstances "economic realities" test to determine whether a worker is an employee or an independent contractor under the FLSA. Citing "confusion and uncertainty" under the simplified degree-of-control test and consistency with case law, the Department suggests the multi-factor test is preferable, as no one factor is in control. Those factors include:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.

- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

The comment period is open through November 28, 2022.