ILLINOIS STATE BAR ASSOCIATION

DECEMBER 2020 VOL 58 NO. 4

Labor & Employment Law

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Department of Labor Issues New Guidance on Whether Employees Must be Paid for Travel and Training

BY SCOTT KIPLINGER & CHRIS THRUTCHLEY

The Wage and Hour Division of the U.S. Department of Labor recently issued two opinion letters detailing how employers must calculate compensable hours worked under the Fair Labor Standards Act ("FLSA"). Employers should review the new guidance pertaining to travel and voluntary training and should realign policies and pay practices where necessary to ensure compliance.

Compensable Travel Time

The DOL considered whether non-exempt foremen and laborers must be compensated for travel time to job sites. Foremen were required to keep a company vehicle at the employer's principal place of business and would pick up the truck, drive it to the job site, and return it to the employer's place of business. Whether that

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Pandemic/COVID-19 Workplace Claims – A Plaintiff's Perspective

BY DAVID FISH

As we transition out of the blindsiding-shock phase of the COVID-19 pandemic (where, for example, restaurant workers were terminated because local authorities shut them down on a few days' notice) and we enter the "new normal", at least for the foreseeable future, we are starting to see employers make illegal decisions such as cutting those employees who are exercising their legal rights, using COVID-19 as a pretext for an illegal termination, and failing to properly navigate the new legislation being passed on the federal, state, and local levels.

Here are the types of employment cases that we see, and will continue to result, because of the COVID-19/Coronavirus

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travel time is compensable is determined by two factors: (1) the nature of the work site; and (2) whether the employee was a foreman or laborer.

Local job sites: Job sites close to the employer's place of business are local. Foremen must be paid for the travel time to local job sites because retrieving the truck, driving it to the job site, and returning it at the end of the day are duties which are "integral and indispensable" to their work. Laborers, however, are not paid for travel to local job sites. Rather, the laborers' travel time is normal commuting time between home and work. Therefore, even if the laborer chooses to meet at the employer's place of business and ride to the job site with the foreman in the company truck, such travel time is not compensable.

Remote job sites: Job sites between 1.5 to 4 hours away from the employer's place of business are "remote." Foremen drive the company vehicle from the place of business to the work site, and such travel time is compensable. However, travel time for laborers is compensable only if the laborers travel during their normal work hours. Furthermore, if employers offer laborers the opportunity to ride to the remote job site with the foremen, the employer may choose to compensate the laborer for either the time that accrues on the trip in the company truck or the time the laborers actually take to travel to the remote job site. Finally, if laborers choose to commute to the remote job sites, travel time outside of normal work hours is not compensable.

Compensable Time for Voluntary Training Programs

A medical facility asked whether the FLSA required employers to compensate employees for attending voluntary training programs. The facility employs clinical staff who must complete continuing education each year to maintain their licenses. The facility also employs non-clinical support staff who have no continuing education requirements. If the facility mandated training or education, it counted the time as compensable but asked whether it could require employees to use paid time off or vacation to attend "voluntary" continuing education requirements not mandated by the employer.

The DOL explained that there are two situations when training time is not compensable for FLSA purposes, even if it directly relates to the job. First, voluntary attendance at a course offered by "independent bona fide institutions of learning" is not compensable. Second, an employer is not required to pay for time voluntarily attending an independent school, college, or trade school after hours, even if the courses are related to the employee's job.

Whether the training is attended to maintain a professional license is only helpful in proving that the course was offered by an "independent bona fide institution of learning." The biggest factor in determining whether professional training is "work time" under the FLSA is, ultimately, whether the training occurs outside of an employee's regular work hours.

The key takeaway from these new opinion letters, is that employers should consider establishing or modifying compensation policies or practices to ensure compliance. GableGotwals's Employment & Labor team is happy to help.

We remain on the cutting edge of employment-related legal developments and are committed to helping employers navigate the nuances of emerging issues they face. Please contact any member of the team for further assistance.■

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This is the newsletter of the ISBA's Section on Labor & Employment Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.

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pandemic:

Health & Safety Retaliation Claims

We have already seen, and we predict we will continue to see, many retaliation claims filed where workers raise COVID-19 related health and/or safety complaints. A typical situation involves an employee raising some type of concern about the safety of the workplace. These concerns can be things relating to the lack of personal protective equipment, an employer's failure to follow social distancing guidelines, or an employee being forced to work next to someone who has a bad cough (and potentially COVID-19).

Employees at this time are scared because they're worried about catching COVID-19. Imagine if you had to sit in a cubicle next to the guy who kept coughing and you had a newborn at home and a spouse with health conditions that make her more susceptible to dying from COVID-19. Employees are, understandably, worried about getting sick. They are also scared about bringing an infection home and infecting their family members.

As a result of this fear, the new water-cooler chat inevitably turns to health and safety concerns. In every crowd, there is usually an employee who speaks up and starts asking about things like working from home, having the company buy more PPE, or allowing other accommodations. Unfortunately, making a workplace safe costs money and, in this economy, some employers are more keen on saving than spending. This creates tension between worker rights and employer rights.

Management often does not like it when people complain. What can unfortunately happen is that the employee who raises the concerns gets fired. Terminating employees for complaining about health and safety issues is often illegal and, understandably, there are a number of different laws that protect workers in this arena.

These claims are typically pursued under the common law of retaliatory discharge. "An employee can state a cause of action if he alleges that he was terminated for protesting unsafe working conditions." *Fragassi v. Neiburger*, 269 Ill. App. 3d 633, 638, 646 N.E.2d 315, 318 (2d Dist. 1995). Alternatively, because there are so many COVID-related rules and regulations, such complaints can be protected under the Illinois Whistleblower Act. 740 ILCS 174/15.

Given that many courts are closed for trials right now, and justice delayed is justice denied, we have turned to federal agencies that have remained open to advance our clients' interests. When our clients have engaged in concerted activities with other workers concerning safety concerns (i.e., speaking up at a safety meeting), we suggest pursuing claims with the National Labor Relations Board (NLRB).

While I have several criticisms about the NLRB, one thing I cannot complain about is how quickly it responds. In the last two NLRB retaliation claims that we have filed since the pandemic, our clients have had their NLRB retaliation interviews scheduled in less than three business days from the day we filed the complaint and the interviews were conducted telephonically. Remember, contrary to popular belief, the National Labor Relations Act protects many non-union employees and can allow employees to get reinstated to their prior positions and receive back wages. As such, I anticipate a substantial increase in NLRB claims.

The OSHA Act of 1970 requires that "Each employer shall furnish to his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" and that "Each employee shall comply with occupational safety and health standards and all the rules, regulations, and orders issued by this Act which are applicable to his own conduct." I also foresee that OSHA whistleblower litigation will substantially increase. Although not as quick as the lightning fast-NLRB process, OSHA provides another forum for resolving health and safety-related complaints. OSHA has a very easy online whistleblower complaint form. As it is so easy to file, and workers are scared right now about health and safety, we anticipate a number of OSHA claims.

Over the next few years, many retaliatory discharge claims arising out of COVID-19 issues will work their way through the courts. In some jurisdictions, the best way to maximize damages for a retaliation claim based upon health and safety issues is by filing a retaliatory discharge claim in court. The downside of this method is that the process takes a long time; the upside is juries do not like to see employees being fired for complaining about health and safety issues. Also, in some jurisdictions (like those where I practice), punitive damages are allowed. Multi-million jury awards are not uncommon for retaliation claims.

Finally, one nice thing about retaliation claims based on health and safety issues is that you can file in multiple forums. For example, you can file with the NLRB and also proceed in court. This allows you to have the benefit of a governmental investigation of your claims which may provide you with a head-start in court.

False Claims/Qui Tam Claims

There will be an explosion in False Claims and Qui Tam cases. The federal government quickly spent over $2 trillion dollars and likely will spend more. State and local governments are also putting out money. Billions are being spent on the care of those who have contracted COVID-19. The Department of Justice has prioritized the investigation of COVID-19 related fraud and directed local offices to appoint a Coronavirus Coordinator.

Employees often know the dirt on what their employers are doing and are eager to share it when they are fired. This makes them prime candidates to be a whistleblower to expose fraud on the government. For example, is an employer taking paycheck protection money and doing something with it other than paying employees defrauding the government? Are physicians and health care providers improperly billing for medical care? Are the companies that are being contracted to provide essential equipment during the pandemic lying to boost up their profits?

Workers' Compensation Claims

There will be a significant number of workers' compensation claims filed as a result of employees becoming sick or dying from COVID-19. An example of such a claim is a health care aide at a nursing home who dies or becomes sick from COVID-19 exposure in the workplace.

Typically, in a workers' compensation claim, a successful claim requires an injury in the line of duty. Usually, this is simple: if a worker has a finger taken off while operating a press at work, that is the type of claim that is clearly in the line of duty. However, showing this is not an easy task in the case of COVID-19; for example, how would an employee be able to prove that she was infected at work as opposed to while shopping at the grocery store?

The interesting question will be how to value these claims. I think it will be somewhat hard to value non-death claims. For example, if someone is sick but recovers in two weeks without any permanent injuries or serious hospitalizations, what is the value of their claim? I anticipate that the most common claim will be death claims, i.e., people who died from their COVID-19 exposure. And, unfortunately, there will be many such fallen heroes.

CARES Act Claims/Disability Related Claims

There will be a significant number of cases brought under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and related emergency legislation. In addition, given the panic in the workplace by those with symptoms that make them more susceptible to dying from COVID, there will be an uptick in disability-related claims under the Americans with Disabilities Act and related legislation. With this said, we think that the majority of these claims are likely to be brought on an individual/non-class basis.

The Family and Medical Leave Act (FMLA) now allows an eligible employee to take FMLA leave on an expanded basis, *i.e.*, to care for a child whose school is closed or unavailable due to the COVID-19 pandemic. Like the FMLA, the Emergency Paid Sick Leave Act (EPSLA), includes anti-retaliation and anti-discrimination provisions. It incorporates the Fair Labor Standards Act (FLSA) by allowing for liquidated damages and attorneys' fees.

Many employers are very reasonable when it comes to COVID-19 related accommodations. Where we tend to find the highest level of claims is for those employees who are "below-average" employees. While the employer may have been willing to put up with these employees under normal circumstances, now that the employee has the "audacity" to ask for an accommodation (that the law allows), that employee may be looking at termination. We anticipate the future issue in many of these cases will be whether the employee would have ended up being terminated anyway, or whether they were fired because he/she requested some type of leave or accommodation. In many respects, I believe that the next few years of employment litigation will be similar to what it was like after the tragic 9-11 attacks: some employers will claim that these employees would have ultimately been fired (anyway) because the economy was crashing.

Wage Claims

Last, but certainly not least, there will be some wage and hour litigation. One area we are seeing frequent violations is with respect to the computation of the "regular rate" for overtime purposes. Consider this example: employer is paying $10 per hour. Employer is adding on hazard pay of $4 per hour extra. When computing the overtime rate, many employers are still paying overtime on the base rate (i.e., an overtime rate of $15 per hour) whereas the appropriate rate is 1.5 times the total compensation ($14) which would make the overtime rate $21 per hour.

As direct employers go out of business and cannot pay wages, one interesting area will be testing the scope of what constitutes an "employer" or "joint employer" under the wage laws. For example, if a temporary agency fails to pay its workers, the end client (i.e., where the employee is placed) may be a viable target for collection purposes. Likewise, because employment laws have expansive liability for certain individuals who own/operate a business, those individuals may be brought in as defendants in wage cases.

There will be claims in the future under the WARN Act. I don't believe that these claims will necessarily arise from the sudden government shutdown, although there have been some cases filed already. (See *e.g.*, *Siers v. Velodyne Lidar*, No. 5:20-cv-02290 (N.D. Cal. Apr. 3, 2020) (claim under WARN Act alleging Pandemic as a pretext for the improper layoffs). We will see some WARN Act claims down the road for those businesses that are dying a slow death (a restaurant, of course, does not need to WARN when it is given no notice that it must shut down); however, a business that is slowly seeing its sales decline and is predicting internally the need to layoff may have a WARN obligation.

Executives with contracts that are prematurely terminated due to the economy will have significant claims. There may also be ERISA claims due to employee benefit violations and diminishing employee retirement account balances.

I anticipate that there may be some claims associated with worker expenses that arise from working at home in those states that require employee expense reimbursement. I don't think these claims are particularly exciting (nor valuable), but having an employee work from home does result in the employee potentially incurring some costs. And, in some instances, the "free and clear" take-home pay could dip below minimum wage and trigger FLSA liability.

There will be some overtime claims from people who are claiming to be working more at home, but I think that these are going to be small, insignificant, and individualized claims (although, from what I have read, the defense bar seems to think otherwise).

With all of these new laws, some with no precedent, the next few years should be an exciting time for employment lawyers. There will be bumpy roads ahead and we, as lawyers, will help keep everyone on the straight and narrow.■

Nondisparagement Clause Does Not Violate National Labor Relations Act

BY MICHAEL R. LIED

The National Labor Relations Board and the federal courts have long protected employees' and unions' right to disagree with management, sometimes vociferously and even profanely. Part of this protection has historically included a degree of negative commentary about the employer. Some recent cases may have chipped away a bit.

In *IGT d/b/a International Game Technology*, 370 N.L.R.B. No. 50 (2020) the general counsel alleged that IGT violated Section 8(a)(1) of the Act by maintaining an overly-broad nondisparagement provision in an agreement, which IGT sometimes offers to lawfully separated employees. An administrative law judge found that the provision was unlawful. The Board majority, however, reversed, over a strong dissent by Member McFerran.

By way of background, IGT is a multinational company that assembles, installs, removes, services, and repairs gaming machines. It has a practice of offering a separation agreement to employees terminated as a result of the elimination of their positions. This agreement offers postemployment benefits to employees who agree to release IGT from all claims relating to their employment and to refrain from certain postemployment conduct.

Section 3 of the agreement described certain benefits to be granted upon execution of the agreement.

Section 8 of the agreement was the allegedly unlawful provision:

You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT.

As mentioned, the administrative law judge found this provision unlawful. He found that, because the provision was not limited to disparaging remarks that are malicious or reckless, employees who receive the agreement would reasonably interpret the provision to prevent them from making critical public statements about IGT's employment terms or practices, and that, therefore, the provision would have a broad potential impact on employee Section 7 rights. The judge concluded that IGT's interest in protecting against malicious or false statements that disparaged its products and services was insufficient to outweigh such an impact.

In another recent case, *Baylor University Medical Center*, 369 NLRB No. 43 (2020), the Board had dismissed an allegation that Baylor University violated Section 8(a)(1) by offering departing employees an opportunity to sign separation agreements containing allegedly unlawful provisions in exchange for severance pay and postemployment benefits to which they otherwise would not have been entitled. The Board rejected the judge's application of *The Boeing Company*, 365 NLRB No. 154 (2017) to the separation agreement and affirmed that *Boeing* only applies to allegedly unlawful work rules establishing conditions of employment. In Baylor University the Board explained that the separation agreement differed from a work rule in two fundamental ways:

First, the agreement was not mandatory; signing it was not a condition of continuing employment, as it was optional and applied only in the event of separation. Second, the agreement exclusively pertained to postemployment activities and had no impact on terms and conditions of employment or any accrued severance pay credit or benefits arising out of the employment relationship that Baylor University would be obligated to pay regardless of whether a departing employee signed. The Board concluded that the mere proffer of the agreement was not coercive and dismissed the allegation.

The *IGT* case similarly involved a separation agreement offered to departing employees, as opposed to a work rule or policy that established conditions of employment. As in *Baylor University*, a departing employee's acceptance of IGT's Agreement was entirely voluntary. Further, any benefits to which the employee would already have been entitled as consideration for the work he or she performed as an employee were unaffected by the employee's decision whether or not to accept the proffered Agreement. Moreover, the *IGT* case did not involve 8(a)(3) allegations or evidence of other unlawful discrimination, nor was there evidence that IGT proffered the agreement under circumstances that would reasonably tend to interfere with the separating employees' exercise of their own Section 7 rights or those of their coworkers.

Because the agreement was entirely voluntary, did not affect pay or benefits that were established as terms of employment, and had not been proffered coercively, the Board majority found that the nondisparagement provision would not tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act.■

Court Will Not Aggregate Employees of Separate Companies to Reach Title VII Threshold

BY MICHAEL R. LIED

Smaller companies are exempt from some employment-related laws, including some federal antidiscrimination laws. The decision excerpted below refused the plaintiff's attempt to try to combine the employees of several related companies to reach or exceed the necessary numerical threshold for the law to apply.

Applecars, LLC is a member of a network of affiliated but corporately distinct used-car dealerships located in Wisconsin. Shannon Prince worked at Applecars for several months in 2018 before he was fired. Prince claimed his firing was retaliatory, and he sued Applecars and its affiliates for racial discrimination under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment to the defendants, noting that Applecars had fewer than fifteen employees and therefore was not subject to Title VII.

On appeal, the court of appeals explained how the dealerships were both related and yet legally separate: The Applecars dealership was affiliated with four other dealerships throughout Wisconsin. Each of these dealerships was independently owned by a separate Wisconsin limited liability company. Robert McCormick owned a majority or outright share in each of these LLCs. Furthermore, each of the dealerships received management sendees from Capital M, Inc., which McCormick also owned. Applecars had fewer than fifteen employees, but if the court were to aggregate all the dealerships, they would have more than fifteen employees.

The dealerships had a number of things in common. Capital M provided management services to each dealership, including marketing, financial, accounting, "visionary," and payroll services; Capital M tracked shared dealership inventory, held personal employee records, and issued identical employee handbooks for each dealership. Capital M's operations manager hired, fired, and promoted each dealership's general manager. McCormick was the sole or majority owner of each dealership. The employees of each dealership gathered for events and parties several times per year.

All the dealerships also advertised on a single website, www.199ride.com. The landing page marketed the dealerships with some language suggesting a single entity, including "Wisconsin's #1 Highest Volume Independent Dealer" and "We are a dealer for the people." Yet, according to the appeals court, there were other clear indicators that each dealership was a separate entity. The landing page displayed all four dealerships' names, physical addresses, and phone numbers. Under a "Locations" tab, a visitor could access a drop-down menu with names of each dealership linked to their own websites. The bottom of the landing page included the d/b/a for each dealership as well.

Importantly, though, each dealership and its LLC owner properly maintained corporate formalities and records. Capital M's management services billed each dealership separately. Each dealership individually paid for Capital M's management services and for the use of the 199ride.com trademark and website. Each dealership had a distinct general manager, its own bank accounts, and its own financial reports. The dealerships also filed and paid their own taxes, paid their own employees (and issued their own W-2 forms for their employees), and entered into their own contracts for business purposes.

The court of appeals looked to its leading case, *Papa v. Katy Industries, Inc.,* 166 F.3d 937 (7th Cir. 1999). There, the court addressed "what test to use to determine whether an employer that has fewer than 15 ... employees, and thus falls below the threshold for coverage by the major federal antidiscrimination laws,... should be deemed covered because it is part of an affiliated group of corporations that has in the aggregate the minimum number of employees." In *Papa*, the court noted that the purpose of exempting small businesses from Title VII was not to encourage discrimination by them but rather "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." The court laid out three circumstances when the existence of an affiliated company would result in potential liability under Title VII. Employee aggregation is appropriate where (1) the enterprise has purposely divided itself into smaller corporations to dodge requirements imposed by the anti-discrimination laws, (2) a creditor of one corporation could, by piercing the corporate veil, sue its affiliate, or (3) the affiliate directed the discriminatory act or practice of which the plaintiff complains.

Accordingly, piercing the corporate veil for the purpose of employee aggregation requires a plaintiff show more than a degree of integration of corporate operations. Because piercing the corporate veil is governed by state law, the appeals court also looked to Wisconsin state law to determine whether to pierce the corporate veil. This did not change the outcome.

The logic in *Papa* that it makes sense for affiliated small businesses to share some operational efficiencies applied to the coordination between Applecars, the other dealerships, and Capital M. Applecars and its related dealerships overlapped a great deal in terms of operations, particularly in the areas of shared services received from Capital M. But the court had already deemed it was legitimate to share those services, such as marketing, financial, accounting, and employee records, without risking veil-piercing. That McCormick was the sole or majority owner of the business was not dispositive; indeed, the fact that other owners held shares in some dealerships but not others is a textbook reason for such companies to maintain formal corporate separation, even if they contracted together for some services.

True, the dealerships shared a web address (where they were advertised and counted together as Wisconsin's largest independent used car dealership), perhaps weighing in favor of piercing the veil. But that alone was not enough, particularly where 199rides.com identified the dealerships separately by name and by address, and importantly, where the companies in question respected every corporate formality. The undisputed evidence that the dealerships properly kept records and maintained separate financial accounts overwhelmed any slight doubts brought on by the website.

As the appellate court wrote in *Papa*, it is nonsense to suggest that a corporate group must erect firewalls among its affiliates or else risk Title VII liability. "The corporate veil is pierced, when it is pierced, not because the corporate group is integrated ... but (in the most common case) because it has neglected forms intended to protect creditors from being confused about whom they can look to for the payment of their claims." Here, there was no evidence the defendants neglected corporate forms or risked confusing their creditors. While substantially integrated, the dealerships properly maintained separate accounts, identities, and corporate records. Therefore, there was no basis to pierce the corporate veil.

The case is *Prince v. Appleton Auto, LLC,* 2020 WL 6156882 (7th Cir. Oct. 21, 2020). ■