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EMPLOYMENT LAW UPDATE

Keith M. Weddington

June 3, 2020

Webinar Housekeeping

- **Questions** – Type your questions for the speaker into the Questions pane and we will seek to address them at the end of the webinar as time permits.
- **CLE** – The ACC-CLT Chapter will coordinate CLE for this webinar.
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- The law is changing rapidly in this area. This presentation is our best attempt to summarize the current state of the law as of June 3, 2020, but is subject to change.

Today's Presenter

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AGENDA

I. Judicial Decisions

- U.S. Supreme Court
- 4th Circuit
- North Carolina Courts

II. Regulatory Update

III. Potential Pandemic-Related Litigation

SUPREME COURT DECISIONS

TRANSGENDER & TITLE VII

R.G. & G.R. Harris Funeral Homes Inc. v. EEOC

(Pending)

- **Issue**: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

SEXUAL ORIENTATION & TITLE VII

Altitude Express v. Zarda

(Pending)

and

Bostock v. Clayton County, Georgia

(Pending)

- **Issue**: Whether the prohibition in Title VII against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

"BUT FOR CAUSATION" & §1981

Comcast Corp. v. National Association of African American-Owned Media et al.

(Decided March 23, 2020)

- 42 U.S.C. § 1981 prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts
- **Issue:** Does a claim of race discrimination under 42 U.S.C. § 1981 require that the plaintiff show "but-for" causation, or only that race is a motivating factor?

"BUT FOR CAUSATION" & §1981

Comcast Corp. v. National Association of African American-Owned Media et al.

(Decided March 23, 2020)

- **Held**: A §1981 plaintiff bears the burden of showing that the plaintiff's race was a "but-for" cause of its injury, and that burden remains constant over the life of the lawsuit.
- Using the lesser "motivating factor" test at the 12(b)(6) stage was inappropriate.
- Decision is consistent with prior SCOTUS decisions requiring "but-for" causation in age and Title VII retaliation claims.

STATUTE OF LIMITATIONS FOR ERISA BREACH OF FIDUCIARY DUTY CLAIMS

Intel Corp. Investment Policy Committee v. Sulyma.

(Decided March 23, 2020)

- ERISA provides for 6 year SOL; but, where plaintiff had "actual knowledge" of the fiduciary breach, SOL is only 3 years.
- **Issue:** Where the defendants disclosed all relevant information but the plaintiff chose not to read or could not recall having read the information, does plaintiff have actual knowledge?

STATUTE OF LIMITATIONS FOR ERISA BREACH OF FIDUCIARY DUTY CLAIMS

Intel Corp. Investment Policy Committee v. Sulyma.

(Decided March 23, 2020)

- Plaintiff does not necessarily have "actual knowledge" of the information contained in disclosures that he receives but does not read or cannot recall reading.
- Defendant must show evidence that plaintiff read and understood the information contained in the plan documents and other relevant statements.

STATUTE OF LIMITATIONS FOR ERISA BREACH OF FIDUCIARY DUTY CLAIMS

Intel Corp. Investment Policy Committee v. Sulyma.

(Decided March 23, 2020)

- Court noted that its ruling did not limit any of the ways a defendant might demonstrate actual knowledge by an ERISA plaintiff sufficient to trigger the 3 year SOL.
- Consider additional steps to emphasize the importance of plan documents and communications.
- Have participants sign acknowledgments of reading and understanding plan documents and disclosures.
- Track online access to documents by participants.

FOURTH CIRCUIT DECISIONS

HATE CRIMES PREVENTION ACT

U.S. v. Hill

(Decided June 13, 2019)

- Federal Hate Crimes Prevention Act of 2009 can be applied to an unarmed assault of an employee engaged in commercial activity in the workplace.
- Nexis to interstate commerce was found sufficient to invoke The Federal Hate Crimes Prevention Act of 2009.
- The risk of federal criminal charges should be mentioned in anti-harassment training to underscore the seriousness of such acts.

TITLE VII & §1981 —SUMMARY JUDGMENT

Matias v. Elon University

(Decided July 22, 2019)

- Affirmed dismissal of race discrimination claim filed by employee who was denied promotion and later terminated for sexually harassing a coworker.
- Two anti-Mexican statements made by the decision maker 9 years apart were isolated and sufficiently removed in time from the promotion decision.

TITLE VII & §1981 —SUMMARY JUDGMENT

Matias v. Elon University

(Decided July 22, 2019)

- Plaintiff's alleged comparator was not comparable
  - The difference between the severity of harassment justified the employer taking different remedial actions against the employees.
  - HR was unable to confirm the complaints lodged against the comparator.
  - Unlike plaintiff, the comparator was never accused of forcing himself on a coworker.

TITLE VII & §1981 —SUMMARY JUDGMENT

Matias v. Elon University

(Decided July 22, 2019)

- Consistency is important; but, discipline for harassment need not be “one size fits all.”
- Employers can impose different levels of discipline based on severity.
- Courts are reluctant to punish employers who investigate and take strong remedial action in response to sexual/unlawful harassment complaints.

PUNITIVE DAMAGES

Ward v. AutoZoners, LLC

(Decided May 11, 2020)

- Fourth Circuit vacated jury's award of punitive damages against employer in a hostile environment sexual harassment case based on lack of personal involvement or malice by the managers who failed to appropriately respond to plaintiff's complaints.

PUNITIVE DAMAGES

Ward v. AutoZoners, LLC

(Decided May 11, 2020)

- Imposing punitive damages in the case of mere knowledge of harassing conduct and negligent failure to act would conflate Title VII's standards for compensatory and punitive damages.
- Doing so would impute liability to an employer in virtually every hostile work environment case based on a theory of negligence.

PUNITIVE DAMAGES

Ward v. AutoZoners, LLC

(Decided May 11, 2020)

- To hold an employer liable for punitive damages for a coworker harassment claim, plaintiff must demonstrate either:
  - (1) the managers participated in the harassing conduct, or
  - (2) the managers acted with malice or reckless indifference in responding to the harassment.

PUNITIVE DAMAGES

Ward v. AutoZoners, LLC

(Decided May 11, 2020)

- Training, prompt investigation and effective remedial action remain the keys to avoiding liability.
- Provide annual anti-harassment training to employees and managers.
- Be sure managers know how to respond to incidents of unlawful harassment.
- Hold managers accountable for doing so.
- Document! Document! Document!

FITNESS FOR DUTY EVALUATION

Johnson v. Old Dominion University et al.

(Decided May 14, 2020)

- ADA prohibits employers from requiring employees to undergo medical exams unless exam is shown to be "job related and consistent with business necessity."
- Employer must have a reasonable belief, based on objective evidence, that: (1) employee's ability to perform essential job functions will be impaired; or (2) employee will pose a direct threat due to a medical condition.

FITNESS FOR DUTY EVALUATION

Johnson v. Old Dominion University et al.

(Decided May 14, 2020)

- Affirmed summary judgment for employer, rejecting ADA claim challenging required fitness for duty evaluation based on employee's behavior.
- Plaintiff's increasingly disruptive and irrational behavior challenging and disputing any comments made re: his work or behavior justified medical exam.

FITNESS FOR DUTY EVALUATION

Johnson v. Old Dominion University et al.

(Decided May 14, 2020)

- Where an employee's behavior and responses to employer's actions become objectively irrational or the employee's ability to communicate with the employer appears to be impaired, a fitness for duty evaluation may be merited.
- Employers should carefully document the business reasons supporting any decision to require a medical/psychological exam.
- Objective evidence is key.

NORTH CAROLINA STATE COURT DECISIONS

ELECTRONIC DISCOVERY

Crosmun v. Trustees of Fayetteville Technical Community College

(Decided August 6, 2019)

- NC's first substantive appellate court decision on electronic discovery
- Defendants objected to document requests on the basis of attorney-client, work product and state and federal statutory privileges
- Case arose from an order on underlying motions to compel discovery filed by plaintiff against FTCC

ELECTRONIC DISCOVERY

Crosmun v. Trustees of Fayetteville Technical Community College

(Decided August 6, 2019)

- Trial court entered order on discovery protocol allowing plaintiff's forensic expert:
  - To access FTCC's devices
  - To create mirror images
  - To run searches desired by plaintiff
  - To screen out potentially privileged documents by using search terms identified by plaintiff
  - To immediately deliver documents not flagged as potentially privileged to plaintiff, while defendant would then review and log privileged search hits/documents

ELECTRONIC DISCOVERY

Crosmun v. Trustees of Fayetteville Technical Community College

(Decided August 6, 2019)

- The forensics expert was acting as plaintiff's expert and agent—not as a court appointed special master or expert.
- Court of Appeals found abuse of discretion by giving plaintiff's agent direct access to potentially privileged information without defendants having an opportunity to avoid potential waiver.
- Held that plaintiff's protocol amounted to an involuntary waiver of privileges.

ELECTRONIC DISCOVERY

Crosmun v. Trustees of Fayetteville Technical Community College

(Decided August 6, 2019)

Court of Appeals suggested that trial court:

- Appoint a special master or court-appointed expert to conduct the forensic examination as an officer of the court.
- Provide defendant with some opportunity to review "hits" prior to production to plaintiff.
- Deem documents produced to be confidential per protective order.
- Order that disclosure of privileged info under the protocol is subject to clawback without any waiver of privilege.

ELECTRONIC DISCOVERY

Crosmun v. Trustees of Fayetteville Technical Community College

(Decided August 6, 2019)

- Despite overturning trial court's order, Court of Appeals acknowledged that ordering a forensic exam of a recalcitrant party's computers is a viable means to resolve ESI disputes.
- Both plaintiffs and defendants in state court matters should look to *Crosmun* for guidance on e-discovery issues and approved authorities.
  - Court cited a number of out-of-state cases and publications as authoritative guidance.
- While NC lacks an equivalent to F.R.E. 502(b), parties can achieve same effect via a consent protective order.

CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

Sterling Title Co. v. Martin

(Decided August 6, 2019)

Andy-Oxy Co., Inc. v. Harris

(Decided November 5, 2019)

- NC Ct. of Appeals continues to strike down noncompetition and nonsolicitation agreements.
- Restrictions should be limited to the "same or similar" position with a competitor.

CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

- Nonsolicitation of customers should be limited to customers with whom employee had contact, absent showing that employee had access to confidential information.
  - "All of employer's customers" will usually be found to be overly broad.
  - Employee's contacts should be material.
- Once a customer doesn't mean always a customer.
- Consider the recency of the customer relationship.

CONTINUED SCRUTINY OF NONCOMPETITION AGREEMENTS

- If a Covid-19 layoff ended the employment relationship and employee is rehired, have employee re-sign noncompetition or nonsolicitation agreements.
- Restricted period typically begins to run upon separation from employment.
- Prior agreements will not spring back to life upon reemployment.

Federal Regulatory Activity

EEO-1 REPORTS & "COMPONENT 2" DATA

- Employers with 100 or more employees (and federal contractors with 50 or more) are required to file annual EEO-1 reports.
- In 2019, employers were required to collect and report W-2 pay data for 2017 and 2018 within 12 pay bands for each EEO-1 job category by gender, race, ethnicity and establishment—along with hours worked during the year.
- The plan was to use this data to identify existing pay disparities for further investigation.

EEO-1 REPORTS & "COMPONENT 2" DATA

- Never mind!
  - EEOC informed OMB that it will not seek to collect pay data in the next report cycle.
- Also, EEO-1 Component 1 data collection is delayed due to Covid.
  - EEOC expects to begin collection of Component 1 data for both 2019 and 2020 in March 2021, with the exact date to be announced later.

DOL FINAL REGULATIONS
New White Collar Salary Threshold

- Effective January 1, 2020
- Impacts overtime exemptions for executive, administrative, professional, outside sales and computer employees.
- To satisfy "salary basis test," employee must receive minimum weekly salary of $684 ($35,568 annually).
- The exemption for "highly compensated employees" now requires minimum annual salary of $107,432, with at least $684/week paid on a salary or fee basis.

DOL PROPOSED REGULATIONS
New White Collar Salary Threshold

- Employers can use nondiscretionary bonuses, incentives and commissions to satisfy up to 10% of the salary level, provided they are paid at least annually.
- No changes to the "duties tests" for white collar exemptions
- No mechanism for automatic adjustments in the future

DOL FINAL REGULATIONS ON JOINT EMPLOYMENT UNDER FLSA

- Effective March 16, 2020
- Final rule provides 4 factor balancing test
- Examines whether potential joint employer:
  - Hires or fires the employee
  - Supervises and controls the employee's work schedule or conditions of employment to a substantial degree
  - Determines employee's rate and method of payment
  - Maintains employee's employment records

DOL FINAL REGULATIONS ON JOINT EMPLOYMENT UNDER FLSA

- Fact that alleged joint employer has the right or ability to exercise any of the four factors is relevant, but not conclusive.
- Instead, whether alleged joint employer actually uses the authority is more relevant.
- No single factor is dispositive in determining joint employer status.
- Weight given to each factor will vary depending on the circumstances.

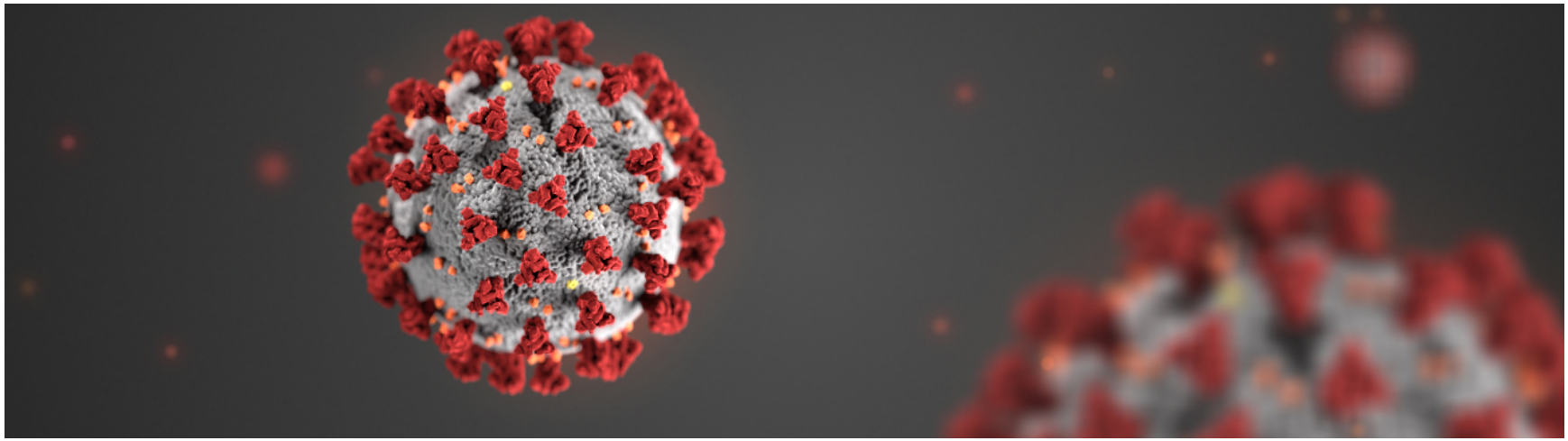
DOL FINAL REGULATIONS ON JOINT EMPLOYMENT UNDER FLSA

- Rule also identifies factors that are either not relevant or are insufficient, standing alone, to establish joint employer status:
  - Operating as a franchisor
  - Maintaining an employee's employment records
  - Unexercised ability to control an employee's conditions of employment
  - Contractual agreements to comply with legal obligations or standards
  - Contractual requirements re: quality control standards

DOL FINAL REGULATIONS ON JOINT EMPLOYMENT UNDER FLSA

- Open question—will courts follow DOL's new joint employer rule?
- Courts may follow an agency's interpretation of statute administered by agency ***if*** agency can show that its interpretation is persuasive.
- In Fourth Circuit, be mindful of *Salinas v. Commercial Interiors, Inc*. (2017), and its six-factor "completely disassociated" test.
- Employers should conform their practices to be in step with new rule in order to be able to rely on the rule in the event of litigation.

POTENTIAL PANDEMIC-RELATED LITIGATION



POTENTIAL PANDEMIC RELATED LITIGATION

Wage and Hour Claims

- Working off the clock from home (minimum wage and overtime issues)
- Meal and rest break claims in some states
- Failure to pay employees' expenses
- Failure to pay exempt employees their full salary when furloughed if any work was done during the furloughed work week
- Misclassification due to salary reductions dropping "exempt" employees below $684/week

POTENTIAL PANDEMIC RELATED LITIGATION

Health and Safety Related Claims

- OSHA
  - General duty clause—provide workplace free from recognized hazards
  - Regulations require PPE in certain industries
  - Retaliation
  - No private cause of action under OSHA, but Sec. of Labor can sue on employee's behalf
  - N.C.'s Retaliatory Employment Discrimination Act allows private cause of action

POTENTIAL PANDEMIC RELATED LITIGATION

Health and Safety Related Claims

- Workers Compensation
  - Pending legislation in some states to provide for presumption re: causation
- Tort claims for illness or death
  - By employees
  - By customers/third parties
- Retaliation/Whistleblower claims for raising health and safety concerns
- Unfair labor practices—retaliation for engaging in protected concerted activity

POTENTIAL PANDEMIC RELATED LITIGATION

Health and Safety Related Claims

- **ADA**
  - Discrimination
  - Failure to accommodate
  - Retaliation
- **FMLA**
  - Failure to provide leave/interference
  - Retaliation

POTENTIAL PANDEMIC RELATED LITIGATION

- **Families First Coronavirus Response Act (FFCRA) Claims**
  - Failure to provide emergency paid sick leave or expanded FMLA leave
  - Retaliation for having requested or used emergency paid sick leave or expanded FMLA leave
- **WARN Act and State Mini-WARN Acts**
  - Failure to provide required notice of mass layoffs
  - Challenges to employers' use of the "unforeseeable circumstances" exception

Contact Us With Questions

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