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ACC Association of Corporate Counsel

EMPLOYMENT LAW UPDATE

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June 1, 2022

Housekeeping

- **CLE** – The ACC-CLT Chapter will coordinate CLE for this webinar.
- **Legal disclaimer** - Portions of this communication may qualify as "Attorney Advertising" in some jurisdictions. However, Parker Poe intends for it to be used for educational and informational purposes only. This communication also is not intended and should not be construed as legal advice. For questions, contact ParkerPoe@parkerpoe.com.
- 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 1, 2022, but is subject to change.

Today's Presenters

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AGENDA

I. Judicial Decisions

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

II. Legislative and Regulatory Updates

III. Hybrid Workplaces, The Great Resignation, and Employee Retention

SUPREME COURT DECISIONS

LIMITED FEDERAL JURISDICTION FOR REVIEW OF ARBITRATION

Badgerow v. Walters

(Decided March 31, 2022)

- Issue: When do federal courts have jurisdiction to rule on motions to confirm, modify or vacate arbitration awards?
- Per prior case law, federal court hearing motion to compel arbitration under FAA can "look through" to the underlying dispute to see if the claim is one over which the court could otherwise exercise jurisdiction.
- Held: No "look through" with re: to motions to confirm, modify or vacate arbitration awards.

LIMITED FEDERAL JURISDICTION FOR REVIEW OF ARBITRATION

Badgerow v. Walters

(Decided March 31, 2022)

- Sec. 4 of FAA provides that a "party may petition any U.S. district court which, *save for such agreement*, would have jurisdiction under Title 28" to compel arbitration.
- Sections 9 and 10 of FAA, which allow a party to move to confirm or vacate an award, do not contain the "save for such agreement" language.
- Federal court must determine whether it has jurisdiction based on the motion itself.

LIMITED FEDERAL JURISDICTION FOR REVIEW OF ARBITRATION

Badgerow v. Walters

(Decided March 31, 2022)

- Motions to vacate, modify or confirm an award will usually raise questions about contract interpretation and enforcement—which are typically matters of state law.
- Such motions will likely need to be heard in state court.
- Possible that a court that orders arbitration under a Sec. 4 motion to compel may retain jurisdiction for subsequent motions in the matter.

ARBITRATION WAIVER NOT BASED ON PREJUDICE

Morgan v. Sundance Inc.

(Decided May 23, 2022)

- Waiver of right to arbitrate does not depend on a showing of prejudice.
- While there is a policy of favoring arbitration, that policy "does not authorize federal courts to invent special, arbitration-preferring procedural rules."
- Waiver will be determined by state law rules

FOURTH CIRCUIT DECISIONS

ADA—REASONABLE ACCOMMODATION

Perdue v. Sanofi-Aventis U.S., LLC

(Decided June 8, 2021)

- Reassignment to an existing vacant position is a reasonable accommodation of last resort
- The ADA's reassignment obligation only applies to positions that are both vacant and existing.
- Employer is not required to convert a full-time position into multiple part-time jobs.

EQUAL PAY ACT
Sempowich v. Tactile Systems Technology
(Decided December 3, 2021)

- Issue: What is the proper metric for wage discrimination under the EPA?
  - Rate vs. Total Wages?
- Prima facie case under EPA:
  - Employer paid higher wages to employee of opposite sex;
  - Plaintiff and the comparator performed work that required equal skill, effort and responsibilities; and
  - Plaintiff and the comparator performed that work under similar working conditions in the same establishment

EQUAL PAY ACT
Sempowich v. Tactile Systems Technology
(Decided December 3, 2021)

- Exceptions/affirmative defenses
  1. A seniority system
  2. A merit system
  3. A system that measures earnings by quantity or quality of production
  4. Any other factor other than sex

- Held: Equality must be satisfied regarding each component of compensation.
- The appropriate metric for assessing wage discrimination is the rate, not total wages.

EQUAL PAY ACT AND TITLE VII
Sempowich v. Tactile Systems Technology
(Decided December 3, 2021)

- In reversing SJ for employer on Title VII claims, 4th Circuit underscored evidence that presented genuine issues of fact—and that provides good lessons for employers.
- Evaluations really do matter. If rationale for adverse action and evaluations are inconsistent, this creates an issue of fact.
- "Same actor inference" in pretext analysis applies only if the hiring/beneficial action and the adverse action occur "within a relatively short time span following the hiring."

SCOPE OF MEDICAL INQUIRY
Coffey v. Norfolk Southern Railway Co.
(Decided January 14, 2022)

- ADA allows employers to make medical inquiries that are job related and consistent with business necessity.
- That standard is met if the employer reasonably believes an employee's medical condition impairs their "ability to perform the essential functions of the job" or "the employee poses a direct threat to self or others.

SCOPE OF MEDICAL INQUIRY
Coffey v. Norfolk Southern Railway Co.
(Decided January 14, 2022)

- Employer must also show that the asserted business necessity is vital to the business and that the request is no broader or more intrusive than necessary.
- Fourth Circuit underscored that where the ADA permits employers to make such inquiries, it also requires employees to comply with those requests.
- An employee's failure to comply can result in a lawful termination of employment.

INABILITY TO WORK DOOMS ADA CLAIM
Jessup v. Barnes Group Inc.
(Decided January 19, 2022)

- Employee asserted that he "has not been able to recover from debilitating relapse" and "is now fully and completely disabled and unable to work."
- Due to this admission employee failed to show he was a "qualified individual" under the ADA.
- Employee also failed to suggest any reasonable accommodation that would have allowed him to return to work.

INABILITY TO WORK DOOMS ADA CLAIM
Jessup v. Barnes Group Inc.
(Decided January 19, 2022)

- Employee's hostile work environment claim failed because his evidence failed to show he was subjected to sufficiently severe or pervasive conduct.
  - Job elimination and demotion
  - Negative performance review
  - Increased sales quota
  - Superior's comment that he would have been a risk to the company in his old position.
  - Supervisor's email (that plaintiff was not aware of) commented that plaintiff had gone crazy and his return to work would be a train wreck.

INABILITY TO WORK DOOMS ADA CLAIM
Jessup v. Barnes Group Inc.
(Decided January 19, 2022)

- Employee's lack of awareness of emails between his supervisor and HR director could not have contributed to his perception of a hostile work environment
- Helpful precedent to counter hostile work environment claims—regardless of whether they are asserted under ADA or Title VII.

"SKY-HIGH" STANDARD TO VACATE AN ARBITRATION AWARD
Warfield v. ICON Advisers, Inc.
(Decided February 24, 2022)

- Arbitrators ignored at will employment
- "Convincing a federal court to vacate an arbitral award is a herculean task."
- Courts are limited to determining "whether arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it."
- FAA provides narrow grounds for vacating award
- In addition to FAA, Fourth Circuit recognizes "manifest disregard" of the law as an independent ground for review.

"SKY-HIGH" STANDARD TO VACATE AN ARBITRATION AWARD
Warfield v. ICON Advisers, Inc.
(Decided February 24, 2022)

- To establish manifest disregard, party mush show:
  - The disputed legal principle is clearly defined and is not subject to reasonable debate; and
  - The arbitrator refused to apply that legal principle.
- Second prong essentially requires evidence that arbitrator knowingly rejected controlling precedent.
- Warfield cited 7th and 8th Circuit cases for the proposition that the presence of an arbitrability clause governing an employment dispute implies "for cause" termination protections (vs. at will).
- ICON cited no North Carolina case rejecting that specific proposition.

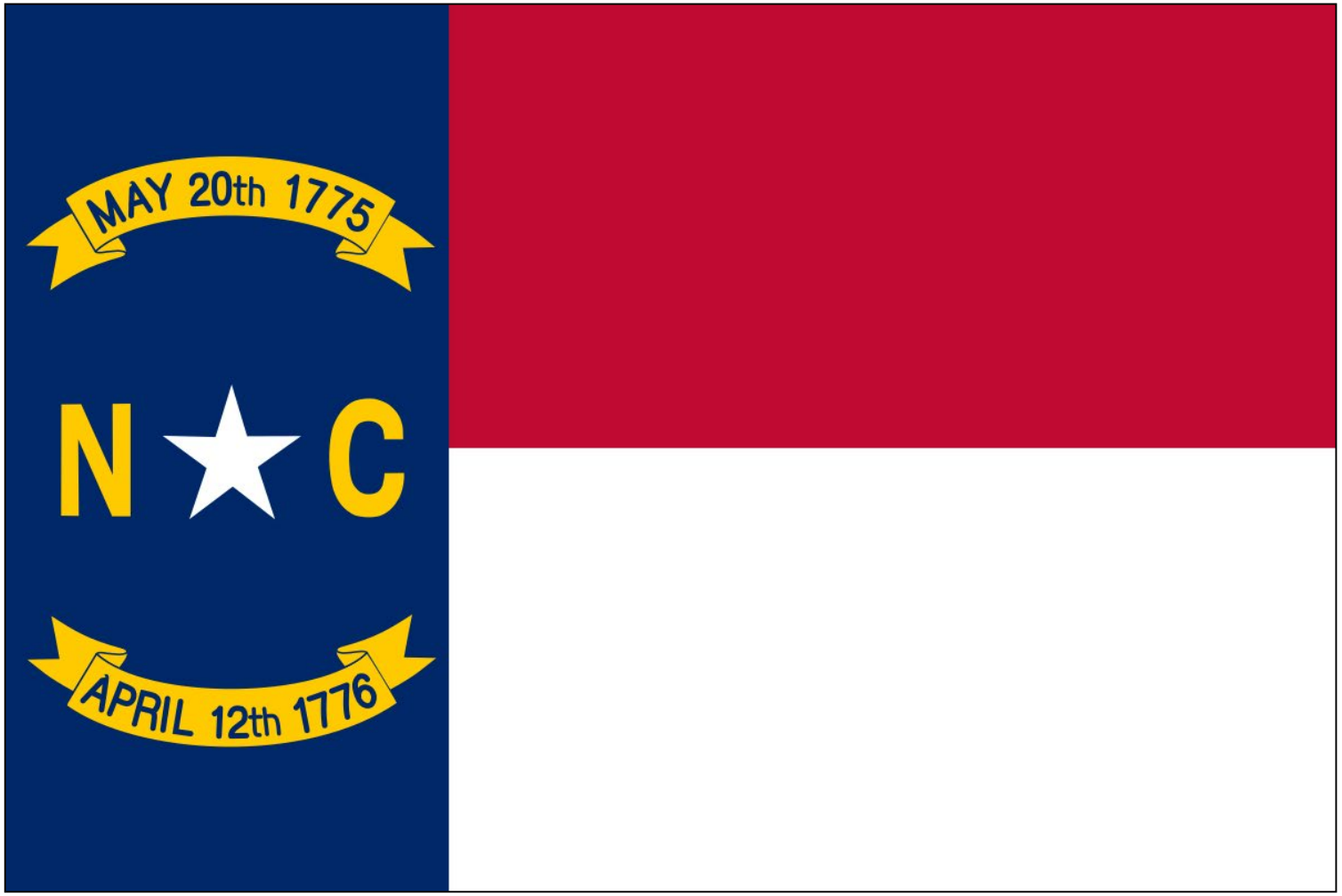
"SKY-HIGH" STANDARD TO VACATE AN ARBITRATION AWARD
Warfield v. ICON Advisers, Inc.
(Decided February 24, 2022)

- Fourth Circuit expressed no opinion on the persuasiveness of the cases cited by Warfield that arbitration implies a "just cause" standard.
- Because the issue is "subject to reasonable debate" the arbitrators could not have manifestly disregarded the law.
- Beware of the "sky-high" standard to vacate arbitration awards.
- Consider including provision in arbitration agreements that the mere fact of an arbitration process does not alter at will employment status.

ILLUSORY AGREEMENT TO ARBITRATE IS INVALID AND UNENFORCEABLE
Coady v. Nationwide Motor Sales Corp.
(Decided April 25, 2022)

- Agreement to arbitrate was contained in acknowledgment receipt of employee handbook, which also gave the employer the ability to amend the handbook's provisions without advance notice or consent.
- Where employer reserves the right to alter, amend, modify or revoke the arbitration policy, the promise to arbitrate is illusory and cannot constitute the consideration necessary to support a binding contract.
- Use stand alone arbitration agreements that exist outside of the employee handbook.

NORTH CAROLINA



UNEMPLOYMENT BENEFITS
In re: Lennane.
(Decided March 11, 2022)

- Issue: Does employee who quits work due to medical restrictions resign for "good cause attributable to the employer?"
- Where employer offered accommodation of employee's medical restrictions and employee failed to accept, employee's resignation is not for good cause attributable to the employer.
- Result could be different if there is evidence that employer failed to attempt to accommodate the employee's restrictions.

FEDERAL LEGISLATIVE UPDATE
Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (February 18, 2022)

- Invalidates existing arbitration agreements for claims of sexual harassment or assault.
- Future arbitration agreements must contain an exception for these claims.
- Parties may only agree to arbitrate such claims ***after*** they arise.

FEDERAL AGENCY UPDATES EEOC

- Gender Identity (6/15/21)
  - Equal access to restroom/locker room facilities.
  - Use of pronouns and hostile environment.
  - Dress codes.
- COVID-19 Retaliation (11/17/21) – applicants, employees, former employees.
- COVID-19 as Disability (12/17/21)
  - Initial infection.
  - Long-COVID.

FEDERAL AGENCY UPDATES EEOC

- Religious Accommodations to Vaccination Policies (3/11/22) – Sincerely-held belief and undue hardship standard.

- Use of AI in Hiring (5/12/22) – algorithmic tools and the ADA.

FEDERAL AGENCY UPDATES
EEOC

- Revised Right-to-Sue Notice:
  - "does not mean the claims have no merit."
  - Dismissal authority granted to investigators.

- Enforcement – Anecdotally, our team has seen an increase in requests for information.

FEDERAL AGENCY UPDATES DOL

- Tip Credit Rule (11/5/21)
  - tip pooling (managers and supervisors).
  - non-tipped work (80/20).
- Independent Contractor Rule (3/14/22)
  - Court reinstates Final Rule DOL attempted to withdraw.
  - Economic realities test.

FEDERAL AGENCY UPDATES OSHA

- Whistleblower Standard – "but for" causation
- Whistleblower Program – soliciting input on Whistleblower Protection Program.
- Heat Stress (4/22/22) – National Emphasis Program.

LEGAL ISSUES ARISING FROM THE HYBRID WORKPLACE

- Accurate timekeeping – FLSA / Wage & Hour
- Tax implications
- Remote work as a reasonable accommodation

THE GREAT RESIGNATION AND EMPLOYEE RETENTION

- Compensation
- Flexible working arrangements
- Parental leave and child care
- The Stay Interview

THE GREAT RESIGNATION AND EMPLOYEE RETENTION

- Restrictive Covenants
  - Reasonable as to time and geographic scope
  - New consideration
  - Non-Compete – Same or similar role
  - Non-Solicit – Material contact with employee/customer

Contact Us With Questions

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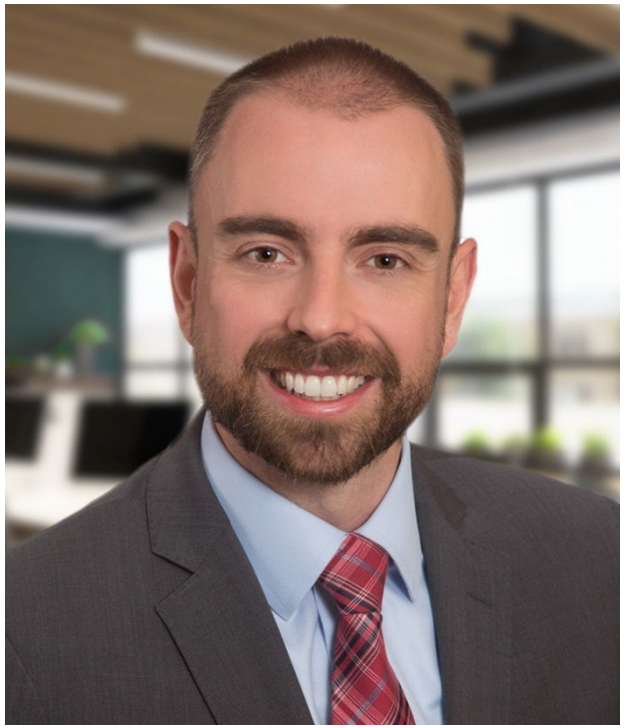

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