

# EMPLOYMENT LAW UPDATE

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by

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## LEGISLATIVE AND ADMINISTRATIVE ACTION

**New DOL regulations on tips.** The Department of Labor has issued guidelines affecting restaurants and other establishments in which employees receive most of their income through tips. **Tip credit.** Under the new rules, an employer can no longer pay minimum wage and then force the wait staff to turn over all tips to the management. This is the practice allowed by the court in *Cumbie v. Woody Woo, Inc.* (9th Cir., 2010). The company kept the tips as additional profits. Under the new rules, employees get to keep their tips and earn more than minimum wage. However, under the new regulations, employers may require contribution of any percentage of tips into a "tip pool" which is then split with other employees who also contributed, or even did the main part, of the services (*i.e.*, bus staff, dishwashers, cooks, etc.). The prior regulations limited the percentage the server could be forced to contribute to a tip pool. (The employer gets a "credit" against wages for the tips up to the minimum wage amount).

**OFCCP's proposed rule will create new requirements and new tracking procedures for veterans.** Government contractors will have to create new tracking procedures for veterans; create benchmarks for hiring vets; do an annual evaluation to assess effectiveness of their outreach and recruitment efforts; keep track of all vets who "expressed interest" in employment, regardless of whether they were qualified or even actually applied for any particular position; and provide a description of why each unsuccessful veteran applicant was not hired or promoted.

**Executive order seeks to root out "pay to play" bribery.** President Obama has proposed an executive order requiring disclosure of political contributions by companies seeking federal contracts, and their officers, directors, subsidiaries or third-party "pass-throughs." The disclosure would be for any contributors of \$5,000 in a year, during the two years prior to applying for the contract. The effort is intended to address the concern

that companies are using their contributions to swing contract awards in their favor or to motivate "no-bid" contracts which were so prevalent, and so criticized, under the last administration. Interestingly, the major opposition to the President's proposal comes from Democrats, led by Senator McCaskil (D-Missouri) objecting to government intrusion into the political contribution process. Most past opposition to rules on disclosure of political contributions have been by Republicans.

**Wisconsin new state budget bill eliminates child labor hour restrictions.** The Wisconsin legislature has eliminated hour restrictions for 16 and 17 year old employees in private sector jobs. The old restrictions limited them to working only six days a week/50 hours during non-school weeks and 26 hours during the school year, and a guarantee of eight hours sleep before the school day began. The legislature has removed those limits, and the teenagers can now work adult hours seven days a week, double shifts or more. There is still a restriction on no work during school hours; however, a teen can work night shift as long as released in time to get to school. Most restrictions remain in place for those under age 16 during the school year to permit a 40-hour work week during the summer and other weeks with no school. The provisions were added to the budget bill and passed without any public hearing. The legislators have not explained how this provision was relevant to the state budget. The sponsors have stated that this is intended to bring the state closer to federal child labor rules. [A more detailed analysis of the new rules and federal child labor law will be posted in mid-July at [boardmanlawfirm.com/readingroom](http://boardmanlawfirm.com/readingroom).]

## **LITIGATION**

The Legal Update includes new developments and matters of interest throughout the United States. Be aware that our various federal circuit courts reach somewhat differing conclusions. So a federal court decision in another part of the country, and especially a different state's court decision, may not quite be "the law" in your jurisdiction. Some courts lead the way; others lag behind. The Legal Update lets you see the overall trends and compare them with your jurisdiction. Wisconsin is part of the Federal Seventh Circuit (Wisconsin, Illinois and Indiana).

### **Theme of the Month: Teenage Workers**

The child labor duties and hour restrictions are not the only concerns regarding employment of teenagers. There are a growing number of cases involving sexual harassment and other abusive environment issues. Teens are among the most vulnerable, most likely people to be harassed or abused, in the workplace. Yet, because they are often part-time, low wage, short-term employees, they too often receive the least attention, the least information and, unfortunately, the least concern when they try (sometimes naively, without knowing the right process or even the right terms) to express

concerns. Employers who hire teens have a special duty of care to actually pay more attention and devote more concern than given to adult employees. The following cases are illustrative. [For more information, request or see *Child Labor Duty of Care* at [http://www.boardmanlawfirm.com/readingroom/child\\_labor\\_article.php](http://www.boardmanlawfirm.com/readingroom/child_labor_article.php).]

**Restaurant must post "guilty notice" in spite of appeal.** A restaurant chain lost a case over sexual harassment of teenage employees by an adult male manager. In addition to monetary damages, the court ordered that notices be conspicuously posted in all of the chain's 20 restaurants informing all employees of the jury verdict and the penalties for sexual harassment. The company appealed the jury verdict and sought an injunction against posting the notices while the appeal was pending. The court declined. It found no irreparable harm and ordered the notices to be posted, plus a \$1,000 per day fine for each day of non-compliance. *EEOC v. Management Hospitality of Racine, Inc.* (E.D. Wis., 2011).

**Donut shops settle case of sexual harassment of teen employees.** The owners of a chain of Dunkin Donut franchises entered a settlement and six-year consent order. The franchise company denied any wrongdoing. The case alleged that a male manager at one of the stores engaged in harassment of female employees, including teenagers, grabbing, rubbing and attempted kissing and describing sexual acts he wanted. The company management allegedly received complaints but took no action until employees reported the matter to local police and the manager was arrested. The settlement includes:

- \$290,000 to be divided among eight former employees;
- Posting of notices about the settlement in all 14 of the company's franchise operations;
- Sexual harassment training for all employees in all stores every two years; and
- The company must give every employee and new hire a wallet-size card on how to file discrimination complaints with the company. *EEOC v. College View Donuts, LCC* (N.D. NY, 2011)

### **Supreme Court**

**Court decides two issues in Wal-Mart case; denies class action and monetary damages.** In *Wal-Mart Stores v. Dukes, et al.*, the Supreme Court made two decisions. One was a split opinion (5-4) on the viability of a class action. The other, a unanimous opinion, regarded damages. The court first decided that the massive class action against all Wal-Mart stores on behalf of over a million female employees, and many past employees nationwide was not valid. The case alleged a number of sex discrimination issues. The majority opinion held that the case was too large to succeed. A class action is supposed to have a "commonality" between the members. The court ruled that there were too many different issues of discrimination by too many different store

managements for commonality. The proposed class was too varied in its situations and alleged harms to hold together.

The unanimous ruling was that the section of the Class Action Rule under which the case was brought did not allow for the monetary damages sought by the plaintiffs. Perhaps a different section of Rule 23 would allow those damages, but not in this case. Since the court invalidated the class, this part of the ruling had little or no effect. It may be of use in future litigation in other class actions.

### **Bankruptcy - Hiring**

**Court clarifies bankruptcy discrimination rules; private sector employers have more latitude.** The U.S. Bankruptcy Code prohibits employment discrimination against those who file bankruptcy. *Meyers v. Toojays Management Corp.* (8th Cir., 2011), was brought by a job applicant rejected due to a prior bankruptcy. The court dismissed the case. It ruled that the Code's anti-discrimination rules make distinctions between private sector and public sector employment. The Code's "plain language" prohibits public sector government employers from using bankruptcy as a factor in either hiring decisions or post-employment actions. However, private sector employers are only prohibited from taking adverse action against those who are already employed, so the hiring decision was not covered.

### **Contracts**

**Halliburton can be sued for fraud in inducing employment due to rape of female employee in Iraq.** A federal district court has ruled that a female former employee can sue for contract fraud and assault. The employee, from Texas, was recruited to work in Halliburton's defense department contracts in the Green Zone in Iraq. The case alleges she was sexually assaulted by Halliburton employees. The company sought dismissal of the case, indicating it was barred by the special provisions of Texas arbitration law and her employment contractual understanding and disclosure that work in war zones entailed "special risk," "danger," capture and injury. The court disagreed. Though some claims may be covered under the Texas law and the "danger" disclosure, sexual assault was not. The company failed to disclose to female applicants that there were prior sexual attacks and harassment perpetrated by company employees. Further, the implied special dangers of a war zone are supposed to be due to the enemy, not attacks by one's own co-workers. *Jones v. Halliburton d/b/a KBR* (S.D. Texas, 2011).

### **Discrimination**

#### **Religion**

**Seventh Day Adventist not entitled to all Saturdays off.** An employer is not required to violate the terms of a collective bargaining agreement (CBA) or valid seniority system

for a religious accommodation. In *Harrell v. Donahue* (8th Cir., 2011), a postal worker's request for his Saturday Sabbath as a regular scheduled day off was declined. He sued for religious discrimination. The court held that the request would violate the CBA and impose an undue hardship on other workers and could be validly denied.

## Sex

**Did carousing with drinking buddies create \$260,000 liability?** A private educational institution has settled a sexual harassment case for \$260,000. Female employees alleged that three male supervisors engaged in sexual comments, sexual texting, solicitation for sex, and sexual touching. In settling, the university denied any wrongdoing. A former Human Resource Manager provided information that the university knew or should have known of the harassment, but no effective action was taken. The HR manager stated that the supervisors at issue were social and drinking buddies with top management, and this relationship impaired the ability of the women to effectively complain or get attention to the situation. The EEOC stated that there was a breakdown in the process by those who should have taken action. *EEOC v. High Tech Institutions, Inc., d/b/a Anthem College Online* (D. Arizona, 2011).

## Retaliation

**\$60,000 settlement for retaliation by HR manager.** Two female employees will receive \$60,000 to settle a case alleging that their HR manager threatened to fire them for reporting sex discrimination in job assignments. The company will also post notices of the settlement and provide management training on discrimination. The company denied any wrongdoing. *EEOC v. Chrysler Group LLC* (E.D. Wisconsin, 2011).

**African American manager retaliation case against African American employee over race discrimination complaint.** An African American airline customer service representative complained that his White supervisor was discriminating against him, enforcing rules more harshly than for White employees and allowing White employees special privileges denied to him. The complaints were made to an African American station manager who advised that the complaints should be kept "in house" and allegedly warned that he could be fired if he kept complaining. The employee complained about continuing discrimination. The station manager allegedly said that she was "tired of his complaining" and recommended his termination. In the ensuing Title VII and Ohio discrimination law case, the court found sufficient evidence of retaliation for a trial. *Hill v. Air Tran Airways* (6th Cir, 2001).

**Jury awards \$1.5 million to gay officer; city could have settled for \$100,000.** A gay police officer won a \$1.5 million jury verdict for retaliation. He complained about anti-gay remarks. He was then subjected to extra scrutiny, "petty" discipline and transferred

to an undesirable assignment. The jury ruled that these were acts of retaliation. The officer made a pretrial request to settle the case for \$100,000 but the city refused. *Crump v. City of Los Angeles* (Cal. Superior Ct., 2011).

### **Whistleblowers: Sarbanes Oxley Act**

**Media leaks are not protected by Sarbanes Oxley Act.** Two Boeing auditors found what they believed to be significant audit deficiencies, irregularities and computer security issues. When unable to get management action, they gave information to a news reporter, who then wrote an article in the Seattle Post-Intelligencer. The leaking auditors were soon discovered and fired. They sued under SOX, which prohibits whistleblower retaliation in publicly-traded corporations. However, the court ruled that SOX has specific disclosure provisions, and the press is not one of the listed places employees can go with whistleblower information. The case was dismissed. *Tides v. The Boeing Co.* (9th Cir., 2011). [Be aware that many other whistleblower laws do provide protection for reports to the press. For more information, request or see *Retaliation at* <http://www.boardmanlawfirm.com/readingroom/retaliation.pdf>.

### **Fair Labor Standards Act**

**Court disagrees with DOL's internship guidelines.** In 2010, the Department of Labor issued a six-factor test for determining whether student interns were truly "interns" who could work without pay or were employees entitled to at least minimum wage and overtime. In *Solils v. Laurelbrook Sanitarium and School, Inc.* (6th Cir., 2011), a federal appeals court rejected the DOL's six factors, finding them "not helpful." It simplified the issue into a one-part balance of whether the "primary benefit" of the work is for the organization's operational needs or for the students/intern's learning and development. In this case, it found that the work was for the student workers' education and development.