2021 in review: notable cases for employers to bear in mind


COMPLIANCE CORNER

Chris Morgan and Marley Masser

COMMENTARY

Now is an ideal time for employers to take note of important changes to local labor and employment laws that may impact their businesses and employees. 2021 brought a slew of significant legislative changes, including: restrictions on noncompetition agreements (Senate Bill 169), prohibition of employment discrimination based on race-associated hairstyles (House Bill 2935), and the inclusion of gender identity as a stand-alone protected class in several employment-related statutes (House Bill 3041).

In addition to these legislative changes, there have been a handful of judicial rulings that employers should consider when making employment decisions in the year ahead. Here are a few:

Aiding and abetting unlawful employment practices

One of the most notable decisions of the past year comes from *Hernandez v. Catholic Health Initiatives*. The Oregon Court of Appeals held that anyone – including a non-employer corporation – may be held liable for aiding or abetting unlawful employment practices of the employer.

In *Hernandez*, the plaintiff – a nurse employed by Mercy Medical Center – suffered a serious workplace injury that necessitated extended medical leave from her position so that she could recuperate and undergo remedial surgery. The plaintiff's employer relied on a third party – a Colorado-based company called Reed Group Management – to manage employee medical leave requests. And while Reed Group claimed to have expertise in Oregon medical leave law, it nevertheless failed to offer the plaintiff positions that met her unique workplace limitations, informed her that she would not be given additional medical leave, and ultimately terminated the plaintiff once she ran out of available medical leave.

Consequently, the plaintiff filed suit alleging that Reed Group aided and abetted her employer in committing an unlawful employment practice by erroneously informing her employer that she was not eligible for medical leave under Oregon law. The defendant, Reed Group, argued that "aiding and abetting" liability under ORS 659A.030(1)(g) is limited only to employers and employees, and not to third parties like Reed Group. The Oregon Court of Appeals disagreed with Reed Group and found in favor of the plaintiff, clarifying that, under the statute, a "person" can include anyone – whether they are co-employers, third-party benefit administrators, third-party human resource coordinators, employee recruiters, background check providers, or, presumably, anyone else involved in the employment process.

Enforceability of state and private-employer vaccine mandates

Another notable case from the last year is *Oregon Fraternal Order of Police v. Governor Kate Brown and State of Oregon*. Thirty-three state police officers and two associations representing police and firefighters challenged Oregon Gov. Kate Brown's Executive Order 21-29. It required most executive department employees, including state police, to be fully vaccinated by Oct. 18, 2021, or face disciplinary action – including termination.

The plaintiffs moved for injunctive relief, arguing that the mandate was unlawfully coercive based on a number of independent legal grounds. The court ultimately denied the relief sought, stating that the plaintiffs could not "overcome the significant public interest in requiring that executive branch employees, health care workers and providers, teachers, school staff, and school volunteers ... be vaccinated."

This recent decision came from one of an increasing number of cases addressing the legality of vaccine mandates. As evidenced by the recent U.S. Supreme Court decision regarding the OSHA vaccination and testing emergency temporary standard, the general tenor of these decisions is that both state and private employer vaccine mandates are likely to be lawful. But agencies like OSHA risk overstepping their constitutional authority in making their own sweeping vaccine mandates.

Workplace safety considerations in shared and common areas

Finally, for employers hoping to transition back to an in-person work model, special consideration should be given to the safety of their workplaces and common areas surrounding their workplaces. As illustrated in *Bruntz-Ferguson v. Liberty Mutual Insurance and IBM Corp.*, employers are responsible for not only keeping not only their immediate workplaces safe from potential hazards, but also shared and/or common areas surrounding their workplaces free from potential hazards.

When a person is injured at work, that injury is generally compensable if it "arises out of" and "in the course of employment." This inquiry, referred to as the "work-connection" test, examines the causal connection between the injury and the employment, as well as the time, place and circumstances of the injury. However, injuries sustained while an employee is going to or coming from the workplace – also known as the "coming-and-going" rule – are not compensable. However, one major exception to this rule is the "parking lot" exception, which applies when an employee is traveling to or from work and sustains an injury on or near the employer's premises.

As an illustration of this rule, in *Bruntz-Ferguson*, the plaintiff sustained an injury after she slipped and fell on an icy curb as she approached her office building to begin a shift at 5 a.m. Even though the injury occurred while the plaintiff was technically "on her way" to work, the injury was compensable under the work-connection test because it occurred in an area that the employer had some degree of control over. This was evidenced by the commercial lease agreement, which, by its terms, designated the place of injury as a shared common area.

Chris Morgan is an attorney with Barran Liebman LLP. He specializes in the defense of complex and high-profile employment matters. Contact him at 503-276-2144 or cmorgan@barran.com.

Marley Masser is a law clerk with Barran Liebman LLP. Contact her at 503-276-2130 or mmasser@barran.com.