Texas

Employment Law Letter

Vol. 33, No. 6 | June 2022

ARBITRATION AGREEMENTS

New law blocks arbitration of sexual assault, harassment claims

by Jacob Monty, Monty & Ramirez, LLP

Arbitration agreements have long been a standard practice across all industries. With the signing of H.R. 4445 into law by President Joe Biden, however, arbitration agreements are no longer enforceable against sexual assault or sexual harassment claims.

Standard practice no more

In February, Congress passed a historic bill some have referred to as the "#MeToo" bill. President Biden signed it into law on March 3, and as a result, certain claims are no longer allowed to be mandatorily arbitrated, regardless of a pre-existing arbitration agreement.

The new law also invalidates agreements that waive an employee's right to file claims through a class action lawsuit. As a result, a predispute arbitration agreement that prohibits employees from filing a lawsuit against their employer, either individually or as a class action, based on alleged sexual harassment or assault is now invalid and unenforceable.

H.R. 4445 amends the Federal Arbitration Act (FAA), which was enacted in 1925 and last amended in 1990. The FAA preempts state laws regarding arbitration agreements, and therefore, predispute arbitration agreements are generally valid and enforceable.

The new law applies to agreements entered into before the bill's signing where a conflict or dispute hasn't yet arisen or accrued. It doesn't, however, preempt existing claims that arose before the law went into effect.

As a silver lining, although employees may not waive their right a lawsuit before a dispute arises, they may waive the right after the fact and opt to proceed with arbitration. You may also keep optional arbitration clauses in your employment agreements.

To be determined

Although the new law is clear in some areas, there are some things that must be left to the courts to decide.

The new law states that courts, rather than arbitrators, must determine if it applies to a certain predispute arbitration agreement. What is yet to be determined is whether it will allow all claims in a "case" to proceed to trial so long as one of the claims on the petition is a sexual assault or sexual harassment claim or whether the employee will continue to be bound by the predispute agreement to arbitrate all other claims with the exception of the sexual assault or sexual harassment claims.

A possible carveout?

Although some employers may now be worried, there's one other course you can take to avoid court and large

What's Inside

What's Online

Employee Wages
DOL again looking to raise FLSA salary threshold
https://bit.ly/3KA1U4Q

Find Attorneys
To find employment attorneys in all 50 states, visit **www.employerscounsel.net**

blr Putting knowledge to work

HR hero by BLR®

verdicts from sympathetic juries with it. You should consider amending your arbitration agreements to include a jury trial waiver when the arbitration agreement isn't enforceable.

In 2004, the Texas Supreme Court found jury waiver agreements don't violate public policy if they are voluntarily made with knowledge of the legal consequences. Including jury waivers in an arbitration agreement for claims barred from arbitration by applicable law could curtail the burden of a nuclear verdict, especially for small employers. The absolute best practice to follow, however, is to treat all employees with respect and follow up on complaints.

At the end of the day, most employers won't want to protect an employee who sexually assaults or harasses their other employees. As of last year Texas now also has a broadened definition of sexual harassment. Unlike federal law under Title VII of the Civil Rights Act of 1964 (where sexual harassment claims only apply to employers with 15 or more employees), Texas defines an employer as a person who employs *one* or more employees. Therefore, all employers in Texas should be wary of additional liability and ensure they follow best practices and amend their arbitration agreements as needed.

Jacob M. Monty is an attorney with Monty & Ramirez LLP in Houston, Texas. You can reach him at jmonty@montyramirezlaw.com. ■

LITIGATION

College shoots 'airball' in basketball coach's FMLA lawsuit

by Michael P. Maslanka, UNT-Dallas College of Law

An "airball," or a basketball shot that misses the backboard, rim, and net entirely, sums up our appeals court's recent opinion about the Family and Medical Leave Act (FMLA) retaliation and interference claims filed by a college coach. The ruling contains multiple lessons for all Texas employers covered by the Act.

Tip-off

Akia Stanton was the head women's basketball coach at Jarvis Christian College in Hawkins, Texas, until the institution fired her in June 2018. Her FMLA claims derive from two events spanning a few weeks during the beginning of that summer.

First, the college's student recruitment efforts were lagging. A frustrated college president called an all-hands-on-deck meeting in which he allegedly threatened to terminate employees for absenteeism.

At the same time, Stanton's anxiety and depression were worsening. She was suffering from panic attacks, experiencing chest and stomach pains, and engaging in uncontrollable bouts of crying while at work.

Game on

Stanton sought medical help. A nurse practitioner evaluated and diagnosed her as suffering from anxiety and depression and stated (in an FMLA form) the conditions would cause "episodic flare-ups periodically preventing [her] from performing her job functions."

The FLMA form also noted Stanton was referred to "psych" and should be excused from work from June 8 to June 25. Certain sections of the form, however, were filled in with answers such as "unknown" or "TBD" (to be determined) by the physician.

Well, the form hit HR's desk, and the director told Stanton on June 21 that the paperwork was incomplete. That is, the college needed answers to the responses "unknown," "TBD," or "as determined by." Also, the form had to be completely filled out within seven days (or by June 28).

So far, so good. The FMLA's rules were being followed. At the time, Stanton responded by stating she was working on submitting a completed form.

What happened next, do you think? That's right, on June 29, the college terminated Stanton. The FMLA retaliation and interference lawsuit followed.

College misses from 'downtown'

The college took several shots from beyond the paint (i.e., three-pointers). No baskets!

First, the college argued Stanton had already found a new job out of state, so seeking the FMLA leave was therefore a sham. Put another way, she didn't really need the leave but wanted time off between departing from the college and commencing her new gig.

Even if true, the fact was irrelevant to the FMLA's coverage. As an employee, she was entitled to avail herself of the employment benefits.

Second, there was some suggestion in the court's opinion that Stanton was stealing things from the college. A June 14 security video showed her removing chairs, a couch, athletic and teaching equipment, and various boxes from her office and loading them into a car. She explained the items belonged to her and that she had brought them with her when she was hired. The college filed a police report on June 19, but the case was closed because of a lack of prosecutable evidence.

If you believe an employee is stealing, you should promptly conduct an investigation and take action. Filing an FMLA lawsuit doesn't grant immunity to the employee. In Stanton's case, the college apparently outsourced the duty to law enforcement.

Third, the college misread the regulations dealing with the FMLA, which are contained in the Code of Federal Regulations. The employer seemed to suggest Stanton's medical conditions weren't "serious health conditions," which trigger FMLA rights. The argument was a no-go.

Having a serious health condition under the FMLA doesn't mean the employee is flat on her back, unable to do a thing. The nurse practitioner noted Stanton's conditions would prevent her from performing her job functions, albeit sporadically. The situation was serious from both a human standpoint and as a legal definition.

Fourth, the college seemed to rely on the FMLA form being incomplete and not corrected within the seven-day window allowed by the regulations. But you need to read the entire rule: "The employer must provide the employee with seven calendar days (unless not practicable under the circumstances despite the employee's diligent good-faith efforts) to cure any such deficiency."

So, the regulations require the employer and the employee to work together to fix the form. Why? Because the FMLA's purpose is to accommodate a serious medical condition, not to say "tag, you're it."

Well, when the buzzer for the game clock finally sounded, Stanton won and was awarded $12,500 in damages. *Stanton v. Jarvis Christian College* (5th Cir., March 11, 2022).

Postgame analysis

While the amount awarded to Stanton was small, never forget this: When an employer loses an FMLA lawsuit, it must pay not only its own lawyers but the employee's lawyers. I promise the bills add up quickly.

Don't be too eager, as here, to fire an employee for a technicality unless you've given the individual plenty of room and time to fix the issue.

When telling employees something is required of them, be sure to explain why! And the reason shouldn't be merely because "the regulations say so" but because, say, you need the information to process the FMLA request fairly and quickly.

The approach should be your general rule for dealing with employees. Explain things to them so they understand the importance of the request but also because jurors will be considering the type of employer you are and whether they would want, say, a family member working for you. Like in a battle, always take the high ground.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

UNEMPLOYMENT COMPENSATION

How to protect your TWC tax rate from chargebacks

by Jacob Monty, Monty & Ramirez, LLP

Despite the current labor shortage, some employers may be suffering the lingering effects of increased unemployment claims from prior years. Texas Workforce Commission (TWC) unemployment chargebacks can affect an employer's tax rate for years to come. Here's how to contest them.

Chargeback basics

Employers pay state unemployment insurance taxes to the TWC as contributions to unemployment benefits. Taxed employers pay the taxes quarterly. When an employee's job is terminated, they can apply for unemployment benefits.

When unemployment benefits are paid, the amount of the unemployment claim is charged back to the claimant's previous employers for purposes of determining how much unemployment taxes the employer should pay in the future. Just as car accidents drive up car insurance rates, the more unemployment claims charged back to an employer, the more unemployment tax the employer owes moving forward. Although unemployment tax rates change year to year due to a variety of factors, the average employer has a tax rate between 1.25% and 1.5%.

Unemployment benefits are charged back to base-period employers. The base period consists of a one-year period a year and a half before the claim was filed. If there are multiple base-period employers, the amount of each employer's chargeback is based on the base-period wages it paid during the period.

The calculations can get confusing when an employee has multiple jobs during a year. There's a risk the employee's wages will be mistakenly charged back to the wrong employer's account, erroneously driving up their tax rate. For that reason, it's important for you to review chargeback claims when they're filed.

Lowering your tax rate

Employers can attempt to lower their tax rate in two ways: voluntary contributions and contesting chargebacks.

Voluntary contributions are paid by employers when they experienced a lot of chargebacks in a specific period, but they want to reduce their overall tax rate. Employers may voluntarily pay all or part of the benefits paid to former employees rather than repaying the benefits through an increase in their employment tax rate.

Employers that want to make voluntary contributions can visit the TWC employer portal to calculate what effect it would have on their overall tax rate.

Contesting chargebacks

The best way to manage your overall tax rate is to timely contest chargebacks to your account. When an applicable unemployment claim is filed, base period employers will receive a notice of maximum potential chargeback. You should be sure to review the notice carefully to confirm the previous employee's alleged dates worked, reason for separation, and wage information are accurate. In some cases, the reason for separation may protect you from a rise in your tax rate based on the chargeback.

For example, if the employee was terminated for misconduct or left voluntarily without good cause (or if one of the protected categories applies or if the date or wage information is listed incorrectly), you should contest the chargeback by responding to the notice of maximum potential chargeback within 30 calendar days.

You should keep personnel folders for each employee with clear records of whether separations invoke protection from chargeback or other legal concerns. The personnel folders should include write-ups signed by the employee for misconduct, records of last chance warnings, and witness statements regarding instances of misconduct when the employee refuses to acknowledge it. Your record keeping practices can help you prove the facts surrounding a termination or employee departure.

For more information on protected categories or how to respond to a notice of maximum potential chargebacks, you can reach out to the TWC or local counsel.

Jacob M. Monty is an attorney with Monty & Ramirez LLP in Houston, Texas. You can reach him at jmonty@montyramirezlaw.com. ■

CONSTITUTIONAL RIGHTS

Public employer alert: new way to sue police officers?

by Michael P. Maslanka, UNT-Dallas College of Law

A number of subscribers are public employers whose employees as well as themselves can be sued for all sorts of reasons not applicable to private-sector companies. Here's one potential lawsuit claim: If a police officer fails to give Miranda warnings to a criminal suspect who is arrested and indicted but later acquitted, can the person sue the officer individually as well as the municipality for which the officer works? The U.S. Supreme Court will soon answer the question. (As if public HR professionals didn't have enough on their plates already!)

Crime in progress

Carlos Vega is a deputy sheriff for Los Angeles County (LAC). He responded to a call from the LAC/University of Southern California (USC) Medical Center, a public hospital. The call was about a male hospital employee who, while transporting a female patient within the hospital, allegedly lifted up her gown and made sexual contact with her.

During an interview, Vega says the employee admitted his guilt, although the officer didn't read his *Miranda* rights to him. Recall from a TV show such as *Law & Order*:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have the lawyer present with you while you are being questioned. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have just read to you? With these rights in mind, do you wish to speak with me?

Vega explained he didn't read the *Miranda* rights to the employee because he believed the interview was noncustodial (i.e., it wasn't taking place while the individual was in custody) and that he therefore could leave at any time. The rule doesn't apply in those instances.

The employee, by contrast, had a different recollection. The confession was admitted into evidence at trial in which the suspect was charged with unlawful sexual penetration. He was found not guilty.

Lawsuit in progress

The employee sued Vega under a federal statute known as Section 1983. The law empowers a person to sue for the violation of our constitutional rights as enumerated in the Bill of Rights. The court of appeals in California said the employee has such a right. (The U.S. 5th Circuit Court of Appeals, which covers Texas, disagrees.)

Vega appealed to the Supreme Court and argued:

- *Miranda* is a "rule" enforcing a "right" that's explicitly stated in the Bill of Rights (i.e., the Fifth Amendment right against compulsory self- incrimination); but
- *Miranda* itself isn't a "right" because its language can't be found anywhere in the U.S. Constitution itself.

Vega v. Tekoh.

Bottom line

My belief is the high court will disagree with the California court of appeals, hold the interrogated employee has no claim, and toss the original lawsuit.

The Supreme Court majority will likely adhere to a concept known as textualism. That is, if the right isn't explicitly recited in the Constitution, then it doesn't exist for Section 1983 claim purposes. The rule still exists, but it wouldn't be elevated to the sacred status of a right. Stay tuned.

Michael P. Maslanka is a professor at the UNT-Dallas College of Law. You can reach him at michael.maslanka@untdallas.edu. ■

FREE SPEECH

Managing activism in the workplace: some guiding principles

In a politically charged era where activism is considered noble, HR managers are confronting new challenges in the workplace in an attempt to find balance between the expression of disparate views while maintaining a productive and cohesive workplace.

Just another day at the office

IT specialist Peter is a devout Catholic. His cubicle displays a Papal flag and other religious items. Several pro-life slogans are also posted on its walls. Sandra is a purchasing specialist who is passionate about social causes. She marched in the Black Lives Matter demonstrations and displays a BLM poster on the wall of her cubicle. She has also posted several slogans that disparage certain politicians. Maura, who works in logistics, is a veteran and very patriotic. In her work area she proudly displays the American flag. She also displays a "Don't Tread on Me" flag and several slogans with conservative messages. Ray is a manager in finance. He is openly gay, and his cubicle displays the rainbow flag and other slogans in support of LGBTQ causes.

Welcome to the new HR reality.

There was a time when most companies tried to foster at least the appearance of social and political neutrality. But in today's politically charged environment, where "silence is violence" and activism is widely encouraged, many corporations see value in championing social or political causes both publicly and internally. As a result, the workplace has become an ideological battleground.

Some examples of companies taking social and political positions include Hobby Lobby, a conservative company that, in highly publicized legal battles, ultimately won the right to refuse to pay for insurance coverage for contraception for its employees. Another is Disney, which publicly denounced Florida's House Bill (HB) 1557, Parental Rights in Education, more commonly known as the "Don't Say Gay" bill. Other examples include companies that gave employees paid time off to march in BLM protests or companies that fly the Pride flag on the company flagpole during Pride month.

Whatever the motivation behind companies' social or political influence over the workplace, employees often receive mixed messages from management regarding what is and isn't acceptable "activism." Further problems can arise when management pushes the corporate culture right or left, leaving the opposite-leaning group of employees feeling disenfranchised. For example, Disney spoke out publicly against the Don't Say Gay bill, but only after a number of its employees protested because it hadn't taken a stand. A group of other Disney employees responded by publishing an anonymous letter asking the company to remain politically neutral and explaining how they feel they no longer have a place in the company.

In addition, many companies now implement policies and/or require employee training that promotes diversity, inclusion, and the right to express views without judgment. At the same time, companies seek to avoid workplace distractions that interfere with productivity, as they always have. What are an employee's rights to engage in activism in the workplace?

Some guiding principles

There's no free speech right in the *private* workplace. While at work, state, federal and local governmental (public) employees enjoy the right of free speech reserved to each American citizen under the U.S. Constitution. The right of free speech does not extend, however, to the *private-sector* workplace. In addition, while private employees are free to express themselves when outside of the workplace, an employer may discipline employees if they make public statements that harm the employer's reputation, for example on social media.

Employers need to be careful, though. An employee can file a claim against an employer if its reaction to a public statement could reasonably be characterized as discriminatory under one of the bases protected by federal or state law. For example, Peter's employer could be subject to a discriminatory retaliation claim if it disciplines him in reaction to an off-premises, public statement claiming his employer is unfairly restricting pro-Christian employees from observing their religious beliefs in the workplace.

The employer owns the place. It's easy for private employees to forget the employer owns the walls, cubicles, computers, phones, and all workplace-generated data. In Wisconsin, private employees have no legal right to display any personal media around the workplace or even on their person while at work. A private employer may restrict completely or require employer approval of anything an employee chooses to display within the workplace. Ironically perhaps, even though Ray's employer flies the Pride flag on the corporate flagpole for all to see, it has the right to require him to take down the Pride flag in his cubicle.

Policies applied consistently to all employees aren't discriminatory. Any one of our four example workers could allege discrimination if individually required to remove their flags, banners, and slogans from their cubicle. Each is protected from discrimination on obvious and well-known bases: religion, race, veteran status, and sexual orientation.

The key to avoiding a discrimination claim is to apply the requirement to all employees, regardless of the nature of the material displayed and without exception. This can mean that something as generally accepted as an American flag may be prohibited. An employee may argue the employer flies the American flag on the corporate flagpole, so they should be able to as well. But as mentioned above, it's the employer's flagpole and place of work, not the employee's.

Bottom line

Regardless of how outspoken an employer may be, private-sector employees don't have a legal right to promote their personal political or social views in the workplace. It's up to the employer to implement uniform, appropriate policies to create the environment and culture it desires. The key is to be consistent. ■

EMPLOYEE BENEFITS

DOL signaling an updated climate in the world of employee benefits

by Tammy Binford

Over the last several months, the U.S. Department of Labor (DOL) has signaled a friendlier stance toward considering environmental, social, and governance (ESG) factors as they relate to employee benefits. Just how far the department will go is yet to be seen, but it's clear a shift in thinking has the potential to change how employee benefit plan fiduciaries make decisions. Recent developments address barriers to consideration of ESG factors as well as steps toward protecting workers' retirement accounts from climate-related risks.

Background

ESG refers to organizations' stands on environmental issues as well as concerns about social justice and corporate leadership. In recent years, investors have begun to include ESG factors in their decisions about where to put their money.

A couple months after President Joe Biden took office, the DOL announced that pending further study, it would not enforce actions taken in the waning days of the Trump administration that were seen as having a chilling effect on benefit plan fiduciaries' ability to consider ESG factors.

Then in October 2021, the DOL proposed a rule that could allow benefit plan fiduciaries more leeway under the Employee Retirement Income Security Act of 1974 (ERISA). The department followed up that development in February 2022 with a call for public comment on what actions, if any, it should take under ERISA to protect retirement savings and pensions from risks posed by climate change.

Climate effects

In February, stakeholders were asked whether the DOL should take action to protect retirement savings from climate-related financial risks. In making the request, the department said it was soliciting general input on actions that can be taken under ERISA and other laws. It also posed specific questions related to data collection and fiduciary issues under the law.

In its request for information, the DOL's Employee Benefits Security Administration (EBSA) asked for input on 22 questions. In addition to the general questions about what actions should be taken to protect employee savings and pensions from climate-related financial risks, the EBSA asks about fiduciary issues under ERISA.

For example, the February request notes ERISA plan fiduciaries now have access to more information on which to make decisions on climate-related financial risk factors when evaluating investment choices, and it asks if the law presents difficulties in obtaining such information.

The request also asks if guaranteed lifetime income products such as annuities help individuals mitigate the effects of climate-related financial risk whether such products offer a safe and efficient strategy to transfer climate-related financial risk from the participant/employee to the insurer/guarantor. If so, the request asks if the EBSA should take steps to facilitate the inclusion of such products in ERISA-covered defined contribution plans.

Another question asks whether the EBSA should sponsor and publish research to improve data and analytics that ERISA plan fiduciaries could use to evaluate climate-related financial risks.

The comment period for the request for information was to end on May 16, 2022.

ESG investing

The October 2021 proposed rule would allow plan fiduciaries to consider climate change and other ESG factors when making investment decisions and exercising shareholder rights.

A fact sheet on the proposed rule points out the DOL "has consistently recognized in its various interpretive guidance that ERISA does not prohibit fiduciaries from making investment decisions that reflect ESG considerations depending on the facts and circumstances."

The fact sheet goes on to say that differences in the "tone and tenor" in different administrations' guidance "have created confusion about these investment issues and have been described by stakeholders as an unhelpful regulatory game of 'ping pong.'"

The proposed changes aim to clarify the permissibility of considering ESG factors. The proposed rule would add text "that makes it clear that, when considering projected returns, a fiduciary's duty of prudence may often require an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action," the fact sheet reports.

The proposed rule includes three examples that may affect risk-return analysis. The fact sheet says that one set of examples includes factors such as "a corporation's exposure to the physical and transitional risks of climate change and the positive or negative effect of government regulations and policies to mitigate climate change."

The fact sheet notes that a second set of examples includes "governance factors, such as those involving board composition, executive compensation, and transparency and accountability in corporate decision-making, as well as a corporation's avoidance of criminal liability and compliance with labor, employment, environmental, tax, and other applicable laws and regulations."

The third set of examples includes "workforce practices, including the corporation's progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention; its investment in training to develop its workforce's skill; equal employment opportunity; and labor relations." ■

HIRING

Labor shortage, diversity efforts prompt new thinking on degree requirements

by Tammy Binford

Not so long ago, employers emphasized the importance of four-year college degrees for a wide variety of positions, even if they couldn't articulate exactly why such a credential was necessary. But now, a labor shortage—worsened by COVID-19 but not entirely created by the pandemic—along with a desire to increase workplace diversity are helping to fuel an attitude adjustment among many employers, spurring them to reason that if a degree isn't necessary for a position, why require it?

Employer change of heart

In April, job site Indeed for Employers reported results of a survey of 502 employers across the country aimed at understanding how the pandemic has affected recruiting and employers' future plans. Among the results: a revelation that most employers would consider eliminating their degree requirements.

The survey found that 75% of employers surveyed had a degree requirement, but 59% of those said they would consider eliminating it in the future. "This trend is even more pronounced among large employers: 67% of companies with 1,000 or more employees would consider doing away with the college requirement, compared to 53% of businesses with 10 employees or fewer," Indeed reported in a blog post about the survey.

The research shows that 30% of respondents said ending the requirement would help them reach more diverse talent, and 26% said an applicant's degree rarely matches the industry.

If employers change their degree policies, how should they assess candidates? The Indeed post points to options.

"When possible, employers should consider whether on-the-job training, combined with a candidate's skills and relevant experience, might be a better predictor of success for specific roles—and, if so, revisit educational requirements in current job descriptions," the post says. "Undergraduate degrees moving from 'must have' to 'nice to have' could open new opportunities for a larger, more diverse pool of job seekers."

Dropping degree requirements isn't the only step employers are taking in their quest to boost diversity and find enough workers. Indeed's study also found that more employers are considering applicants who come from different types of positions. Also, those looking for jobs are increasingly applying for roles different from their past work experience.

"Among employers who now consider non-industry applicants, 33% say they're willing to train them on the job," the Indeed post says. "Casting a wider net also helps them reach a more diverse candidate pool (29%) and attract more applicants overall (23%)."

Skills-based hiring makes gains

In February, the *Harvard Business Review* reported on research showing that many companies are loosening degree requirements and moving toward skills-based hiring, especially in middle-skill jobs.

The researchers note that many employers stepped up degree requirements in the early 2000s, but by the 2008-09 recession, many had "recognized that a reset was in order."

It was then that many large businesses announced they would eliminate degree requirements for many jobs. The researchers found that after a decade, many degree requirements had indeed changed, and the change happened in two waves that are ongoing—one structural and the other cyclical.

The study identified a structural reset starting in 2017, the beginning of the bull market for workers, and a cyclical reset that began in 2020. In explaining the structural reset, the report on the research says that "if demand for talent far outreaches supply, employers de-emphasize degrees."

Jobs in IT and managerial occupations were most affected by the reset. "The essence of the structural reset is this: In evaluating job applicants, employers are suspending the use of degree completion as a proxy and instead now favor hiring on the basis of demonstrated skills and competencies," the report says. "This shift to skills-based hiring will open opportunities to a large population of potential employees who in recent years have often been excluded from consideration because of degree inflation."

Regarding the cyclical reset, the report explains the labor shortage has prompted some employers to stop requiring degrees for many jobs at least temporarily. For example, the researchers looked at job postings for intensive-care and critical-care nurses during the pandemic and found that postings asking for a bachelor's degree declined by 12% between 2019 and 2020.

"The shift may reflect only a temporary accommodation in the face of an emergency, which is why we consider it a cyclical rather than a structural reset, but nonetheless, given its scale, it's likely to teach us a lot about whether workers who have degrees actually perform better than newly hired workers who do not," the researchers wrote, adding that previous research indicates that performance differences between degreed and non-degreed employees "are often marginal outside specific fields such as professional services and finance." ■

TEXAS EMPLOYMENT LAW LETTER (ISSN 1046-9214) is published monthly for $499 per year by **BLR®—Business and Learning Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to Content Manager Alan King, aking@blr.com.

For questions concerning your subscription, contact your customer service representative at 800-274-6774 or custserv@blr.com.