Employer Express February 2014 Newsletter

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Key developments in the Employer Express February 2014 newsletter include:

Supreme Court Developments

Supreme Court Clarifies Donning and Doffing

The U.S. Supreme Court clarified what constitutes "changing clothes" under the Fair Labor Standards Act (“FLSA”), ruling that the time a class of U.S. Steel Corp. workers spent donning and doffing protective gear was not compensable working time.

The FLSA provides that time spent "changing clothes" at the beginning or end of a workday is not compensable work time if it is treated as non-work time by a collective bargaining agreement but does not define the term. In *Sandifer v. U.S. Steel Corp*, the Supreme Court held that "changing clothes" should have its ordinary meaning, which would include time spent changing into protective clothing.

The Court found that of the twelve items workers at U.S. Steel were required to put on for work, only three fell outside the definition of clothes – but that time spent changing into these items was minimal. Many appellate courts have viewed time spent changing into "non-clothes" items to be "de minimis," and thus not compensable, where employees are also changing into clothing. However, the justices rejected this presumption, directing courts to focus on whether the vast majority of the time period in question is spent changing clothes or putting on and taking off non-clothes items. If the vast majority of time in question is spent putting on and off equipment of other non-clothes items, the entire period would be compensable.

This brings new clarity to a heavily litigated area, which should give employers more clarity as to how to compensate employees.

Supreme Court Hears Oral Arguments in *Noel Canning v. NLRB*

As described in last month's newsletter, employers have been closely watching the appeal of Noel Canning v. NLRB, in which the D.C. Circuit Court of Appeals found President Barack Obama's controversial "recess" appointments to the National Labor Relations Board ("NLRB") invalid. In January, the Supreme Court heard oral arguments in the case, expressing considerable skepticism of the President's power to make recess appointments.

The case revolves around President Obama's three January 2012 recess appointments to the NLRB, which occurred when the Senate was not actually in recess, but rather convening pro forma sessions every three days. Justice Elena Kagan stated the recess appointment may be a "historic relic" that had little place in an era where Congress no longer holds recess for over half a year and is generally available.

A finding that these appointments were constitutionally invalid could potentially affect decisions made by the NLRB during this time. The Court did not hint at what effect any invalidation of the recess appointments would have on these decision, however employers should anticipate the aggressive NLRB agenda to include re-issuing any that are affected by the eventual ruling. We can help you navigate this evolving situation as it progresses through 2014.

Arbitration Agreements In the News

NLRB Expands its Controversial View of Arbitration Agreements

The NLRB expanded its negative, and controversial, view of the enforceability of employee arbitration agreements last month, finding that an employer's requirement that its workers enter into arbitration agreements that did not expressly forbid class or collective actions, and it's filing of a motion to compel arbitration and dismiss class claims in an overtime suit ran afoul of federal labor law.

In *Leslie's Poolmart,* Administrative Law Judge Virginia Thompson applied the NLRB's controversial *D.R. Horton* decision that invalidated an employee arbitration agreement that forbade class and collective claims as a violation of employees' rights (both union and non-union) to engage in collective action under the NLRA. Applying the principles from *D.R. Horton* to this case, she found

that while the agreement itself did not bar class or collective action claims, Leslie's Poolmart's attempt to utilize the agreement to compel arbitration and dismiss class claims evinced an intention to prohibit such claims.

Judge Thompson refused to recognize that the Fifth Circuit overruled the key holding in *D.R. Horton*, or that the decision has been widely rejected by courts that have considered it. She also rejected counsel's hope to stay consideration pending the Supreme Court's decision in *Noel Canning*, discussed above, which may void *D.R. Horton*.

This decision creates another potential problem for employers wishing to utilize arbitration agreements. The decision suggests that arbitration agreements must expressly permit an employee to bring a class or collective action claim in arbitration for such agreements to survive NLRB review. The NLRB's aim is not clear, particularly in the face of overwhelming case law from the Courts of Appeal and strong Supreme Court precedent under the Federal Arbitration Act.

Ninth Circuit Dismisses Class Action Based on Arbitration Agreement Class Waiver

Declining to follow the NLRB, the Ninth Circuit in California compelled arbitration of a wage/hour class action, finding that an Ernst & Young arbitration agreement was valid and enforceable.

The plaintiff in *Richards v. Ernst & Young LLP*, a former Ernst & Young employee, filed a rehearing petition in September after a Ninth Circuit panel reversed a decision finding that the employer had waived its right to arbitrate his claim because it actively litigated the case. The Ninth Circuit accepted counsel for Ernst & Young's explanation that the argument was raised after the Supreme Court's ruling in favor of arbitration class waivers in *AT&T Mobility v. Concepcion*, and held that the plaintiff was barred from pursuing a class action.

The decision adds the Ninth Circuit to the long list of Courts of Appeals that have ruled such arbitration agreements with class and collective action waivers to be enforceable – a list that includes the Second, Third, Fourth, Fifth, Eighth and Eleventh Circuits. The affirmed and clarified opinion also rejects plaintiff's attempted reliance on *D.R. Horton* as "too late" – stating, without deciding the issue, that the other Courts of Appeals and the "overwhelming majority" of district courts to have considered the NLRB's ruling to have considered it and decided not to defer to the agency's interpretation.

Wage/Hour Updates

Federal Court Conditionally Certifies Nationwide Class of Human Resource Managers in OT Suit Against Major Retailer

A Florida federal judge conditionally certified a nationwide class of Lowe's Home Centers human resources managers for claims they weren't actually managers and were willfully misclassified as exempt from overtime pay requirements, highlighting the need for effective and accurate auditing of employee classifications – even within your HR Department.

The opt-in class in *Lytle v. Lowe's Home Centers Inc.* includes human resources store managers and other HR employees – amounting to a potential class of almost 1,800 employees who plaintiffs allege were misclassified as exempt because their duties are not as sophisticated as their title suggests. Discrepancy between what a job title or description may list and what an employee's day-to-day responsibilities are can result in significant liability under the FLSA. The suit alleges that while the employees in question may hold the title of "manager," the employees lack supervisory authority over other employees and exercise no discretion in meaningful decisions. In fact, the Amended

Complaint alleges that these employees often were required to operate cash registers, clean bathrooms, greet customers, and sweep floors.

Employers should conduct regular audits of positions where it exempt status is even slightly questionable. Job titles, and even job descriptions, are not determinative of an employee's exempt status. The determining factors are job responsibilities and "salaried" status. We can help you make these often tough decisions, and direct how a proper audit may be conducted, thus preventing your corporation from the specter of a far-reaching overtime pay suit.

Interns at Issue

Largest Unpaid Intern Settlement Approved

In what is purportedly the largest settlement in an intern class action to date, a New York federal judge granted preliminary approval to a $450,000 settlement between Elite Model Management and former unpaid interns who spent short periods of time at the self-described "world's most prestigious modeling agency."

The FLSA permits unpaid internships, but only if the internships meets strict criteria that the intern does not displace regular employees. The complaint in *Davenport v. Elite Model Management Corp*, sought at least $50,000,000 in unpaid wages, overtime pay, liquidated damages, interest and attorneys' fees for unpaid interns who worked for the modeling agency between February 2007 and the date of a final judgment. The plaintiff alleged that Elite used its internship program to source free labor that it otherwise would have had to use paid employees to perform.

With the rise of "unpaid intern" actions, this settlement should caution employers to take a hard look with counsel at their internship programs. The Department of Labor only considers an internship proper under the FLSA if all of the following requirements are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Employers should carefully review their unpaid internship programs to make sure that they are legal under the FLSA. Please contact us so that we may help you prevent an otherwise beneficial program from potentially exposing you to substantial liability.

New Legislation

New York

Reminder: New York City Earned Sick Time Act Takes Effect April 1, 2014

As detailed in last month's newsletter, New York City's new Earned Sick Time Act ("ESTA"), one of the most significant mandatory changes to employers' leave practices in years, takes effect on April 1, 2014.

As outlined in a prior Kelley Drye client advisory, all employers with more than 20 employees should be prepared to roll out revised policies and notify employees of their rights by the April 1, 2014 effective date. As the requirements of the ESTA are fairly specific, employers with operations in NYC should review the law itself. Employers should pay particular attention to part-time and temporary employees, who are frequently excluded from employer leave policies but may be entitled to leave under the new law. We are happy to assist you with any questions you may have to comply with these new requirements.

Reminder: NYC Pregnancy Non-Discrimination Act Took Effect January 31, 2014

Under the new New York City pregnancy non-discrimination law, employers are required to issue "pregnancy accommodation" notices to all new employees at the time of hire and to existing employees by May 30, 2014. A downloadable copy of the required notice can be found on the New York City Commission on Human Right' website. The law encourages, but does not require, employers to post the Notice in the workplace.

New Jersey

New Jersey Passes Amendment to Law Against Discrimination Providing for Reasonable Accommodation to Pregnant Women

Following our report last month on New York City's new pregnancy non-discrimination law, New Jersey Governor Chris Christie, on January 21, 2014, signed a new law which adds pregnancy as a protected classification, and requires accommodation of all pregnant employees. Like New York City, Garden State employees must accommodate pregnant employees, even those that are not medically "disabled."

The Amendment, signed just months after the measure's overwhelming support in the state legislature, became immediately effective. For purposes of the Amendment, "pregnancy" means "childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth." New Jersey employers are now required to make reasonable workplace accommodations for "needs related to pregnancy" when a pregnant woman requests the same based upon the advice of her physician. Employers may only avoid this obligation if such an accommodation proves to be an undue hardship for the employer.

The Amendment offers several examples of reasonable accommodations, including:

- bathroom breaks,
- breaks for increased water intake,
- periodic rest,
- assistance with manual labor,
- job restructuring or modified work schedules, and
- temporary transfers to less strenuous or hazardous work.

The Amendment also prohibits an employer from penalizing an employee for requesting an accommodation because of pregnancy.

Employers should review their policies and procedures and make any necessary changes in as soon as practicable, and advise their supervisors and managers on how to handle accommodation requests.

New Jersey Law Banning "Must-Be-Employed" Jobs Ads Upheld

A state appeals court found that a New Jersey law that attempts to limit discrimination against the unemployed by prohibiting employers from stating in a job listing that applicants must be employed did not violate the free speech rights of employers.

The New Jersey Appellate Division, in *New Jersey Dep't of Labor and Workforce Dev. v. Crest Ultrasonics et al.*, found that challenges to the law as violations of the First Amendment and the New Jersey constitution failed. The court found that the New Jersey law was narrowly tailored with the significant goal of helping unemployed workers present their qualifications to potential employers.

As detailed in last month's newsletter, New York City also passed legislation directed toward protecting the unemployed in the hiring process as an amendment to the New York City Human Rights law last year. The New York City law prohibits both job listings from listing current employment as a necessary qualification and discrimination against the unemployed in hiring, compensation or terms of employment. Fortunately, the New Jersey law does not prohibit discrimination – and employers are free to disregard applications from the unemployed.

In New Jersey, employers must ensure that all job listings, postings, or ads in any source, even if listed through a separate agency, make no mention that an applicant must be employed or that unemployed will not be considered. In New York City, employers must not only follow these steps with their ads, but must evaluate applicants based on their qualifications and not allow an applicant's unemployed status affect their hiring and compensation decisions.

Federal Agencies' Activity and Related Decisions

Background Checks Under Continued Scrutiny

On January 30, the EEOC asked the Fourth Circuit Court of Appeals to reconsider the dismissal of a lawsuit alleging that an employer's use of background checks amounted to race and gender discrimination.

As we reported in last month's newsletter, employers should continue to be cautious about how they use background checks.

The EEOC has been increasingly active in filing lawsuits against employers that use background checks. In *EEOC v. Freeman*, the defendant, a Dallas-based corporate event planner, secured summary judgment against the EEOC's claims that the company's use of credit and criminal background screens in hiring had a disparate impact on African American and male applicants.

The EEOC brought the case in 2009 on behalf of 51 unsuccessful applicants who were denied employment allegedly on the basis of their credit history, and 83 unsuccessful applicants who were denied employment allegedly on the basis of their criminal history. In ruling against the EEOC, the district court refused to entertain expert reports submitted by the EEOC – that purportedly demonstrated that Freeman's screening practices were preventing members of protected groups from getting jobs – were plagued with errors and completely unreliable.

NLRB “Ambush Election” Rule Back on the 2014 Labor Agenda

Under new NLRB rules, non-union employers may face union elections that take place in as little as 10 days from the time an election petition is filed, vastly reducing employers’ opportunities to communicate with employees on the issues.

For years, unions and employers alike have used the time between the filing of a petition for a union election with the National Labor Relations Board and the election itself to communicate with employees about the pros and cons of unionizing. On February 5, the National Labor Relations Board announced controversial new election rules that, if implemented as planned, will reduce that time to as little as 10 days.

Informally termed the “ambush election rule,” the new regulation would not only significantly reduce the time before a union election, but would permit most challenges to an election only after it has taken place and require employers to provide employee email addresses for campaigning purposes.

As published in the Federal Register, the new rule is the same as one finalized by the NLRB in December 2011. That rule was struck down by the D.C. Circuit Court of Appeals in the much-publicized *Noel Canning* decision in May 2012 (see “Supreme Court Hears Oral Arguments in *Noel Canning vs. NLRB*, above), in which the Court ruled that the NLRB lacked the required quorum to act at the time it established the ambush election rule and many others. As predicted in the last issue of Employer Express, however, a new NLRB with a full complement of five Senate-confirmed members will resume an activist agenda – the “ambush election” rule being a prime example.

Some regard the shift towards a quicker election as a transparent effort by a pro-union NLRB to limit an employer’s opportunity to communicate to employees that unionization is less certain to bring them benefits than a union may have led them to believe. Unions often quietly organize employee groups prior to the filing of an election petition, and many employers become aware of those efforts only when an NLRB election petition is filed. Many employers view the relatively short time before an election under current rules – about a month – as a fair counterbalance to one-sided, underground union campaigns.

NLRB Chairman Mark Pearce, announcing the new rule, said that it will avoid “unnecessary delay and inefficiencies” that “hurt both employees and employers.” Given the way the new rule tips the scales in favor of a union, however, litigation by employers and employer advocacy groups that oppose the change to the NLRB’s election rules is a near certainty. We will keep you apprised of developments as they occur.

NLRB Gives Up Union-Poster Fight

The National Labor Relations Board announced that it would not seek U.S. Supreme Court review of a pair of appeals court decisions striking down its rule that required employers to post notices explaining workers’ collective bargaining rights.

In *National Association of Manufacturers et al. v. NLRB*, the U.S. Court of Appeals for the D.C. Circuit found in May of 2013 that the NLRA, which states that the expression or dissemination of views cannot constitute an unfair labor practice as long as the expression contains no threat of reprisal or promise of benefit must confer upon employers the right to stay silent, or in this case, refuse to hang the posters required by the rule. In *Chamber of Commerce v. NLRB*, the Fourth Circuit more broadly found that the NLRB lacked authority under the National Labor Relations Act to implement such a requirement.

After both the D.C. Circuit and the Fourth Circuit Court of Appeals denied the agency's petition for rehearing last July, the EEOC had until January 2, 2014 to file petitions for certiorari to the Supreme Court. At the close of 2013, the EEOC announced that it would not seek this review, meaning the rule will not go into effect. If implemented, an employer would be found to have committed an unfair labor practice if it did not post this official notice informing employees of their rights to unionize. This represents a significant victory for employers in non-union and partially non-union workplaces.

"Disability" Developments

EEOC Brokers Settlement in First Systemic GINA Suit

The EEOC reached a settlement of claims in its first systemic Genetic Information Non-Discrimination Act ("GINA") lawsuit, after finding that a nursing and rehabilitation center, Founders Pavilion, Inc., had allegedly sought its employees' genetic information.The settlement will cost the employer $110,400.00 for the GINA claims alone, and over $250,000 in related claims under the ADA.

GINA prohibits the use of genetic information in making employment decisions, and restricts employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history). The EEOC alleged that Founders violated GINA by asking for family medical history as part of a pre-employment, return-to-work, and annual medical exams of its staff.

Employers should be careful to craft their policies to avoid any request for the categories of information discussed above, particularly where medical examinations are required for a position. While this is only the fourth case brought by the EEOC under GINA, and the first complaint alleging a systemic practice, employers should be mindful that the EEOC will continue to pursue these claims.

Fourth Circuit Holds that Temporary Impairment May be Covered Under ADAAA

Reversing a dismissal by a district court, the U.S. Court of Appeals for the Fourth Circuit held last month that a temporary impairment caused by an injury may be a covered disability under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA").

The ADAAA, signed into law by President Obama in 2008 "emphasized that the definition of disability should be construed in favor of broad coverage of individuals" and "make[s] it easier for an individual seeking protection under the ADA to establish that he or she has a disability within that Act's meaning. The Fourth Circuit's holding in *Summers v. Altarum Institute*, took this purpose to heart and shows a marked departure from previous case law that found temporary conditions, even those lasting up to a year, did not fall within the definition of "disability" under the ADA.

The Court is the first federal appeals court to apply the ADAAA's expanded definition of disability to include temporary impairments. The Court approved to the EEOC's final regulations implementing the ADAAA that provide that "effects lasting or expected to last fewer than six months can be substantially limiting" for purposes of a finding that an employee is actually "disabled."

Employers should be mindful that they should with the ADAAA's new definitions and directives taking force, it is more risky to assume that an employee's injury does not qualify as a disability – even if this answer may have been clear in the past. Therefore, employers should not refuse to entertain reasonable accommodation requests based on old assumptions. The Fourth Circuit noted that while duration of the impairment is one factor to be considered, the severity of the impairment was also

important. We can help you navigate these new and uncertain standards as they develop.

OFCCP Revised Self-Identification of Disability Form Approved

Under new OFCCP regulation, going into effect on March 24, 2014, federal contractors must invite job applicants and employees to self-identify their disabilities. The OFCCP has published a "Voluntary Self-Identification of Disability" form, which employers can use for this purpose.

The OFCCP's new form, which is now available on their website, provides three options for an applicant or employee to self-identify:

1. YES, I HAVE A DISABILITY (or previously had a disability)
2. NO, I DON'T HAVE A DISABILITY
3. I DON'T WISH TO ANSWER

It also provides a "Reasonable Accommodation Notice", advising responders as to their rights under federal law and providing examples of reasonable accommodations.

Under the new regulations, federal contractors must establish a seven percent utilization goal for workers with disabilities. Employers are required to resurvey employees every five years and remind them at least once between surveys of their ability to fill out another "Voluntary Self-Identification of Disability" form.

While compliance is phased in based on the date of the employer's next regular Affirmative Action Program ("AAP") update following March 24, 2014, the OFCCP has suggested employers come into compliance as soon as practicable after that date. Employers should determine when the existing workforce must be surveyed.

In the News

"Bridgegate" in New Jersey Highlights the Danger of E-Mail and the Need for Restrictive Device-Use Policy

In the aftermath of the continuously evolving "Bridgegate" scandal involving members of Governor Christie's staff – we see that texts and emails have been the strongest evidence of potential wrong-doing. Employers should take a hard look at their device-use policies.

Amidst thousands of e-mails and text messages that implicated several of Governor Christie's associates in the scandal, a broader lesson should be learned regarding control of an employee or agent's business related communications and use of personal devices – issues that can plague any employer, not just a public figure. Choosing whether to provide employees with accounts and devices to use to communicate during work hours or outside of the office can be a difficult question that involves significant expenditure by the employer, however this story should not necessarily mean that employers must make costly changes to their existing policies.

The ACLU, in an open letter to the Governor, suggested that he mandate all his personnel to use their government-issued accounts and to provide copies of any other communication made outside of these accounts (a move some private corporations are also implementing). Aside from the prevention of inappropriate or damaging communications employees may be ashamed to send over a corporate device, personal devices prevent security risks for employers. Employers are unable to control the security level and protects that employees have on their personal accounts, and

therefore the use of personal devices may result in confidential business information being passed over non-secure networks.

While it may be wise for employers to require employees use a company-issued device, this may not always be economically feasible. Moreover, where such restrictions are in place, it is difficult to truly prevent all communication across personal devices. In these cases, employers should review their device-use policies, and ensure that their policies are clear, including a broad definition of what constitutes a business communication, and providing for broad authority for the employer to audit such communication over personal devices. We can help you craft the best policies and practices to prevent your company from falling victim to the next “Bridgegate.”

Honors and Awards

Matthew C. Luzadder Receives Client Service All-Star Mention

Matthew C. Luzadder, a member of the Labor practice group in Kelley Drye’s Chicago office, has been included as one of only 49 labor and employment specialists named in the 2014 BTI Client Service All-Stars report.

BTI interviewed more than 300 corporate counsel, and asked them to name attorneys who “excelled in the growing area of labor and employment law by clearly and effectively communicating with their clients and providing services at a reasonable cost.” Mr. Luzadder represents management in employment actions both in the federal courts and before the Equal Employment Opportunity Commission and various state agencies.