Employer Express July 2014 Newsletter

Barbara E. Hoey, Mark A. Konkel

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Key developments in the Employer Express July 2014 newsletter include:

ARBITRATION AND CLASS ACTIONS

California's Supreme Court Reverses Itself, Approves Mandatory Class Action Waivers, with an Important Carve-Out

The nationwide surge in decisions approving mandatory arbitration agreements for employees continued late last month, when the employee-friendly California Supreme Court found that a 2007 decision issued from its bench saying that class waivers were unenforceable in certain circumstances is invalid in light of U.S. Supreme Court precedent.

In *Iskanian v. CLS Transportation Los Angeles LLC*, the California Supreme Court found that its prior precedent was preempted by the Federal Arbitration Act and its interpretation by the U.S. Supreme Court in *AT&T Mobility v. Concepcion.* California state courts, one of the last remaining murky territories for enforcement of mandatory employee class waiver arbitration agreements, are now bound to accept them.

The decision still has an important exception – employers may not preclude class actions brought under California's Private Attorney General Act ("PAGA"), because of what the California Supreme Court found to be an inherent conflict with public policy. California's PAGA allows employees to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency. While employees are required to give notice to an employer and an opportunity to cure before bringing suit under PAGA, this is often an undesirable option for employers in claims alleging significant penalties across a large workforce.

As we have reported previously, this trend follows the overwhelming majority of Circuit Courts of Appeal to enforce such agreements. This stands as yet another blow to the National Labor Relation Board's controversial *D.R. Horton* ruling, which stands as a major outlier in this overwhelming trend.

While employers should continue to take solace in these decisions that continue to narrow those jurisdictions where enforcement is shaky (to the extent they still exist), they should also realize that class action waivers and arbitration agreements are not a one-size-fits-all policy. Employers must consider their size, the potential claims at issue, and other factors to determine if such agreements are right for them.

WAGE AND HOUR LAW

Wave of Suits from Former Interns Pursuing Wage-and-Hour Claims

Last month we reported on the L.A. Clippers' wage suit alleging that a team of interns were compelled to perform the work of paid employees without any compensation. As the treatment and protection of interns in the workplace continues to be a hot topic, and in light of recent New York legislation passed on March 26, 2014, that granted greater employment protections for interns, a number of additional class action suits relating to intern pay have been filed in the Second Circuit.

In its recent amicus brief, the Department of Labor (DOL) told the Second Circuit that a limited exception for trainees under federal wage requirements does not apply to the unpaid interns who performed substantive tasks and filed a wage action against Fox Entertainment Group Inc.

The DOL further argued that nothing in the Fair Labor Standards Act (FLSA) suggests that for-profit employers should be permitted to circumvent their obligation to compensate individuals who are performing productive work by categorizing entry-level or temporary workers as "interns" or "trainees."

The DOL's brief was filed the same day that several unions (the American Federation of State County and Municipal Employees, Communications Workers of America, Service Employees International Union, and United Food and Commercial Workers) submitted their own amicus briefs. They were joined by the National Employment Lawyers Association, the Economic Policy Institute and the Writers Guild of America East, who are all pushing the Second Circuit to uphold the lower court's findings in favor of the former Fox interns.

Similar class action suits have hit Coach Inc., Universal Music Group Inc., and Hearst Corp. in the Second Circuit. In each of these pending suits, a class of Plaintiffs, who were former interns, contends that their employer was not justified to withhold compensation under the guise of "unpaid internships." Defendants such as Hearst adamantly contend that the interns were not employees. Hearst further argues that the practical effect of the Plaintiffs' claims would be the end of student internships in the private sector and the losers would be the many students who seek out unpaid internships for the benefits they provide.

Employers should keep a close eye on these cases as they develop – the landscape of intern compensation decisions is constantly shifting and providing confusing and contradictory directions to businesses who wish to continue to utilize valid, educational programs. Kelley Drye can help to guide you in what the DOL and judges look for in a lawful internship program.

NATIONAL LABOR RELATIONS ACT

Noel Canning Ruling to Impact National Labor Relations Board's Immediate Agenda

In late June, the Supreme Court affirmed the D.C. Circuit's holding in NLRB v. Noel Canning, finding President Obama's controversial recess appointments to the National Labor Relations Board in January 2012 were invalid, casting doubt on hundreds of Board decisions.

The Recess Appointments Clause authorizes the president to fill any existing vacancy during any recess – whether occurring during or between sessions of Congress – of sufficient length. However, for purposes of the clause, the Senate is in session whenever it indicates that it is, as long as it retains the capacity to transact Senate business. The President had made three recess appointments to the five seat Board while the Senate was out of town, except for intermittent, routine sittings, between the two sessions.

The National Labor Relations Board (NLRB) will now have to revisit hundreds of decisions involving the three disqualified appointees, and potentially issue new decisions. Among others, the NLRB has asked the Fourth Circuit to review its ruling that Nestle Dreyer's Ice Cream Co. violated federal labor law in refusing to bargain with the maintenance workers' union after the NLRB directed their union election in November 2011.

The ruling also casts doubt on the validity of regional directors appointed by the Board, opening the door for employers to challenge adverse decisions by making the argument that a regional director lacked authority.

Employers should stay tuned as the impacts of this ruling take effect – NLRB precedent harmful to business interests may be overturned, and specific findings of the NLRB against employers may be overturned pending review by a valid panel.

11th Circuit Decides Free Speech Cannot Protect Union's Retaliation

The Eleventh Circuit recently held that the First Amendment couldn't shield a Florida firefighters union from liability for retaliation. The decision affirmed a jury's verdict that a union memo calling for reprisal against two workers after they filed charges with the U.S. Equal Employment Opportunity Commission (EEOC) constituted retaliation.

The union appealed the decision by Judge James S. Moody Jr., who had decided to let stand a 2012 verdict that the union retaliated against plaintiffs Anthony Booth and Jerry Brown when it leaked their names to colleagues in a memo meant to induce retribution for the EEOC charges.

The memo named Booth and Brown as the employees who lodged an EEOC complaint against a former supervisor and against Pasco County, Florida and speculated that the cost of litigation would cause union fees across the board to rise. A jury eventually found that the memo was an adverse action since it appeared to call for reprisal against Booth and Brown and because it led Booth and Brown to fear that their colleagues might put them in a life-threatening situation during the course of a fire response.

The panel said that the First Amendment is to be used primarily to protect matters of public concern,

and the memo didn't qualify as a matter of public concern because it was never intended for public consumption. The panel further added that the memo's assertion that union dues would rise because of the EEOC charge was a baseless threat that is not protected by the First Amendment either.

This decision provides a valuable lesson that employers should not view adverse action narrowly to simply include matters that go directly to the terms and conditions of employment.

WHISTLEBLOWERS

Webb-Webber Decision Reverses Longstanding Requirement under New York Whistleblower Law

New York's highest court recently overruled longstanding precedent interpreting N.Y. Labor Code's whistleblower law, finding that an employee is not required to identify the specific law, rule or regulation allegedly violated by the employer to survive a motion to dismiss.

In *Webb-Weber v. Community Action for Human Servs., Inc*., an employee alleged that she advised her employer regarding a number of issues, including falsification of patient medication and treatment records, inadequate fire safety, mistreatment of residents, and deficiencies in patient care, among other violations. These reports resulted in a number of sanctions, however the plaintiff did not identify any specific laws, rules or regulations that were purportedly violated in connection with the alleged activities of her employer.

The court found that the plain language of the statute does not require a plaintiff to identify the specific "law, rule, or regulation" violated. Still, the pleading must identify the particular activities, policies, or practices that the employee alleges to be a violation of law, so that an employer has notice of the alleged complained-of conduct.

Past the pleading stage, a plaintiff still has the burden of proving an actual violation of law, as opposed to merely establishing that the plaintiff possessed a reasonable belief that the violation occurred. Additionally, the violation must be of a kind that creates a substantial and specific danger to public health or safety.

Fourth Circuit Nixes False Claims Act Suits Based on Public Information

Late last month, the Fourth Circuit ruled that federal courts cannot consider whistleblower suits brought under the False Claims Act (FCA) where those allegations are publicly available and did not originate from the purported whistleblower, cementing a significant defense for employers facing FCA suits.

In *United States Ex Rel. Ahumada et al. v. Nish et al.*, No. 13-1672, a former executive for the National Center for Employment of the Disabled ("NCED") brought a *qui tam* action against his former employer and several NCED suppliers alleging that the NCED defrauded the government under a contracting program that promotes employment for blind and other severely disabled people. The fraud allegations in this case were publicly reported in October 2005 through news reports and articles in Washington and Texas, which disclosed the potential lack of required quotas of disabled workers on staff to qualify for the government contracts.

The Fourth Circuit found that the former exec was not an "original source" for the information under Fourth Circuit precedent, because his knowledge was not direct and independent where it is based on public disclosure. The intervening news reports defeated his claims that such allegations could form the basis for an FCA claim. The Court found that his allegations were too similar to some of the

earliest news reports to constitute an “independent source,” and tossed his claims against his former employer’s suppliers.

Employers facing FCA claims should keep this case in mind as they weigh their options in settling with an FCA relator to avoid costly litigation – the former exec’s employer settled with him in the infancy of the action.

NJ Supreme Court Confirms Narrow Reading of New Jersey Whistleblower Law for Healthcare Employees in Upholding Registered Nurse Termination

The New Jersey Supreme Court confirmed a narrow reading of the Conscientious Employee Protection Act (CEPA), finding that claims asserted under that law’s “improper quality of patient care” provision must be premised upon a reasonable belief that the employer violated a law, rule, regulation, declaratory ruling adopted pursuant to law, or a professional code of ethics that governs the employer affecting patient care standards.

In Hitesman v. Bridgeway, Inc., A-73-12 (June 16, 2014), a registered nurse (“RN”) was fired after complaining to management and government agencies, and disclosing redacted records to a television reporter regarding the rate of infectious disease among his employer’s patients. The RN claimed his complaints were supp;orted by the American Nursing Assoiciation Code of Ethics, his employer’s employee handbook, and the employer’s Statement of Resident Rights.

The highest court of New Jersey disagreed, finding that the RN did not identify authority that applies to any activity, policy, or practice of the employer because the authorities relied upon by the plaintiff provided no standard for his employer’s control of infectious disease, did not define acceptable patient care, and did not state a clear mandate of public policy.

Employers should take notice of this, and other limiting decisions of state whistleblower laws, that require that an employee merely “complain” about an issue he finds objectionable. Kelley Drye’s Labor and Employment Group can help differentiate between those cases that are properly based on actionable laws or standards, from baseless and hollow complaints of improper care.

FAIR CREDIT REPORTING ACT

FCRA Suit Against Home Depot Should Serve As Reminder To Ensure Compliance

Home Depot, Inc., the world’s largest home improvement specialty retailer and employer to over 300,000 employees, was hit with a Fair Credit Reporting Act (FCRA) suit alleging that the company failed to provide the required notices to employees prior to obtaining consumer reports in connection with their applications and prior to taking adverse action based upon those reports’ findings.

The Complaint alleges that the retailer’s online job posting system does not provide a standalone disclosure that is required to run a consumer report in connection with an employment application. With the increasing reliance on online solicitation and online applications, large employers should ensure that their forms are up to date as one slip up can mean across-the-board liability. Courts have generally found that a plaintiff seeking statutory damages under the FCRA need not allege or prove actual damages or injury for standing, plaintiffs’ attorneys are likely to find claims alleging willful violations attractive.

Employers should also be wary that states continue to pass laws that limit or outright prohibit the consideration of certain details of an applicant’s background, such as a credit score, with certain exceptions. FCRA compliance is an easy fix, and Kelley Drye can walk you through both federal

compliance and the increasing state law restrictions and bans on the use of such information. To borrow from Home Depot's motto – "You can do it. We can help."

AFFORDABLE CARE ACT

Hobby Lobby Decision Finds Employers Have Corporate Religious Rights

The Supreme Court's controversial Hobby Lobby decision sent shockwaves throughout the country as the Justices, split 5-4, found that the Religious Freedom Restoration Act (RFRA) applies to closely held for-profit corporations.

Justice Alito's opinion in *Burwell v. Hobby Lobby Stores, Inc.* found that the regulations promulgated by the Department of Health and Human Services under the Affordable Care Act (ACA) requiring employers to provide their female employees with no-cost access to contraception violate the RFRA when employers object to the regulation due to their religious beliefs.

The implications of this ruling may be fairly dramatic, as closely held entities employ millions across the United States, and the broad holding can have far reaching implications where diverse religious beliefs are at issue. Additionally, the Court did not answer the question of whether publicly traded companies also fall under the statute's protections.

Justice Ginsberg, writing in dissent, detailed the fear that many critics of the decision share – the holding has broad possibilities for companies to use their new corporate religious rights to refuse to comply with other provisions of the ACA. For example, they may refuse to cover antidepressants, blood transfusions, or vaccinations.

However, others believe that Justice Alito crafted a narrowly tailored opinion that will not open the floodgates for new RFRA claims and believe the decision will only impact smaller businesses that employ less than 50 people and are already exempt from the ACA's mandates. The Supreme Court did recognize that large corporations will be unlikely to assert RFRA objections to federal regulations, as investors don't want their companies run based on religious beliefs.

Either way, employers should regard the *Hobby Lobby* decision as significant because it limits the reach of the ACA's regulations and affords employers considerable autonomy in running their businesses.

House Democrats did not take long to respond. On Wednesday July 9th, 2014, they introduced legislation that would override the *Hobby Lobby* decision and make employers responsible for providing contraceptive protection under the Affordable Care Act. The act, known as the Protect Women's Health and Corporate Interference Act, reinstates the ACA's contraceptive coverage.

If successful, the law would require employers to cover their workers' health insurance as required by the ADA, and states that federal laws, including those protecting the freedom of religion, cannot shield employers from paying for services they find objectionable. Houses of worship and religious nonprofits would still be exempt from the requirement.

DISCRIMINATION LAW UPDATE

New Jersey Appeals Court Finds State Discrimination Law Protects Divorcing Workers

In late June, the Superior Court of New Jersey, Appellate Division, revived a wrongful termination suit alleging discrimination based upon marital status arising out of the plaintiff's divorce with another employee after it was revealed he had an extramarital affair with yet another employee, both of

whom the plaintiff had supervised.

The plaintiff's employer had allegedly told him that he was being terminated because he would soon be going through an "ugly divorce." The lower court found that the NJ Law Against Discrimination does not protect employees for employment decisions that are not based on one being "married" or "unmarried." Therefore, the process of divorce, and a large swath of employees, were not protected, found the appeals court on review.

The appellate court found that the employee had been terminated because of stereotypes about divorcing persons – that they are "antagonistic," "uncooperative with each other," and "incapable of being civil or professional in each other's company."

NJ Legislature Approves Penalties for Employment Status Bias

The New Jersey legislature recently approved a bill that would penalize employers for discriminating against job applicants who are unemployed. The legislation is aimed to help the long-term unemployed re-enter the workforce by prohibiting employers from refusing to accept applications from the unemployed.

A 30-5 vote by the New Jersey Senate advanced S-1440 and cleared a hurdle for the bill designed to combat employment status discrimination. The Senate's passage of S-1440 was its second approval by the full Senate since its introduction in February. In May, the Senate passed the bill more narrowly before introducing it to the General Assembly's Labor Committee. In May, the Assembly committee advanced the bill with amendments and in June, the full body approved it.

The Assembly version of the bill clarifies that the bill prohibits discrimination against unemployed individuals in employment decisions, but that employers can still research an applicant's employment history and consider whether an individual is unemployed. The bill will take effect after Gov. Chris Christie signs it into law.

Violations of the measure would implicate civil penalties of $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each additional violation. If approved, New Jersey would join New York, Oregon, and Washington D.C. as locations with legislation in place to prevent employment status discrimination. Over a dozen additional states have introduced similar bills. Employers should monitor approval of these laws in jurisdictions where they operate, and ensure there is appropriate training with human resources and management.

EEOC Issues Pregnancy Bias Guidance Ahead of Major Supreme Court Ruling

The Equal Employment Opportunity Commission issued new enforcement guidance on pregnancy discrimination and related issues on July 14, providing detailed examples of the agency's views on proper compliance with the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) as they apply to pregnant workers. This comes a mere two weeks after the U.S. Supreme Court agreed to hear a PDA suit against UPS, Inc., which has the potential to obviate any guidance that does not conform with the Court's eventual holdings.

The guidance takes an expansive view on employers' obligations under the PDA. The PDA was a 1978 Amendment to Title VII that required "women affected by pregnancy, childbirth or related medical conditions" must be treated the same "as other persons not so affected but similar in their ability or inability to work." The ADA requires reasonable accommodation for qualified disabled workers. The EEOC's guidance essentially reads this reasonable accommodation requirement into the PDA, creating new obligations for employers at the federal level.

While many state laws are beginning to require accommodation of routine pregnancy related issues such as required extra breaks and time for nursing, the ADA had only protected pregnancy related conditions that rise to the level of a "disability," such as gestational diabetes. The new EEOC guidance implies that employers must provide some sort of accommodation for routine pregnancy related issues, creating confusion among employers regarding their further obligations.

The Supreme Court's future ruling on the PDA may tweak this guidance, however it will not consider the 2008 ADA Amendments Act, which took a broad view of what constitutes a disability. Therefore, there is the chance that these new obligations will continue to set a baseline standard and be persuasive in federal discrimination claims. While all employers should carefully review this guidance, employers who do not already have a pregnancy accommodation protocol in place due to state law or corporate policy should revisit their obligations under federal law.

President Obama Signs Executive Order Protecting LGBT Workers

On Monday, July 21, President Obama signed Executive Order 11478 amending an earlier order and adding sexual orientation and gender identity to the list of categories protected from discrimination by federal contractors. Employers who contract with the federal government should review the President's Order and adjust their EEO policies accordingly.