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IN THIS ISSUE

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USCIS ENACTS REGULATORY CHANGES TO THE H-1B "VISA LOTTERY"

There is a 20,000 annual quota for cap-subject H-1B visa petitions where the beneficiary (employment candidate) possesses a U.S. master's degree or higher and a 65,000 annual quota for cap-subject petitions where the beneficiary possesses a U.S. or foreign bachelor's degree. Since the last recession, demand for H-1B visas greatly exceeds supply.

United States Citizenship and Immigration Services (USCIS) has historically allocated these scarce visas through a "visa lottery." Petitioners (U.S. employers) must submit fully documented H-1B visa filings during the first five business days of April – six months before the October start of a new fiscal year. In mid-April, USCIS conducts two random selection lotteries. First, the 20,000 annual quota is chosen; then, the 65,000 annual quota is determined. Petitions where the beneficiary has a U.S. master's degree or higher participate in the second "lottery" if they lose the first one.

USCIS returns the petitions, including the filing fee checks that lose the "lottery." USCIS adjudicates the winning petitions.

This allocation system has been much criticized on grounds of both efficiency (enormous amounts of wasted resources) and outcomes (higher-paying positions receive no priority). The numerous bills to reform this allocation system have received little congressional support.

On December 3, USCIS released a proposed regulation that would make two changes in the current "visa lottery" system. First, petitioners would no longer submit completely documented H-1B visa petitions. Instead, USCIS would run an electronic "registration system" by which employers would file a streamlined form with no supporting documentation. The random "lottery" would be conducted based on this form alone. Winners would then be required to file complete petitions. Losers would not have wasted resources on the preparation of unselected petitions.

The reaction of the H-1B visa user community to the creation of a "registration system" has been positive. The efficiency gains that such a system would produce are obvious. However,

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employers fear that if USCIS rushes to implement the registration system in March of 2019 instead of a year later, the result will be chaos.

The second proposed change to the H-1B visa allocation system is to reverse the order of the two "lotteries." The motivation for this initiative is to maximize the number of visas awarded to individuals with U.S. master's degrees or higher. USCIS assumes that these beneficiaries are the most skilled and the highest paid. The proposed regulation offered no evidence in support of this assumption.

On January 31, 2019, USCIS issued the final regulation. USCIS is delaying the implementation of the "registration system" until 2020. The reversal of the order of the two "lotteries" is effective in 2019. Because there is an argument that the reversal must be legislated by Congress and is not within the authority of USCIS, a party with standing could challenge the agency in federal court.

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AFFORDABLE CARE ACT DEVELOPMENTS AFFECTING EMPLOYERS

A trio of recent court decisions involving the Patient Protection and Affordable Care Act (ACA) have resulted in uncertainty about the law and how it may impact employers. On December 14, 2018, a federal district court judge in Texas ruled that the ACA is unconstitutional. It remains unclear exactly what this ruling means for individuals who are required under the ACA to obtain health insurance (known as the "individual mandate") as well as certain employers that are required to offer qualifying health insurance to their full-time employees (known as the "employer mandate"). Until the judge provides further clarification or the decision is upheld on appeal, individuals and employers should continue complying with the ACA's requirements.

Looking at the particular decision in *Texas et al. v. United States*, District Judge Reed O'Connor based his decision on the elimination of the tax penalty for failing to comply with the individual mandate beginning in 2019 pursuant to the Tax Cuts and Jobs Act of 2017 (TCJA). In 2012, a divided United States Supreme Court upheld the constitutionality of the individual mandate under the ACA on the basis that the penalty was in fact a tax and constituted a valid exercise of Congress' taxing power. Because that Supreme Court decision also found that the individual mandate was not a valid use of Congress' power to regulate commerce, Judge O'Connor held that the individual mandate without the tax penalty was unconstitutional. Because Judge O'Connor further determined that the individual mandate "is essential to" the ACA as a whole, he held that the entire law was unconstitutional.

What impact will this decision have on employers who are required under the ACA to offer qualifying health coverage to their employees? Probably very little until it is further clarified by Judge O'Connor himself or through the appeal process. The judge did not issue an injunction against enforcement of the ACA, and it remains to be seen if he will offer any further clarification of his opinion. In a statement following the decision, the Department of Health and Human Services (HHS) asserted that the "decision does not require that HHS make any changes to any of the ACA programs it administers or its enforcement of any portion of the ACA at this time." Consequently, employers will be expected to continue complying with the ACA coverage mandates and all reporting and disclosure requirements.

The decision will certainly be appealed, but it is unclear whether the court must address other substantive issues before an appeal can be decided procedurally. In any event, it could take quite some time before the appeal process runs its course and might even include another trip for the ACA to the Supreme Court.

Consequently, the ACA remains in place and enforceable. We also note that while the TCJA removed the tax penalty for failure to comply with the individual mandate, there was no similar repeal or elimination of penalties related to an employer's failure to comply with the employer mandate or other requirements of the ACA on employer-provided health insurance coverage.

In addition, in January 2019, two district courts issued injunctions blocking the extension of certain religious and moral exemptions to the ACA's contraceptive coverage requirements. One of these rulings by District Judge Wendy Beetlestone imposed a nationwide injunction on enforcement of the coverage exemptions issued by HHS in November 2018. The ACA statute and regulations exempt

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churches, religious orders and religious non-profits from being required to provide contraceptive coverage at no cost. In the *Hobby Lobby* case, the Supreme Court extended the exemption to family or other closely-held businesses with religious objections to the requirements. These new HHS rules allow publicly-traded businesses and nonprofits that are not religiously affiliated to avoid the contraceptive coverage requirements and also permit private businesses to be exempt based on "sincerely held moral convictions."

Judge Beetlestone's injunction raises concerns about whether HHS followed proper procedures for issuing the expanded HHS exemptions and whether the exemptions exceed HHS's legitimate rulemaking authority. Pending a decision on these arguments, the injunction means that employers who are subject to the contraception coverage requirements should continue providing those benefits.

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NLRB DECISION MAKES IT EASIER TO CLASSIFY WORKERS AS INDEPENDENT CONTRACTORS – FOR UNION PURPOSES

The National Labor Relations Board (NLRB), the federal agency that oversees the rights of private sector employees to unionize, issued a decision making it easier for employers to classify individuals as independent contractors. Independent contractors do not have the right to unionize pursuant to the National Labor Relations Act. On January 25, 2019, the NLRB issued a decision affirming that airport shuttle franchisees were properly classified as independent contractors, as opposed to employees, and therefore were not eligible to unionize. SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338, Case 16-RC-010963 (Jan. 25, 2019) In doing so, the court overturned a 2014 NLRB decision that had revised the test for determining whether individuals are independent contractors. FedEx Home Delivery, 361 NLRB No. 65 (2014). The opinion, penned by President Trump appointees, rejected the revisions made during President Obama's era to what is known as the common-law agency test.

This test includes the following ten factors that courts review to determine whether individuals are properly classified:

(1) The extent of control which, by the agreement, the master may exercise over the details of the work;

(2) Whether or not the one employed is engaged in a distinct occupation or business;

(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(4) The skill required in the particular occupation;

(5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(6) The length of time for which the person is employed;

(7) The method of payment, whether by the time or by the job;

(8) Whether or not the work is part of the regular business of the employer;

(9) Whether or not the parties believe they are creating the relation of master and servant; and

(10) Whether the principal is or is not in business.

The 2014 *FedEx* Board rejected an opinion by the D.C. Circuit Court of Appeals holding that the animating principle of this inquiry was whether an individual had "significant entrepreneurial opportunity for gain or loss." Instead, the *FedEx* Board stated that a new factor to be considered is whether the evidence showed that the alleged contractor was *in fact* rendering services as part of an independent business and noted that only actual entrepreneurial opportunity (as opposed to theoretical opportunity) should be considered in evaluating whether an individual was an employee or a contractor.

The recent *SuperShuttle* rejects the revisions made by the 2014 *FedEx* Board, claiming that they impermissibly altered the common law test and longstanding precedent. In doing so, the board reverted back to the traditional common law test listed above.

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SO, WHAT DOES THIS MEAN FOR EMPLOYERS?

As an initial matter, employers must keep in mind that this ruling applies only to matters that may come before the NLRB. That means that properly classified independent contractors could not engage in unionizing campaigns. This common law test, however, does not replace any of the many other applicable independent contractor tests, including the IRS Right to Control Test (relating to federal taxes), the Economic Realities Test (applied for federal wage and hour matters), the Right to Control Test (used for discrimination statutes) or many of the other federal, state or local tests that exist to determine independent contractor status. Therefore, it is entirely possible that an individual may be considered a contractor pursuant to this decision but still be considered an employee for other purposes.

This decision is likely good news for the "gig" and "share" economies, including ride-sharing entities. It signals to employers that the NLRB is not currently seeking to expand protections to these non-traditional areas of employment and that an individual's entrepreneurial opportunities still animate this analysis.

Finally, this confirms that the law related to independent contractors continues to be extremely complex, and penalties related to misclassifications can be steep. Employers should consult with their labor and employment counsel when it comes to independent contractors and misclassification concerns to navigate this ever-changing area of the law.

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