

2016 EMPLOYMENT LAW OUTLOOK

Tom Brady
tbrady@clarkhill.com
(313) 965-8291

Kurt Miller
kmiller@clarkhill.com
(412) 394-2363

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CONTENT

- National Labor Relations Board
- Department of Labor Wage and Hour Administrator
- Equal Employment Opportunity Commission
- United States Supreme Court

NATIONAL LABOR RELATIONS ACT

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“AMBUSH” ELECTION RULES

- Rules took effect April 14, 2015
- Purpose is to cut the time it takes to hold a union representation election
- New rules:
 - Speed up pre-election procedures
 - Limit pre-election hearings
 - Limit post-hearing briefs
 - Limit right to appeal Regional Director’s decision to the full Board
 - Make Board review of post election objections discretionary
 - Discontinue Board’s 25 day election rule
- Impact of proposed rules:
 - Compromises the employer’s ability to present their point of view to workers
 - Impairs employees’ ability to educate themselves about unionization

NEW RULES FIRST SIX MONTHS RESULTS

- No significant raise in the number of election petitions filed in the first six months
- Median days between filing petition and pre-election hearing fell from 13 to 10 days
- No meaningful pre-election hearing
- Median days between the filing of petition and a consent election fell from 38 to 23 days
- Median days for a directed election fell from 68 days to 34
- The union win rate for elections was 68.3%, not significantly greater than the 69% for 2014

RECOMMENDATIONS

- Begin campaigning against unions now
- Train managers and supervisors to avoid unfair labor practices
- Require managers and supervisors to listen to and address employee complaints
- Conduct a union avoidance audit to identify and address issues
- Review and modify policies that the Board finds objectionable
- Compare wages and fringe benefits of competitors
- Enforce no-access rules
- Enforce company non-solicitation rules
- Enforce non-distribution rules

OTHER KEY ISSUES

- The Board changes the “joint employer” test Board
- Micro Units
- Employees may use company e-mail to help organize or engage in other Section 7 activity
- Persuader Rule scheduled for release in April 2016

Recommendations

- Review your service contracts with labor supply companies to determine if the contract provides your company an opportunity to exercise control over wages, benefits, hours and other terms and conditions of employment. Avoid any supervisory role over loaned employees
- Review your organization and determine what and why certain units are more appropriate than others
- Limit employees who may use the company e-mail system

BOARD LIMITATION ON COMPANY POLICIES

- The Board continues to focus on company policies that it believes limit employees in the exercise of their Section 7 rights. Board focuses on policies regarding:
 - Maintaining confidentiality of company information
 - Prohibiting employees from revealing information about an investigation
 - Rules prohibiting employees from “walking off the job”
 - Arbitration clauses that prohibit class action arbitrations or law suits
 - Overbroad non-solicitation and non-distribution rules
 - Conflict of interest rules
 - Forbidding behavior that is uncivil, discourteous or bullying

Recommendation

- Have your polices reviewed by your labor counsel

DEPARTMENT OF LABOR

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“WHITE-COLLAR” EXEMPTION RULE

- New rules for the “white-collar” overtime exemption:
 - Raise the weekly salary from \$455 to \$970 a week
 - Raise the minimum salary for those covered under the “highly compensated employee” exemption from \$100,000 in total compensation annually to \$122,148
 - Imposes escalator provision annually raising the salary level
 - DOL may consider amending the “duties” rule for the administrative exemption
- The DOL is scheduled to issue the final rule in July 2016

Recommendation

- Review your exempt employees to determine:
 - If you can move any exempt employees to hourly status
 - Ensure that exempt employees qualify for the exemption’s duty tests

EMPLOYEE MISCLASSIFICATION

- Employers frequently misclassify employees as exempt or independent contractors
- The DOL uses an economic reality test considering these six factors:
 - Is the work an integral part of the employer's business?
 - Does the worker's managerial skill affect the worker's opportunity for profit or loss?
 - How does the worker's relative investment compare to the employer's investment?
 - Does the work performed require special skill and initiative?
 - Is the relationship between the worker and the employer permanent or indefinite?
 - What is the nature and degree of the employer's control?

EMPLOYEE MISCLASSIFICATION

Recommendations

- Review any independent contractor agreements to ensure they meet the requirement of the DOL's economic reality test
- Consult with an attorney experienced in the Fair Labor Standard Act to ensure that the contractor meets the requirements of an independent contractor
- If the contractor does not meet the economic reality test, change the relationship so that the contractor does meet the test
- If the contractor's duties make the contractor an employee, begin treating them as employees

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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EEOC'S STRATEGIC ENFORCEMENT PLAN

1. Eliminate barriers in recruitment and hiring
2. Protecting immigrant, migrant and other vulnerable workers
3. Addressing emerging and developing issues
4. Enforce equal pay laws
5. Preserving access to the legal system
6. Preventing harassment through systemic enforcement and targeted outreach

EEOC FOCUSES ON LGBT ISSUES

- Courts have held that Title VII does not prohibit discrimination based on sexual orientation
- The EEOC has moved lesbian, gay, bisexual and transgender claims to the “front burner”
 - The EEOC has held in several administrative cases that LGBT discrimination is a form of sex discrimination prohibited by Title VII
 - Courts have found that LGBT employees have stated a claim for “sexual stereotyping”

RECOMMENDATIONS TO AVOID LGBT DISCRIMINATION

- Check state and local laws to determine if they prohibit LGBT discrimination
- Educate your workforce to avoid LGBT discrimination
- Have dress codes that are gender neutral
- Prohibit and address any claims of harassment including LGBT
- Consider adding LGBT to your list of protected categories
- If you are disciplining a LGBT or “non-conforming” employee, treat the employee like similar employees who are not LGBT or “non-conforming”

ELIMINATE BARRIERS IN RECRUITMENT AND HIRING

- Limit employer use of background and credit checks
- Pattern and practice suits
- The Equal Employment Opportunity Commission is renewing its focus on job qualification standards that have a disparate impact on individuals with disabilities

RECOMMENDATIONS

Recommendation

- Follow the EEOC guidance on use of criminal background checks
 - Employer validates criminal conduct exclusion for the position - i.e., if data supports job-relatedness
 - Employer develops a targeted screen considering at least
 - The nature of the crime
 - The time elapsed
 - The nature of the position sought
 - Opportunity for individualized assessment
- Review your hiring data once a year to ensure that policies and procedures used in the hiring process do not have an adverse impact on a protected category
- Review your job descriptions once a year or when a job opening occurs to ensure that the essential functions of the job are clearly stated

SUPREME COURT CASES

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SUPREME COURT 2015-2016 DOCKET

- *Green v. Donahoe*, 760 F.3d 1135, 123 FEP Cases 1425 (10th Cir. 2014)

Question presented: Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employee's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

- *MHN Government Services, Inc. v. Zaborowski*, 501 Fed. App'x 461 (9th Cir. 2014)

Question presented: Whether California's arbitration-only severability rule is preempted by the Federal Arbitration Act

- *DIRECTV, Inc. v. Imburgia*, 2014 BL 97698, 170 Cal. Rptr. 3d 190 (Cal. Ct. App. 2014) (argued 10/6/15)

Question presented: Whether subscribers can pursue class claims in a California court despite an arbitration agreement barring class claims, and whether the Federal Arbitration Act preempts California case law that class action waivers in arbitration agreements are invalid

SUPREME COURT 2015-2016 DOCKET

- *Tyson Foods, Inc. v. Bouaphakeo*, 765 F.3d 791, 23 WH Cases2d 330 (8th Cir. 2014)
Questions presented: (1) Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; (2) Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the FLSA, when the class contains hundreds of members who were not injured and have no legal right to any damages
- *Friedrichs v. California Teachers Association* 9th Cir., No. 13-57095, order (Nov. 18, 2014)
Questions presented: Whether *Abood v. Detroit Board of Education*, 431 U.S. 209, 95 LRRM 2411 (1977), should be overruled and public-sector “agency shop” arrangements invalidated under the First Amendment and whether it violates the First Amendment to require that public employees affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech

SUPREME COURT 2015-2016 DOCKET

- *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 2014 BL 335056 (11th Cir. 2014) U.S., No. 14-723 (*argued* 11/9/15)

Addresses a dispute between a health plan and a worker injured by a drunken driver. The case could have big consequences for pension recipients and people on disability—or not, depending on which lawyers manage to persuade the U.S. Supreme Court justices

- *Gobeille v. Liberty Mutual Insurance Co*, 746 F.3d 497, 57 EBC 2009 (2d Cir. 2014)

Question presented: Did the Second Circuit—in a 2-1 panel decision that disregarded the considered opinion advanced by the United States as amicus—err in holding that the Employee Retirement Income Security Act preempts Vermont's health care claims database law as applied to the third-party administrator for a self-funded ERISA plan?

QUESTIONS?



Kurt A Miller

(412) 394-2363

kmiller@clarkhill.com



Thomas P. Brady

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tbrady@clarkhill.com

THANK YOU

Note: This presentation is not a substitute for legal advice in any specific situation. Employers facing specific issues should seek the assistance of an attorney.

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