EMPLOYMENT FLASH

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INSIDE

US Supreme Court Rules on Donning and Doffing Issue

On January 27, 2014, the U.S. Supreme Court unanimously held that the time steel workers spent "donning and doffing" their protective gear constituted "changing clothes" under Section 203(o) of the Fair Labor Standards Act (FLSA), which allows parties to collectively bargain over the right to compensation for such activities. In *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014), a provision of U.S. Steel Corporation's collective bargaining agreement (CBA) provided that time spent changing clothes was not compensable. Nevertheless, petitioners, a group of current and former employees of U.S. Steel Corporation's steelmaking facilities, filed an FLSA collective action against the company, arguing that time spent donning and doffing protective gear at the beginning or end of each workday is not encompassed within the concept of "changing clothes" under FLSA Section 203(o) and, therefore, could not be excluded under their CBA. In particular, petitioners argued that (i) the items at issue were not "clothes" because they were designed and used to protect against workplace hazards, as opposed to being generally worn for "decency or comfort" and (ii) they were not "changing" because the items were simply worn over other clothing.

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NLRB Judge Invalidates Arbitration Agreement Without Class Action Waiver

On January 17, 2014, an administrative law judge (ALJ) for the National Labor Relations Board (NLRB) held that maintaining and enforcing a mandatory arbitration agreement violated the National Labor Relations Act (NLRA) by interfering with an employee's Section 7 right to engage in concerted activity, even though the agreement did not expressly prohibit classwide, collective or representative actions. *Leslie's Poolmart, Inc. v. Keith Cunningham*, No. 21-CA-102332, 2014 WL 204208 (N.L.R.B. Jan. 17, 2014). In so holding, the ALJ expanded the NLRB's controversial decision in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), where the NLRB held that an arbitration agreement violated the NLRA because it explicitly precluded the filing of joint, class or collective actions.

The respondent in the case, Leslie's Poolmart, required that all employees sign a mutual arbitration agreement as a condition of employment. A former employee of Leslie's Poolmart, Keith Cunningham, filed an action in California state court alleging wage and hour violations. Leslie's Poolmart removed the case to federal court and moved to compel arbitration of the individual claims and dismiss the class claims. The court granted the motion, and Cunningham then filed a charge with the NLRB. The ALJ applied *D.R. Horton* to hold that

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Leslie's Poolmart had interfered with Cunningham's right to engage in concerted activity under Section 7 of the NLRA. In *D.R. Horton*, the NLRB held that the collective pursuit of employment claims is a substantive right under Section 7 and, therefore, the employer violated Section 8(a)(1) of the NLRA (which prohibits employers from interfering with, restraining or coercing employees in the exercise of their Section 7 rights) by explicitly requiring that employees waive that right through an arbitration agreement.

Leslie's Poolmart argued that the ALJ should not apply *D.R. Horton* because the Fifth Circuit recently overruled this decision on the grounds that the NLRB had failed to give proper weight to the Federal Arbitration Act (FAA). *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). According to the Fifth Circuit, the NLRB's analysis treated the NLRA as "the only relevant authority," but the FAA and cases applying it mandate a different outcome. In so holding, the Fifth Circuit joined the Second, Eighth and Ninth circuits in rejecting the NLRB's position that arbitration agreements containing a class action waiver violate the NLRA. (*See Employment Flash, Nov. 2013*).

In rejecting Leslie's Poolmart's argument, the ALJ concluded that the Fifth Circuit decision was not controlling, and it was bound to apply board precedent unless and until the Supreme Court expressly overrules *D.R. Horton*. Notably, *Leslie's Poolmart* goes even further than the NLRB's decision in *D.R. Horton*, as the arbitration agreement in *Leslie's Poolmart* did not, on its face, prohibit class or collective actions. The ALJ found that this was not a meaningful distinction, however, on the ground that maintenance of the arbitration policy and filing a motion to compel "has the effect" of prohibiting collective or class action, and, therefore, violates the NLRA. As the ALJ stated, "while the agreement is silent as to collective or class actions, in practice, Respondent closed the avenue to pursue collective and/or a classwide litigation when it sought to limit Cunningham and other similarly situated employees to arbitration of their individual claims."

This decision is significant both because it indicates that NLRB judges are continuing to apply *D.R. Horton* despite disapproval from circuit courts, and because it expands *D.R. Horton*'s application to agreements despite their silence on classwide, collective and representative actions.

Second Circuit Rules on Single Employer Liability Under the WARN Act

On December 10, 2013, the Second Circuit addressed the open question of what test governs whether a related or parent entity can be considered an employer under the Worker Adjustment and Retraining Notification Act (WARN Act). *Guippone v. BH S & B Holdings LLC*, 737 F.3d 221 (2d Cir. 2013). In so doing, it adopted the five-factor test for determining whether related entities are single employers as set forth in the U.S. Department of Labor regulations, which generally focus on the degree of the subsidiary's independence from the parent. These factors are: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source and (5) the dependency of operations. 20 CFR § 639.3(a)(2) (2013).

The plaintiff in *Guippone*, a former employee of the retail stores Steve & Barry's, brought a putative class action claim for violation of the WARN Act against, among other entities, his employer and the employer's holding company and sole managing member. The employer's private equity investors, members of whom were on the board of the holding company, had purchased the retail stores in bankruptcy but, not long after the acquisition, the stores again filed for bankruptcy. The employees were laid off after a resolution was passed by the holding company authorizing the employer to effectuate a reduction in force two days before the bankruptcy filing.

Applying the five-factor test, the Second Circuit vacated the district court's grant of summary judgment to the holding company, finding that the record evidence raised a material question of fact as to whether the holding company was a single employer, together with the plaintiff's direct employer, its closely held subsidiary, within the meaning of the WARN Act. In particular, the Second Circuit noted that, "[m]ost critically," the evidence raised a question of fact as to whether the holding company made the layoff decision. In essence, the court observed that the evidence would allow the jury to conclude that the employer was "so controlled" by the holding company that the resolution passed by the holding company's board to authorize the employer's reduction in force "was, in fact, direction … to undertake the layoffs."

This decision highlights the importance of investors observing corporate formalities, particularly when addressing employment practices in the bankruptcy context.

SDNY Reaffirms Undocumented Workers Can Seek Back Pay for FLSA Violations

In *Colon v. Major Perry Street Corp.*, 12 Civ. 3788(JPO), 2013 WL 6671770 (S.D.N.Y. Dec. 19, 2013) (to be reported in F. Supp. 2d), the U.S. District Court for the Southern District of New York held that undocumented workers are eligible to recover unpaid minimum wage and overtime wages under the FLSA, despite the Second Circuit's recent decision in *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013), limiting the discretion of the NLRB to award back pay to undocumented workers under the NLRA.

Rudy Colon, individually and on behalf of others similarly situated, including potentially undocumented workers, brought suit against his employer, Major Perry Street Corporation, along with its individual and corporate owners, alleging minimum wage and overtime claims under the FLSA and New York Labor Law. During the process of the plaintiffs' revision of the Notice of Pendency in connection with conditional certification of an FLSA collective action, the Second Circuit issued the *Palma* decision, which the defendants argued barred undocumented workers from participating in the action.

In rejecting the defendants' argument that *Palma* represents a "sea change" in established practice, the *Colon* court explained that the FLSA broadly defines the term "employee" as "any individual employed by an employer" and does not include undocumented workers among the enumerated exceptions. According to the *Colon* court, the FLSA's legislative history and the U.S. Department of Labor's interpretation of the FLSA during the past 60 years likewise support the conclusion that the FLSA encompasses undocumented workers. The court then engaged in a historical analysis of NLRA cases where the Supreme Court and the Second Circuit curtailed the NLRB's discretion to award certain remedies to undocumented workers in light of national immigration laws. The court emphasized that despite this curtailment, courts continued to apply the FLSA and its remedies to undocumented workers. Thus, according to the *Colon* court, the *Palma* decision does not necessarily conflict with courts' long-standing recognition that the FLSA permits undocumented workers to recover back pay.

The *Colon* court also harmonized its decision with the *Palma* decision by explaining the difference between the remedial schemes of the NLRA and the FLSA, noting that while the NLRA provides the NLRB with especially broad discretion in choosing an appropriate remedy, the FLSA provides statutorily defined damages, which are limited to back pay and minimal liquidated damages. Further, the *Colon* decision emphasized that the NLRA and the FLSA regulate fundamentally different activity — the NLRA regulates labor organizing activity and forces employers to compensate workers engaging in activities that may be viewed as disruptive, whereas the FLSA regulates working conditions and merely forces employers to compensate workers for doing their work. The *Colon* court ultimately concluded that despite the *Palma* decision and other recent developments regarding the NLRA, undocumented workers remain entitled to retrospective back pay under the FLSA. The *Colon* court revised the Notice of Pendency accordingly and denied defendants' motion for discovery related to the immigration status of the potential plaintiffs.

New York City to Expand Earned Sick Time Act

On January 17, 2014, New York City Mayor Bill de Blasio announced that he would seek to expand the city's Earned Sick Time Act (ESTA), which was passed in June 2013 over former Mayor Michael Bloomberg's veto. N.Y.C. Admin. Code, tit. 20, ch. 8, §§ 914-924 (2013). The new legislation introduced by Mayor de Blasio would apply to more workers and cover a broader range of circumstances than the existing ESTA. Though ESTA currently contains a phase-in component based on employer size, Mayor de Blasio's proposal mandates that the effective date for all covered employers will be April 1, 2014.

Under the current version of ESTA, covered employers (*i.e.*, those with 15 or more employees or at least one domestic worker) must provide paid sick leave to full- and part-time employees who work more than 80 hours in a year based on one hour of sick time for every 30 hours worked, up to a maximum of 40 hours of accrued time per year. Employers with less than 15 employees must allow employees to take the accrued sick time as unpaid leave. Notably, Mayor de Blasio announced that he would seek to lower the employee threshold applicable to the paid leave requirement to five employees. The mayor also seeks to remove an exemption for the manufacturing sector.

Under ESTA, an employee may use accrued sick leave for (1) the employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of any such illness, injury or health condition or need for preventive medical care; (2) care of a family member who needs medical diagnosis or care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or (3) closure of the employee's place of business due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed due to a public health emergency. As currently drafted, "family member" includes an employee's child, spouse, domestic partner or parent, or the child or parent of an employee's spouse or domestic partner. Mayor de Blasio seeks to expand the

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definition of "family member" to include grandparents, grandchildren and siblings.

Other notable provisions of ESTA include a requirement that unused sick time is carried over to the next year, although employers are not required to allow more than 40 hours of sick time in a calendar year. Furthermore, employers are not required to pay out unused sick leave upon termination. If an employer's time-off policy meets the requirements of ESTA and allows paid leave for the same purposes as ESTA, additional sick time is not required, even if the paid leave is designated as vacation, personal days or days of rest. ESTA has special provisions regarding domestic workers and employees covered by a collective bargaining agreement.

New York City is part of a wider trend toward embracing paid sick leave in the workplace. Other local jurisdictions with paid sick leave laws include San Francisco, Seattle, Washington, D.C., Portland, Oregon and Jersey City. Connecticut is currently the only state that has legislated paid sick leave on a statewide basis. Although the bill has not yet been passed by the city council, it is widely expected to become law. Therefore, employers should review personnel policies to ensure compliance with the bill.

New Jersey Passes Ban on Workplace Pregnancy Discrimination

On January 21, 2014, Governor Chris Christie signed New Jersey Senate Bill S. 2995, which amends New Jersey's Law Against Discrimination by banning employers from discriminating against employees on the basis of pregnancy and medical conditions related to pregnancy and childbirth. S. 2995, 2012-2013 Reg. Sess. (N.J. 2014). The new legislation also bans pregnancy discrimination in the housing, public accommodation and finance spheres. The legislation became effective immediately upon signing.

In particular, the legislation requires employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth. Reasonable accommodations include bathroom and water breaks, periodic rest breaks, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work. Such accommodations must be made when the employee requests the accommodation based upon the advice of a physician. The legislation also prohibits employers from penalizing employees in terms, conditions or privileges of employment for requesting or using the accommodation. Additionally, the new law prohibits employers from refusing to hire or employ, discharging, requiring retirement of or discriminating against an individual in terms, conditions or privileges of employment because of that individual's pregnancy. Also, employers or employment agencies are prohibited from printing or circulating any advertisement or publication that directly or indirectly express any limitation or discrimination related to an individual's pregnancy.

The legislation does not require reasonable accommodations if the provision of such accommodations would cause "undue hardship" to an employer's business. Moreover, although the legislation prohibits an employer from treating a female employee whom the employer knows or should know is affected by pregnancy less favorably than those who are not affected by pregnancy and who are similarly situated with respect to their ability to work, the legislation makes clear that this prohibition does not increase or decrease employees' rights to paid or unpaid leave in connection with pregnancy.

New Jersey has now joined the eight other states (Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland and Texas) that have adopted legislation addressing pregnancy discrimination in the workplace and other spheres. In addition, as a reminder, the New York City Council recently passed the Pregnant Workers Fairness Act, which went into effect on January 29, 2014, and requires employee notification of its terms going forward. N.Y., Local Law 2013/078 (Oct. 2, 2013). Therefore, employers in New Jersey, New York City and other applicable jurisdictions should review their current policies and practices in light of these recent legal developments in the workplace.

New Jersey Appellate Division Upholds Criminal Indictment Regarding Employee's Taking of Confidential Documents to Support Discrimination Charge

In a decision dated December 24, 2013, the New Jersey Appellate Division upheld a criminal indictment charging a former clerk for the North Bergen Board of Education (board), Ivonne Saavedra, with theft of movable property and official misconduct, both predicated on her taking of "highly confidential" public documents to support an employment discrimination case. *State of New Jersey v. Saavedra*, No. A-1449-12T4, 2013 WL 6763248 (N.J. Super. Ct. App. Div. Dec. 24, 2013) (to be reported in A.3d). Saavedra contended that her taking of documents was not criminally sanctionable in light of *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239 (2010), which she alleged established an absolute right for employees with employment discrimination lawsuits to take potentially incriminating documents from their employers and therefore insulate such employees from criminal prosecution. However, the Appellate Division disagreed.

Quinlan, the Appellate Division noted, established a seven-part totality-of-the-circumstances test to determine whether a private employee is privileged to take or use documents

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New Jersey Appellate Division Upholds Criminal Indictment Regarding Employee's Taking of Confidential Documents to Support Discrimination Charge *(continued from page 4)*

belonging to an employer. However, the Appellate Division found that, in the context of a motion to dismiss a criminal indictment, the State of New Jersey (state) need only introduce sufficient evidence to establish a *prima facie* case that the defendant has committed a crime. As the Appellate Division made clear, the defendant's honest belief that she had a right to remove the documents could only be raised as an affirmative defense at trial. In *Saavedra*, the state established a *prima facie* case with respect to the charge of theft of movable property by introducing evidence that Saavedra violated the board's clear policies and regulations by taking highly confidential original documents with the purpose of depriving the board of such documents. Likewise, the state met that standard with respect to the official misconduct claim, chargeable only against a public servant. The Appellate Division further found that permitting the state's prosecution of Saavedra would not have a chilling effect on potential plaintiffs' discrimination claims under the facts of the case, noting "a variety of options by which to obtain information that is reasonably calculated to lead to the discovery of admissible evidence."

While the *Saavedra* decision involved a criminal indictment of a public sector employee and may not have direct implications for private employers, the ruling is a noteworthy development with respect to criminal prosecution of employees who take an employer's confidential materials even if for purposes of supporting a discrimination claim. Further, this ruling underscores the importance that employers implement policies and procedures that clearly address the treatment of confidential documents and information.

California's Domestic Worker Overtime Provision Takes Effect

As a reminder, California's "Domestic Worker Bill of Rights" took effect on January 1, 2014. The law requires that certain domestic employees receive overtime at a rate of one and one-half times the employee's regular rate of pay for all hours worked over nine in a workday and all hours worked over 45 in any workweek. This is in addition to the federal minimum wage, which requires overtime pay for hours worked over 40 in a workweek. *See Employment Flash,* November 2013.

San Francisco Implements Flexible Work Schedule Ordinance

San Francisco has adopted a new ordinance, the Family Friendly Workplace Ordinance (FFWO), which requires employers of employees in San Francisco to consider requests for flexible or predictable work schedules due to caregiving responsibilities. The FFWO went into effect on January 1, 2014, and applies to employers that employ 20 or more employees (anywhere, not just in San Francisco). The FFWO does not require employers to accommodate all employees with flexible working schedules. Rather, the FFWO provides that covered employees have a right to request a "flexible or predictable working arrangement" to assist with caregiving responsibilities for a child, a family member with a serious health condition, or the employee's parent if the parent is age 65 or older. Given that the major thrust of the FFWO is procedural, employers with operations in San Francisco should familiarize themselves with the FFWO to properly and timely address any requests made under the ordinance. The FFWO joins other San Francisco-specific employment ordinances, such as the Paid Sick Leave Ordinance, the Health Care Security Ordinance and its Minimum Wage Ordinance, which provides for a higher minimum wage than California state law.

US Department of Justice Announces Largest Payment in Immigration Case

The U.S. Department of Justice (DOJ) recently announced that Infosys, an India-based information technology consulting company, agreed to pay the U.S. government $34 million under a settlement agreement with the DOJ, the largest payment in history in an immigration case. The settlement resolved allegations that Infosys, which has locations in approximately 30 countries and 17 cities across the United States, violated the Immigration and Nationality Act (INA) by misusing the H-1B visa worker program and the B-1 business visitor visa program to minimize its visa-related costs, increase employee movement within the company, obtain an unfair advantage over competitors and avoid tax liabilities.

By way of background, the H-1B visa program is commonly used by U.S. employers seeking to employ foreign nationals in "specialty occupations," such as engineers, computer programmers and financial analysts. In general, a specialty occupation is one that requires a theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree (or equivalent experience) for the specific specialty. In contrast, the B-1 visa is a non-immigrant visa that allows a foreign national to temporarily enter the United States for limited business purposes, rather than productive employment, and includes such limited business activities as consulting with business

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US Department of Justice Announces Largest Payment in Immigration Case *(continued from page 5)*

associates, negotiating a contract, traveling for business conventions and participating in short-term training. Thus, the INA provides that a B-1 visa holder may not enter the United States to perform skilled or unskilled labor.

In particular, the government's complaint alleged that Infosys, in an effort to circumvent the requirements, limitations and government oversight of the H-1B visa program, knowingly and unlawfully used B-1 visa holders to perform skilled labor in order to fill positions in the United States for employment that otherwise would be performed by U.S. citizens or require legitimate H-1B visa holders. In that connection, the U.S. government claimed that Infosys engaged in several practices in furtherance of its alleged visa scheme, including claims that Infosys: (1) submitted "invitation letters" to U.S. consular officials that contained "materially false representations," stating that the purpose of the travel was to engage in "meetings" or "discussions" when the true purpose was to engage in work on coding and programming; (2) provided instructions to B-1 visa holders regarding how to deceive consular officials, such as avoiding certain terminology and using misleading job titles; and (3) failed to properly maintain and update Form I-9 records for many foreign nationals.

The settlement agreement recognized that Infosys demonstrated a commitment to compliance with immigration law through its current visa and I-9 practices, which now include use of the E-Verify electronic employment eligibility verification program. Additionally, Infosys agreed to strengthen its B-1 visa policy and procedures by imposing strict limits on the duration of visits to the United States on a B-1 visa, instituting new requirements for B-1 visa invitation letters, and implementing policies that discipline employees for violating immigration laws and policies.

The Infosys settlement underscores the importance of implementing clear and thorough company policies in connection with the use of the B-1 visa program. Amidst the upcoming start of the H-1B visa petition filing period for this fiscal year, *i.e.*, April 1, 2014, which is anticipated by many to involve a flurry of petitions that may in fact reach the statutory cap of 65,000 in the first week or two, it is likely that the U.S. government's sensitivity and scrutiny surrounding the B-1 visa program will remain at a high level.

UK Government Reforms TUPE

As a follow up to the November 2013 *Employment Flash*, the U.K. government's revisions to the Transfer of Undertakings Protection of Employment (TUPE) regulations became effective on January 31, 2014, and introduce some practical changes which will benefit employers in connection with transactions involving employees in the U.K. By way of general background, TUPE implements a European Directive to protect employees and their accrued rights in connection with a change of employer, *e.g.*, a business sale.

Collective consultation

With respect to consultation requirements, the most significant change under the revisions (New TUPE) is that the transferee (in the context of a business sale, the buyer) will be able to consult employee representatives prior to the transfer to meet its obligation to consult about any collective dismissals, including redundancies, it intends to make on or shortly after the transfer date (which would typically be at closing).

Currently, there are two separate requirements to consult about such dismissals. First, the transferor (seller) has an obligation to inform and consult with appropriate representatives about the TUPE transfer prior to the transfer. That consultation includes discussions about measures envisaged in connection with the transfer, such as any proposed dismissals. Second, if the buyer proposes to dismiss 20 or more employees within 90 days, it has a separate obligation to consult with appropriate representatives for at least 30 days before it can implement the dismissals. This period increases to 45 days if 100 or more employees are at risk. Under current TUPE, a buyer has been unable to start its consultation until after closing, thereby resulting in a delay in effectuating dismissals. In practice, many employers combined TUPE and redundancy consultation in these circumstances pre-closing, but the buyer was at risk of a protective award of up to 90 days' pay per employee if it did not wait until 30 (or 45) days after the transfer before the first dismissal took effect.

Although under New TUPE a buyer will be able to commence (and, if time permits, complete) its consultation about collective dismissals before the transfer date, (i) it must notify the seller in writing that it wishes to so consult; and (ii) the seller must agree. A seller is unlikely to agree to the buyer starting such consultation until the deal is certain in light of potential confidentiality and/or employee morale concerns. It follows that the parties are likely to agree to a gap between signing and closing to allow for the required consultation. Moreover, as the buyer will be dependent on the seller's cooperation to consult before closing, it should seek indemnities or other contractual protection if the seller does not afford it sufficient information and access to the employees and their representatives.

The "ETO" test and changes to the workforce

A dismissal in connection with a TUPE transfer is automatically unfair unless the dismissing employer has an "economic, technical or organisational reason entailing changes in the workforce" (ETO reason). A seller cannot rely on the buyer's ETO reason to avoid an automatically unfair dismissal.

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UK Government Reforms TUPE *(continued from page 6)*

Where there is an ETO reason, the affected employees still will need to transfer to the buyer for the resulting dismissal to be fair (albeit that dismissal can now be implemented without delay after the transfer if the buyer has otherwise met its collective and individual consultation requirements).

Until now, a pure change of workplace has not satisfied the ETO test as it does not amount to a "change in the workforce," which requires a change in the number or function of the employees. Where the purchaser of a business wants employees to work from a different location, it has been at risk of claims that it is imposing a substantial change to the employees' contracts to their material detriment, for which they can also claim unfair dismissal. New TUPE provides that a change of location will be deemed to be a "change in the workforce," and resulting dismissals can, therefore, be fair. The employer will, however, need to give notice and ensure that the dismissal is otherwise fair (for example, by following fair selection and individual consultation procedures).

Changes to terms and conditions: Clarity regarding collective agreements

On a TUPE transfer, the buyer is obliged to honor the employees' existing contracts of employment and any changes in connection with the transfer (even with employee consent) are therefore void. New TUPE confirms that employees can now agree to such changes where an ETO reason is the "sole or principal" reason for the change. Note, however, that a desire to cut costs on its own is insufficient.

As noted above, TUPE generally protects employees' terms and conditions in connection with a business transfer. However, New TUPE provides that businesses will be able to renegotiate terms and conditions set forth in collective agreements (*e.g.*, collective bargaining agreements) with effect one year after the transfer date, provided that the overall change is no less favorable to the employees. In addition, resolving a long debate as to the extent to which those collectively negotiated terms are protected, New TUPE clarifies that where employees have terms and conditions provided for in collective agreements, only the terms and conditions in the collective agreement existing at the time of the transfer will apply to the employment with the new employer. In other words, subsequent changes to the agreement will not bind the new employer where it is not a party to the subsequent collective agreement.

Other changes

Another notable provision of New TUPE includes the fact that transferring organizations will now have 28 days to provide certain information (such as the terms of employment) about transfers that occur on or after May 1, 2014, rather than just 14 days. Also, a key revision that has garnered a great deal of attention in the U.K. involves TUPE's application to a change of contractor, known as a "service provision change." This provision is unique to the U.K. and provides protection over and above the requirements of the European Directive from which TUPE derives. New TUPE will add the requirement that, in order for a service provision change to have occurred, the activities of the new contractor after the transfer must be "fundamentally the same" as the activities carried out previously. This will assist incoming contractors (and their clients) where they propose to perform the contracted service in a different way.

US Supreme Court Rules on Donning and Doffing Issue *(continued from page 1)*

In reaching its holding, the Court recognized that nothing in the text or context of FLSA Section 203(o) suggests anything other than the ordinary meaning of "clothes," which, in the Court's view, includes protective clothing such as jackets, pants and hoods. The Court further rejected the distinction proffered by petitioners, emphasizing that the statutory compensation requirement to which Section 203(o) provides an exception "embraces the changing of clothes only when that conduct constitutes 'an integral and indispensable part of the principal activities for which covered workmen are employed.'" The Court clarified that, even with respect to items that can be regarded as integral to job performance, its definition of "clothes" does not include all items worn on the body, such as certain accessories, tools, equipment and devices. Further, the Court noted that the term "changing" not only connotes "substituting" clothes, as petitioners argued, but also "altering one's dress."

Applying these principles, the Court observed that the employees at issue spent the majority of their time donning and doffing clothes that clearly fell within the definition of "clothes" under FLSA Section 203(o), *i.e.*, jackets, pants and hoods, hardhats, snoods, wristlets, work gloves, leggings and metatarsal boots, and only a *de minimus* amount of time putting on and taking off non-qualifying items, such as safety glasses, earplugs and respirators. Given these circumstances, the Court concluded that all of the time met the FLSA Section 203(o) standard and, therefore, the compensation could be determined by a CBA. As the Court stated, "the question for courts is whether the period at issue can, *on the whole*, be fairly characterized as 'time spent in changing clothes or washing.'" Though the *Sandifer* decision primarily impacts employers with CBAs, the Court noted its reservation regarding application of the *de minimus* rule by certain circuit courts when addressing an employee's compensable activities that are not governed by a CBA. In that regard, the Court commented that current Department of Labor regulations are stricter and prohibit employers from "arbitrarily fail[ing] to count hours as hours worked any part, however small" that an employee "is regularly required to spend on duties assigned to him."

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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