Employment Flash

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Eastern District of Texas Rules DOL's Final Overtime Rule Invalid

In an August 31, 2017, order, a court in the U.S. District Court for the Eastern District of Texas ruled that the final overtime rule (Final Rule) issued by the Department of Labor (DOL) on May 23, 2016, is invalid. The Final Rule, which was enjoined by that same court on November 22, 2016, would have raised the salary threshold from $455 per week to $913 per week for the executive, administrative and professional exemptions under the Fair Labor Standards Act (FLSA). After conducting a *Chevron* analysis, the court found that the Final Rule impermissibly replaces the FLSA's duties test with a salary threshold, effectively transforming the duties test into a minimum salary test. In reaching its conclusion, the court cited the DOL's estimate that 4.2 million workers who are currently ineligible to receive overtime pay would become eligible for it under the Final Rule without any change to the workers' duties. The court held that the DOL had exceeded its authority granted under the FLSA and invalidated the Final Rule. The DOL previously indicated in a brief filed with the U.S. Court of Appeals for the Fifth Circuit on June 30, 2017, that it "has decided not to advocate for the salary level ($913 per week) set in the [F]inal [R]ule at this time and intends to undertake further rulemaking to determine what the salary level should be."

New York Appeals Court Holds Class Action Waivers Are Unenforceable

In *Gold v. N.Y. Life Insurance Co.*, 2017 N.Y. App. Div. LEXIS 5627 (1st Dept. 2017), a New York state appellate court ruled that a class action waiver in an agent contract that barred employees from bringing class or collective actions against their employer was unenforceable and violated the National Labor Relations Act (NLRA). In *Gold*, a group of former employees filed a wage and hour class action asserting that the employer made illegal wage deductions and failed to comply with state minimum wage and overtime laws. One of the employees had signed an agreement requiring any claims

or disputes to be arbitrated. The arbitration clause prohibited any claims from being brought "on a class action, collective action or representative action basis either in court or arbitration." The former employees proceeded with their claims as a proposed class action, and when the employer moved to compel arbitration, the Supreme Court of New York County granted the employer's motion to compel arbitration and, except for the one employee whose agreement contained the arbitration provision, dismissed the other plaintiffs' wage and hour claims. On appeal, the New York state appellate court relied on a recent decision by the U.S. Court of Appeals for the Seventh Circuit, *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), which invalidated a class action waiver. The New York state appellate court stated that class action waivers violate Sections 7 and 8 of the NLRA by interfering with employees' "right to engage in concerted activities for mutual aid and protection." In addition, the New York state appellate court found that the class action waiver violates the Federal Arbitration Act. The U.S. Supreme Court granted *certiorari* to hear a case in January 2018 that will resolve the circuit split between the Seventh Circuit decision in *Lewis* invalidating such class action waivers and the Fifth Circuit decision in *D.R. Horton v. NLRB*, 737 F.3d 344 (2013), upholding such class action waivers.

Recent Developments Regarding Restrictive Covenants

In May 2017, a California district court enjoined an employer from using materials allegedly stolen by one of its engineers from a former employer and required that the materials be returned to the former employer. The engineer was prohibited from working on his current employer's version of the former employer's technology.

In June 2017, a federal district court in New York declined to enforce a nonsolicitation agreement. The court found that the employer's interest in avoiding resignations by a group of key employees did not constitute a legally cognizable protectable interest. Such interests are limited to protection from (i) misappropriation of trade secrets or confidential customer lists or (ii) competition by a former employee whose services are unique or extraordinary. The same court held — consistent with New York state precedent — that preparations to compete do not violate a noncompete agreement. Further, a New York City bill proposed in July 2017, if enacted, would bar employers from enforcing noncompete agreements against nonexempt, "low-wage" workers.

A new law that was adopted in Nevada in June 2017 restored the ability of state judges to "blue-pencil" noncompete agreements — meaning overbroad provisions can be enforced in a revised form — after the Nevada Supreme Court ruled in 2016 that doing so exceeds judicial authority. The new law also describes a clear blueprint for a valid noncompete (*i.e.*, a protectable interest, no "undue hardship" and restrictions that are appropriate in relation to the value they protect), legally permits enforcement of noncompetes against laid-off workers only while they are paid their respective salaries and benefits, and limits the extent to which employers can prohibit former employees from soliciting customers.

In addition, there have been recent nonsolicitation developments in Illinois. In June 2017, an Illinois appeals court held that requests to connect on a LinkedIn site do not amount to a violation of a nonsolicitation agreement because such requests are generic invitations to connect rather than attempts to poach workers.

DC Circuit Overturns NLRB Joint-Employer Holding

The U.S. Court of Appeals for the District of Columbia Circuit recently reversed a decision of the National Labor Relations Board (NLRB) finding that CNN was a joint employer with Team Video Services. *NLRB v. CNN America Inc.*, No. 15-1112 (D.C. Cir. Aug. 4, 2017). For decades, CNN has contracted with outside vendors to supply technicians, and those technicians have been consistently represented by a union. In 2003, CNN announced that it was terminating its contract with outside vendors and would begin directly hiring technicians. When the union sought recognition and bargaining, CNN did not recognize or bargain with the union, and CNN did not directly hire more than 100 of the contract technicians. Affirming the administrative law judge's decision, the NLRB found that CNN was a joint employer and violated the NLRA by terminating the contract because of anti-union animus and by failing to bargain with the union about its decision to terminate those contracts. In addition, the NLRB found that CNN was a successor employer and violated the NLRA by failing to recognize and bargain with the union.

On appeal, the D.C. Circuit found that the three-member panel of the NLRB did not follow its precedent in finding that CNN was a joint employer and by "sidestepping" the direct and immediate control test, which requires the showing of direct and immediate control over the terms and conditions of employment to prove a joint employer relationship. The three-member panel decided the CNN case before the full panel changed the joint-employer standard in *Browning-Ferris*, 362 NLRB No. 186 (2015). The D.C. Circuit drew a distinction between the decisions of the three-member panel and the full panel. The court found that in *Browning-Ferris*, the NLRB explicitly considered and overruled its precedent that found a "direct and immediate control" requirement, but in *CNN*, the NLRB ignored its precedent. The D.C. Circuit reversed and remanded the case with respect to the joint-employer issues and found that "[s]ilence in the face of inconvenient precedent is not acceptable." The D.C. Circuit noted that its decision did not affect the current appeal in *Browning-Ferris*, which is pending before a different panel of judges on the D.C. Circuit.

Ninth Circuit Refuses to Give Deference to DOL Guidance on Tip Credit

On September 6, 2017, a panel of the U.S. Court of Appeals for the Ninth Circuit ruled that the DOL deserves no deference with respect to its 2016 administrative guidance about whether employers can claim a tip credit for certain nontipped duties that an employee performs. The panel issued this ruling for a consolidated group of nine cases in which former servers and bartenders alleged that various restaurants underpaid them by improperly claiming tips as a credit toward the federal minimum wage.

The FLSA allows employers of workers who customarily earn more than $30 per month in tips to pay such workers a cash wage of $2.13 per hour and claim the workers' tips as a credit toward the $7.25-per-hour federal minimum wage requirement. A DOL regulation addresses how this tip credit applies to employees who have two different job roles for the same employer. It states that an employer cannot claim a tip credit for hours that an employee works in a nontipped position. In its 2016 administrative guidance, the DOL interpreted this regulation to mean that an employer cannot take a tip credit for the time a tipped employee spends performing duties that are not related to the tipped occupation if that time exceeds 20 percent of his or her hours worked. In contrast to the U.S. Court of Appeals for the Eighth Circuit's ruling in *Fast v. Applebee's International Inc.*, 638 F.3d 872 (8th Cir. 2011), the Ninth Circuit panel ruled that the DOL's interpretation was not entitled to deference because the guidance is inconsistent with the regulation it purports to clarify and creates new substantive rules regulating how employees spend their time performing work.

Third Circuit Rules That Single Slur Can Establish Workplace Harassment

On July 14, 2017, the U.S. Court of Appeals for the Third Circuit held that a single racial slur may be enough to establish a workplace harassment claim. In *Castleberry v. STI Group*, No. 16-3131 (3d. Cir. July 14, 2017), two black laborers brought harassment, discrimination and retaliation claims against their staffing agency and the client company where they worked. The laborers alleged that their employment was terminated because they reported a manager's use of a racial slur. The staffing agency and client company argued that no courts have found that a single, isolated incident could constitute a hostile work environment. The Third Circuit disagreed and stated that for a workplace harassment claim to survive the pleading stage, the laborers must allege that the harassment is "severe or pervasive" rather than "severe and pervasive." The Third Circuit reasoned that "the Supreme Court's decision to adopt the 'severe or pervasive' standard lends support that an isolated incident of discrimination (if severe) can suffice to state a claim for harassment ... Otherwise why create a disjunctive standard where alleged 'severe' conduct — even if not at all 'pervasive'— can establish a plaintiff's harassment clam?" In contrast to other courts that have held that a single racial epithet is not actionable, and overturning a ruling from the U.S. District Court for the Middle District of Pennsylvania dismissing the laborers' claims, the Third Circuit found that a manager's use of a racial slur in front of the laborers constitutes severe conduct that could create a hostile work environment.

Firing an Employee for Being 'Too Cute' May Constitute Gender Discrimination

A New York state appellate court allowed a gender discrimination claim to proceed where a former employee alleged that her employment was terminated because she was too attractive. The former employee filed her complaint against married co-owners of a business that employed her. She alleged that the husband said his wife might become jealous because the former employee was "too cute." Approximately four months later, the wife allegedly texted the former employee demanding that she stay away from her husband and family. The husband fired the former employee later that same day.

Courts in other jurisdictions, including Georgia and Iowa, have routinely dismissed similar gender discrimination claims where employees were fired due to concerns expressed by the employer's spouse about the relationship between the employer and employee. The New York court distinguished those cases by emphasizing that the impetus for the employment termination in this case was based solely on the employer's actual or perceived attraction to the employee, whereas the other cases focused on the employee's attraction and behavior. In its brief filed in support of the former employee, the New York City Commission on Human Rights argued that employment decisions based on "sexual desire or perceived sexual attractiveness" amount to *prima facie* gender discrimination. The court ultimately ruled that adverse employment actions motivated by sexual attraction are gender-based and constitute unlawful gender discrimination under New York law.

Regulatory Update

NLRB Nominations and Confirmations

The NLRB is comprised of five board members who act collectively as a quasi-judicial body tasked with deciding cases in administrative proceedings. Board members are appointed by the U.S. president and confirmed by the Senate to serve two five-year terms, with one board member's term expiring each year. The general counsel position, which is independent from the NLRB, investigates and prosecutes unfair labor practices cases and has

the broad authority to determine which cases the NLRB pursues and prioritizes. The general counsel has the final authority to issue complaints and dismiss charges. The general counsel also supervises all NLRB attorneys and officers and employees in the NLRB's regional field offices. The general counsel holds a four-year term.

On September 15, 2017, the White House announced that Peter B. Robb, a management-side labor attorney, was nominated to become the next general counsel of the NLRB, a position currently held by Richard F. Griffin, Jr., a Democrat who was appointed by President Barack Obama and whose four-year term ends on October 31, 2017. Robb formerly worked as an NLRB field attorney from 1977 to 1979 and returned to the NLRB in 1982 to serve as a staff lawyer and chief counsel to Republican NLRB member Robert P. Hunter.

If confirmed, Robb will join an agency in transition. The NLRB is currently comprised of four board members — Democrats Mark Gaston Pearce and Lauren McFerran, and Republicans Marvin E. Kaplan and Chairman Philip Miscimarra. Kaplan, a former attorney for the Occupational Safety and Health Review Commission, was recently nominated by President Donald Trump and confirmed by the Senate on August 3, 2017. Chairman Miscimarra recently announced he will not seek another term when his current one expires in December 2017. President Trump has not yet announced a nominee to fill this impending board vacancy, but he has nominated Republican management-side labor attorney William Emanuel to fill the existing fifth vacancy. If Emanuel is confirmed by the Senate, the NLRB will have its first Republican majority composition in nine years.

A Republican majority on the board could set the stage for reconsideration of prior pro-labor board decisions, including decisions regarding joint employer relationships, employee handbooks, work-related policies, employee rights under the NLRA and other decisions that broadly construed workers' rights under the NLRA.

EEO-1 Report's Controversial Pay Data Collection Suspended

On August 29, 2017, the White House Office of Management and Budget (OMB) issued a memorandum suspending implementation of the EEO-1 Report's pay data collection and reporting requirements, which certain employers would have had to comply with starting in March 2018. The new EEO-1 reporting requirements would have required employers with more than 100 employees to report summary wage data and hours-worked data categorized by employees' gender, ethnicity and race. Though some opposed such requirements and claimed they would be overly burdensome to businesses, others viewed the compensation data as a useful tool for identifying pay discrimination and assessing potential pay violations.

The OMB's decision to stay the implementation of the new requirements was purportedly prompted by the Equal Employment Opportunity Commission's acting chair, who emphasized the amount of time that employers would need to change their payroll systems in order to meet the March 2018 deadline. The OMB's memorandum cited the Paperwork Reduction Act as the justification for its review and immediate stay of the new EEO-1 requirements, and stated that the pay data collection requirements "lack practical utility, are unnecessarily burdensome and do not adequately address privacy and confidentiality issues." Despite the indefinite stay of the new requirements, the pre-existing EEO-1 requirement that employers submit ethnicity, race and gender data by job category will remain in effect.

International Spotlight

Update on UK's Gig Economy and Taylor Review's Recommendations

The April 2017 edition of *Employment Flash* considered the recent case law in the U.K. concerning the categorization of staff and their respective employment rights, particularly in the gig economy. Following a string of high-profile cases and the recent rise in the U.K. of self-employment, "causal work" (*i.e.*, certain types of nontraditional work) and "zero-hours contracts" (*i.e.*, contracts that do not require employers to provide employees with a minimum amount of work), the U.K. government commissioned the report "Good Work: The Taylor Review of Modern Working Practices," which was published on July 11, 2017. The Taylor Review includes a wide range of recommendations aimed at improving the working conditions of all staff, particularly those employees and workers who are not employed full-time.

The key recommendations of the Taylor Review are:

- A new category of "dependent contractor" should replace the current legal definition of "worker," and legislation should be changed to adopt a clearer definition of dependent contractor or worker. An individual's classification as a dependent contractor should be determined by the level of control an employer maintains over an individual at work. A dependent contractor should be entitled to certain employee rights such as holiday pay and statutory sick pay. The Taylor Review notes that this new category might help to clarify workers' rights and improve enforcement of those rights.

- The government should create a free online tool to make it easier to determine an individual's employment status and related rights. A similar tool is operated for tax purposes by Her Majesty's Revenue and Customs, a tax department of the U.K. government.
- The government should encourage certain workplace practices and employment relations by, for example, promoting strategies to ensure the development of workers' skills, career advancement and an increase in earning potential. The Taylor Review does not recommend significant employment-related legislation and regulation.
- Tax treatment of employees and workers/dependent contractors in the U.K. should be the same (it is not currently), but independent contractors should remain subject to a separate tax regime. Moreover, if someone is classified as an employee by a tax tribunal, that decision should be binding for both tax and employment law purposes.

With the U.K. unemployment rate at a 42-year low, the Taylor Review recognizes the importance of maintaining a balance between a flexible labor market and workplace fairness to ensure that good quality work, good working conditions and income security are at the forefront of business and government strategy. The government is currently considering the Taylor Review's recommendations.

France Creates Specific Rights for Independent Workers in Gig Economy

The legal status of the approximately 200,000 independent workers in France's gig economy has been the subject of recent public scrutiny because such workers do not benefit from employee protections under the French labor code even when they are subject to employer control. The new gig economy has triggered concerns that such workers are not truly independent and that legislators should consider changes in work-related practices. In response to these concerns, a French law was passed in 2016 that offers specific protection to certain independent workers. This new law will take effect in January 2018.

The new law imposes a form of social responsibility for digital platforms that engage the services of independent workers. In particular, it mandates such platforms to provide some of those workers with insurance against occupational accidents, access to professional education and the right to create workers unions that protect their collective interests. The digital platforms will be required to pay for such insurance and contribute financially to workers' professional education. The protections will be required only for workers who earn more than $6,000 (about €5,099) per year and who contract with digital platforms that control both the manner and the price of services provided or goods delivered. They include platforms such as Uber, which sets the prices of rides through its digital application. The digital platforms will be prohibited from terminating the engagement of, or taking any adverse action against, such workers in the event of collective work stoppages.

Moreover, French legislators are considering creating a worker status between those of "employee" and "independent contractor," similar to one that currently exists in the U.K. Until then, if a labor court concludes that the relationship between a worker and a digital platform is a type of employment relationship, the worker would be entitled to the benefits and protections afforded to employees under the labor code.

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