Employment Flash

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In This Issue:

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DOL Adopts New Seven-Factor Internship Test

On January 5, 2018, the U.S. Department of Labor (DOL) published a new fact sheet (#71) that offers guidance on whether interns and students should be classified as employees and thus eligible to receive minimum wage and overtime pay under the Fair Labor Standards Act (FLSA). The DOL adopted a seven-factor test to determine whether interns qualify as employees under the FLSA. The test follows the "primary beneficiary" standard that several appellate courts have recognized. The primary beneficiary standard examines the "economic reality" of the relationship to determine which party is the primary beneficiary of the relationship. The primary beneficiary standard is flexible, and none of the seven factors alone are determinative of whether an intern-employer relationship exists. The seven factors are that the internship: (1) does not involve an expectation of compensation; (2) provides training that would be similar to that given in an educational environment; (3) is tied to the intern's formal education program; (4) corresponds to the academic calendar; (5) is limited to a period of beneficial learning; (6) involves work that complements, rather than displaces, the work of paid employees; and (7) is conducted without entitlement to a paid job at its conclusion.

The U.S. Court of Appeals for the Second Circuit established the seven-factor test in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016), when it declined to defer to the six-part test laid out by the DOL in its 2010 guidance, which is now rescinded. The DOL's six-part test had required that *all* six criteria be satisfied to establish an intern-employer relationship. In a press release issued on January 5, 2018, the DOL noted that "the Ninth Circuit [recently] became the fourth federal appellate court to expressly reject the U.S. Department of Labor's six-part test." The DOL Wage and Hour Division noted that it will update its enforcement policies to align with its new position and recent case law, and will analyze purported internships on a case-by-case basis.

DOL Reissues 17 FLSA Opinion Letters

On January 5, 2018, the DOL reissued 17 advisory opinion letters that had been published at the end of President George W. Bush's administration but were subsequently rescinded. President Donald Trump's administration has indicated that it will reinstate the practice of issuing opinion letters. The 17 advisory opinion letters contain the DOL's responses to specific compliance questions from employers regarding a range of FLSA issues, includ-

ing employers' potential good-faith reliance defenses to alleged FLSA violations. Many of the letters discuss the exempt status of certain job positions, including, for example, client service managers of an insurance company and consultants, clinical coordinators and business development managers of a health care placement company. Two of these letters address inquiries about the salary basis test for exempt employees, including inquiries about paying exempt employees when they are absent from work. Other notable topics include whether certain bonuses or other payments should be incorporated into employees' regular rates of pay for purposes of overtime calculations, whether certain pay formulas accurately calculate regular rates of pay and overtime payments, compensation for being "on-call," and joint employment issues with respect to nonprofit and for-profit companies.

The letters do not overturn existing law, but they do provide employers with guidance and bases for responses to charges and lawsuits involving the issues noted above. In addition, employers can establish an affirmative defense to monetary liability under the Portal-to-Portal Act if they demonstrate that they acted in good faith and in conformity with and in reliance upon any written regulation, ruling or interpretation issued by the DOL's Wage and Hour Division. Furthermore, opinion letters can be used to support an employer's good-faith defense against the FLSA's double liquidated damages penalty.

Sexual Harassment and Abuse Provision of a New Tax Bill

The December 22, 2017, "Tax Cuts and Jobs Act" contains a provision aimed at reducing the use of nondisclosure agreements in connection with the settlement of sexual harassment and sexual abuse claims. The provision, Section 162(q) of the Internal Revenue Code, prohibits employers from deducting as a business expense any settlement payments (including legal fees) that relate to sexual harassment or sexual abuse if the settlement payment is subject to a nondisclosure agreement. The reference to legal fees appears to include fees paid to either the employer's or the claimant's attorney. The provision leaves several practical and legal questions unanswered, including whether the provision could have the effect of causing employers to litigate sexual harassment claims, notwithstanding privacy and reputational concerns, and whether multiple claims that are covered by confidential settlements, including some that are not related to sexual harassment or sexual abuse, are all subject to the provision's prohibition.

NLRB Memo's Treatment of Significant Legal Issues

On December 1, 2017, the National Labor Relations Board (NLRB) set forth new guidelines for mandatory submission of certain cases to the NLRB's Office of the General Counsel. Newly appointed General Counsel Peter B. Robb makes clear in Memorandum GC 18-02 that while all pending cases should be processed and decided in accordance with existing law, the NLRB's regional offices (Regions) should nonetheless submit all cases involving "significant legal issues" to the Division of Advice of the Office of the General Counsel. GC 18-02 defines significant legal issues as cases decided "over the last eight years that overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the General Counsel." In addition, GC 18-02 requires that Regions submit to the Division of Advice other "cases where complaint issuance is appropriate under current Board law, but where [the Office of the General Counsel] might want to provide the Board with an alternative analysis." The Office of the General Counsel will then advise Regions "on how to present the issue to the Board." GC 18-02 includes examples of significant legal issues and cases that may warrant an alternative analysis, including the scope of concerted activity for mutual aid and protection, the legality of workplace rules in employee handbooks, employees' use of an employer's email system and the scope of protection afforded to work stoppages. Further, the general counsel rescinded several Obama-era Division of Advice memoranda in GC 18-02, including GC 15-04, dated March 18, 2015. GC 15-04 had served as guidance for employers and practitioners regarding the legality of common handbook policies and rules.

GC 18-02 suggests that the new general counsel may intend to alter the approach of the Office of the General Counsel with respect to employer policies and rules. Indeed, just recently, the NLRB overturned the standard used to determine the legality of workplace rules and policies, in a December 14, 2017, decision, *The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, 365 NLRB 154 (2017).*

ERISA Forum Selection Clauses

On January 16, 2018, the U.S. Supreme Court denied *certiorari* on the issue of whether the venue provision in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(2), preempts and invalidates forum selection clauses

in ERISA plans. The ERISA venue provision states that an action under the statute "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found."

The ERISA venue question arose in connection with a plan participant's appeal from the U.S. Court of Appeals for the Seventh Circuit's decision, *In re Mathias*, 867 F.3d 727 (7th Cir. 2017), *cert. denied sub nom. Mathias v. USDC CD IL, et al*., No. 17-740, 2018 WL 411019 (U.S. Jan. 16, 2018), finding an ERISA plan forum selection clause valid and enforceable. There, the Seventh Circuit reasoned that the language of the ERISA venue provision does not explicitly prohibit parties from contractually agreeing to bring an action in a particular court, noting that the statute's venue language is "entirely permissive." Further, the Seventh Circuit found that a forum selection clause in an ERISA plan does not contravene the purposes of ERISA, which include providing plan participants with access to federal courts. The Seventh Circuit adopted the reasoning of the U.S. Court of Appeals for the Sixth Circuit in *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 932 (6th Cir. 2014), which found that ERISA's plain text and public policy do not invalidate forum selection clauses in ERISA plans.

The Supreme Court later denied *certiorari* on this same issue in a U.S. Court of Appeals for the Eighth Circuit case where the court issued an order denying review of a district court's enforcement of a forum selection clause in an ERISA plan. *Clause v. U.S. Dist. Court for E. Dist. of Missouri*, 137 S. Ct. 825 (2017). No other circuit courts have addressed this issue, although the majority of district courts have found that forum selection clauses in ERISA plans are valid and enforceable.

Amendment to NYCHRL Regarding 'Cooperative Dialogue'

On January 19, 2018, a bill that amends the New York City Human Rights Law (NYCHRL) became law. The new NYCHRL amendment (Int. No. 804-A.) requires employers and other covered entities to engage in "cooperative dialogue" with individuals who may be entitled to a reasonable accommodation. Until now, the NYCHRL did not expressly require an employer to engage in a specific process in response to a request for an accommodation. Notably, the federal Americans with Disabilities Act (ADA) does specify the steps that employers must take as part of the interactive process, and federal courts are not aligned about whether failure to initiate the interactive process is itself a "per se" violation of the ADA. The new NYCHRL amendment specifically addresses these issues. In particular, the new NYCHRL amendment makes it "an unlawful discriminatory practice" for covered entities not to "engage in good faith in a written or oral dialogue" with those who may be entitled to an accommodation. In addition, the new NYCHRL amendment requires that "[u]pon reaching a final determination at the conclusion of a cooperative dialogue," covered entities must provide "a written final determination [to the person requesting an accommodation] identifying any accommodation granted or denied." The amendment also ensures that "[t]he determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue."

Breastfeeding Discrimination Banned in New Jersey

On January 8, 2018, New Jersey Gov. Chris Christie signed into law legislation prohibiting employers from discriminating against employees who breast-feed, or express breast milk, in the workplace. Under the new law, employers are prohibited from treating unfavorably, in terms of compensation and other conditions of employment, any employee who the employer knows, or should know, is breast-feeding. In addition, employers must provide a breast-feeding employee with reasonable accommodations, near such employee's workspace, where the employee can breast-feed or extract breast milk, unless doing so would create an undue hardship on the employer. Further, employers must treat the break afforded to breast-feeding employees no less favorably than the employer treats, or would treat, other employee breaks.

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