Employment Flash

Skadden

May 2019

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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US Supreme Court Says Class Arbitration Must Be Explicitly Authorized

On April 24, 2019, the U.S. Supreme Court ruled in *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275 that, under the Federal Arbitration Act, courts may not infer consent to arbitrate on a classwide basis from an ambiguous agreement. The Court in *Lamps* held that, like silence in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, ambiguity does not provide a sufficient basis to conclude that the parties agreed to sacrifice the principal advantages of individual arbitration. The Court noted that class arbitration undermines some of the most important benefits of individual arbitration because class arbitration is more expensive, more complex procedurally and more time-consuming than individual arbitration.

EEO-1 Update: Appeal of Heightened Pay Reporting Requirements

As reported in the March 2019 issue of Employment Flash, a federal district court in *National Women's Law Center v. Office of Management and Budget*, No. 17-CV-2458-TSC (D.D.C. March 4, 2019), vacated the stay that the Office of Management and Budget (OMB) placed on the earlier OMB-approved EEO-1 form requiring reporting of employee compensation data, broken down by ethnicity, race and sex. On May 1, 2019, pursuant to the district court's order for the Equal Employment Opportunity Commission (EEOC) to collect two years of data, the EEOC announced it would collect compensation data, broken down by ethnicity, race, and sex, for years 2017 and 2018. The EEOC announced that covered employers — those employers with at least 100 employees and government contractors with 50 or more employees and at least $50,000 in contracts — must file the required compensation data by September 30, 2019.

On May 3, 2019, just two days after the EEOC's announcement, the Department of Justice appealed *National Women's Law Center* to the U.S. Court of Appeals for the District of Columbia Circuit. This appeal could potentially delay the September 30,

2019, deadline for the collection of compensation data based on ethnicity, race and sex. Nonetheless, because the appeal has no immediate impact on the district court's decision, covered employers should continue to prepare to submit the required compensation data for years 2017 and 2018 to the EEOC by the September 30, 2019, deadline.

DOL Issues Opinion Letter Regarding Gig Economy Worker Classification

In an April 29, 2019, opinion letter, the Wage and Hour Division of the Department of Labor (DOL) concluded that the service providers of an anonymous virtual marketplace company (VMC) were properly classified under the federal Fair Labor Standards Act (FLSA) as independent contractors of the VMC. According to the DOL, economic dependence is the touchstone for determining whether a worker is an employee (rather than an independent contractor) entitled to the FLSA's protections. Applying the "economic realities" test, the DOL concluded that none of the six factors of the test demonstrated that the service providers were economically dependent upon the VMC. Specifically, the DOL found, among other things, that (i) the service providers appeared to have complete autonomy over their work hours, subject to minimal, if any, supervision by the VMC, (ii) the service providers were free to work for competitors of the VMC during and upon termination of their engagement with the VMC, and (iii) while the VCM retained some ability to control prices, the service providers controlled the determinants of profit or loss because they could choose different types of jobs with different prices, work on as many jobs as they saw fit and negotiate the price of their jobs.

Notably, DOL opinion letters are not binding upon courts. Also, while it provides guidance as to the DOL's views, the opinion letter described above applies solely to the anonymous VMC that requested the letter under the specific facts presented. Furthermore, worker classification tests under state wage and hour laws can be stricter than the FLSA's economic realities test, and several states favor classifying workers as employees rather than independent contractors.

NLRB Advice Memoranda Issued in May 2019

On May 14, 2019, the National Labor Relations Board (NLRB) issued a series of backdated advice memoranda that directed the regional offices of the NLRB to dismiss or pursue claims under the National Labor Relations Act (NLRA) in connection with a variety of employment-related issues, as described below.

- In an April 2019 memo, the NLRB concluded that Uber drivers are independent contractors, not employees, under the common-law agency test set forth in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019) — a test that aims to measure workers' entrepreneurial opportunity (*i.e.*, workers' ability to influence their pay). In *SuperShuttle*, the NLRB applied 10 nonexhaustive common-law factors, emphasized the lack of control over the manner and means by which drivers conduct business and ultimately dismissed van operators' efforts to organize at an airport. In the April 2019 memo, the NLRB reasoned that Uber drivers have the freedom to establish their own work schedules, control their work locations based on where they log in to the Uber app, and could — and often do — work for other ride-share competitors; these three features afford drivers significant opportunities for economic gain and, ultimately, entrepreneurial independence. The NLRB concluded that Uber drivers are independent contractors, not employees, and thus do not have unionization rights under the NLRA.
- In a second April 2019 memo, the NLRB advised that the employer was under no obligation to withhold and remit dues to a new, amalgamated union, regardless of the new union's status as a successor under the NLRA, because employees' dues-checkoff authorization forms specifically authorized payments to one union and contained no "successors and assigns" clause.
- In a third April 2019 memo, the NLRB advised that a union's issuance of counterproposals to an employer's proposed pension contribution rate increases was not a breach of the union's duty to bargain in good faith because none of the contracts at issue contained reopener provisions obligating the union to bargain over the employer's contribution proposals. Even if the contracts included reopener provisions, the union's counterproposals were made in good faith, the NLRB stated.
- In a December 2018 memo, the NLRB revisited the issue of whether using banners and inflatable "Scabby the Rat" and "Fat Cat" balloons during demonstrations amounts to illegal secondary picketing in violation of the NLRA. The memo urged a local field office director in Illinois to re-open a complaint against the use of a Fat Cat balloon and to press the NLRB to overturn precedent that had previously ruled that the use of these inflatable animals was legal, nonpicketing action under federal labor law. The memo further advised that, even if the use of misleading banners and balloons of Scabby the Rat or Fat Cat does not constitute picketing, the action should not be shielded by the First Amendment because it amounts

to either commercial speech, which is afforded less protection than certain other forms of speech under the U.S. Constitution or, in the case of the banners, knowingly false speech, which is afforded no protection at all.

- In another December 2018 memo, the NLRB stated that a union violated the NLRA by failing to notify an employee that the employee's grievance was denied until after the contractual period for appeals had ended. The NLRB found that the union breached its duty of fair representation because it failed in one of its most basic duties of informing the grievant that his grievance had been denied so that the grievant could make a timely decision about whether to proceed to the appeal stage.
- In a September 2018 memo, the NLRB concluded that an employer did not violate the NLRA by not providing an employee with a representative during an investigatory interview. However, the NLRB found that the union violated the NLRA because the union's refusal to provide the employee with a representative during an interview that the employee reasonably believed could result in disciplinary action violated the "bad faith" prong of the union's duty of representation.
- In a July 2018 memo, the NLRB found that an employer's workplace policy not to conduct any activity that is not in the best interest of the employer was an overbroad work rule that could interfere with core NLRA-protected activity, such as strikes, protests, boycotts, etc. However, the employer did not violate the NLRA by imposing discipline pursuant to the overbroad rule because the employee did not engage in NLRA-protected conduct, but rather, was disciplined because of his attendance record.
- In an April 2018 memo, the NLRB found that an apprenticeship training committee was an agent of a union and that the union was therefore responsible for alleged unfair labor practices committed by the training committee's officials.
- In a February 2017 memo, the NLRB concluded that an employer violated the NLRA for refusing to bargain with a union over written warnings as well as employment suspensions and disciplinary discharges. Though the union did not request to bargain with the employer after each disciplinary action, the NLRB concluded that the union did not waive its right to bargain over the matters because it would have been futile for the union to do so after the employer had repeatedly refused to bargain.

NLRB Advice Memoranda Issued in April 2019

In April 2019, the NLRB released a series of backdated memos that directed the regional offices of the NLRB to dismiss or pursue claims under the NLRA in connection with a variety of employment-related issues, as described below.

- In a March 2019 memo, the NLRB passed on an opportunity to clarify its unit-packing doctrine in a case where an employer was alleged to have hired or transferred new employees to a store after a representation petition was filed but before the union had secured a sufficient showing of interest among prospective unit members to proceed to an election. The NLRB directed the union to proceed with an election and allowed the union to challenge the votes of the supposed "packed" employees.
- In a June 2018 memo, the NLRB reminded unions that lawful internal discipline policies cannot be enforced in an unlawful manner. For example, where an otherwise facially lawful union policy impacts the union member's employment relationship with an employer, the NLRB will balance the union member's individual interests in engaging in the conduct at issue against the union's interest in disciplining the conduct at issue to determine if enforcement was lawful.
- In a February 2016 memo, the NLRB found that a labor union breached its duty of fair representation to its union members when it failed to respond to member requests to cease collecting union dues, because employees are guaranteed the ability to revoke such authorization. Similarly, in an October 2018 memo, the NLRB found that a union breached its duty of fair representation where the union failed over a period of weeks to process and pursue a union member's grievance.
- In a June 2014 memo, the NLRB affirmed that a union with Section 9(a) representative status is entitled to require an employer to continue to recognize and bargain with a union, even after the collective bargaining agreement expires, unless the employer can show that the union has lost majority support. In a recent March 2019 memo, the NLRB affirmed that the prohibition on an employer's ability to unilaterally change the terms and conditions of employment, without first providing the employees' union with notice and an opportunity to bargain, is limited to changes that are "material, substantial, or significant."
- The NLRB also released memos from 2011, 2016 and 2018 that found employers violated the NLRA through the use of overbroad work rules, including media and social media policies.

The memos focused on the risk of overbroad polices impacting employee speech and the ability to engage in protected activity outweighing an employer's business justifications.

NLRB Narrows 'Perfectly Clear' Successor Doctrine

On April 2, 2019, the NLRB issued a decision favorable to employers, narrowing the circumstances under which a successor employer forfeits its right to set initial employment terms. In *Ridgewood Health*, 367 NLRB 110 (April 2, 2019), Ridgewood Health Services acquired a nursing home and hired some, but not a majority, of its predecessor's union employees on different employment terms than those they had with their predecessor employer. As determined later, Ridgewood unlawfully refused to hire four of the predecessor union employees based on their union status in an effort to avoid being deemed a successor employer.

Under *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972), an ordinary successor employer (*i.e.*, one that substantially continues the business and hires a sufficient number of its predecessor's union employees to constitute a majority of the new workforce) is obligated to recognize and bargain with the union representing the employees of the predecessor's workforce, but is free to set different initial terms and conditions of employment. A "perfectly clear" successor, on the other hand, which plans to retain all or substantially all of the predecessor's union workforce, must bargain with the predecessor's union prior to establishing new employment terms. However, the NLRB has held that where a successor employer engages in anti-union hiring practices, the successor employer forfeits the right to set new employment terms. Prior to its decision in *Ridgewood Health*, under *Galloway School Lines* and its progeny, the NLRB had applied the "perfectly clear" successor doctrine when a successor employer engaged in discriminatory, anti-union hiring, even where it was clear that the successor would not have hired all or substantially all of the predecessor employees absent such discrimination. In striking down *Galloway* and its progeny, the NLRB narrowed the "perfectly clear successor" doctrine, clarifying that it applies only where the successor retains or would have retained (absent discriminatory animus) all or substantially all of the predecessor employees.

Social Security Administration Resumes Notifying Employers With 'No-Match Letters'

After a seven-year hiatus, the Social Security Administration (SSA) has resumed notifying employers in the event the wage and tax statements (Forms W-2) submitted by the employer do not match the SSA's records of an employee's name and Social Security number. The SSA began to mail Employer Correction Request Notices, also known as "no-match letters," in March 2019, advising employers that corrections are needed for the SSA to post an employee's earnings to the correct record. The letters do not include the names or Social Security numbers of mismatched employees. Rather, employers must register with the SSA's Business Services Online to view and correct errors in employee names and/or Social Security numbers. A mismatch could be caused by typographical errors, unreported name changes, inaccurate employer records or false identification.

Once an employer receives a no-match letter, the employer should review its records for any clerical errors, notify the employee of the mismatch and give the employee a reasonable amount of time to resolve the mismatch. U.S. Immigrations and Customs Enforcement may consider an employer's failure to take any corrective action based on the no-match letter as a negative factor when determining if enforcement actions — including fines and criminal prosecution — should be taken against an employer that employs someone who is in fact unauthorized to work in the United States.

In the no-match letter, the SSA advises employers not to take any adverse action (*e.g.*, suspension, discrimination or termination) against an employee solely based on the letter and that, by doing so, an employer may be held liable for discriminating against an employee based on citizenship or nationality in violation of state or federal law.

New York City Issues Final Guidance to Employers on Sexual Harassment Training

New York City has issued its final guidance on sexual harassment training requirements under the Stop Sexual Harassment in NYC Act (the Act), which went into effect on April 1, 2019. The Act requires all New York City employers with 15 or more employees to provide annual sexual harassment training each calendar year, beginning with the initial required training, which must be completed by December 31, 2019. All employees who work more than 80 hours in a calendar year and at least 90 days, including supervisory and managerial employees, interns, short-term employees and part-time employees, must receive the required training. The FAQ state that any employees who work or will work in New York City for more than 80 hours in a calendar year and for at least 90 days must receive training, regardless of whether the employer is based in New York City. If an employee is based outside of the city but regularly interacts with other employees in New York City, even if they are not physically present in the city, they should receive training. The city's guidance advises employers to train independent contractors who work the same minimum

hours and days established for employee training, and provides that independent contractors count toward the 15-employee minimum threshold regardless of the number of days or hours for which they are engaged.

The New York City Commission on Human Rights (Commission) developed an interactive online sexual harassment training module that is free and publicly available and fulfills the training requirement. The online training takes approximately 45 minutes to complete and satisfies the New York State sexual harassment training requirement as well. Employers may elect to provide sexual harassment training to employees themselves or through a third-party vendor, as long as the training provided covers the minimum content requirements. This required content includes, among other mandatory information, a description of sexual harassment using examples, any internal complaint process available to employees to address sexual harassment claims, a description of the Commission's complaint process, and the responsibilities of supervisory and managerial employees in preventing sexual harassment in the workplace. In addition to the annual training requirement, the Act also requires employers to post a notice of employees' rights and distribute a fact sheet to all newly hired employees.

New York City Bans Marijuana Testing of Job Applicants

On April 9, 2019, the New York City Council approved new legislation that will make it an unlawful discriminatory practice under the New York City Human Rights Law for an employer, labor organization, employment agency or agent to require prospective employees to undergo pre-employment marijuana testing. The legislation became binding law on May 10, 2019 after Mayor Bill de Blasio did not sign or veto the bill within 30 days of its passage. The new law will apply to employees in the private and public sectors. However, the law will not apply to (i) individuals working in certain safety-specific positions, such as police officers, (ii) jobs requiring a commercial driver's license, or (iii) any role requiring the supervision of children or medical patients. Furthermore, the law will not apply to any drug testing required by federal department of transportation regulations, federal or state contracts, or collective bargaining agreements. The City Commission on Human Rights will promulgate rules for implementation of the new law, which will take effect one year after enactment, on May 10, 2010, in order to give employers time to prepare for compliance.

New York City Releases Three Model Lactation Accommodation Policies

Effective March 18, 2019, New York City employers are required, absent an undue hardship, to provide breastfeeding employees with both a lactation room and a refrigerator suitable for storing breast milk, in reasonable proximity to such employee's work area. The lactation room must be a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion. It must also include, at minimum, an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water. Effective the same date, New York City employers are required to develop and implement a written policy regarding the provision of a lactation room. The New York City Commission for Human Rights issued three model lactation accommodation policies on March 18, 2019: one for workplaces with a dedicated lactation room, one for workplaces with a multipurpose space for lactation, and one for workplaces with no dedicated space for lactation. The policies each address an employee's right to a lactation room, an employee's right to a reasonable time to express breast milk during any given work day and the employer's lactation accommodation request process.

Ninth Circuit Rules California's 'ABC' Test for Independent Contractor Classification Applies Retroactively

On May 2, 2019, the U.S. Court of Appeals for the Ninth Circuit held that the California Supreme Court's landmark decision in *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), applies retroactively. *Vasquez v. Jan-Pro Franchising Int'l, Inc*., No. 17-16096 (9th Cir. 2019). In *Dynamex*, the California Supreme Court adopted the "ABC" test for determining whether a worker is an employee or an independent contractor for purposes of wage and hour laws. According to the ABC test, a worker is presumed to be an employee unless all three of the following conditions are met: (i) the individual is free from control and direction in connection with the performance of services, both under his or her contract for the performance of service and in fact; (ii) the service is performed outside the usual course of the business of the employer; and (iii) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

As noted in the June 2018 issue of Employment Flash, the *Dynamex* decision did not specify whether the ABC test applies retroactively. But in *Vasquez*, the appeals court held that *Dynamex* does not present an exception to the rule that the California Supreme Court's rulings are generally retroactive. The Ninth Circuit remanded the case to the U.S. District Court for the Northern District of California to apply the ABC test and decide the case on the merits.

California May Join New York in Prohibiting Discrimination Based on Hairstyles

The New York City Commission on Human Rights recently adopted new rules providing for employees' rights to maintain natural hair or hairstyles that are closely associated with their racial, ethnic or cultural identities. Now California is seeking to enact a similar law, recognizing that employers with dress code policies prohibiting natural hair such as "afros, braids, twists and locks ... are more likely to deter Black applicants and burden or punish Black employees."

SB 188, also known as the CROWN Act (Create a Respectful and Open Workplace for Natural Hair), proposes to amend the definition of "race" in the California Fair Employment and Housing Act (FEHA) to be "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." In addition, SB 188 will add a new definition of "protective hairstyles" under FEHA that will include braids, locks and twists.

SB 188 passed in the California State Senate on April 22, 2019, and will move on to the California State Assembly. California employers should begin evaluating current dress and grooming requirements to ensure the policies are nondiscriminatory and compliant. Dress and grooming policies should not restrict employees from maintaining natural hair or hairstyles that are closely related to their race, ethnicity or culture.

Massachusetts Supreme Court Rules Commission-Only Employees Entitled to Overtime

The Massachusetts Supreme Judicial Court recently held that, under the state's overtime statute, employees paid entirely on a commission basis are still entitled to a time-and-a-half overtime premium for hours worked in excess of 40 hours per week and for hours worked on Sundays. *See Sullivan v. Sleepy's LLC*, 2019 Mass. LEXIS 244 (Mass. May 8, 2019). The plaintiffs were employees at Sleepy's, a retail mattress chain located primarily in the northeastern United States, who were paid a $125 daily advance, plus commissions on sales in excess of their daily advance, regardless of how many hours they worked in a given week. The Massachusetts overtime statute requires employers to pay qualifying employees who work in excess of 40 hours per week 1.5 times their "regular rate." The statute expressly excludes, among other forms of payment, commissions, advances on commissions and Sunday premium pay from the calculation of an employee's "regular rate."

Because of this exclusion, the state Supreme Court determined that the premium rate paid to commission-only employees for hours worked in excess of 40 hours per week or hours worked on a Sunday must be at least 1.5 times the state minimum wage, which is currently $12 per hour. The court's decision overruled two opinion letters issued by the Massachusetts Department of Labor in 2003 and 2009, respectively, that Sleepy's relied on to argue that it was not required to pay commission-only employees overtime premiums. The state Supreme Court explained that its holding is consistent with previous decisions in which the court determined that employers cannot retroactively allocate payments to fulfill one set of wage obligations against separate independent obligations.

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