Employment Flash

Skadden

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Supreme Court Rules That Defendants Can Lose Objection Based on Title VII's Charge-Filing Requirement if Not Timely Raised

In a June 3, 2019, decision, *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, the U.S. Supreme Court resolved a conflict among the federal circuit courts and held that the charge-filing requirement of Title VII of the Civil Rights Act of 1964 (Title VII) is nonjurisdictional (meaning that the requirement does not delineate the classes of cases a court may entertain or the persons over whom the court may exercise jurisdiction) and, therefore, unlike with jurisdictional objections — which may be raised at any time in a proceeding — defendants who do not timely raise an objection based on a plaintiff's failure to follow the claim-processing rule forfeit such objection.

In *Fort Bend*, the plaintiff filed a charge against her employer before the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment and retaliation for reporting the harassment. While the charge was pending, the defendant employer terminated the plaintiff's employment after the plaintiff failed to report for work on a Sunday and went to a church event instead. The plaintiff attempted to supplement the charge by handwriting "religion" on a form called an "intake questionnaire," but the plaintiff did not amend the formal charge document. Upon receiving a right to sue letter from the EEOC, the plaintiff filed suit in federal district court, alleging discrimination based on religion and retaliation for reporting sexual harassment. Years into the litigation, the defendant employer asserted for the first time that the district court lacked jurisdiction to adjudicate the plaintiff's religion-based discrimination claim because the plaintiff had not stated such a claim in her EEOC charge. The Supreme Court affirmed the decision of the U.S. Court of Appeals for the Fifth Circuit that the charge-filing was nonjurisdictional and therefore subject to forfeiture if not timely raised in a litigation. The Supreme Court explained that the provisions containing Title VII's charge-filing requirement do not speak to a court's authority or in any way to the jurisdiction of the district courts.

New York Passes Reforms to State Discrimination Laws

On June 19, 2019, the New York state Legislature passed a bill that expands protections against discrimination and harassment under the New York State Human Rights Law (NYSHRL). The bill is expected to be signed into law by Gov. Andrew M. Cuomo soon. If enacted, the bill will amend the NYSHRL to apply to all New York state employers regardless of the size of their employee population. The bill lowers the standard for proving harassment claims, from requiring a plaintiff to demonstrate that the harassment was "severe or pervasive" — the standard applicable under federal anti-discrimination law — to requiring a plaintiff to demonstrate that the harassment subjected the plaintiff "to inferior terms, conditions or privileges of employment" because of the plaintiff's membership in a protected class. Additionally, the bill eliminates the long-standing Faragher-Ellerth defense under which an employer could avoid liability by showing that (i) it attempted to prevent and correct the harassing conduct and (ii) the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities.

Under the bill, the fact that an employee did not file a complaint will not be determinative of an employer's liability. Moreover, employers may not include broad nondisclosure provisions in settlement agreements resolving any discrimination claims, and this restriction would no longer be limited to only sexual harassment claims unless requested by the employee. The bill also extends the NYSHRL's protections for nonemployees, such as independent contractors, against any discriminatory behavior. Previously, nonemployees were protected against sexual harassment but not discrimination or harassment based on other protected characteristics.

The bill also provides for increased financial penalties for employers in all employment discrimination cases by allowing a prevailing plaintiff to recover punitive damages and attorneys' fees. Finally, the bill extends the statute of limitations period for filing sexual harassment complaints with the New York State Division of Human Rights from one year to three years. The new legislation will take effect 60 days after it is signed into law.

Southern District of New York Grants Motion to Compel Arbitration, Despite New York Law

In a June 26, 2019, decision, *Mahmoud Latif v. Morgan Stanley & Co. LLC et al.*, 2019 WL 2610985, the U.S. District Court for the Southern District of New York (SDNY) granted the defendant's motion to compel arbitration of the plaintiff's sexual harassment claims, despite Section 7515 of the New York Civil Practice Law and Rules, titled "Mandatory arbitration clauses; prohibited," which became effective on July 11, 2018, and renders agreements to arbitrate sexual harassment claims null and void except where prohibited by federal law. In its first decision analyzing the new law, the SDNY held that applying Section 7515 to invalidate the parties' agreement, which was to arbitrate all claims, including those relating to sexual harassment, would be inconsistent with the Federal Arbitration Act. Citing precedent from the U.S. Supreme Court outside of the Section 7515 context, the SDNY explained that the Federal Arbitration Act sets forth a strong presumption that arbitration agreements are enforceable, and it held that Section 7515 does not displace this presumption.

Dynamex Developments

Assembly Bill 5, which is currently pending in the California Legislature, could codify into the California Labor Code the "ABC" test (described below) for determining whether a worker should be classified as an independent contractor or employee. The bill is the state Legislature's response to the California Supreme Court's decision on April 30, 2018, in *Dynamex Operations West, Inc. v. Super. Ct.*, 4 Cal. 5th 903 (2018), which changed the standard for determining whether a worker should be classified as an independent contractor or employee for purposes of the California wage orders. The ABC test, which presumes a worker is an employee and places the burden on the employer to establish that the worker is an independent contractor, provides that a worker may be considered an independent contractor only if the worker: (A) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) performs work that is outside the usual course of the hiring entity's business; and (C) is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed. (*Dynamex*, 4 Cal. 5th at 957-58, 964.)

Assembly Bill 5 would expressly codify *Dynamex*'s ABC test as Labor Code Section 2750.3 and apply the test for purposes of the Labor Code, Unemployment Insurance Code and California wage orders. The bill, as proposed, currently creates exceptions for certain workers, such as insurance brokers, real estate licensees, direct sales salespersons and service providers as well as those in professional services and the construction industry.

Relatedly, on July 22, 2019, the U.S. Court of Appeals for the Ninth Circuit panel withdrew its opinion that the California Supreme Court's decision in *Dynamex* should apply retroactively. (*Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 2019 WL 3271969 (9th Cir. July 22, 2019)). The Ninth Circuit panel's order stated that it will certify the question of whether *Dynamex* should apply retroactively to the California Supreme Court.

Ninth Circuit Holds That Federal De Minimis Doctrine Does Not Apply to California Wage and Hour Claims

On June 28, 2019, the Ninth Circuit reversed two summary judgment decisions in favor of employers, holding that the employers' de minimis defense failed with respect to claims for unpaid wages brought under California wage and hour law. *Chavez v. Converse, Inc.*, No. 17-17070; *Rodriguez v. Nike Retail Services, Inc.*, No. 17-16866. The federal de minimis doctrine precludes employee recovery of otherwise compensable amounts of time that are small, irregular or administratively difficult to record. Last year, as reported in the September 2018 issue of *Employment Flash*, the California Supreme Court rejected the application of the federal de minimis doctrine to state wage and hour claims in *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018). However, the court left open the question of whether a state de minimis principle may apply to situations where compensable time is so minute or irregular that it is unreasonable to record such time. In *Chavez* and *Rodriguez*, the employers required retail employees to undergo off-the-clock exit inspections each time they left the store. The record reflected that exit inspections took between no time and several minutes, and there was evidence that 92.2% of exit inspections lasted less than one minute and 97.5% lasted less than two minutes. Notwithstanding, the Ninth Circuit declined to apply any de minimis defense, finding that there was a genuine dispute between the parties as to whether these amounts were more than "minute," "brief" or "trifling."

Fourth Circuit Holds that Sarbanes-Oxley Act Does Not Shield All Complaints

On June 13, 2019, the U.S. Court of Appeals for the Fourth Circuit vacated a May 2017 ruling by the Department of Labor (DOL) that held an employer violated provisions of the Sarbanes-Oxley Act (SOX) that protect whistleblowers for reporting certain types of financial-related fraud. *Northrop Grumman Sys. Corp. v. United States Dep't of Labor*, No. 17-2204. In this case, the employer terminated an employee as part of a reduction in force. Prior to the employment termination, the employee had raised concerns about the company's arbitration policy and certain policies and procedures allegedly linked to the arbitration policy, such as a part of the company's annual ethics training and conflict of interest form. The former employee alleged that her employment termination violated SOX whistleblower protections. A three-judge panel of the Fourth Circuit unanimously reversed the DOL ruling, holding that the former employee's activity did not warrant whistleblower protection because her complaints did not relate to mail fraud, wire fraud, bank fraud, securities fraud, any Securities and Exchange Commission rule or regulation, or any federal law relating to fraud against shareholders. Further, the panel concluded that even if the former employee's complaint did fall under one of the foregoing categories, there was not enough evidence to show that a reasonable person would believe the company's conduct contravened SOX's whistleblower protection provision.

Illinois Workplace Transparency Act Increases Workplace Protections

In June 2019, the Illinois General Assembly passed the Workplace Transparency Act (WTA), which is pending Gov. JB Pritzker's signature. The WTA provides increased workplace protections from harassment, discrimination and other employment-related issues. It prohibits an employer from entering into an employment agreement that contains a nondisclosure or nondisparagement clause that relates to harassment or discrimination claims. However, such clauses are enforceable in settlement or separation agreements if (i) the claims accrued or the dispute arose before the settlement or separation agreement was executed; (ii) the clauses are mutually agreed upon and mutually benefit both the employer and the employee; (iii) the employee has 21 days to review the agreement before it is executed; and (iv) the employee has seven days after executing the agreement to revoke it. The WTA also requires that any arbitration agreement exclude discrimination and harassment claims and allow an employee or applicant to pursue such claims through either arbitration or the courts.

The WTA also requires the Illinois Department of Human Rights (DHR) to produce a model sexual harassment prevention training program and for every employer to use the model or establish its own training program for employees and supervisors, and to provide such training every year. The WTA, however, does not state when the DHR must provide the model training program for employers to begin compliance or develop their own program. The WTA also imposes reporting requirements on covered employers by requiring them to submit a yearly report to the DHR of all settlements, adverse judgments, administrative rulings or equitable relief orders related to harassment or discrimination. The data will be used by DHR to provide an aggregated public report, such that no individual employer's data is identifiable. The DHR may, however, open an investigation if an employer reports a pattern and practice of unlawful discrimination.

The WTA also amends the Illinois Human Rights Act (HRA) to (i) prohibit harassment toward employees and nonemployees alike, including contractors, vendors and consultants; and (ii) prohibit discrimination, actual or perceived, on the basis of race, color, religion, national origin, ancestry, age, sex, pregnancy, sexual orientation, marital status, disability or military status. Previously, the HRA prohibited harassment only toward employees and prohibited only "perceived" discrimination or harassment on the basis of disability.

Illinois Employers May Face Liability Under Illinois Gender Violence Act

On May 17, 2019, the Illinois Appellate Court for the Third District held in *Gasic v. Marquette Mgmt., Inc*., 2019 IL App (3d) 170756, that a legal entity, such as a corporation, can be sued under the Illinois Gender Violence Act (GVA). The text of the GVA states that victims of "gender-related violence" may file civil lawsuits against "a person or persons perpetrating that gender-related violence." The GVA also defines "perpetrating" as "either personally committing the gender-related violence or personally encouraging or assisting the act or acts of gender-related violence." In *Gasic*, the plaintiff filed suit against the company that managed the apartment complex in which she lived and one of its maintenance engineers. The plaintiff claimed that the engineer had entered her apartment and engaged in unwanted sexual contact amounting to sexual assault and battery. In a 2-1 decision, the appellate court ruled in favor of the plaintiff and rejected the company's argument that a corporate entity is incapable of personally acting or encouraging another to act. The court cited the inclusion of corporate entities in the definition of "persons" in the Illinois Statute on Statutes and relied on Illinois case law supporting the construction that a "person" includes corporate entities absent a clear contrary intention in the statute's language or legislative history. The *Gasic* decision shows that plaintiffs can survive a motion to dismiss on GVA claims and that the GVA is a new source of liability for Illinois employers.

Washington State Enacts New Noncompete Law

On May 8, 2019, Gov. Jay Inslee signed into law new requirements applicable to noncompete agreements entered into in the employment context. Under the new law, noncompete agreements are unenforceable against employees earning less than $100,000 annually as well as against independent contractors earning less than $250,000 annually. Noncompete agreements longer than 18 months are also presumptively invalid. The new law requires a court or arbitrator that decides to reform, rewrite, partially enforce or otherwise modify a noncompete clause to order that the employer compensate the employee for attorneys' fees and costs, plus either the employee's actual damages or the statutorily imposed penalty of $5,000.

The new law also contains a restriction on "moonlighting," prohibiting employers from implementing restrictions on employees earning less than two times the state's minimum wage from working a second job, including for a competitor. If an employee's employment is terminated as a result of a layoff, a noncompete is invalid under the new law unless, during the period of enforcement, the employer provides garden leave equivalent to the employee's base salary at the time of termination, less any compensation earned through subsequent employment. Employers are also required to disclose the terms of any future applicable noncompete provisions to prospective employees, including that a noncompete covenant may become enforceable in the future. Employers entering into noncompetes with current employees are also required to provide independent consideration. The new law does not address the use of nonsolicitation agreements or other related restrictive covenants in employment agreements. The law goes into effect on January 1, 2020. The statute applies to all proceedings commenced after the law's effective date but also specifies that a cause of action may not be brought if a noncompete covenant is not being enforced. Thus, which provisions of the law apply retroactively to noncompete agreements entered into before January 1, 2020, is not clear and will likely require clarification from the courts.

International Spotlight

France Adopts Measures to Reduce Gender Pay Gap

Consistent with the "equal work equal pay" initiative and the prohibition of discrimination on the basis of gender, a new decree entered into force in France on January 1, 2019. The decree is aimed at eliminating the pay gap between women and men in companies with at least 50 employees, and establishes specific indicators that must be used to measure any existing pay gap disparity in such companies. The decree requires companies to take measures to reduce, and ideally eliminate, any existing pay gap when a company falls below a specific threshold based on these indicators.

The decree calculates a result for applicable companies according to the following five indicators: (i) the pay gap between women and men; (ii) the gap in the rate of salary increases between women and men; (iii) the gap in promotion rates between women and men; (iv) the gap in the percentage of employees who benefit from an increase in their salary during the year following their return from maternity leave; and (v) the ratio of employees belonging to the underrepresented gender among the 10 highest-compensated employees in the company. If the company's overall result during three consecutive years is below the threshold, the company must pay a penalty set at a maximum of 1% of the total payroll for the last calendar year that precedes the end of the three-year period. In addition, the result obtained by each company must be published on the company's website.

European Court of Justice Rules That Employers in the EU Must Record Employees' Entire Work Time

On May 14, 2019, the European Court of Justice decided that European Union member states that do not require employers to keep a record of employees' entire work time are in violation of the EU-Working Time Directive (EU-Directive 2003/88/EG). In many European countries, including Germany, the local work time regulations require employers to keep a record of work time that is in excess of eight hours per work day only. According to the decision, it is necessary to measure employees' entire daily work time, daily work time relative to the work week and the number of overtime hours to protect the interest of employees. Those EU member states whose local work time regulations do not comply with the ruling of the European Court of Justice must implement additional regulations in their local regulations to comply with the decision. This decision will affect many companies that do not currently use electronic time recording systems or that have employees working off-premises, including remote workers and sales employees. There is currently no fixed deadline for EU member states to implement additional regulations.

For more detail on this decision and how it applies in the U.K., please refer to our *UK Employment Flash* (to which you can subscribe by emailing skaddenarpsetal@skadden.com), in which we also report on:

- the ability to enforce post-termination restrictions in the U.K. by deleting an unenforceable provision (the "blue pencil test");
- whether it is discriminatory to refuse enhanced pay to a father taking shared parental leave;
- the latest fines for breaching the EU General Data Protection Regulation; and
- the progress of initiatives to ensure that women are represented on the boards of the top companies in the U.K.

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