Employment Flash

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In This Issue:

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NLRB Rules Employers Cannot Require Employees to Waive Labor Law Rights in Severance Agreements

On February 21, 2023, in *McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL-CIO*, 372 NLRB No. 58, the National Labor Relations Board's (NLRB) reverted the standard for analyzing confidentiality and non-disparagement provisions to pre-Trump era precedent, under which the Board will analyze a separation agreement on its face as to whether the agreement has a reasonable tendency to interfere with, restrain or coerce an employee in the exercise of their Section 7 rights.

Prior to 2020, there was long-standing NLRB precedent that ruled proffers of separation agreements containing broad proscriptions on the exercise of employee rights under Section 7 of the National Labor Relations Act (NLRA) (such as confidentiality and non-disparagement provisions) were unlawful because such agreements purported to create an enforceable legal obligation to forfeit those rights. Accordingly, analysis of severance agreements was focused on whether the relevant agreement had a "reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights."

In 2020, the NLRB issued two decisions — *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a Inter-national Game Technology*, 370 NLRB No. 50 (2020) — that overturned this precedent, holding that the mere proffer of an agreement requiring confidentiality was not unlawful and that coercive circumstances surrounding the proffer (or another unfair labor practice evidencing animus toward the exercise of Section 7 activity) were required to invalidate a separation agreement.

McLaren Macomb involved a Michigan hospital that permanently furloughed 11 employees during the COVID-19 pandemic and conditioned severance benefits upon the employees' signing an agreement that contained confidentiality and non-disparagement provisions. The NLRB found that the provisions that (1) prohibited employees from disclosing the terms of an agreement "to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction"; and (2) required employees "not to make statements to [e]mployer's employees or to the general public which could disparage or harm the image of [e]mployer, its parent and affiliated entities and their officers, directors, employees, agents and representatives" were unlawful, and therefore the severance agreements were as well.

Note that the *McLaren Macomb* decision does not apply to a separation agreement proffered to a "supervisor," which is defined under the NLRA as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). Determination of whether an individual is a "supervisor" under the NLRA is a fact-specific inquiry.

Supreme Court Upholds FLSA Salary Basis Requirement for Exempt Employees

On February 22, 2023, the U.S. Supreme Court issued its decision in *Helix Energy Solutions Group, Inc. v. Hewitt*, 143 S. Ct. 677, upholding the requirement under the Fair Labor Standards Act that all employees classified as exempt from minimum wage and overtime laws be paid on a salary basis.

Hewitt involved an oil rig worker named Michael Hewitt, who earned over $200,000 annually while working 12 hours a day, seven days a week (84 hours a week) for 28 days, followed by 28 days off, and who was paid at a daily rate via a paycheck issued every two weeks. Mr. Hewitt was classified as an exempt employee and thus, not paid overtime pay. Mr. Hewitt then sued Helix, alleging that because he was not paid on a salary basis, he was improperly classified as exempt and owed overtime pay.

In a 6-3 decision, Justice Elena Kagan wrote for the Court and emphasized language in the Code of Federal Regulations, which states that "an employee will be considered to be paid on a 'salary basis'…if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." The Court wrote that "[a] daily-rate worker's weekly pay is always a function of how many days he has labored. It can be calculated only by counting those days once the week is over…not…by ignoring that number and paying a predetermined amount." The Court also distinguished between the basis on which an employee is paid (meaning the "unit of time used to calculate pay") and the frequency by which an employee receives a paycheck, noting that paycheck frequency is irrelevant in determining whether an employee is paid on a salary basis. The Court further noted that a daily rate may satisfy the salary basis test for certain employees who are guaranteed a minimum salary each week and paid additional amounts that bear a reasonable relationship to the amount actually earned each week, but the parties in Hewitt agreed this exception did not apply in the case at hand. Since Mr. Hewitt was not paid on a salary basis, the Court found that he was eligible for overtime pay.

DC Circuit Court Partially Affirms Decision That Struck Down 2019 NLRB Rule

In 2019, the NLRB promulgated a rule governing elections in which employees vote on whether to be represented by a union. The rule, which was promulgated without public notice and comment, (1) extended the deadline for employers to turn over worker contact information to unions, (2) delayed certification of election results until after any requests for review had been resolved, (3) limited whom unions could designate as their election observers, (4) required disputes concerning unit scope, voter eligibility and supervisory status to be litigated and resolved before an election was directed and (5) created a presumptive waiting period of 20 business days following the direction of an election to allow the NLRB to rule on disputes between the parties. The rule was challenged by the American Federation of Labor and Congress of Industrial Organizations, and a 2020 decision by the U.S. District Court for the District of Columbia struck the rule down in its entirety on the basis that the NLRB was obligated to seek public comment on the proposed rule. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit partially reversed that decision, holding that the changes regarding preelection litigation of disputes and a presumptive post-election waiting period were procedural and did not require public notice and comment. However, the court affirmed the striking down of the remaining three parts of the rule, finding that each was substantive and required public notice and comment. *The Court of Appeals case is American Federation of Labor and Congress of Industrial Organizations v. National Labor Relations Board*, Case Nos. 20-5223 and 20-5226.

Federal Prosecutors Push for Compliance With Compensation Clawbacks

In a March 2023 memo, the Criminal Division of the U.S. Department of Justice (DOJ) announced the "Compensation Incentives and Clawbacks Pilot Program," a three-year pilot program that it claims will deter corporate crime and "incentivize the development and implementation of effective compliance programs." The initiative has two components. First, a company that enters into a corporate resolution (a program to settle criminal allegations) with the DOJ will be required to "implement criteria related to compliance in its compensation and bonus system." In its memo, the DOJ provided a nonexclusive list of criteria to be implemented, including prohibiting bonuses for employees who do not satisfy compliance requirements, applying discipline to employees who violate the law (and their supervisors who knew or were willfully blind to the violations) and "incentives for employees who demonstrate full commitment to the compliance process." Prosecutors will have discretion to determine the precise criteria a company must meet under the circumstances.

Second, companies may be eligible for reduced fines in exchange for clawing back compensation paid to employees who have committed misconduct. If a company that enters into a corporate resolution with the DOJ is attempting in good faith to recoup compensation from such employees at the time that a fine is levied, the company will be eligible for a fine reduction equal to the full amount it is attempting to claw back. Any amounts not successfully recouped by a company at the end of a resolution period must be paid back, but the company can still receive credit for up to 25% of the amount that the company attempted, in good faith, to recover. In addition to employees who commit misconduct, the clawback provision applies to compensation paid to supervisors who had authority over employees or business areas that engaged in misconduct and knew about or were willfully blind to said misconduct.

The pilot program, which launched on March 15, 2023, is the latest attempt by the DOJ to prioritize individual accountability for corporate crime. This follows September 2022 DOJ guidance that stated the government's "first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime." In response to the DOJ's focus on ensuring individual accountability, employers may wish to consider strengthening their own mechanisms to ensure individual compliance and opt to inform employees of the potential for clawbacks as a result of noncompliance.

New York Federal Court Holds EFAA Blocks Arbitration of Claims Brought Together With Sexual Assault or Sexual Harassment Claims

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), which was signed into law by President Joe Biden on March 3, 2022, invalidates pre-dispute arbitration agreements "with respect to a case which is filed under Federal, Tribal, or State law and relates to [a] sexual assault dispute or [a] sexual harassment dispute," unless the complainant wishes to proceed with arbitration. Simply stated, the EFAA affords an employee the right to choose whether to bring such claims before a court or before an arbitrator, notwithstanding any agreement the employee may have signed before the dispute arose that requires such claims to be resolved through arbitration.

It is an unanswered question as to whether the EFAA also would prohibit employers from unilaterally enforcing pre-dispute arbitration agreements related to nonsexual assault, nonsexual harassment claims brought concurrently with sexual assault or sexual harassment claims. Recently, the U.S. District Court for the Southern District of New York weighed in on this issue, taking the position that a plausibly pled sexual assault or sexual harassment claim may shield concurrently filed claims from a pre-dispute arbitration agreement:

- In *Johnson v. Everyrealm, Inc., et al.*, 2023 WL 2216173, the court considered whether, after a court has determined that the EFAA applies to a particular claim, an arbitration agreement may be enforceable with respect to concurrently filed claims. According to the court, the operative language of the EFAA, namely Congress' use of the term "case" (rather than "claim"), is indicative of the intent to "key[] the scope" of the EFAA's invalidation of an arbitration agreement to the entirety of a "case" relating to a sexual assault or sexual harassment dispute. Thus, the court held that where a claim in a case alleges conduct that constitutes a sexual assault or sexual harassment dispute, the EFAA renders a pre-dispute arbitration agreement unenforceable with respect to the entire case at the election of the complainant.
- In *Yost v. Everyrealm, Inc., et al.*, 2023 WL 2224450, the defendant moved to compel arbitration of the plaintiff's claims and the plaintiff argued that because her Second Amended Complaint included sexual harassment claims, the arbitration agreements at hand were unenforceable under the EFAA. Finding the plaintiff's sexual harassment claims to be "implausibly pled," the court granted the defendant's motion to dismiss the plaintiff's sexual harassment claims and held that the EFAA requires an individual to plausibly plead a sexual harassment claim in order to invoke the EFAA.

California Supreme Court Changes Course on Permissibility of Arbitration Agreements

California's Assembly Bill 51 (AB 51) would have made it a criminal offense for an employer to require an employee or an applicant for employment to agree to mandatory arbitration of violations of the California Fair Employment and Housing Act and the California Labor Code as a condition of employment, continued employment or the receipt of any employment-related benefit. Although AB 51 was signed into law by Gov. Gavin Newsom on October 10, 2019, and was set to take effect on January 1, 2020, enforcement of AB 51 has been enjoined for more than three years.

On August 22, 2022, a majority of a panel of the U.S. Court of Appeals for the Ninth Circuit voted *sua sponte* to grant rehearing in *Chamber of Commerce of the United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021) (*Bonta*), the U.S. Chamber of Commerce-led challenge to AB 51 on the basis that AB 51 is preempted by the Federal Arbitration Act (FAA). The majority of the court also voted to withdraw its 2-1 decision partially upholding AB 51.

On February 15, 2023, the Ninth Circuit issued its decision, holding that AB 51 is indeed preempted by the FAA. The court found that AB 51's "penalty-based scheme to inhibit arbitration agreements before they are formed violates the equal-treatment principle inherent in the FAA…and is the type of device or formula evincing hostility towards arbitration that the FAA was enacted to overcome" (internal citations omitted). The court further explained that because the FAA's purpose is to further the congressional policy of encouraging arbitration, and AB 51 stands as an obstacle to that purpose, AB 51 is preempted by the FAA. Accordingly, employers in California can now require applicants for employment and employees to sign agreements with arbitration provisions as a condition of employment, continued employment or receipt of an employment-related benefit. The February 15, 2023, decision of the U.S. Court of Appeals for the Ninth Circuit is *Chamber of Commerce of the United States of America et al. v. Bonta et al.*, 62 F.4th 473.

Illinois Supreme Court Rules Claims Under State's Biometric Privacy Act Accrue Each Time Data is Unlawfully Collected

On February 17, 2023, the Illinois Supreme Court held that a claim under the Illinois Biometric Privacy Act (BIPA) — which provides safeguards around the collection of biometric data — accrues each time such data is unlawfully collected or disclosed. The BIPA requires private entities, including employers, to (1) obtain written consent before collecting an individual's biometric data, (2) explain the process of storing and destroying the data, and (3) protect it as safely as the company "protects other confidential and sensitive information." In *Cothron v. White Castle System, Inc.*, 20 F.4th 1156 (7th Cir. 2021), an employee named Latrina Cothron brought a putative class action against White Castle, her employer, for allegedly violating the BIPA by implementing a system under which employees' fingerprints were collected through a third party and scanned each time employees accessed their pay stubs and work computers. White Castle argued that the action was time-barred because the initial collection of biometric data occurred in 2008. The Seventh Circuit sent the case to the Illinois Supreme Court to decide the following question of law: whether claims accrue under the BIPA each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, or whether it only occurs upon the first scan and first transmission. The Illinois Supreme Court held that a separate claim accrues under the BIPA each time a private entity scans or transmits an individual's biometric identifier or information in violation of the BIPA. Consequently, Ms. Cothron's case may now proceed to a jury trial in federal court. The Illinois Supreme Court decision is *Cothron v. White Castle System, Inc.*, 2023 IL 128004.

New Jersey Considers Restrictions on Automated Employment Decision Tools

A bill introduced in the New Jersey General Assembly would restrict the use of automated employment decision tools in the state. Selling such tools in New Jersey would be unlawful under the legislation, unless the following conditions are met:

- the tool was subject to a "bias audit" in the year prior to the sale;
- the sale includes a free, annual bias audit service; and
- the sale includes a statement that the tool is subject to the legislation.

An "automated employment decision tool" is defined in the legislation as:

> "any system the function of which is governed by statistical theory, or systems the parameters of which are defined by systems, including inferential methodologies, linear regression, neural networks, decision trees, random forests, and other learning algorithms, which automatically filters candidates or prospective candidates for hire or for any term, condition or privilege of employment in a way that establishes a preferred candidate or candidates."

The bill defines a "bias audit" as an impartial evaluation, including, but not limited to, testing of an automated employment decision tool to assess its predicted compliance with the provisions of New Jersey's Law Against Discrimination and any other applicable law relating to discrimination in employment.

The bill specifies that any employer that chooses to use an automated employment decision tool to screen employment candidates must notify the candidate within 30 days of its use that the tool was used to assess the candidate's job qualifications or characteristics, and that the tool is subject to the provisions of the legislation. Violations of the law would be subject to a civil penalty of up to $500 for the first violation (and for each subsequent violation occurring on the same day), and up to $1,500 for each subsequent violation. The legislation is similar to Local Law Int. No. 1894-A, passed by the New York City Council to amend the City Administrative Code to include regulations on the use of automated employment decision tools, which was previously covered in detail in our September 2022 *Employment Flash*. If enacted, the New Jersey legislation would be enforceable by the commissioner of the New Jersey Department of Labor and Workforce Development, but unlike the New York City law, the legislation does not include a private right of action. The bill was reported favorably out of committee on January 19, 2023, and is awaiting further action in the chamber.

New Jersey Looks to Curtail Certain Non-Disparagement Agreements

Legislation pending in the New Jersey Senate would curtail the use of certain non-disparagement provisions in the state. Such provisions typically prohibit parties from communicating anything negative about one another, even if the information being communicated is truthful. In 2019, New Jersey passed a ban provisions in employment contracts and settlement agreements that have "the purpose or effect of concealing details relating to a claim of discrimination, retaliation, or harassment." These provisions were "deemed against public policy and unenforceable against a current or former employee" in the ban. While the 2019 law clearly impacted nondisclosure and confidentiality provisions, a 2022 ruling by the New Jersey Appellate Division in *Savage v. Twp. Of Neptune*, 273 A.3d 685, 692–97 (N.J. App. Div. 2022) held that the law does not impact the enforceability of non-disparagement provisions in employment or settlement agreements. The non-disparagement provision in that case prohibited a former employee from making "any statements . . . regarding the past behavior of the parties, which . . . would tend to disparage or impugn the reputation of any party."

The new legislation would supersede the Appellate Division's ruling and clarify that any non-disparagement provision that requires a party to conceal details relating to discrimination, retaliation or harassment is unenforceable against a current or former employee. This means that employers could not bar employees from communicating with others regarding such claims, even if doing so would cast the employer in a negative light. The legislation passed the General Assembly by a wide margin in October 2022 and is awaiting action in the Senate.

International Spotlight

France

Negotiation Concludes Regarding National Cross-Industry Agreement on Value Sharing

Upon the invitation of the French government and after 11 negotiation meetings, a national cross-industry collective bargaining agreement on value sharing (Accord national interprofessionnel sur le partage de la valeur) was concluded on February 10, 2023, and later approved by a majority of national employer and employee trade unions. This agreement includes several measures aimed at promoting value sharing within French companies and improving employee shareholding and savings schemes. It contains both (1) measures directly binding on companies covered by the scope of the agreement (which includes a majority of companies in France) and (2) measures that are to be later transcribed into French legislation.

A significant measure introduced by the agreement is the obligation for companies that employ between 11 and 49 employees to implement a value sharing scheme (*e.g.*, profit-sharing, value sharing bonuses, savings plans) once such companies have generated a net taxable income of at least 1% of their revenue for three consecutive years (2022, 2023 and 2024). The amounts paid under such a scheme will benefit from a favorable tax and social security regime. Previously, companies employing less than 50 employees were exempt from the obligation to introduce a profit-sharing scheme for employees. This new obligation will come into force on January 1, 2025, and will be implemented experimentally for a period of five years.

Companies who have at least 50 employees and that have at least one trade union representative will need to include in their profit-sharing agreements (before June 30, 2024) a mechanism aimed at taking into account exceptional profits generated by the company in France. This may take the form of either an automatic payment of supplementary profit-sharing amounts or by commencing negotiations with the trade union representative(s) in respect of another value-sharing mechanism.

This agreement is subject to approval by the French Ministry of Labor before it comes into force.

Germany

Forged Vaccination Certificate Constitutes Good Cause for Termination

In its February 7, 2023, decision in Case No. 8 Sa 326/22, the Higher Labor Court Düsseldorf found that an employee who presented his employer with a forged vaccination certificate could be terminated for good cause within the meaning of Section 626(1) of the German Civil Code, despite the employee's long service time working for the employer. The court held that presenting a falsified vaccination card with the intention of circumventing a legal requirement to provide proof of vaccination constitutes a breach of a "secondary" (implied) obligation under the employment contract that is sufficiently serious to justify termination of employment without notice. The ruling held that the employee's action evidenced a "high degree of criminal energy," such that the relationship of trust between the employer and employee was permanently damaged. Due to the severity of the employee's action, neither the likelihood of the action being repeated nor the employee's long-standing service with the employer were relevant to the analysis.

Negotiated Salary No Excuse for Unequal Pay for Equal Work

In a press release dated February 16, 2023, the Federal Labor Court announced its decision in Case No. 8 AZR 450/21, finding that an employer had engaged in gender-based pay discrimination — specifically, that a woman had been paid a lower salary than a male colleague even though both employees performed the same work. In finding the existence of discrimination, the court was unpersuaded by the employer's argument that the pay difference was based on the male employee having negotiated a higher salary, rather than because of gender. Though the full decision has yet to be published, this ruling may indicate that employees with equal qualifications and who do equal work, but who are paid less than other employees of another gender, may be entitled to higher salaries, given that an employee's salary negotiation skills will not be an excuse for an employer's failure to provide equal pay for equal work.

United Kingdom

UK CMA Publishes Guidance on Anti-Competitive Recruitment and Hiring Practices

On February 9, 2023, the U.K. Competition and Markets Authority (CMA) published guidance for employers on how to comply with U.K. competition law in their recruiting and hiring practices, focusing in particular on the prohibition on anti-competitive agreements. The key types of employer behavior in the labor market that would breach the prohibition (whether done in connection with employees, freelancers or contract workers) are: (1) no-poaching agreements between businesses; (2) wage fixing agreements; and (3) sharing of sensitive information regarding terms and conditions of employment offered by a particular business with other businesses.

The CMA recommended various steps that businesses can take to avoid running afoul of the prohibition, such as providing training to recruitment staff on competition law and ensuring a robust internal reporting process is in place to handle any anti-competitive issues that may arise. If a business has already engaged in anti-competitive behavior, the guidance recommends notifying the CMA immediately (in such circumstances, the CMA is more likely to be lenient when subsequently taking enforcement action).

The consequences of engaging in anti-competitive behavior in breach of competition law include fines of up to 10% of group worldwide annual revenue, unenforceability of any anti-competitive agreements, potential director disqualification and follow-on claims for damages, in addition to reputational damage.

The CMA's interest in preventing anti-competitive behavior in the labor market is part of a broader trend in which competition authorities have taken the view that companies not only compete for customers through the products and services they supply to the market, but also for services provided by employees. Other government agencies in the U.S., Canada and elsewhere in Europe have recently provided similar guidance, and the European Commission is currently reviewing its approach to enforcement actions in respect of these types of anti-competitive practices.

Parker Review Committee Update and Recommendations for Ethnic Diversity of UK Boards

On March 13, 2023, the Parker Review Committee, an independent review committee led by Sir John Parker, published a report on improving the ethnic diversity of U.K. companies' boards and announced a set of recommendations to improve the ethnic diversity of the senior management teams of FTSE 350 companies and the top 50 largest U.K. private companies. The review itself was established in 2017 as part of a series of measures designed to tackle the lack of diversity in the U.K. corporate sector. According to the Committee, nearly all of the U.K.'s FTSE 100 companies and 67% of FTSE 250 companies now have at least one minority ethnic director on their boards.

To continue this momentum towards increasing diversity in U.K. businesses, the Committee has proposed new voluntary measures for ethnic diversity within the senior management teams of FTSE 350 companies. These measures include — by December 2023 — setting a percentage target by for each senior management team (defined as members of the executive committee and senior managers who report directly to them) to include members who identify as being from an ethnic minority background, to be achieved by December 2027, and disclosing this target in their annual report. Further, the Committee has made recommendations directed at 50 of the U.K.'s largest private companies, including that they have at least one ethnic minority member on their boards by December 2027.

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