Employment Flash

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In This Issue:

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New York, Minnesota and NLRB Act To Limit Noncompetes

New York Legislature Passes Bill To Ban Post-Employment Noncompetes

On June 20, 2023, the New York state Legislature passed a bill that bans post-employment noncompetition agreements. Gov. Kathy Hochul is expected to sign the bill, 30 days after which it will go into effect. If enacted, New York will join California, Minnesota, North Dakota and Oklahoma in instituting broad bans on post-employment noncompetes.

This far-reaching bill prohibits contracts signed after the law becomes effective that restrain anyone from engaging in a lawful profession, trade or business and prohibits employers from entering into a "noncompete agreement" with any "covered individual." "Noncompete agreement" is defined as any agreement or clause that prohibits or restricts a covered individual from obtaining employment after the conclusion of employment with the employer. The bill explicitly excludes fixed-term contracts, nondisclosure agreements and customer nonsolicits from its coverage.

"Covered individual" is defined as any person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person. It does not exclude highly compensated individuals from its coverage.

The bill provides a private right of action allowing a covered individual to bring a civil action seeking injunctive relief, liquidated damages up to $10,000, lost compensation, damages and attorneys' fees within two years of the later of when:

- the noncompete agreement was signed,
- the covered individual learns of the noncompete agreement,
- the employment relationship is terminated, or
- the employer seeks to enforce the noncompete agreement.

Notably, the bill does not expressly exclude a business seller who remains employed by the company or a buyer from the definition of "covered individual." Courts have historically used a more lenient standard in evaluating sale-of-business noncompetes. It remains to be seen how New York courts will interpret the new law outside of the employment context.

Minnesota Becomes Fourth State To Issue Ban

On May 24, 2023, Minnesota Gov. Tim Walz signed into law SF 3035, which will void most noncompete agreements enacted after July 1, 2023. The bill does not have retroactive effect, so any noncompete agreements already in place as of July 1, 2023, will not be considered void under the new law. The bill broadly defines "covenant not to compete" as any agreement that prevents an employee, after termination of employment, from performing work for another employer for a specified period of time, in a specified geographic area or in a capacity that is similar to the employee's work for the employer that is party to the agreement.

"Employee" is defined as any individual who performs services for an employer, **including independent contractors**.

The bill still allows for other types of restrictive covenant agreements, including nonsolicitation, nondisclosure and trade secrets agreements. Additionally, noncompete agreements will be enforceable if they are agreed upon in connection with the sale of a business or in anticipation of the dissolution of a business. The bill does not allow employers to use choice of law provisions in contracts to evade Minnesota law. Minnesota is the fourth state to statutorily ban noncompete agreements. Similar bans also exist in California, North Dakota and Oklahoma, and as mentioned above, New York's proposal is awaiting the governor's signature.

NLRB Memo Declares That Most Noncompetes Violate the NLRA

On May 30, 2023, NLRB General Counsel Jennifer Abruzzo issued a memorandum expressing her view that most post-employment, noncompete agreements violate the NLRA. In the memorandum, addressed to all regional directors, officers-in-charge and resident officers, Abruzzo stated that such agreements interfere with a nonsupervisory employee's exercise of rights under Section 7 of the NLRA and that, except in limited circumstances, she believes their proffer, maintenance and enforcement violate Section 8(a)(1) of the NLRA.

Abruzzo wrote that noncompete agreements are unfair labor practices under Section 8(a)(1) of the NLRA when they are overbroad in that they have a chilling effect on employee activity protected under Section 7, including:

- Concertedly threatening to resign to demand better working conditions.
- Carrying out concerted threats to resign or otherwise concertedly resigning to secure better working conditions.
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions.
- Soliciting co-workers to work for a local competitor as part of a broader course of protected concerted activity.
- Seeking other employment to specifically engage in protected activity with other workers at an employer's workplace.

Not all post-employment, noncompete agreements will violate the NLRA, however. Abruzzo's view is that if a noncompete is narrowly tailored to special circumstances that justify an infringement on employee rights, the agreement will not violate the NLRA. As an example, provisions that clearly restrict only an individual's managerial or ownership interests in a competing business may not violate the NLRA, Abruzzo said.

In the memorandum, Abruzzo instructs NLRB regions to submit cases to the NLRB's Division of Advice involving noncompete provisions that are arguably unlawful and to seek make-whole relief for employees that can demonstrate that an overbroad noncompete caused them to lose opportunities for other employment.

NLRB Revisits Independent Contractor Test, and 'Entrepreneurial Activity' Is No Longer Front and Center

In a June 13, 2023, decision, the National Labor Relations Board (NLRB) revisited its approach to assessing whether a worker is an employee under the National Labor Relations Act (NLRA) (and therefore covered by the NLRA) or an independent contractor (and therefore excluded from coverage). In *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case No. 10-RC-276292, the board reinstated the standard set out in its Obama-era decision of

FedEx Home Delivery, 361 NLRB 610 (2014), which was overruled in the Trump-era decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). In *Atlanta Opera*, the board found that the workers at issue in this case — makeup artists, wig artists and hairstylists who work at The Atlanta Opera — are employees under the NLRA.

In *SuperShuttle*, the NLRB put a "significant entrepreneurial opportunity for gain or loss" at the center of its analysis. In *Atlanta Opera*, the NLRB made clear its view that entrepreneurial activity is not the core of the analysis, and the presence or lack of entrepreneurial activity is not alone enough to establish that a worker is an independent contractor, rather than an employee. Instead it reverted to the factors set out in Section 220 of the Restatement (Second) of Agency as the (nonexhaustive) list of factors to consider in determining a worker's status as an employee or independent contractor.

These factors are:

- The extent of control which the employer/engaging entity may exercise over the details of the work.
- Whether the worker is engaged in a distinct occupation or business.
- The kind of occupation, including whether in the locality the work is usually done under the direction of an employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer/engaging entity or the worker supplies the instrumentalities, tools and the place of work.
- The length of time for which the worker is employed/engaged.
- The method of payment.
- Whether the work is part of the regular business of the employer/engaging entity.
- Whether the parties believe they are creating an independent contractor relationship.
- Whether the employer/engaging entity is or is not in business.

Supreme Court Holds Employers Can Sue Union for Intentional Property Damage Caused by Strike

On June 1, 2023, the U.S. Supreme Court held that an employer could sue a union for damage intentionally caused to the employer's property as a result of strike action by unionized employees. Writing for the 8-1 majority in *Glacier Northwest, Inc. dba Calportland v. International Brotherhood of Teamsters Local Union No. 174*, Justice Amy Coney Barrett held that the right to strike under the NLRA is not absolute and therefore does not necessarily preempt an employer's tort claims for property damage.

Glacier Northwest mixes, and then delivers by truck, concrete to consumers in Washington state. After a collective bargaining agreement between Glacier and the International Brotherhood of Teamsters Local Union No. 174, which represents Glacier's truck drivers, expired, the union called for a work stoppage. The stoppage was called on a morning the union knew Glacier was mixing and delivering substantial amounts of concrete. The union directed employees to ignore Glacier's instructions to finish deliveries that were in progress, and as a result, a substantial amount of concrete hardened and became unusable.

The Court held that the NLRA does not protect strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated and imminent danger due to the sudden cessation of work. The Court noted that the workers reported for duty as if they would deliver the concrete, which led to the creation of perishable concrete. The workers only ceased work once the concrete was mixed and poured into trucks. Because hardened concrete could not be delivered to customers and would damage the trucks, the Court found that the union took affirmative steps to endanger Glacier's property, rather than reasonable precautions to mitigate that risk.

While the NLRA preempts state law when the two conflict, the Court held that the union's conduct in this case was not protected by the NLRA and thus Glacier's tort claims were not preempted. Glacier's case against the union was remanded to the Washington Supreme Court, with that court's prior decision in favor of the union, reversed.

NLRB Sets Out Remedies Against Employers Who Have Shown a 'Proclivity' To Violate the NLRA or Engage in Egregious or Widespread Misconduct

The NLRB recently provided employers with additional insight into the types of remedies the board may consider in cases involving employers that repeatedly violate the NLRA or engage in egregious or widespread misconduct.

In a 2-1 decision issued on April 20, 2023, the NLRB considered, and ultimately affirmed, the remedies imposed by an administrative law judge against an employer that had engaged in a course of unlawful conduct during the collective bargaining process, as well as ordering additional remedies.

In addition to the NLRB's "standard" remedies for refusal to bargain (such as rescinding changes to terms and conditions of employment that were unilaterally implemented by the employer after bargaining ceased) and other remedies ordered by the administrative law judge (such as a reading of the NLRB's notice to employees by the employer's CEO or an NLRB agent in the presence of the CEO), the NLRB ordered additional remedies in light of the employer's past actions evidencing "its open hostility toward its responsibilities under the [NLRA]":

- An "explanation of rights" (a document informing employees of their rights in a more comprehensive manner) to be added to the NLRB's notice.
- A reading of the NLRB's notice and explanation of rights in English and in Spanish, with the union present if it wished to be there.
- Distribution of the notice and explanation of rights to employees at the reading, by mail and by electronic means.
- Extended posting of the notice and explanation of rights at the employer's facility.
- Visitation by the NLRB to the employer's facility to ensure it is in compliance with its obligation to post the notice and explanation of rights.
- A bargaining schedule with written progress reports provided by the employer to an NLRB compliance officer.
- Reimbursement of any wages lost by employees as a result of bargaining being conducted during working hours.
- A broad cease-and-desist order prohibiting the employer from refusing to bargain in good faith, changing the employees' terms and conditions of employment without first bargaining with the union to a good-faith impasse and otherwise interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the NLRA.

Although the decision was not intended to be an exhaustive discussion of potential remedies, in discussing these and other remedies available to it, the NLRB provided insight into the types of remedial actions it may order in cases involving employers who have "shown a proclivity to violate the [NLRA] or who have engaged in egregious or widespread misconduct."

The case is *Noah's Ark Processors, LLC d/b/a WR Reserve and United Food and Commercial Workers Local Union No. 293*, Case 14-CA-255658.

Reminder: Virtual I-9 Verification To End

At the onset of the COVID-19 pandemic, the Department of Homeland Security and Immigration and Customs Enforcement adopted a temporary virtual I-9 option (discussed most recently in our December 2022 edition of *Employment Flash*), which was extended several times. The final extension expires on July 31, 2023.

Employers will have until August 30, 2023, to perform the required physical examination of identity and employment eligibility documents for those individuals hired on or after March 20, 2020, whose documents have been examined only virtually.

Upcoming Enforcement Deadline for New York City Automated Employment Decision Tool Law

New York City is set to begin enforcing its automated employment decision tool (AEDT) law on July 5, 2023. The law was passed in November 2022 and took effect on January 1, 2023 (as covered in detail in our September 2022 edition of the Employment Flash with updates in our December 2022 and January 2023 editions), but enforcement was delayed.

As previously reported, the law regulates AEDTs (sometimes called "artificial intelligence tools") by prohibiting employers and employment agencies from using these tools to screen candidates or employees for hiring or promotion decisions unless those tools have been subject to a bias audit within one year prior to their use, information about the audit is publicly available, and notices have been provided to New York City job candidates and employees on whom the tools are used.

Enforcement of the law was delayed multiple times during notice and comment periods and two rounds of proposed rules, but on April 6, 2023, the New York City Department of Consumer and Worker Protection issued the AEDT law final rule and announced that implementation and enforcement will begin on July 5, 2023.

In light of the upcoming enforcement date, employers using AEDTs for positions in New York City should review their current practices to determine whether they will need to comply with the AEDT law. This will require assessing whether the employer is currently using artificial intelligence tools in making hiring or promotion decisions, and if so, determining whether such tools:

- Are derived from "machine learning, statistical modeling, data analytics, or artificial intelligence."
- Issue a "simplified output."

- Are being used to "substantially assist or replace discretionary decision making" for employment decisions, in each case, within the meaning of the final rule.

New York City employers using covered AEDTs will need to take steps to comply with the AEDT law, including making plans to conduct an independent bias audit and publish the results, as well as developing compliant notices to provide to applicants and employees.

Penalties for noncompliance with the AEDT law include civil penalties of up to $500 for the first violation and each additional violation on the same day, and between $500 and $1,500 for each subsequent violation. Each day during which a tool is used in violation of the law constitutes a separate violation, and any failure to provide a required notice will be a separate violation.

Candidates and employees can file a private right of action for violations of the law, and the New York City Corporation Counsel office may also initiate enforcement actions under the law.

New York City Passes Height and Weight Anti-Discrimination Law

On May 26, 2023, New York City became the seventh U.S. city to pass a law specifically prohibiting discrimination in employment based on a worker's height or weight. The new law, a bill passed by the New York City Council and signed by New York City Mayor Eric Adams, will amend the New York City Human Rights Law effective November 22, 2023, to add height and weight as protected characteristics.

Under the new law, employers may consider height or weight in employment decisions where required by federal, state or local laws or regulations. Further, employers may consider height or weight in employment decisions when reasonably necessary for normal operations or where an employer can show that the worker's height or weight prevents them from performing the essential requisites of the job and there are no reasonable alternative actions the employer could take that would allow the worker to perform the essential requisites. The New York City Commission on Human Rights may adopt additional regulations permitting height or weight considerations for certain jobs.

The new law does not prevent employers from offering incentives that support weight management as part of a voluntary wellness program.

Illinois Guarantees 40 Hours of Paid Leave to Employees

Existing Illinois law does not guarantee employees any paid time off, for any reason. This will soon change. On March 13, 2023, Illinois Gov. J.B. Pritzker signed the Paid Leave for All Workers Act (PLAWA) into law, guaranteeing employees in Illinois up to 40 hours of paid leave every 12-months. The PLAWA will permit employees to use paid leave for any purpose, as long as the leave is taken in accordance with the provisions of the PLAWA and the employer's policies, which must be consistent with the legislation.

Under the PLAWA, employees accrue paid leave at the rate of one hour for every 40 hours worked, up to a minimum of 40 hours (or greater amount, if an employer chooses to provide more than 40 hours of paid leave). Alternatively, 40 hours of paid leave can be front-loaded and provided by an employer on the first day of (i) employment or (ii) any 12-month period.

If paid leave is front-loaded, employers are not required to allow carryover of unused paid leave from one 12-month period to the next. Instead, an employer may require use of all paid leave prior to the end of the period for which it was granted. Employers are permitted under the PLAWA to:

- Set a reasonable minimum increment for the use of paid leave not to exceed two hours per day.
- Require an employee to provide seven days' notice before paid leave is to begin if the use of paid leave is foreseeable.

For purposes of the PLAWA, the term "employee" **excludes**:

- Employees as defined in the federal Railroad Unemployment Insurance Act or the Railway Labor Act.
- Certain students who are employed by colleges or universities on a temporary basis at less than full time.
- Short-term employees who are employed at institutions of higher education for less than two consecutive calendar quarters during a calendar year and who do not have a reasonable expectation that they will be rehired by the same employer of the same service in a subsequent calendar year.
- Independent contractors.

The PLAWA becomes effective on January 1, 2024.

International Spotlight

France

Repayment of 'Welcome Bonus' Permitted in Case of Employee Resignation

On May 11, 2023, the French Supreme Court (*Cour de cassation*) upheld the validity of a contractual provision requiring an employee to partially repay a "welcome bonus" if the employee resigned from employment within a certain period of time. The provision, which was included in the employee's employment

agreement, provided that the employee would be entitled to a bonus of €150,000, paid within 30 days of starting work and subject to partial repayment if the employee resigned within 36 months of the start of employment.

In previous decisions, the French Supreme Court ruled that similar provisions were invalid on the basis that a repayment obligation breaches the principle of freedom of work, which is constitutionally guaranteed under French law. In fact, the Court of Appeal of Paris held precisely that in deciding this case, finding that the repayment obligation resulted in "setting a price" for the resignation, which constituted an infringement of the employee's freedom of work.

The French Supreme Court found, however, that the provision, the objective of which was to encourage a long-term relationship between employer and employee, did not constitute an unjustified and disproportionate infringement to the principle of freedom of work, given that:

- The repayment obligation was not for the full amount of the bonus, but prorated based on the amount of time left until the expiry of the 36 months.
- The bonus was separate and apart from the employee's salary.

Unjustified Absence From Work Is a Resignation Under New Legislation

Following the passage of a December 21, 2022, law (*Loi n° 2022-1598 du 21 décembre 2022 portant mesures d'urgence relatives au fonctionnement du marché du travail en vue du plein emploi*), and its April 17, 2023, decree (*Décret n° 2023-275 du 17 avril 2023 sur la mise en œuvre de la présomption de démission en cas d'abandon de poste volontaire du salarié*), French legislation has been amended to provide that an employee's unjustified absence from work will now be presumed to be a resignation from employment.

Previously, an employee who failed to report to work without justification was typically dismissed by their employer on the basis of misconduct and was eligible for state-sponsored unemployment benefits. Employees who intended to resign, but did not want to be deprived of unemployment benefits (such benefits not being available in the case of resignation), would often simply fail to report for work. According to a recent study published by the French labor ministry, dismissals due to job abandonment represented 71% of dismissals for "serious misconduct" in the first half of 2022.

To end this practice, articles L. 1237-1-1 and R. 1237-13 of the French Labor Code now provide that any employee who fails to report for work without justification and does not return to work within 15 days of receipt of a formal notice from the employer to resume work or provide a legitimate justification for his or her absence is deemed to have resigned from their employment.

Germany

Implementation of Whistleblower Protection Act

The German legislature has passed the German Whistleblower Protection Act (WPA), implementing European Union (EU) Directive 2019/1937. The law is expected to take effect on July 2, 2023.

Highlights of the new legislation are as follows:

- Under the WPA, companies with 250 or more employees, public sector companies and cities with more than 10,000 residents must implement secure whistleblower systems immediately. Companies with 50 to 249 employees have until December 17, 2023, to ensure their compliance with the new law.
- The WPA's scope extends to reporting of violations of EU law, national law, criminal offences, administrative offences that endanger an individual's life or health, as well as violations of money laundering, terrorism financing, product safety and environmental regulations, among others.
- A whistleblower may submit a report, either orally or in writing using the secure system or in person to a reporting office. The whistleblower must disclose his or her identity to the reporting office (making anonymized reporting an impossibility). However, the reporting office must comply with the EU's general data protection regulation and must not disclose the identity of a whistleblower, except where he or she intentionally or through gross negligence reports inaccurate information. A whistleblower who willfully, or with gross negligence, submits an inaccurate report will be required to compensate any injured parties for damages caused by the inaccurate report.
- Once a report is made, the reporting office must, within three months, inform the whistleblower what action has been taken as a result of his or her report, which may include initiating internal investigations, forwarding the report to the relevant authority or closing the case due to lack of evidence.
- The WPA protects whistleblowers against reprisal by their employer for making a report, provided the whistleblower had reasonable grounds to believe at the time the report was made that the information they reported was correct. In the event of an unlawful reprisal by an employer, the whistleblower will be entitled to compensation for damages caused by the employer's unlawful conduct.

United Kingdom

UK Government Announces Proposed Changes to the Employment Law Landscape

On May 10, 2023, the U.K. government's Department for Business and Trade published a policy paper titled "Smarter Regulation To Grow the Economy" as part of the government's efforts to rethink how it regulates businesses post-Brexit. In the paper, the government proposes three key changes to U.K. employment law:

1. **Limiting the enforceability of noncompete clauses in employment agreements**. The government intends to introduce new legislation to limit the permissible length of noncompete clauses in employment agreements to three months. Currently under English law there is no statutory limit on the duration of post-termination noncompetes, provided that they are tailored to the individual and go no further than reasonably necessary to protect a legitimate business interest. The government has confirmed that limiting noncompetes will not interfere with the law on confidentiality provisions, nor employers' ability to use paid notice periods, garden leave clauses or non-solicit clauses.
2. **Simplifying the consultation requirements that apply when a business transfers to a new owner**. The government proposes an amendment to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to enable businesses to consult directly with their employees if there are no employee representatives in place when the business has fewer than 50 employees or the transfer affects fewer than 10 employees.
3. **Reducing reporting burdens in relation to the Working Time Regulations**. The government intends to remove the EU law requirement that businesses keep records of working hours for employees who have opted out of the 48 hour week and to allow for rolled-up holiday pay, permitting employers to add holiday pay to an employee's normal pay (effectively paying holiday pay in advance), which will help in administering holiday pay for employees on short-term contracts.

It remains to be seen when and how the U.K. government intends to implement these proposals.

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