Employment Practices Newsletter - August 2013

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Dodd-Frank "Whistleblower" Protection Requires Report to SEC

An employee working in Iraq discovered what he believed to be violations of the Foreign Corrupt Practices Act by his co-workers. He reported his suspicions to his superiors, and was fired shortly thereafter. The employee sued the employer, alleging that his termination violated the whistleblower-protection provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). The employer moved to dismiss, arguing that the employee did not fall within Dodd-Frank's definition of "whistleblower." The employer's theory was that Dodd-Frank only protects employees who have made a report to the Securities and Exchange Commission (SEC) and that because this employee had only made an internal report to his superiors, he was not protected. The district court agreed with the employer and dismissed the suit. A panel of judges from the U.S. Court of Appeals for the Fifth Circuit affirmed. Acknowledging that some federal district courts and even the SEC's own regulations have found that Dodd-Frank's definition of "whistleblower" is ambiguous and does not necessarily require a report to the SEC, the panel rejected those interpretations based upon its reading of the statute's plain language. "[T]he whistleblower protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws *to the SEC* to qualify for protection," the panel held, and "[b]ecause [this employee] failed to do so, his whistleblower-protection claim fails." This case is an important development for SEC-regulated employers. If the Fifth Circuit's decision is followed by other federal courts, it will significantly limit the protection available to whistleblowers under Dodd-Frank by effectively barring claims by any employee who has not made an SEC report.

Asadi v. G.E. Energy (USA) LLC, No. 12-20522 (5th Cir. July 17, 2013)

Court Affirms Civil Rights Judgment in Favor of White Men Who Complained About Discrimination Against an African-American Co-Worker

Two white male maintenance workers at a farmer-owned rice cooperative filed internal grievances against a supervisor who described an African-American co-worker using a racial slur. Two investigations were conducted. The first, by the warehouse director, concluded that the accusations were without merit solely because a third employee could not recall what the supervisor had said. At the time, the warehouse director stated to the warehouse superintendent that he was angry at one of the two men who filed the grievance because he would not drop the grievance. The second, by the director of human resources, found reason to doubt the supervisor's denials and recommended the supervisor undergo diversity training. The maintenance workers were fired shortly thereafter in a restructuring plan that eliminated their jobs and they filed claims for retaliation under the Civil Rights Act of 1866; Title VII of the Civil Rights Act of 1964, as amended; and the Arkansas Civil Rights Act. A jury found for the maintenance workers and awarded them compensatory damages. The jury did not consider punitive damages because the district court refused to provide a necessary instruction. On appeal, the employer contended that that there was insufficient evidence of a causal connection between the grievances and the terminations because although the warehouse director proposed the restructuring plan and had expressed anger that one worker refused to drop his grievance, the plan was also independently approved as a good business decision by a division manager, the human resources director, a vice-president, and the chief executive officer. The U.S. Court of Appeals for the Eighth Circuit affirmed under the "cat's paw" theory, which makes an employer vicariously liable for adverse employment actions if one of its agents, other than the ultimate decision maker, is motivated by animus and intentionally and proximately causes the action. The court found it significant that the warehouse director had conducted an insufficient first investigation and expressed anger at one of the two men, and that the warehouse superintendent testified that elimination of the positions would not have happened but for the grievances. The court rejected the employees' punitive damages appeal because the human resources director had made a good faith effort to investigate, thus precluding punitive damages even under the cat's paw theory. This case demonstrates the importance of adequate follow-up procedures. Even if an employer makes a genuine good faith investigation into discrimination claims, there still may be risk if someone other than the ultimate decision maker is motivated by animus and intentionally causes an adverse employment action against the complaining employee.

Bennett v. Riceland Foods, Inc., Nos. 12-1748, 12-1833 (8th Cir. July 19, 2013)

Employees' Claims Fail Due to Insufficient Pleading

Multiple health care employees alleged that their employers (health care systems, hospitals, etc.) violated the Fair Labor Standards Act (FLSA), New York Labor Law (NYLL), and the Racketeer Influenced and Corrupt Organizations Act (RICO) by failing to compensate them for work performed during meal breaks, before and after scheduled shifts, and during required training sessions. The employees asserted multiple common law claims and also claimed that they were not paid for "gap time" (situations where an employer does not pay an employee for time worked, but such nonpayment does not violate federal overtime laws). The district court dismissed the complaints in their entirety for failing to state a claim. The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of the FLSA gap-time, RICO and certain common law claims. The court found that the employees had failed to provide adequate details that they worked more than 40 hours in a workweek, which is required under the FLSA. Additionally, the employees failed to state when the unpaid wages were earned and the number of hours worked without compensation, specific dates of employment, and pay and positions. They also failed to identify the entity that directly employed the employees. Without this information, the court could not determine whether there was a violation of the FLSA. The mere allegation that the employees were not paid for overtime work was insufficient. The court did opine, however, that because the FLSA does not address "gap time" violations, the employees might have a claim for such time worked under New York state law. The court added that although the employees failed to properly allege the claim, the district court erred in failing to allow them an opportunity to amend their complaint to include this violation. Employers must take caution to ensure that employees are accurately and timely paid for both regular and overtime hours pursuant to state and federal law.

Nakahata v. New York-Presbyterian Healthcare Sys. Inc., No. 11-0734 (2nd Cir. July 11, 2013)

Airport Skycaps' Common-Law Claims Over Baggage Fees Are Preempted

Airport skycaps (described as "porters who provide curbside service" at airports) brought two putative class actions against two airline carriers. The airlines had introduced a $2-per-bag-fee for curbside service for departing passengers at airports, which baggage-handling fees did not inure to the skycaps' benefit. The skycaps claimed that their compensation "decreased dramatically" after the fees were established because some passengers thought the $2 charge was a mandatory gratuity and others declined voluntarily to tip in addition to paying the $2 charge. Skycaps faulted the airlines for not adequately notifying passengers that the charge was not a gratuity. The skycaps sued for unjust enrichment and tortious interference. The district court dismissed the claims as preempted by the Airline Deregulation Act (Act). The consolidated appeals posed an issue of first impression: could the skycaps maintain common law actions for unjust enrichment and tortious interference based on the airlines' imposition and retention of baggage-handling fees for curbside service? The U.S. Court of Appeals for the First Circuit affirmed, holding that the Act preempted the skycaps' common-law claims. Although "[p]reemption is strong medicine, not casually to be dispensed," courts are responsive to federal preemption of state law, either expressly or by implication, after an analysis of statutory language, congressional intent and case law. Despite efforts to properly compensate employees in compliance with the law, external factors may nevertheless affect employees' rights. Employers must be mindful of such issues and be proactive to address such issues where practical so as to avoid costly, protracted litigation.

Joseph Brown, et al. v. United Airlines, Inc., Nos. 12-1542, 12-2056 (1st Cir. July 9, 2013)

Court Finds Individual Liable for Employees' Pay as "Employer" Under FLSA

A class of employees of a supermarket chain sued both their corporate employer and the owner of the corporation personally for failure to pay proper overtime compensation under the Fair Labor Standards Act (FLSA). When the corporation defaulted in paying a settlement amount to the employees, the employees sought summary judgment against the owner under a theory of personal liability under the FLSA. The district court found that the owner was personally liable as an "employer" under the FLSA because he had operational control over the business. The U.S. Court of Appeals for the Second Circuit affirmed, applying a four-factor test to determine whether an individual may be considered an employer under the FLSA. The court looked to whether the individual: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. Here, however, the court found personal liability where only two of these factors were present. The court further found that to be an "employer" under the FLSA an individual must possess control over a company's actual "operations" in a manner that relates to an employee's employment as opposed to simply making corporate decisions that have nothing to do with an employee's function. However, even occasional involvement by an owner may give rise to the operational control necessary to directly affect the nature or conditions of the employees' employment. In light of this decision, individuals with ownership and management interests in a corporation should carefully evaluate the extent of their operational control in the organization and consult legal counsel to avoid any personal liability under the FLSA.

Irizarry v. Catsimatidis, No. 11-4035-cv (2d Cir. July 9, 2013)

Seventh Circuit Permits Monetary Form of Relief for Breach of Fiduciary Claim Brought Under Section 502(a)(3) of ERISA Based on Misleading Plan Terms

An employee covered under her employer's group health plan followed the advice in the group health plan's benefits summary and called the plan's customer service hotline as specified to confirm whether a particular type of surgery would be covered. The customer service hotline confirmed that the procedure was covered. After the employee had the surgery, her claim for coverage was denied because the group health plan did not cover that type of surgery. The employee sued the group health plan under section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) for breach of fiduciary duty, seeking damages to cover the cost of her surgery. The district court granted summary judgment for the group health plan, concluding that it could not award the relief sought even if a breach of fiduciary duty was proven because the relief sought was essentially compensatory damages, which were not available as equitable relief under Section 502(a)(3). The U.S. Supreme Court subsequently issued its decision in *Cigna v. Amara*. On appeal, the U.S. Court of Appeals for the Seventh Circuit held that based on *Amara*, "make-whole money damages" may be sought as an equitable remedy under Section 502(a)(3) where the employee demonstrates that the group health plan breached its fiduciary duty to him or her and the breach caused the employee's damages. The court also held that the employee could bring a breach of fiduciary claim under Section 502(a)(3) against a plan fiduciary because the plan summary was ambiguous in that it: (1) failed to identify a means by which a participant could obtain an authoritative determination of coverage; (2) invited participants to call customer service without informing them they could not rely on any advice they received; and (3) was unclear whether there was coverage for the procedure the employee underwent. The court reiterated that a plan fiduciary has an affirmative obligation to provide accurate and complete information when a plan participant or beneficiary inquires about his or her insurance coverage. Employers should ensure their plan documents and summary plan descriptions and all other documents describing group medical benefits are accurate and consistent and clearly indicate which parties are authorized to provide information regarding coverage.

Kenseth v. Dean Health Plan, No. 11-1560 (7th Cir. June 13, 2013)

Isolated Incidents of Racial Slurs Were Not Severe and Pervasive

An African American former parks and recreation department maintenance worker alleged that he was subjected to a racially hostile work environment, denied promotions based on his race, and subjected to retaliatory action. He sued his former employer, alleging: (1) constitutional violations under 42 U.S.C. §§ 1981 and 1983; (2) violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*.; and (3) violation of the Tennessee Human Rights Act (THRA), Tenn. Code Ann. § 4-21-101 *et seq*. The employer was granted a partial judgment on the pleadings as to the Section 1983 and THRA claims on statute of limitations grounds, and successfully sought summary judgment on the remaining claims. The U.S. Court of Appeals for the Sixth Circuit affirmed, holding that most of the incidents relied upon by the employee only involved coarse language used by employees, and did not evidence racial animus. Furthermore, the court found that the fact that there were four instances of racial slurs over the course of two years might have been inappropriate and offensive, but were not sufficiently severe and pervasive so as to alter the terms and conditions of the employee's employment. Finally, the court found that the employee could not maintain his failure to promote claims because the evidence did not support the claim that he was not promoted due to race or retaliation; instead, the evidence showed that the employee was not qualified for the position. Although the court here found that the comments were not actionable in this context, employers should nevertheless ensure that policies clearly identify such inappropriate conduct and that such policies are enforced.

Nicholson v. City of Clarksville (No. 12-6318) (6th Cir. July 17, 2013)

School Bus Driver Exempt From FLSA Overtime Provision

A school bus driver sued his employer under the Fair Labor Standards Act (FLSA), alleging that the employer failed to properly compensate him for overtime. As a general rule, the FLSA requires covered employers to pay employees 1.5 times their hourly wages for all hours worked in excess of 40 during a work week. However, several exemptions — including one for interstate motor carriers — apply to this provision. Specifically, the Motor Carrier Act vests the U.S. Secretary of Transportation with sole authority to set maximum hours for interstate motor carriers. Here, the driver's regular route required that he transport children from schools in Illinois to their homes in Indiana. In upholding summary judgment for the employer, the U.S. Court of Appeals for the Seventh Circuit held that the only relevant issue was whether the power to control hours fell under the Department of Transportation or the U.S. Department of Labor. In this case, due to the interstate nature of the driver's route, that authority fell to the Department of Transportation and the driver could not seek overtime under the FLSA. Employers should carefully evaluate their payment structures in relation to the FLSA's exemptions to ensure that a proper compensation structure is in place.

Almy v. Kickert School Bus Line, Inc., No, 13-1273, (7th Cir. July 16, 2013)

Illinois Looks to Increase Enforcement Efforts for Employee Misclassification

On July 23, 2013, Illinois Governor Pat Quinn signed House Bill 2649 and House Bill 923, both of which seek to curb misclassification of employees as "independent contractors" in the construction industry. The two bills serve to amend Illinois Employee Classification Act by imposing penalties upon employers who classify workers as independent contractors to avoid certain employer-related responsibilities, such as workers' compensation insurance, employment taxes, unemployment insurance and overtime pay. Under the new law, employers will also have new notification duties that require companies to report to the state's labor department any payments made to independent contractors for construction work. One of the biggest changes will be that corporate officers who knowingly violate the law may face personal liability. These new provisions are anticipated to go into effect January 1, 2014. Employers should review their classification practices to ensure compliance with state and federal law concerning the utilization of independent contractors.