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Newsletters

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Court Finds Companies to Be Single Employer for Purposes of Arbitrability Under Union Contract

A tile installation company employed union workers. Certain customers of the company requested nonunion employees in order to obtain cheaper labor. As a result, the company's owners started a second company, which employed only nonunion employees. The union filed a grievance, seeking union benefits for the employees at this new company. The joint arbitration committee granted the union's request, which prompted the companies to move to vacate the award. The union also moved for summary judgment, seeking to enforce the award. The owners argued that the new company was not subject to the collective bargaining agreement and thus should not be bound by the arbitration award. The district court granted the union's motion to enforce the award on the grounds that under the "single employer" doctrine, the companies were treated as one and the same. The U.S. Court of Appeals for the Seventh Circuit affirmed, concluding that the two companies were centrally operated by the same entity and were thus one and the same for purposes of arbitrability under the contract. This case demonstrates the complexity of collective bargaining, arbitration agreements, and company formation. Due to the consequences that can and do arise when the three are combined, employers should carefully review written agreements before making any big changes so as to ensure continued compliance with federal and state law.

Attorneys

David Ian Dalby

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Service Areas

Employee Benefits

Labor & Employment

Lippert Tile Co., Inc. v. International Union of Bricklayers and Allied Craftsmen, et al., No. 12-2658 (7th Cir. Aug. 1, 2013)

For more information, please contact your regular Hinshaw attorney.

Employee Terminated for Attending Father's Funeral Allowed to Proceed With Religious Accommodation Claim

A material handler/packer requested several weeks of unpaid leave to attend his father's funeral in Nigeria and to lead the performance of the burial rites. The employee said that his attendance at the funeral rites was "compulsory" and that if he did not show up to perform the rites, he and his family would sustain a spiritual death. The employer denied the request and terminated the employee upon return from his unexcused leave of absence. The employee sued, claiming that his employer had failed to accommodate his religious beliefs. The employer successfully sought summary judgment on the grounds that the employee's two letter requests failed to provide any notice of the religious character inherent in his requests for unpaid leave. The U.S. Court of Appeals for the Seventh Circuit found that the same letters and record adequately created disputed issues of material fact over whether the employer had notice of the religious matter associated with the request for leave. For instance, the court noted that the employee not only stated that he would be attending his father's funeral, but also stated that the leave was to "participate in the funeral rite according to our custom and tradition [,]" and his need "to be there and involved totally in this burial ceremony[.]" This created a triable issue of fact. Further, in terms of undue hardship, the court found that there was high turnover in this particular job, and that temporary staff were regularly used to perform the job; thus, there were easily other employees who could have performed the work in the employee's absence, and the undue hardship defense was not established. This case reminds employers to consider requests from employees for unpaid leave based on stated reasons that relate to religious beliefs that fall anywhere along the broad spectrum of worldwide religious beliefs, customs, practices and systems.

Adeyeye v. Heartland Sweeteners, LLC, No. 12-3820 (7th Cir. July 31, 2013)

Contact for more information: Ambrose V. McCall

Retaliatory Discharge Claim Not Preempted by the Labor Management Relations Act

A manufacturing employee's finger was partially amputated while using a "kicking method" of removing metal from bundles. He sought medical and temporary total disability benefits under the Illinois Workers' Compensation Act. The employer considered the "kicking method" to be an unsafe work practice and when the employee returned to work, it suspended him for three days. The employee's union filed a grievance on his behalf. Upon his return from suspension, the employee received additional safety training. Shortly thereafter he was again accused of violating a safety rule, which prompted the employer to inform the union that the employee would be terminated. The union advised the employee to ask that his discharge be characterized as a "permanent layoff with no recall rights" so that he would be eligible for unemployment insurance and a neutral job reference. The employer agreed, as long as the employee dismissed the earlier filed grievance. The employee later sued in Illinois state court, claiming that the settlement was a sham and that he was fired for filing a workers' compensation claim. The employer removed the retaliatory discharge suit to federal court under the theory that the employee's lawsuit was really a claim under the parties' collective bargaining agreement that was preempted by Section 301 of the Labor Management Relations Act. The U.S. Court of Appeals for the Seventh Circuit held that the resolution of the retaliatory discharge claim rested on a factual dispute that did not require the interpretation of the collective bargaining agreement and remanded the case back to state court for lack of federal subject matter jurisdiction. Employers should be mindful that the circumstances surrounding an employee's separation, and not necessarily how the employer characterizes the departure, will be considered in determining whether the employee was in fact discharged.

Crosby v. Cooper B-Line, Inc., No. 13-1054 (7th Cir. Aug. 7, 2013)

For more information, please contact your regular Hinshaw attorney.

State Employee's Retaliation Claim Barred by Eleventh Amendment

An employee for a state administrative agency sued the agency and various state employees, alleging retaliation in response to a prior disability discrimination lawsuit he filed against the same employer. Among other defenses, the employer asserted that as a state agency it was immune from suit under the Eleventh Amendment to the U.S. Constitution

and similarly, under the doctrine of sovereign immunity. The district court did not specifically rule on the issue, but granted summary judgment for the employer on other grounds. The U.S. Court of Appeals for the Eighth Circuit held that the Eleventh Amendment bars retaliation claims for money damages under Title V of the Americans with Disabilities Act (ADA). Absent a pattern of discrimination by states against employees who oppose unlawful employment discrimination against the disabled, Congress could not abrogate the states' Eleventh Amendment immunity from Title V claims. Consequently, the employee's claims were dismissed. This case is significant for government employers in that it recognizes additional protections against employees' ADA claims for retaliation.

Lors v. Dean, No. 12-2955 (8th Cir. Aug. 8, 2013)

Contact for more information: Eileen M. Caver

Second Circuit Holds FLSA Claims Subject to Class Action Waiver in Arbitration

An employee entered into an arbitration agreement with her employer when she was hired. The arbitration agreement required the employee to arbitrate any claims arising out of the Fair Labor Standards Act (FLSA) as opposed to suing in court and that she individually arbitrate FLSA claims instead of arbitrating as part of a class of employees. The employee subsequently sued the employer in federal court on behalf of herself and a class of other similarly situated employees, alleging that she was denied overtime pay in violation of the Fair Labor Standards Act. The employer sought to compel arbitration and to dismiss the employee's claim due to the class-action waiver provision in the arbitration agreement. The employee asserted that the provision was unenforceable based on the "effective vindication" doctrine, which allows a court to invalidate agreements "that prevent the 'effective vindication' of a federal statutory right." Specifically, the employee asserted that the costs and fees associated with arbitrating her claim individually, rather than collectively, would dwarf her potential damages under the FLSA. The district court denied the employer's motion, finding that the agreement was unenforceable. The U.S. Court of Appeals for the Second Circuit rejected the employee's argument based on recent U.S. Supreme Court rulings holding that plaintiffs could not invalidate a waiver of class arbitration by relying on a similar "effective vindication" argument. The U.S. Supreme Court had also held that a class action waiver will not be invalidated based on the fact that plaintiffs have no economic incentive to pursue their claims individually because "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." The Second Circuit, relying on the U.S. Supreme Court's decision, held that the individual arbitration provision in the arbitration agreement between the employer and employee was not invalid. Class waivers in arbitration agreements have been at the forefront of litigation across the country. Employers should review their arbitration agreements for such waivers, and consult with counsel to determine compliance with state and federal laws.

Sutherland v. Ernst & Young LLP, Case No. 12-304 (2nd Cir. Aug. 9, 2013)

For more information, please contact your regular Hinshaw attorney.

Court Allows Parties to Arbitrate, Despite Years of Previous Litigation

The employee sued her employer, alleging violations of California's overtime laws and seeking to assert claims on behalf of a class. After several years of litigation, the employee moved to certify a class. The district court granted the motion in part, narrowing the class that the employee represented. In the same order, the court denied the employer's motion to compel arbitration based upon existing case law, on the grounds that the employer waived its right to arbitrate by litigating for years without raising the arbitration agreement. The U.S. Court of Appeals for the Ninth Circuit reversed, observing that waiver of a contractual right to arbitration is not favored and any party arguing waiver of arbitration bears a heavy burden of proof. The employee argued that she was prejudiced because there was litigation on the merits and as a result, some of her claims were dismissed. The court rejected this argument because the employee's claims for failure to provide meal and rest breaks were dismissed without prejudice, and her claim for injunctive relief was dismissed due to lack of standing because she was not a current employee and could not benefit from prospective relief. Neither dismissal constituted a decision on the merits. The court also rejected the employee's argument that she was prejudiced because her employer conducted discovery that caused her to incur expenses during years of litigation prior to the motion to compel. This decision demonstrates the strong federal policy of enforcing arbitration agreements, even in the employment context. This policy is another factor weighing favor of removing employment cases to the federal from state courts where possible.

Richards v. Ernst & Young, LLP, No. 11-17530 (9th Cir. Aug. 21, 2013)

Contact for more information: David I. Dalby

Volunteer Firefighters Considered to Be "Employees" for Determining Employer's Eligibility Under FMLA

A fire department dispatcher sued his employer under the Family Medical Leave Act (FMLA) for allegedly violating his right to protected leave. The employer moved for summary judgment, arguing that the employee was not eligible for leave under the FMLA because the employer did not employ at least 50 employees. At that time, the employer employed 41 employees, excluding 25-30 "volunteer" firefighters, who were not required to respond to any emergency calls, but who were paid $15 per hour for the time they did spend responding to a call or maintaining equipment. The volunteers were not considered employees by the department, and thus did not receive health insurance, sick or vacation time, or social security benefits. But, the volunteers did have the ability to be promoted or discharged. The district court granted the fire department's motion. The U.S. Court of Appeals for the Sixth Circuit reversed, concluding that the volunteer firefighters were, in fact, "employees" within the meaning of the Fair Labor Standards Act (FLSA). The court held that the substantial wages paid to the firefighters constituted compensation, not nominal fees, which weighed in favor of finding that they were employees, not volunteers. The court acknowledged that the employer did not dictate the firefighters' schedules, but concluded that that was insufficient to overcome the fact that the firefighters were paid substantial wages for performing work as permitted by the employer. Employers should carefully review their relationship with any "volunteers" to ensure that they do not qualify as employees under the FLSA or applicable state law.

M*endel v. City of Gibraltar,* No. 12-1231, (6th Cir. Aug. 15, 2013)

For more information, please contact your regular Hinshaw attorney.

NLRB Has Wide Discretion to Delineate Parameters of Bargaining Unit

A nursing home operator employed numerous types of employees, from licensed nurses and certified nursing assistants (CNA), to various service and maintenance employees. A union sought to represent a unit of 53 full-time and part-time CNAs, but the operator argued that the unit should be expanded to include an additional 86 nonsupervisory, nonprofessional service and maintenance employees, including cooks, records clerks, and staffing coordinators, among others. The operator argued that all of these employees had similar educational requirements, and had to complete the same employment application, undergo the same hiring process, and participate in the same employee orientation. The regional director issued a decision and direction of election, finding that the petitioned-for unit of full-time and part-time CNAs at the nursing home was an appropriate unit. An election was held, and the union won. The operator ultimately refused to bargain and the union filed an unfair labor practice charge. The National Labor Relations Board (NLRB) found that the operator violated the National Labor Relations Act in refusing to bargain. On appeal, the issue was whether the NLRB acted within its discretion in rendering its ruling. The U.S. Court of Appeals for the Sixth Circuit disagreed with the employer, finding that the NLRB had "wide discretion" under the Act to delineate the bargaining unit, and, under these circumstances, the application of the traditional community interest test to the unit of CNAs was appropriate. Given the NLRB's ultimate discretion to determine which employees can and should be included, employers should proceed with caution and in consultation with legal counsel in their bargaining activities.

Kindred Nursing Centers East LLC v. National Labor Relations Board, No. 12-1027 (6th Cir. Aug. 15, 2013)

For more information, please contact your regular Hinshaw attorney.

PAGA Penalties Cannot Be Aggregated for Diversity Jurisdiction Purposes

An employee worked for a pest control services company from 2005 to 2010. After leaving the company, he filed a representative action under California's Private Attorneys General Act (PAGA), alleging that he and other nonexempt employees had been deprived of meal periods, overtime, vacation wages, and itemized wage statements. The employer removed the matter to federal court on the basis of diversity jurisdiction, based on the claim that the aggregate dollar amount of all the employees' penalty claims would exceed the $75,000 diversity threshold. The district court acknowledged a divergence of opinion among the courts, but allowed the aggregation of the claims, and thus allowed the case to remain in federal court. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the PAGA claims

were individually held claims, not group claims, and therefore could not be aggregated to exceed the $75,000 threshold. The U.S. Supreme Court had previously held that claims of class members can be aggregated to meet the jurisdictional amount requirement only when they "unite to enforce a single title or right in which they have a common and undivided interest." Here, the appellate court held that all the rights held by the employees were held individually, as an employee suffers a unique injury that can be redressed without the involvement of other employees. Therefore, PAGA penalties cannot be aggregated for diversity jurisdiction purposes. PAGA penalties can provide for significant exposure for California employers. As demonstrated by this case, however, the one benefit that could potentially be gleaned from such high exposure has been removed.

Urbino v. Orkin Services, Inc., No. 11-56944 (9th Cir. Aug. 13, 2013)

For more information, please contact your regular Hinshaw attorney.

Settlement of Age Discrimination Dispute Subject to FICA Tax Withholding

An employee who was terminated made claims with the Equal Employment Opportunity Commission (EEOC) against his financial services employer, alleging age discrimination in violation of the Age Discrimination in Employment Act and New York state law. The dispute was ultimately resolved by the parties for $250,000. When making the payment, the employer withheld taxes pursuant to the Federal Insurance Contribution Act (FICA). The employee claimed that this was improper and sought a refund of the $4,218 withholding. The district court held that the money paid to the employee constituted "wages," and was thus properly subject to the FICA taxes, and dismissed the employee's complaint. The U.S. Court of Appeals for the Second Circuit affirmed. Because the funds were payments received with respect to employment under 26 U.S.C. § 3121, the court concluded they were subject to the tax. Employers that resolve disputes with employees must take caution to comply with state and federal law regarding tax liabilities with respect to those payments, especially when they may be deemed to be "wages" under the applicable law.

Gerstenbluth v. Credit Suisse Sec. (USA) LLC, No. 12-4125-cv (2d Cir. Aug. 27, 2013)