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Newsletters

Employment Practices Newsletter - April 2014

April 1, 2014

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U.S. Supreme Court Finds Severance Payments "Taxable Wages"

Finally resolving a case that we discussed previously in this publication, both at the District Court level (2010) and at the Appellate Court level (2012), the Supreme Court of the United States has ruled that severance payments will be considered taxable wages for both income tax and FICA tax purposes. The employer was experiencing financial difficulties in 2001 and began a series of layoffs before entering bankruptcy. As part of the final compensation package to employees affected by the layoffs, the employer provided severance benefits that were not based on state unemployment benefits. The Bankruptcy Court, the District Court and the U.S. Court of Appeals for the Sixth Circuit had all previously held that these severance benefit payments should not be treated as wages for payroll tax purposes. The rationale behind those rulings was that for withholding purposes, section 3402(o) of the Internal Revenue Code provided that a supplemental unemployment benefit payment should be treated "as if it were a payment of wages" paid to the employee. The lower courts thus inferred that such payments should not actually be treated as wages. Writing for a unanimous Court (with Justice Kagan recused), Justice Kennedy held that the severance payments were considered remuneration for employment and thus must be taxed as wages for all purposes, including FICA tax purposes. The Supreme Court rejected the Sixth Circuit's inference under section 3402(o),

finding that the language of that section did not actually state that supplemental unemployment benefit payments were not wages. Rather, the Court focused on the plain language of the Code with respect to the definition of wages for FICA purposes and found that there was no exception from that definition for the type of payments at issue in this case. This decision resolves a circuit split that had arisen as a result of the Sixth Circuit's earlier ruling. An employer who makes severance payments in virtually any context should treat such payments as taxable wages for income and FICA purposes, unless the employer can identify a specific statutory exception to that treatment.

United States v. Quality Stores, No. 12-1408 (U.S. Sup. Ct. March 25, 2014)

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Sarbanes-Oxley Protects Employees of Private Companies that Contract with Public Companies

Two employees of a private company that contracted to manage mutual funds were terminated after they blew the whistle on alleged fraud relating to one of the managed funds. The mutual fund about which they complained was a public company that had no employees of its own. The employees therefore filed suit under the Sarbanes-Oxley Act of 2002, alleging that their employer had violated that Act's whistleblower protections when it terminated them. Sarbanes-Oxley provides that "no public company . . . or any . . . contractor or subcontractor . . . of such company, may . . . discriminate against an employee . . . because of whistleblowing activity." The employer moved to dismiss their suit, arguing that this provision of the Act does not apply to employees of a public company's private contractors and subcontractors. The U.S. Supreme Court agreed with the employees, holding that the whistleblower protections created by the Act extend to employees of private companies that contract with public companies. The Court specifically found that this interpretation of the Act was supported by the plain text ("no . . . contractor . . . may discharge . . . an employee"), that its interpretation comported with the policy goals of the Act (warding off another "Enron debacle" by extending protection to all potential whistleblowers, including outside professionals), and that the alternative interpretation offered by the employer would effectively "insulate the entire mutual fund industry" from the Act because nearly all funds have no employees of their own. Private employers under the impression that Sarbanes-Oxley does not apply to them should take note: a private employer's adverse action against an employee due to whistleblowing regarding a public company with whom the private employer contracts will create liability under Sarbanes-Oxley.

Lawson v. FMR LLC, et al., No. 12-3 (U.S. Sup. Ct. March 4, 2014)

Contact for more information: your regular Hinshaw attorney.

Fifth Circuit Affirms NLRB Decision Against Employee Confidentiality Policy

A Texas-based non-union trucking company adopted a confidentiality clause providing that employees could not share or copy information including "financial information" and "personnel information and documents." The policy also stated that, "Disclosure of Confidential Information could lead to termination." An employee challenged the policy as a violation of the National Labor Relations Act (NLRA), and in a split decision the NLRB held that, although there was no reference to wages or other specific terms and conditions of employment in the confidentiality clause, the clause nonetheless violated Section 8(a)(1) of the NLRA because it was overly broad and contained language employees could reasonably interpret as restricting the exercise of their Section 7 rights, such as prohibiting the discussion of their salaries and wages with coworkers or non-employees. The employer appealed and the U.S. Court of Appeals for the Fifth Circuit affirmed. The court held that the confidentiality clause improperly prohibited employees from sharing financial information, which could include wages and thus reinforced the likely inference that the rule proscribes wage discussion with outsiders. Moreover, the court noted that the confidentiality clause gave no indication that some personnel information, such as wages, is not included within its scope. Finally, the court found that the fact that employees did not interpret the confidentiality provision to restrict their
Section 7 rights was not determinative because the NLRB is merely required to determine whether employees would reasonably construe the language to prohibit Section 7 activity and not whether employees have thus construed the rule. In light of this decision, employers should review their employee confidentiality policies to assure these provisions do not include possible restrictions on employees' rights under the NLRA.

Flex Frac Logistics, LLC v. NLRB, No. 12-60752 (5th Cir. March 24, 2014)

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Fifth Circuit Holds Federal Rules of Civil Procedure Do Not Revive State Time-Barred Discrimination Claims on Removal

In March 2011, a manufacturing worker sued his former employer in Texas state court, alleging race discrimination and retaliation under the Texas Labor Code. In December 2012, the employee filed an amended complaint asserting additional claims under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Based on the newly asserted federal claims, the employer removed the case to the U.S. District Court for the Northern District of Texas and moved to dismiss the amended complaint as time-barred pursuant to the state's relation back statute. The employee argued that his federal claims were, in fact, timely even though they were filed after the limitations period expired because they related back to the date of his original state court complaint. In a case of first impression, the district court granted the employer's motion to dismiss, finding that Texas relation back rules, not federal procedural rules, applied to the employee's federal claims. The employee appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court and held that the Texas relation back statute, not Federal Rule of Civil Procedure 15, governed under the circumstances. The court reasoned that state procedural rules apply while the case is pending in state court, and federal procedural rules apply only after a claim is removed to federal court. Once a case is removed, the Federal Rules of Civil Procedure do not revive claims that, according to state law, are time-barred. Employers facing claims from employees should, upon receipt, verify that the claims are timely, taking note of the rules of the appropriate forum.

Taylor v. Bailey Tool & Mfg. Co., No. 13-10715 (5th Cir. March 10, 2014)

Contact for more information: your regular Hinshaw attorney.

Bank Prohibited From Removing Financial Advisor's PAGA Claim to Federal Court

An employee working as a financial advisor associate at a California bank claimed he was misclassified as exempt, but should have been an hourly employee who received overtime wages. The employee filed suit in state court seeking relief under the Private Attorneys General Act of 2004 (PAGA) for his share of civil penalties based upon the employer's alleged violations of California's overtime, meal and rest breaks, and business expense reimbursement statutes. The bank removed the employee's claim to federal court based on diversity jurisdiction, asserting that all non-party similarly situated employees' claims should be aggregated to meet the $75,000 threshold under the Class Action Fairness Act of 2005 (CAFA). The employee sought to remand the case based on the federal "anti-aggregation rule" and on the grounds that his PAGA case is not a "class action" under CAFA. The district court denied the employee's remand action but subsequently the U.S. Court of Appeals for the Ninth Circuit found in the employee's favor, remanding the case to state court. The court explained that this type of lawsuit under PAGA is dissimilar to CAFA because there are no notice requirements, non-party aggrieved employees cannot opt out of the proceedings, the adequacy of the named plaintiff is not assessed, and final judgment does not preclude aggrieved employees from seeking other remedies. This ruling is significant because it appears to suggest that even where diversity principles might otherwise apply and permit removal to federal court, the favored forum of most employers, PAGA cases may ultimately have to be adjudicated in state court.

Baumann v. Chase Inv. Serv. Corp., No. 12-55644 (9th Cir. March 13, 2014)

Contact for more information: your regular Hinshaw attorney.

Employees' Unpaid Wages Claims Fail Due to Collective Bargaining Agreement

A group of current and former union employees brought suit against their employer, a chicken processor in Greenville, South Carolina, asserting claims for payment of unpaid wages under the Fair Labor Standards Act (FLSA) and related state laws, among other things. The district court granted the employer's motion for summary judgment on the FLSA unpaid wage claim based upon the terms of the collective bargaining agreement (CBA) applicable to the employees, but denied the motion on the state unpaid wages claims. A jury later found in favor of the employees on the state unpaid wages claim. The employer appealed. The U.S. Court of Appeals for the Fourth Circuit reversed the jury verdict and found that the CBA ultimately preempted state law because the parties had previously agreed upon the work schedule and work

hours in the CBA. The CBA's terms and the supremacy of federal law provides for the enforcement of the CBA, because that was the contract that set forth the wages for the employees as agreed upon by the employees and the employer. When disputes about wages arise, employers should carefully review the terms of any applicable agreements to determine that proper procedures are being followed and to ensure that the employees and employer alike comply with any grievance procedures set forth therein.

Barton v. House of Raeford Farms, Inc., No. 12-1945 (4th Cir. March 11, 2014)

Contact for more information: your regular Hinshaw attorney.

Employee With Depression Must Do More Than "Potentially Qualify" For FMLA Leave

The president of a security company suffered from depression and anxiety. He sent the CEO of his parent company a vacation schedule listing eleven weeks of vacation for the following two years. The CEO denied his request, and the president responded that his doctor had told him that his need to take vacation time was "no longer optional." The CEO fired the president, citing insubordination and poor performance. After he was fired, the president acquired a Family and Medical Leave Act (FMLA) form from his doctor who wrote that the president suffered from depression and was receiving treatment but that he could not predict when his condition would cause incapacity. The president filed suit, alleging interference with the right to unpaid leave under the FMLA and for terminating him for seeking leave. The jury found the president suffered from a serious health condition, was eligible for FMLA leave, and gave proper notice under the Act; however, it found that the president was not fired due to his requested leave. Interestingly, the jury still awarded the president $200,000 in damages. After the jury rendered its verdict, the employer filed a renewed motion for judgment as a matter of law on the grounds that the jury's verdict was inconsistent and the employee did not qualify for FMLA leave, but the judge denied the motion. The employer appealed, and the U.S. Court of Appeals for the Eleventh Circuit found that the employee had provided sufficient notice of leave, but that the employee's request did not qualify for FMLA protection. Giving an employer notice of unqualified leave does not trigger the FMLA's protection; otherwise, the FMLA would apply to every leave request. The FMLA does not extend protection to any leave that is medically beneficial simply because the employee has a chronic health condition. The leave for a chronic condition must be for a period of incapacity or treatment for such incapacity. Requests for leave for medical purposes can be tricky, and employers should consult with human resources professionals or counsel before denying such requests, as they almost inevitably result in an interference claim.

Patrick Hurley v. Kent of Naples Inc., No. 13-10298 (11th Cir. March 20, 2014)

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FLSA Collective Action Waiver Upheld Under Federal Arbitration Act

Two window repairers filed a collective action against their employer under the Fair Labor Standards Act (FLSA) for unpaid minimum and overtime wages. The employer moved to compel arbitration and to dismiss the lawsuit pursuant to an agreement the employees had previously signed. The arbitration agreement specifically precluded the filing or joining of a collective action. The employees argued that their right to file a collective action was a non-waivable, substantive right under the FLSA and that therefore the arbitration agreement was invalid. The district court agreed with the employer and dismissed the lawsuit. The U.S. Court of Appeals for the Eleventh Circuit affirmed. The court engaged in a lengthy analysis, but key to that analysis was that the Federal Arbitration Act permits a party to enter into an arbitration agreement waiving their right to file a collective action unless another federal statute expressly prevents a party from waiving that right, but that the FLSA contained no such language. The court also reviewed the legislative history and purpose of the FLSA and ruled that such a waiver was not inconsistent and the right to a collective action under the FLSA was merely procedural and already less expansive than that which would otherwise be available under the Federal Rules of Civil Procedure. This decision is important for employers because it confirms the validity of such waivers in increasingly popular arbitration agreements.

Walthour v. Chipio Windshield Repair, LLC, No. 13-11309 (11th Cir. March 21, 2014)

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No Tolling of Statute of Limitations on State Law Tort Claims During Pending EEOC Charge

The employee, who worked for the employer first as an accountant and later as a receptionist, claimed that she was subjected to an abusive work environment rife with offensive sexual comments and contact from her supervisor. She resigned and then filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) and over a year later, ultimately received a right to sue. A few months later, she filed suit in federal court alleging hostile work environment and constructive termination in violation of Title VII of the Civil Rights Act of 1964, violations of the New York State Human Rights Law, as well as tort claims for assault, battery, and emotional distress. The employer moved to dismiss on the grounds that her state law tort claims were barred by the applicable one-year statute of limitations. The employee appealed, arguing that the limitations period was tolled by her filing of a charge with the EEOC. Affirming the district court's ruling, the U.S. Court of Appeals for the Second Circuit joined the Seventh and Ninth Circuits in holding that the filing of a charge of discrimination with the EEOC does not toll the limitations period for state-law tort claims, even when those claims may arise out of the same factual circumstances as those alleged in the EEOC charge. In holding as such, the court found that there is simply "no basis for concluding that a civil rights claimant should be entitled to delay filing any state court claims during the EEOC's consideration of a charge of discrimination." Employers should review complaints/charges received for timeliness at the outset to ensure that any objections can be appropriately raised.

Castagna v. Luceno, No. 13-796 (2d Cir. March 5, 2014)

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NLRB Upholds Employee's Termination for "Negative Attitude"

A restaurant employee filed an unfair labor practice charge against her former employer, claiming that she had been terminated for previously engaging in efforts to organize. The employee claimed that while she was putting union flyers on employees' cars, her supervisor threatened her with termination. Ultimately, however, the employer did terminate the employee, but claimed that she was terminated for violating the employer's policies relating to workplace procedures and conduct in that she had badmouthed the restaurant to customers and complained to customers about employee policies. The National Labor Relations Board found in favor of the employer, 2-1, finding that the employer did not terminate two employees for union or protected concerted activity, nor did the employer engage in unlawful discrimination. Rather, the NLRB pointed to the restaurant's employee handbook, which specifically defined insubordination, which included "displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." While the circumstances in this case supported the dismissal based upon a "negative attitude," employers need to nevertheless take caution to ensure that terminations do not violate the National Labor Relations Act or applicable state or federal employment laws.

Copper River of Boiling Springs, LLC, 360 N.L.R.B. No. 60 (February 28, 2014)

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