# Newsletters

## Employment Practices Newsletter - November 2014

**November 3, 2014**



### NLRB Again Rules Against Class Action Waivers in Arbitration Agreements

In a controversial ruling, the National Labor Relations Board decided 3-2 to follow its own 2012 often criticized decision in *D.R. Horton* holding that arbitration agreements barring class action lawsuits about working conditions, which are signed as a condition of employment, are unlawful under the National Labor Relations Act. The binding arbitration agreement at issue was provided to Sheila Hobson by Murphy Oil USA in November 2008 as a condition of her employment when she was hired to work at the company's Calera, Alabama facility. A few months prior to her departure from Murphy Oil, Hobson filed a collective action in June 2010 in the U.S. District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act. Murphy Oil filed a motion to compel arbitration seeking to force Hobson and others to arbitrate their claims on an individual basis. In response, Hobson filed an unfair labor practice charge with the NLRB in January 2011 and a complaint was subsequently issued against Murphy Oil alleging that the arbitration agreement violated Section 7 of the NLRA by prohibiting employees from litigating their employment related claims concertedly. The District Court granted Murphy Oil's motion to compel individual arbitration and stayed the lawsuit. While the District Court action was stayed, the NLRB issued its decision striking the class action ban in Murphy Oil's arbitration agreement. The NLRB's decision stokes the

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flames ignited by the Board in *D.R. Horton*, a decision that was subsequently overturned by the U.S. Court of Appeals for the Fifth Circuit, rejected by myriad federal courts and criticized by some (including the Fifth Circuit in its *D.R. Horton* ruling) as conflicting with U.S. Supreme Court precedent in *AT&T Mobility LLC v. Concepcion*,131 S. Ct. 1740 (2011). Given this backdrop, the NLRB's ruling should be closely followed as undoubtedly an appeal will follow the NLRB's decision, which seems likely to end up at the U.S. Supreme Court.

*Murphy Oil USA, Inc. and Sheila Hobson,* 361 NLRB No. 72, (NLRB, October 28, 2014)

Contact for more information: Your Hinshaw attorney.

**Employer's Plan Policy and ERISA Govern Nature and Extent of Leave Available to Employee**

Employee Joan Sherfel exhausted her short-term disability benefit following the birth of her child. She then requested and was provided additional leave under the WFMLA (Wisconsin's Family Medical Leave Act), which requires that employers allow employees six weeks of unpaid leave following "[t]he birth of an employee's natural child." The Act's substitution provision requires employers to allow an employee to substitute "paid or unpaid leave of any other type provided by the employer" for the unpaid leave provided by the statute. When Sherfel asked to substitute paid short-term disability leave for the unpaid WFMLA leave her employer refused because she was no longer short-term disabled as defined by the plan. Sherfel unsuccessfully sought relief from the Wisconsin Department of Workforce Development. On appeal, the U.S. Court of Appeals for the Sixth Circuit concluded that when a plan administrator is faced with the choice of violating the Wisconsin Act or violating the terms of the ERISA (Employee Retirement Income Security Act) plan, the Supremacy Clause of the U.S. Constitution requires the administrator to comply with ERISA. In other words, the plan language governs the employees' eligibility for benefits. Employers who do business in Wisconsin should be mindful of this issue since it affects the nature and extent of leave available to employees under various statutes.

Sherfel v. Newson,No. 12-4285 (6th Cir. September 30, 2014)

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**Independent Contractor Status Thwarts Doctor's Attempted Employment Claims**

Pathologist Larry Alexander was an independent contractor with a hospital pursuant to a contract. He was required to pay his own taxes, maintain his own malpractice insurance and pay his own professional licenses. The hospital required him to have medical privileges at its facility, billed patients on his behalf, and paid him in equal monthly payments for his services. The hospital ultimately gave notice of the termination of his contract. He filed suit, claiming he was terminated in violation of the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA). The hospital successfully sought summary judgment on the grounds that Alexander was not an employee. Alexander appealed. The U.S. Court of Appeals for the Eighth Circuit evaluated his employment status by analyzing the situation under the various independent contractor tests. The court held that under the ADA and ADEA, the term "employee" meant the common-law master-servant relationship, and that the right to control the manner and means of the work of the individual is a central inquiry, though not particularly illuminating in a hospital setting where the hospital must exercise some degree of control regardless of whether the physician is an employee or independent contractor. Alexander admitted he performed his duties free from control of the hospital, had sole control over his schedule, personally determined whether to hire additional doctors to assist him, paid his own taxes, and provided his own insurance, all supporting the independent contractor designation. Though the FMLA has a more broad definition of "employee," Alexander's freedom to use his contractual compensation to hire substitute physicians and staff, his payment for his own licensing and insurance, and his tax returns reflected his economic independence and supported the conclusion that he was not an employee under the FMLA. In classifying workers, employers should be aware of the various factors which may result in an employee/employer relationship.

Alexander v. Avera St. Luke's Hosp.,No. 13-2592 (8th Cir. September 30, 2014)

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**NLRB Finds Employees' Facebook Comments Support Termination**

The supervisor of a school district's after-school teen center invited employees to submit anonymous comments regarding the pros and cons of their job. Employees Ian Callaghan and Kenya Moore felt that after they submitted comments, they were given the "cold shoulder." Thereafter, Moore received an offer letter for the new year which advised of a forthcoming demotion, and Moore and Callaghan discussed the upcoming school year on Callaghan's Facebook page. In the conversation thread, they agreed to cause problems at the center, neglect job duties, and disregard the well-being of the center. A co-worker showed the conversation to management, and the employees' job offers were rescinded. The employees filed an unfair labor practice charge, and the question before the National Labor Relations Board (NLRB) was whether the employees could claim that their discussion was covered by the National Labor Relations Act as "protected, concerted activity." The NLRB's General Counsel argued on behalf of the employees that in the context of the unrest at the end of the prior school year and both employees' overall history of compliance, their Facebook posts "could not reasonably be understood as seriously proposing insubordinate conduct." The NLRB disagreed, noting that the employees' "numerous detailed descriptions of specific insubordinate acts" were fundamentally different than speech found protected in other cases, where statements could "easily be explained away as a joke" or were "hyperbole divorced from any likelihood of implementation." This was a far different case, the NLRB reasoned – given the "magnitude and detail" of the acts that the employees advocated, the statements were not protected by law. The school district, the Board concluded, "was not obliged to wait for the employees to follow through on the misconduct they advocated." This decision demonstrates that not all speech is protected in the workplace, and that employees may lose legal protections when their conduct goes "over the line."

Richmond District Neighborhood Center, No. 20–CA–091748 (N.L.R.B. October 28, 2014)

Contact for more information: Your Hinshaw attorney.

**Fifth Circuit Rules on Validity of Later-Added Arbitration Clause**

The employer, AmeriPlan, operated through a network of independent business owners (IBOs) who sold health plans and recruited additional IBOs. The IBOs attained the title of "Sales Director" after they achieved a certain sales volume. The higher-level IBOs received a percentage of the profits from the "down line" IBOs they recruited. The employment agreement between AmeriPlan and the Sales Directors was governed by three contracts: (1) the Broker Application and Agreement, (2) the Sales Director Agreement, and (3) the Policies and Procedures Manual. None of the agreements contained an arbitration provision when the plaintiff-employees entered into them. Later, the company added an arbitration clause to the Policies and Procedures Manual, but not to the other documents. Certain Sales Directors filed a class action suit claiming AmeriPlan failed to pay the promised residual income. The case was dismissed in favor of arbitration and the Sales Directors appealed, claiming that the arbitration provision was not valid. The U.S. Court of Appeals for the Fifth Circuit faced two fundamental issues: (1) whether the later-added arbitration requirement was compatible with the forum selection clause contained in another document, and (2) whether the arbitration clause could be reconciled with provisions in other contracts requiring that disputes first be submitted to non-binding mediation. The court ultimately held that the arbitration requirement could be harmonized with the forum selection clause, but not with the mediation requirement under these facts. The forum selection clause merely established a venue for the case, but did not preclude arbitration as the method by which the case could be resolved. The mediation requirement, however, was in direct conflict with the later-added arbitration requirement, and reading the two together rendered the dispute resolution proceedings meaningless. The case provides guidance for employers when considering whether it is permissible to add an arbitration provision to an existing agreement, and highlights the challenges which can result when there are multiple employment documents at issue.

Sharpe v. AmeriPlan, No. 13-10922 ($5^{th}$ Cir. October 16, 2014)

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**Employee Can Pursue Bias Claim Based on Company's Age-Based Health Care Considerations**



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Associated Underwriters faced financial strain and explored lowering its health insurance fees as a cost-saving measure. In executing its plan to lower health insurance costs, the company urged employee Marjorie Tramp and another employee over the age of 65 to use Medicare instead of the company's health insurance plan. Email correspondence also revealed the company's discussions with its healthcare insurer regarding the ages and health of employees who were leaving the company and the company's hopes that with the "older, sicker" employees leaving, its insurance rates would go down. Tramp was ultimately terminated and filed suit claiming age discrimination, among other things. The employer prevailed on summary judgment at the district court level, and Tramp appealed. The U.S. Court of Appeals for the Eighth Circuit found that Tramp could feasibly maintain a claim for age discrimination because the employer's consideration and treatment of insurance premiums were not "divorced" from age, and considering age in conjunction with health care costs could be discriminatory. Further, the email correspondence reflected an insensitivity and crudeness about the relationship between age and health care premiums on the company's part, and the Court found that the statements could very well demonstrate the employer's intent to lay off older, more expensive employees. Summary judgment was accordingly reversed on the age discrimination claim. Choosing to terminate employees based on the high cost of health care premiums alone may not necessarily be actionable, but like in this case, where age appears to be a significant basis for the decision, employers may be faced with age discrimination claims.

Tramp v. Associated Underwriters, Inc., No.13-2546 (8th Cir. October 7, 2014)

Contact for more information: Your Hinshaw attorney.

**EEOC Can Proceed With ADEA Lawsuit Against Pennsylvania Court**

A staffing agency assigned 70-year-old Carolyn J. Pittman (Pittman) to work on a scanning project at the Court of Common Pleas of Allegheny County, Fifth Judicial District of Pennsylvania (Court of Common Pleas). The staffing agency told Pittman that she had been terminated by the Court of Common Pleas because the project had ended when, in fact, the project had not ended, and the Court of Common Pleas replaced Pittman with a much younger worker. The U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit on Pittman's behalf in the U.S. District Court for the Western District of Pennsylvania against the Court of Common Pleas alleging a violation of the Age Discrimination in Employment Act (ADEA). The Court of Common Pleas moved to dismiss the ADEA claim arguing that the Eleventh Amendment to the United States Constitution makes it immune as a State agency from the EEOC's lawsuit under the U.S. Supreme Court case of *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). The District Court disagreed and denied the Court of Common Pleas' motion to dismiss. The District Court explained that while the *Kimel* decision applied the Eleventh Amendment to bar actions by "private petitioners" seeking damages against State employers, it did not prohibit actions by a federal agency, i.e., the EEOC, seeking to enforce the ADEA against the States. As a result, States, as well as a myriad of State agencies, should be aware that the Eleventh Amendment cannot shield them from prosecution of federal employment laws by the EEOC on behalf of individual employees.

*EEOC v. Court of Common Pleas of Allegheny County,* No. 14-899 (W.D. Pa. October 15, 2014)

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**NLRB Fashions Harsh Remedies Against Employer with History of Alleged Unfair Practices**

A union brought a consolidated complaint against an employer, alleging multiple unfair labor practices. The employer had a ten-year history of appearing before the National Labor Relations Board (NLRB) for alleged unfair labor practices. The Administrative Law Judge found that the employer did commit multiple unfair labor practices, including: (1) notifying employees that the union representatives were barred from entering the employer's premises; (2) engaging in surveillance of its employees; (3) threatening to remove a union representative from a public sidewalk while he handed out union literature to the employees; (4) suspending and discharging an employee because he is a union activist; and (5) unilaterally and without bargaining changing conditions of employment. The employer filed exceptions and the union filed cross-exceptions to this decision. The NLRB affirmed the ruling, but modified the remedy. Notably, the NLRB ordered the employer to pay the litigation costs and expenses of the General Counsel and of the union from the investigation of the claims up through the proceedings before the NLRB and to pay the union its bargaining expenses. The NLRB further implied that employees unlawfully terminated for union activity may be entitled to front pay in lieu of reinstatement under



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the Act, although it deferred consideration of the Board's authority to award front pay. This case demonstrates the discretion afforded to the NLRB in fashioning remedies as well as the possibility for harsh remedies to be imposed even where the entire Board is not in agreement.

*Pacific Beach Corp. v. Int'l. Longshore & Warehouse Union,* Local 142, 361 NLRB No. 65 (NLRB October 24, 2014)

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**No Qualified Immunity for State College in Connection with Public Employee's Reinstatement Claim**

A former employee of the Central Alabama Community College, Edward Lane, claimed that he was terminated from his position with the college for exercising his right to free speech. He filed suit against the college and its president Steve Franks, alleging violation of 42 USC 1983 for retaliation in violation of the First Amendment to the U.S. Constitution. The district court granted summary judgment in favor of the college's president, and also concluded that Lane's official-capacity claim against Franks for equitable relief was barred by the Eleventh Amendment, and Lane appealed. The U.S. Court of Appeals for the Eleventh Circuit affirmed, finding that Lane's subpoenaed testimony at a federal criminal trial regarding his official duties was not protected because it was not made in the capacity of a private citizen. The court further concluded that Franks was entitled to qualified immunity as a result. The U.S. Supreme Court affirmed in part and reversed in part, finding that Lane's "truthful testimony under oath … outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes … even when the testimony relates to his public employment or concerns information learned during that employment." Though there was an established violation, the court concluded that Franks was nevertheless entitled to qualified immunity in his individual capacity, and thus affirmed dismissal of the claims against Franks. On remand, the Eleventh Circuit reconsidered the sovereign immunity issue in light of the Supreme Court's findings. Lane sought equitable relief in the form of reinstatement, and the court found that such claims fall within the scope of an exception to qualified immunity and thus, are not barred by the Eleventh Amendment. Further, even though reinstatement required the State to pay Lane's salary did not trigger protection; rather, the court acknowledged injunctive relief often necessitates expenditure of state funds, but such ancillary effects on the state treasure are permissible under the circumstances. State employers should be mindful of the fact that the Eleventh Amendment will not always provide an absolute bar to public employees' claims, and as this case demonstrates, the concept of qualified immunity may not always be available as a defense to such claims.

Lane v. Central Alabama Comm. Coll., No. 12-16192 (11th Cir. October 8, 2014)

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**Restaurant Owner Personally Liable for FLSA Violations**

Three kitchen workers brought suit alleging that the restaurant and bar at which they worked and its owner violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime. The owner claimed that the restaurant's financial manager was solely responsible for the decisions not to pay workers overtime. The district court clarified that "joint liability" in which more than one employer is liable for the same underpayment of wages is contemplated by the FLSA. The court also found that the owner had final authority over the terms and conditions of workers' employment, including the amount and form of their wages. The court further found that the owner regularly worked at the restaurant, oversaw all day-to-day operations, and hired and supervised the restaurant's financial manager, who was in charge of payroll. These "economic realities," the court found, established that the owner was in fact an "employer" under the FLSA and therefore, he could be held personally liable to the employees on their wage claims. Many states allow employers to be held individually responsible for wage violations, serving as yet another reminder of the importance of complying with wage and hour laws.

*Reynoso v. Motel LLC,* N.D. Ill. No. 1:13-cv-05004, 10/21/14

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