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Newsletters

Employment Practices Newsletter - April 2016

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Is Labor Law Putting the Franchise Business Model at Risk?

By: Evan Bonnett

Over the course of the last year, we have kept you abreast of National Labor Relations Board (NLRB) case law and Department of Labor (DOL) interpretive/enforcement guidance, how these agencies are changing their view of the responsibility of parent corporations for the employment relationship between employees of temporary agencies and franchises, and how these changes have the potential to drastically alter the benefits and risks of utilizing these relationships.

In what could become one of the most enlightening applications yet of this emerging shift, an NLRB hearing before an administrative law judge began in mid-March involving allegations by workers that McDonald's is responsible as a joint employer for the alleged labor law violations of its franchisees. The franchisors are alleged to have threatened, disciplined, or fired franchise employees who participated in widely-publicized campaigns for collective bargaining and a $15 minimum wage.

In addition to denying the underlying allegations, the franchisees and McDonald's have to contend with the joint employer issue. In 2014, the NLRB General Counsel determined that roughly one-fifth of the allegations sufficiently raised a question about McDonald's control over its franchisees such that McDonald's could be named as a respondent to the complaints arising from the franchisees' actions.

In the meantime, in a case involving staffing agency employees, the NLRB this past summer modified its joint employer standard and applied it retroactively. As background, under the old standard, for a company to be a joint employer, it must have had and exercised direct and immediate control over such topics as hiring; firing; discipline; supervision and direction; and wages and compensation. Now, mere *possession* of that control over these topics may be sufficient to establish joint employer status; the ultimate question under the new standard is whether bargaining is "meaningful" without both "employers."

The litigation ensuing from McDonald's challenge to the General Counsel's joint-employer determination may tell us a great deal about the NLRB's application of the new standard to the franchisor-franchisee relationship.

Service Areas

Labor & Employment

While we will not know the results of this case for some time and therefore cannot comment on any precedent it may establish just yet, it is clear that how the NLRB applies its new standard may have profound effects. Shifting responsibility to the franchisor undermines one of the very purposes of the franchisor-franchisee relationship: the *franchisee's* control and responsibility for its own employment decisions, including the terms and conditions of employment.

This, in turn, has broad implications for collective bargaining—an adverse ruling for McDonald's could mean that similar franchisors may be faced with workers organizing on a much broader scale and bargaining directly with franchisors, rather than just with each franchisee.

Going forward –This is merely the beginning of this phase of the case, and the outcome is not yet known. After this hearing, the case may be appealed to the full NLRB board for review. That decision may then be appealed to federal court. We will continue to keep you informed of any changes as they develop in this area of the law.

U.S. Supreme Court Green Lights Use of Statistical Sampling to Prove Classwide Injury in *Tyson Foods v. Bouaphakeo*

By: Beth Odian

In mid-March, the U.S. Supreme Court held in a 6-2 ruling that members of an FLSA class could present statistical evidence to certify a class of individuals who worked over 40 hours per week due to the extra time it took to don and doff their work gear. Individual inquiries were not necessary. In reaching its decision, the Court noted that because of "an evidentiary gap" in Tyson's recordkeeping, "a representative sample may be the only way to establish liability." Therefore, the sample "cannot be deemed improper merely because the claim is brought on behalf of the class."

Importantly, the majority opinion cautioned that the opinion did not create a blanket rule allowing the use of statistical evidence in class actions. Rather, whether the use of statistical evidence is appropriate should be determined on a case-by-case basis depending on the purpose of the sample considered with the underlying cause of action.

The decision appears to pave a smoother path for collective actions by employees. That said, given the Court's emphasis that the decision turned on the unique facts of the case, it remains unclear how far-reaching the Tyson decision will be in practice.

New York District Court Holds Sexual Orientation Not Protected by Title VII

By: Susan Kusper

In March the Equal Employment Opportunity Commission ("EEOC") filed its first federal lawsuits against private-sector businesses, challenging sexual orientation discrimination as sex discrimination. Coincidentally, a week later, the U.S. District Court for the Southern District of New York held in *Christiansen v. Omnicom Group, Inc.* that, although sexual orientation discrimination is "reprehensible," it does not violate Title VII. These cases demonstrate the legal community's struggle in defining and interpreting the law as currently written while, at the same time, attempting to ensure equal protections for gay and lesbian individuals.

The *Christiansen* court held that, under the law as it currently stands, Christiansen could not state a claim for Title VII sexual orientation discrimination. The court clearly struggled with its decision, referring to defendant's actions as "reprehensible." The court also questioned whether it is ever possible to desegregate acts of discrimination based on sexual orientation, which is not prohibited under current laws, from those based on sex stereotyping, which is prohibited. Christiansen has already appealed.

Employers should note that although Title VII does not explicitly include sexual orientation in its list of protected categories, it is clear the EEOC will enforce Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. In addition, some state and municipal laws specifically prohibit discrimination on the basis of sexual orientation.

Whistle While You Work… On Getting Dressed: Wisconsin Supreme Court Rules Hormel Employees To Be Paid for Time Putting on Clothing and Safety Gear

In *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, the union representing Hormel's plant employees sought compensation for the time it took employees to don and doff their company-required clothing and equipment. The Wisconsin Supreme Court held that "donning and doffing the clothing and equipment at the beginning and end of the day in the instant case is 'integral and indispensable to the employees' principal activities of producing food products" and, therefore, the employees must be compensated for this time. In reaching this decision, the Court rejected Hormel's argument that six minutes per day was *de minimus*, or such a small amount of time to be non-compensable.

Wage and hour claims, particularly those dealing with off-the-clock work, are some of the most attractive claims for plaintiffs' attorneys given the large number of impacted employees. It is important to know whether employees are spending time on-site before or after their shift and, if so, whether those employees are performing tasks that are "integral and indispensable" to the employee's principal activities. The issue of off-the-clock work can arise in any industry, whether it's donning the necessary safety gear, stocking supplies at a work station, or reviewing medical charts prior to shift change.

Captivating! NLRB Reverses 57-Year-Old Decision, Expands "Captive Audience" Rule in Mail Ballot Elections

By: Evan Bonnett

Since 1953, the NLRB precedent has prohibited employers and unions from holding mandatory-attendance mass campaign assemblies, speeches, or similar communications less than twenty-four hours before the scheduled time for an election (i.e., "captive-audience" meetings).

Later NLRB precedent interpreted the *Peerless Plywood* case to apply to manual elections—and applied the captive audience rule differently to mail-ballot elections, holding that the captive audience rule applied only from the time that the ballots were *actually* mailed by the NLRB regional office, rather than 24 hours before. The ban continued until the terminal time and date for the return of the ballots.

In its February decision in *Guardsmark, Inc.*, the NLRB found that the different standards for the two types of elections caused confusion. The NLRB then looked to its Rules and Regulations and held that the "scheduled time for conducting" a mail-ballot election "shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail." After making this determination, the NLRB officially overturned *Oregon Washington Telephone Co.* and chose to apply the earlier *Peerless Plywood* standard.

Therefore, the NLRB will now treat mail-in ballot elections and in-person elections the same with regard to the 24-hour captive audience prohibition. This means that the parties to an election are prohibited from "speeches that tend to interfere with the sober and thoughtful choice which a free election is designed to reflect" for a full 24-hour period even before the ballots are *mailed.*

EEOC's Updated Retaliation Enforcement Guidance Seeks to Expand the Reach of its Anti-Retaliation Laws

By: Beth Odian

Effectively responding to employee discrimination complaints by current employees without running afoul of federal and state anti-retaliation laws presents a slippery slope for all employers. In fact, retaliation complaints make up nearly half of all discrimination charges filed with the EEOC today. Thus, it is critical that employers, their managers, supervisors, and employees understand who the laws protect and what constitutes retaliation.

On Thursday the EEOC sought to clarify these standards by issuing updated proposed enforcement guidance. The proposal is the first update to the EEOC's Compliance Manual since 1998. The proposal was prompted by significant developments in the law and the marked increase of retaliation claims over the last eighteen years.

The 76-page proposal covers the definition of retaliation, the elements of a retaliation claim, interference claims under the Americans with Disabilities Act, remedies, and best practices. Rather than summarize all of the above, we will highlight the most significant developments below.

"But for" Causation

Retaliatory acts are those taken *because* the employee engaged in protected activity. Consistent with the Supreme Court's opinion in *University of Texas Southwest Medical Center. v. Nassar*, the guidance adopts a "but for" causation standard. Under this standard, the employee must show that "but for" a retaliatory motive, the employer would not have taken the adverse action. Significantly, the employee need not show retaliation was the "sole cause" of the adverse action. This effectively eliminates a mixed motive defense to retaliation claims.

Opposition

The EEOC guidance also proposes an expansive definition of "opposition." Individuals who oppose discrimination, by explicitly or implicitly communicating a belief that the employer may be engaging in employment discrimination, are protected. Citing the Supreme Court decision in *Crawford v. Metro. Gov't of Nashville & Davidson County, Tennesee*, the guidance explains that its expensive definition includes employees who do not instigate action, but rather "stand pat" by refusing to take action. Opposition may also include employees who accompany a coworker to make an internal discrimination complaint, as well as employees who merely answer questions during an investigation into potential discrimination.

Adverse Action

Following *Burlington Northern and Santa Fe Railway v. White*, the guidance proposes adoption of a broader definition of "adverse action" than the definition employed under EEO non-discrimination laws. In retaliation cases, "adverse action" includes any action that is "materially adverse" to the employee—that is any action that may deter an employee from engaging in protected activity. Less severe work-related actions, such as reprimands, lowered evaluations, and verbal abuse, as well as non-work-related actions, such as disparaging an employee to the public, constitute adverse action under the proposed standard.

The guidance also adopts the "zone of interests" rule set forth by the Supreme Court in *Thompson v. North American Stainless, LP*. That rule allows third parties harmed by an employer's retaliatory acts to bring a claim. For example, an employee discharged because of a family member's protected action would have standing to bring a retaliation claim.

Manager Rule

The guidance explicitly rejects the "manager rule" adopted by several circuits. As such, it is likely that the EEOC will continue to pursue actions on behalf of managers who oppose discrimination in their management role even in those jurisdictions following the manager rule.

Best Practices

Finally, the EEOC suggests best practices to reduce the retaliatory actions in the work place. Such practices include the following:

- Establishing written policies with user friendly examples of employer dos and don'ts,
- Employing general and specialized training for managers, supervisors, and employees,
- Providing advice and individualized support to employees involved in employer investigations,
- Proactively following up with affected employees during the pendency of an investigation, and
- Reviewing all consequential employment actions to ensure compliance with EEO anti-retaliation statutes.

The public comment period is now over. We will keep you updated on further developments.

The Deadly 4-4 SCOTUS Split: What Happens in the Wake of Justice Scalia's Death

With the Supreme Court coming out of recess last month, the practical implications of Justice Scalia's death will become more apparent. Justice Scalia's February death has a tremendous impact on the upcoming sessions of the Supreme Court.

Take, for instance, the late Justice's voting. The votes that Scalia cast in cases that have not yet been publicly decided are now void. If Scalia was part of an overwhelming majority or minority, the absence of his vote will not have much of an effect. But if Scalia was part of a slim, five-justice majority, the absence of his vote leaves the Court divided four to four. If no majority exists, the Court cannot issue a majority opinion, and the lower court's decision stands. The lower court's decision will simply be "affirmed by an equally divided Court."

The four-to-four split has already impacted at least one case before the Supreme Court this term.

On March 29, 2016, the justices ordered the parties in *Zubik v. Burwell* to submit briefs discussing whether religious non-profits could provide employees contraceptives without requiring the employer to go through the opt-out process. The move suggests the Court's forthcoming decision will outline a compromise between religious non-profits and the Affordable Care Act's contraceptive mandate, rather than decide one way or the other whether the exemption should be extended to these religious non-profits. Loss of Justice Scalia's vote likely influenced the order.

Justice Scalia's absence is likely to affect at least one other labor case. Currently, public employees in 23 states and the District of Columbia must pay an "agency fee" to cover the cost of certain union activities, such as collective bargaining, even if they do not support the union on principle or for any other reason. During oral arguments in *Friedrichs v. California Teachers Association*, conservatives criticized that system as a violation of employees' First Amendment rights. It was widely expected that the Court would strike down any system that charged public employees regardless of whether they agreed with the union—but without Justice Scalia's vote, the Court may now be divided four to four. Further, if the Court is unable to render an opinion, the lower court's ruling, which upheld the current system, would govern.

Of course, instead of "affirming by an equally divided court," the Court could also order the cases currently in front of it to be reargued once a new Justice is confirmed. While this has happened in the Supreme Court before, Republicans have held steadfast to their vow to block the confirmation of Merrick Garland or any other Obama nominee. If Republicans refuse to soften their stance, it could be over a year before any cases can be reargued in front of a full Court.

The Court took on many incredibly controversial issues this term, including the above cases and affirmative action, voting rights, and abortion. The Court's inability to render a decision in these and other cases could impact the legal landscape for years to come.

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