Employment Law Developments and Trends

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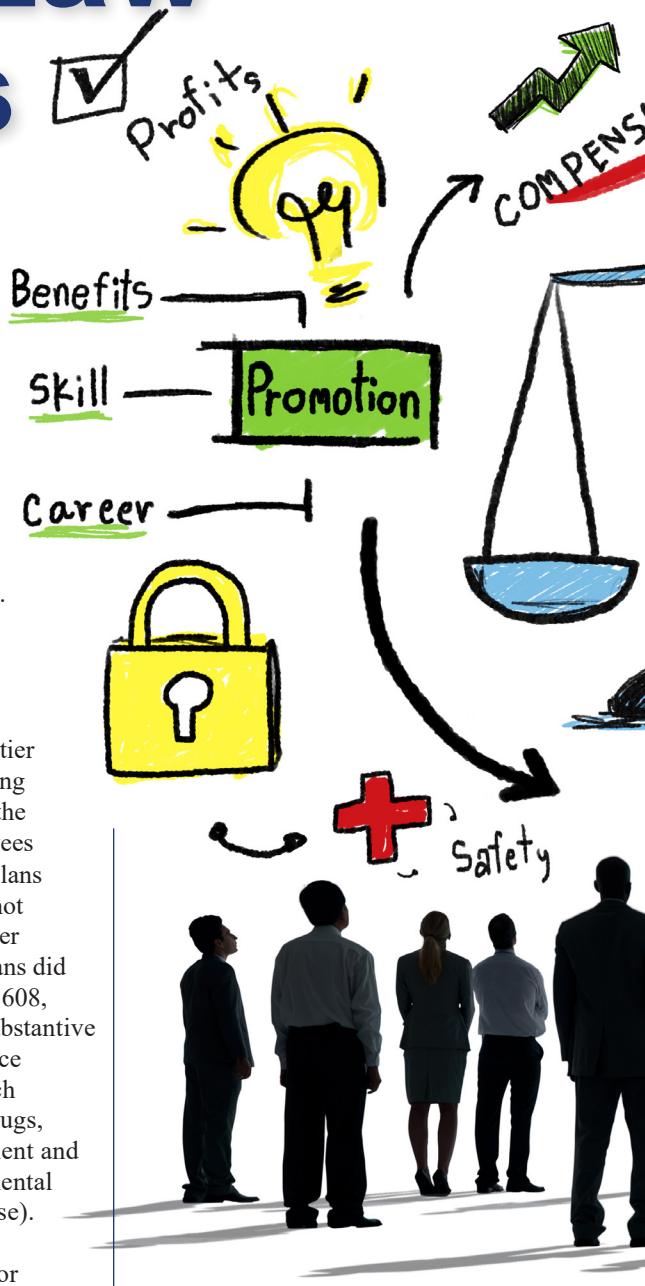

Employment law is a dynamic practice area in which new law develops each year. Last year was no exception. Below are notable employment law developments and trends from 2018.

Minimum Wage

In 2018, the Nevada Supreme Court provided long-overdue clarity to the Minimum Wage Amendment (MWA) to the Nevada Constitution. The MWA allows an employer who offers health benefits to pay a minimum wage of $1 per hour less than an employer who does not provide health benefits. Although the MWA became part of the Nevada Constitution more than 10 years ago (as the result of a voter initiative), the question of what health benefits an employer must provide to qualify for the privilege of paying the lower-tier minimum wage has been unclear.

The MWA expressly provides that employers must offer health benefits in the form of health insurance that covers "the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer." Nev. Const. Art. 15 § 16(A). But the MWA is silent as to what, if any, specific health benefits must be provided. The Nevada Supreme Court finally answered this question in *MDC Restaurants, LLC v. Eighth Judicial District Court*, 134 Nev. Adv. Op. 41, 419 P.3d 148, 150 (2018).

In *MDC Restaurants*, employees alleged that their employers paid them the lower-tier minimum wage without providing sufficient health benefits under the MWA. Specifically, the employees argued that the limited benefit plans offered by their employers did not qualify them to pay the lower-tier minimum wage, because the plans did not comply with NRS Chapters 608, 689A and 689B, which place substantive requirements on health insurance (e.g., that it cover expenses such as hospice care, prescription drugs, cancer treatment, the management and treatment of diabetes, severe mental illness and alcohol or drug abuse). The district court agreed and granted the plaintiffs' motion for partial summary judgment on the issue. The employers then filed a petition for a writ of mandamus with the Nevada Supreme Court.

The Nevada Supreme Court granted the employers' writ petition and held that in order to qualify to pay the lower-tier minimum wage under the MWA, an employer is *not* required to offer health insurance that provides specific benefits or meets the substantive requirements imposed by Nevada statutes. Rather, an employer is qualified to pay the lower-tier minimum wage if it offers health insurance that:

1. Is of a value greater than or equal to the wage of an additional dollar-per-hour; and
2. Meets the "premiums of not more than 10 percent of the employee's gross taxable income from the employer" requirement set forth in the MWA.

The court reasoned that it is unlikely that, in enacting the MWA, the voters considered or intended to incorporate the entirety of Nevada's statutory scheme regarding health insurance into the meaning of "health benefits." Instead, the court stated that the purpose of the MWA was simply to provide higher wages to employees or, in the alternative, health insurance; and nothing in the text or purpose of the MWA suggests that the voters intended to create one tier that was inherently more valuable to employees than the other (which would be the case if extensive and costly health benefits were required for the lower-tier).

Non-Competes

Although rules against broad geographic restrictions in non-compete agreements may be outmoded or "hopelessly antiquated" in this digital age (*see Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, No. 3:11-CV-00585-RCJ (D. Nev. Aug. 22, 2011)), in 2018, the Nevada Supreme Court affirmed its rule that non-compete agreements are subject to "a high[] degree of scrutiny" and enforceable only if they are geographically "limited to areas where the employer has 'established customer contacts and good will.'" *See Landon Shore v. Global Experience Specialists, Inc.*, 134 Nev. Adv. Op. 61, 422 P.3d 1238 (2018).

In *Landon Shore v. Global Experience Specialists, Inc.*, an employee entered into a non-compete agreement that prohibited him from working with a competitor in a similar capacity anywhere in the U.S. for a period of 12 months after his employment ended. However, a few months after his employment ended, the employee took a similar position with a California-based competitor. The former employer sued and sought a preliminary injunction against the employee working for the competitor.

The trial court had found that the nationwide restriction in the non-compete agreement was reasonable because the former employer conducted business in 33 states, the District of Columbia and Puerto Rico.

The trial court granted the preliminary injunction, but the Nevada Supreme Court reversed the decision. The trial court had found that the nationwide restriction in the non-compete agreement was reasonable because the former employer conducted business in 33 states, the District of Columbia and Puerto Rico. The Nevada Supreme Court, however, held that the geographical restriction was unreasonable, because it was not limited to the specific areas where the former employer had established customer contacts and goodwill. The fact that

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the former employer was labeled a nationwide business did not eliminate the requirement that the geographical scope must be limited to the areas where the employer had established customer contacts and goodwill.

Therefore, since the evidence did not support the nationwide restriction provided for in the non-compete agreement, meaning that the employer did not demonstrate a probability of success on the merits, the trial court erred in granting the preliminary injunction against the employee.

Joint Employers

On September 14, 2018, the National Labor Relations Board (NLRB) released a draft rule that would reverse the NLRB's 2015 decision in *Browning-Ferris*, 362 NLRB No. 186 (2015).

In *Browning-Ferris*, the NLRB adopted a new, looser standard for determining whether two or more entities could be considered joint employers of a single individual. Under *Browning-Ferris*, an entity may be considered a "joint employer" even if it has never exercised control over the terms and conditions of an individual's employment. Rather, employers could be considered "joint" based simply on the existence of reserved control, indirect control or control that is limited and routine—essentially, the existence of potential control is enough.

The NLRB's new proposed rule would restore the traditional standard for determining joint employer status; specifically, an entity is only a joint employer if it "possesses and exercises substantial, direct and immediate control" over an individual. Assuming the rule becomes final, it will become more difficult for an individual to demonstrate he or she has two or more joint employers (as it was prior to the *Browning-Ferris* decision).

Arbitration Agreements

The trend toward stronger enforcement of arbitration agreements, including in the employment context, continued in 2018. On May 21, 2018, the U.S. Supreme Court held that arbitration agreements that mandate individualized resolution of claims (as opposed to class or collective resolution) are enforceable under the Federal Arbitration Act (FAA). In doing so, the court rejected the argument that such class action waivers violate Section 7 of the National Labor Relations Act (NLRA), which generally protects employees' rights to act in concert with one another.

The court addressed a split created by decisions from three federal circuit courts of appeal: *Epic Systems Corp v. Lewis* (7th Circuit), *Ernst & Young v. Morris* (9th Circuit) and *National Labor Relations Board v. Murphy Oil USA* (5th Circuit). All three cases involved employees who sought to bring collective or class actions under the Fair Labor Standards Act (FLSA), and their respective employers who sought to enforce pre-dispute arbitration agreements that waived such collective actions and mandated one-on-one arbitration of wage disputes. In support of their position, the employees argued that the class and collective action waivers were illegal, because they violated the NLRA's prohibition on barring employees from engaging in concerted activities.

The employees first asserted that the NLRA served as a basis for the court to invoke the FAA's saving clause, which allows a court to invalidate an agreement to arbitrate "upon such grounds as exist at law or in equity for the revocation of any contract." The court rejected this argument, determining that revocation of any contract means what it says: that the saving clause applies only to generally applicable contract defenses that would apply to any contract, not to defenses that are unique to arbitration contracts. Here, the alleged illegality was based only on the argument that Section 7 of the NLRA prohibited the waiver of the right to proceed collectively in arbitration, which is a defense tailored only to a specific type of contract, not a generally applicable contract defense.

The employees then asserted that the NLRA served as an independent basis on which the court should invalidate the arbitration agreements at issue as violating federal law. The court dismissed this argument by holding that Section 7 of the NLRA, which prohibits an employer from interfering with the concerted activities of its employees, concerns the right for employees to unionize and bargain collectively, and does not purport to govern the procedural details of civil actions under the FLSA. NL

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