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Eleventh Circuit Rules that the FMLA Protects Pre-Eligibility Requests for Post-Eligibility Leave

In *Pereda v. Brookdale Senior Living Communities, Inc.*, 2012 WL 43271 (11th Cir. Jan. 10, 2012), the Court of Appeals for the Eleventh Circuit recently concluded that a pre-eligibility request for post-eligibility maternity leave is protected activity under the Family and Medical Leave Act (FMLA). According to the court, because employees may be required to give advance notice of leave before they have met the FMLA's eligibility requirements, the FMLA regulatory scheme must protect such pre-eligible employees when they put their employers on notice of their intent to take FMLA leave once they become eligible.

Kathryn Pereda (Pereda) began working for a senior living facility operated by Brookdale Senior Living Communities, Inc. (Brookdale) on Oct. 5, 2008. In June 2009 — less than 12 months after she was hired — Pereda informed Brookdale that she was expecting a baby and would be requesting leave after the birth of her child. Pereda's baby was due on November 30, 2009, following her one year anniversary of employment. According to Pereda, after learning about her pregnancy, Brookdale began harassing her and placed her on a performance improvement plan with unattainable goals. Brookdale also began writing Pereda up for absences related to her pre-natal care. In early September 2009, Pereda took time off after her physician instructed that she needed bed rest. She was fired several days later, after only 11 months of employment and one month shy of the 12-month FMLA eligibility threshold.

Pereda subsequently filed a complaint against Brookdale asserting claims for interference and retaliation under the FMLA. The district court dismissed Pereda's claims, finding that Brookdale could not have interfered with Pereda's FMLA rights because she was not entitled to FMLA leave at the time that she requested it. It further concluded that Pereda did not engage in protected activity for which Brookdale could have retaliated against her because she was not eligible for FMLA leave at any time during her employment. The Court of Appeals for the Eleventh Circuit disagreed.

The court acknowledged that to be eligible for leave under the FMLA, an employee must have been employed for 12 months, worked the requisite 1,250 hours within the previous 12 months, and experienced a triggering event, such as the birth of a child. Although it was undisputed that Pereda was not yet eligible for FMLA leave at the time of her discharge, it was also undisputed that she would have been eligible for leave by the time she gave birth to her baby and commenced her requested leave. The fact that Pereda would have been eligible for FMLA leave at the time of her anticipated absence distinguished her case from those cited by Brookdale and made this an issue of first impression for the court.

After examining the FMLA's regulatory scheme, and its employee notice obligations in particular, the court concluded that "[w]ithout protecting against pre-eligibility interference, a loophole is created whereby an employer has total freedom to terminate an employee before she can ever become eligible." The FMLA requires that an employee give not less than 30 days advance notice of foreseeable leave. *See* 29 U.S.C. § 2612(e)(1). According to the court, this notice period was meant as protection for employers to provide them with sufficient notice of extended absences. "It would be illogical to interpret the notice requirement in a way that requires employees to disclose requests for leave that would expose them to retaliation, or interference, for which they have no remedy." Without a remedy, the court continued, "the advanced notice requirement becomes a trap for newer employees and extends to employers a significant exemption from liability.... Such an interpretation is inconsistent with FMLA and the purpose of the Act."

Because the court concluded that the FMLA protects a pre-eligibility request for post-eligibility leave from interference, it likewise found that Pereda could state a cause of action for FMLA retaliation. Remanding the case to the district court, the court noted that the question remained as to whether there was "colorable evidence that Brookdale did in fact retaliate against plaintiff."

In reaching its decision, the court noted the dearth of federal appeals court decisions on the precise issue faced by the court, noting that the question was left open by an earlier Eleventh Circuit opinion in the case of *Walker v. Elmore Cnty. Board of Education*, 379 F.3d 1249 (11th Cir. 2004). The Court proceeded to approvingly cite to several district court opinions on point, including *Beffert v. Pennsylvania Department of Public Welfare*, 2005 WL 906362 (E.D.Pa. Apr. 18, 2005), in which an Eastern District of Pennsylvania judge likewise concluded that an employee could proceed with her FMLA retaliation claim where she had been employed for less than 12 months but requested leave to begin more than one year after her employment commenced.

Pereda is an important case for employers to heed. Employers should assume that employees who are not yet eligible for leave will be protected by the FMLA if they report a future need for leave to begin when they otherwise would have met the Act's eligibility criteria. Accordingly, employers should consider the potential legal risks before taking any adverse action against pre-eligible employees who have requested post-eligibility FMLA leave.

NLRB's General Counsel Again Weighs in on Social Media in the Workplace

On January 24, 2011, the General Counsel of the National Labor Relations Board (NLRB or the Board) released a second report discussing social media cases decided under Section 7 of the National Labor Relations Act (NLRA). Pursuant to the NLRA, employees (whether unionized or not) have a right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection," (called a "Section 7 right") and it is an unfair labor practice for an employer to interfere with, restrain or coerce an employee in the exercise of this right. Posts on social media sites, even if the posts are made from home computers during non-working hours, can constitute such concerted activity in some circumstances. As discussed at Dechert's October 2011 Labor Seminar, the General Counsel's first report on this issue, which was released on August 18, 2011, described 14 cases in which it considered whether employer policies and practices regarding employees' use of social media ran afoul of Section 7. In this latest report, the General Counsel has offered opinions on an additional 14 cases. Although not the definitive opinion of a court or the NLRB, the General Counsel's comments are instructive regarding circumstances that may give rise to a Section 7 violation.

The General Counsel approved social media policies that "prohibited the use of social media to post or display comments about co-workers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's work place policies against discrimination, harassment, or hostility" on account of a protected characteristic.

However, the policies with ambiguous adjectives in social media policies fared worse. The General Counsel believes that social media policies using broad and/or vague adjectives to describe what employees may or may not do violate the NLRA because such policies *may* be construed to limit employees' Section 7 rights, and thereby chill employees exercise of those rights. Specifically, the General Counsel objected to policies prohibiting making "disparaging comments about the company," prohibiting "discriminatory, defamatory, or harassing web entries," permitting only "appropriate" and "professional" discussions about the terms or conditions of employment, prohibiting "insubordinate, disrespectful, or inappropriate conduct or conversations," and prohibiting "unprofessional communication that could negatively impact the employer."

This new report also suggests that context matters. For example, the General Counsel commented that a policy prohibiting employees from using or disclosing confidential or proprietary information was lawful when promulgated by a drug store chain, because in the context of pharmaceutical sales the policy would not be construed by employees to apply to Section 7 rights. This finding is striking, because an employer operating clinical testing laboratories put forth a similar policy, prohibiting disclosure or communicating information of confidential, sensitive, or non-public information concerning the company on or through company property, which the General Counsel characterized as overbroad pursuant to the NLRA.

Similar to the prior report, the General Counsel reported that employers violated the NLRA in several cases by disciplining or terminating employees who engaged in concerted activity through their speech on social media sites. For example, the General Counsel noted that an employee's comments that an employer behaved badly when demoting her, and the subsequent Facebook conversation it incited, "clearly" constituted concerted activity; thus, her termination as a result of this conversation was unlawful.

However, the General Counsel determined that employee terminations due to inappropriate comments on social media sites in some cases were lawful because the employees' comments in those circumstances were not protected concerted activity. In two cases, the General Counsel opined that employees' comments about the poor performance of co-workers did not constitute protected speech under the NLRA. The General Counsel reasoned that these comments were not protected because co-worker performance is too attenuated to the terms and conditions of employment. The General Counsel also approved terminations due to employees posting personal gripes: including, an employee's post of an expletive and her employer's company name; an employee's rant against other co-workers and the employer, and an employee's posts complaining about a co-worker sucking his teeth.

Employers should recognize that they may face serious liability under the NLRA by maintaining an overbroad social media policy, or if they discipline or terminate an employee unlawfully because of the employee's use of social media. Accordingly, employers are advised to review their social media polices for terms including, but not limited to, "appropriate" "professional/unprofessional" and "disparaging" and consider reworking their polices to be more specific. The General Counsel suggested that including specific examples of what sorts of social media speech are prohibited, or permitted, may help save a potentially overbroad policy in some circumstances.

Court Allows Claims Against Employer Who Accessed Social Media Accounts to Proceed

In Maremont v. Susan Fredman Design Group, No. 10-C-7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011), the U.S. District Court for the Northern District of Illinois refused to grant summary judgment to an employer on an employee's claims pursuant to the Lanham Act and the Stored Communication Act. In so doing, the district court created the potential that an employer could face liability for unauthorized use of an employee's social media account(s).

In connection with her duties as the Director of Marketing, Public Relations and e-commerce at Susan Fredman Design Group (SFDG), an interior design firm headquartered in Chicago, Jill Maremont edited a blog, *"Designer Diaries: Tales from the Interior,"* and opened and maintained a Facebook account for SFDG. Maremont also opened a Twitter and a Facebook account from an SFDG computer where she would post content promoting SFDG and provide links to SFDG's blog and website. Maremont took a leave of absence following a car accident. During the leave, SFDG continued to post on the Twitter and Facebook accounts without Maremont's permission. The unauthorized posts described Maremont's accident as well as promoted SFDG's blog and website.

Maremont asserted two claims against SFDG as a result of the unauthorized posts. First, she brought a "false association" and/or "false endorsement" claim under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A). Liability exists under the Lanham Act for false endorsement when "a person's identity is connected with a product or service in such a way that consumers are likely to be misled about that person's sponsorship." The court denied the defendant's request for summary judgment on this claim, despite the fact that Maremont had undeniably associated herself with SFDG on the social media sites in question prior to her accident, and without regard for the fact that she created these two social media sites while at work, from a work computer, and had a history or using those social media sites in the performance of her job for SFDG. Instead, the court noted that Maremont has an interest in her name and identity as portrayed in her personal social media accounts.

Second, Maremont brought a claim for unauthorized use and access under the Stored Communications Act. The Stored Communications Act allows private causes of action based on unauthorized, intentional access to communications that are held in electronic storage. The district court refused to grant defendant's motion for summary judgment on this claim, noting the existence of undisputed evidence that defendant accessed Maremont's personal Facebook and Twitter accounts, arguably, without Maremont's authorization.

The district court's opinion highlights that employers should recognize that unauthorized use of an employee's social media account, even if that account was created at work and used for work purposes, could create liability under the Lanham and Stored Communication Acts. Employers would be prudent to encourage employees who perform marketing or social media functions to do so exclusively on social media accounts owned by the employer, and to prohibit access to social media accounts that could be characterized as personal.

Court Allows Claim Against Employees for Erasing Work Documents on Personal Computers

In Executive Security Management, Inc. v Dahl, No. 09-9273, 2011 WL 5570106 (C.D. Cal. Nov. 15, 2011), the U. S. District Court for the Central District of California denied summary judgment and permitted an employer's claims pursuant to the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act to survive summary judgment.

Defendants, a husband and wife who both worked for Apex, a corporation that provides executive security, event security, and event accreditation services at concerts and sporting events, were suspended and eventually resigned. Apex then brought several claims against them for allegedly engaging in a campaign to discredit Apex, interfering with Apex's relationships with former clients and employees, stealing Apex's confidential information and erasing its data.

Apex brought a claim pursuant to the Computer Fraud and Abuse Act, which prohibits a number of computer-related crimes, the majority of which involve accessing computers without authorization or in excess of authorization. In this case, Apex alleged that the couple exceeded their "authorized access" to Apex's computers when they used an erasure program on two of their personal laptops and four of Apex's computers and allegedly erased documents. The loss of that information allegedly caused one of Apex's client's to terminate its relationship with the company. The court denied the former employees' request for summary judgment even as to those claims related to the employees' personal laptops, holding that the employees could be liable for erasing work documents, even those documents on their personal computers.

Apex also brought claims under the Wiretap Act and the Electronic Communications Privacy Act. The Wiretap Act prohibits someone from intentionally intercepting or causing to be intercepted wire, oral, or electronic communications. Apex alleged that the defendants violated the Wiretap Act when they forwarded other employees' emails. However, it was undisputed that the defendants were required to maintain the corporate email system as part of their jobs. The district court dismissed Apex's wiretap claim, "rejecting" the argument that "forwarding" email constitutes an interception pursuant to the Act. But, the court did find that the same unauthorized email-forwarding behavior may support a claim under the Electronic Communications Privacy Act because it reasoned that the employees, even though they had access to others emails, may have exceeded that authorized access in some circumstances.

The *Dahl* case highlights the possibility that employers may be able to recover from employees for destroying company property on *personal* computers, or for abusing their access to a company email and similar communication systems.

''At Will'' Employment Remains the Rule, Not the Exception, in Pennsylvania

In *Edwards v. Geisinger Clinic*, No. 11-1528, 2012 WL 171967 (3rd Cir. Jan. 23, 2012), the U.S. Court of Appeals for the Third Circuit rejected an employee's assertions that his previous employer, who terminated his employment, promised that he would be employed for at least three years. In doing so, the Third Circuit reaffirmed Pennsylvania's strong presumption of "at will" employment, absent clear and precise evidence that the parties intended to enter into an employment contract for a definite term.

The case involved Dr. Philip Edwards, a licensed physician from the United Kingdom. Dr. Edwards was recruited by and began working for Geisinger Clinic in Pennsylvania in its interventional radiology department. During the interview process, Geisinger informed Dr. Edwards that it requires new physicians to obtain certification from the American Board of Radiology, which requires that the physician complete four years of employment with an accredited program. This requirement was reiterated in Geisinger's offer letter to Dr. Edwards, which stated that he "will be granted four to six years from the date of employment to become board certified" or his "continued employment . . . will need to be reevaluated." Several days later, Dr. Edwards signed a formal employment application stating that his employment could not be terminated because of certain actions, such as having "a practice which includes a substantial number of patients with expensive medical conditions." Neither the offer letter nor the application contained a disclaimer informing Dr. Edwards that his employment was "at will." Geisinger also sponsored Dr. Edwards for an H-1B visa, which allowed him to return to the United States to work at Geisinger. Dr. Edwards asserted that both he and Geisinger had to represent to the immigration authorities that he "had at least a three year employment commitment," the minimum for an H-1B visa. Geisinger terminated Dr. Edwards after less than three years of employment.

Dr. Edwards sued and brought a breach of contract claim, arguing that there was an express contract for a definite employment term. Geisinger disagreed, and pointed to the requirement in the offer letter that Dr. Edwards sign a Practice Agreement. The Practice Agreement, which Dr. Edwards signed a month or two after commencing employment with Geisinger, provided that Dr. Edwards "acknowledge[s] that [his] employment with Geisinger is 'at will' and may be terminated at any time by either party for any or no reason."

Finding no dispute of fact, the trial court granted summary judgment for Geisinger. The Third Circuit affirmed, noting Pennsylvania's presumption that employment is "at will" absent clear and precise evidence to the contrary. The Third Circuit found that none of Dr. Edwards' evidence met this standard. First, the language in the offer letter providing that Dr. Edwards "will be granted four to six years" clearly was meant to clarify the board certification requirement. Second, the absence of "at will" language in the employment application and offer letter does not suggest that the parties intended the employment to last for a particular period, especially given Pennsylvania's presumption that employment relationships are "at will." Third, the employment application's list of enumerated circumstances that would not lead to the termination of Dr. Edwards' employment suggests that Geisinger could terminate Dr. Edwards' employment for any other reason. These declarations, said the Third Circuit, are akin to policy statements in employee handbooks, which under Pennsylvania precedent do not limit termination to cases involving just cause absent unambiguous language. Finally, Dr. Edwards presented no evidence that Geisinger represented to immigration authorities that Dr. Edwards would be employed for three years, and the H-1B visa program permits employers to terminate the employment of a visa holder prior to the expiration of the visa.

The Third Circuit's opinion not only reinforces Pennsylvania's presumption of "at will" employment absent express language to the contrary, but reminds employers that all of their employment documents, especially hiring documents, must be drafted with care to avoid creating a contract of employment for a specific term. By way of example, Geisinger may not have been able to obtain summary judgment had their offer letter not been drafted so clearly. Had the meaning of the phrase "will be granted four to six years" been ambiguous, Dr. Edwards may have been able to avoid summary judgment on his breach of contract claim. Employers would also be prudent to include "at will" employment disclaimers in all of their hiring documents, including their offer letters and employment applications.

Supreme Court Applies the Ministerial Exception to Bar ADA Claim

On January 11, 2012, the Supreme Court applied the "ministerial exception" to employment discrimination laws, deciding that churches and other religious groups must be free to choose their leaders without government interference.

In *Hosanna-Tabor v. EEOC*, No. 10-553, a religious school asked a teacher to resign because of a medical condition. When she refused and threatened to assert her rights under the Americans with Disabilities Act ("ADA") the school terminated her — and sent a letter expressing that her termination was premised on her threat of legal action. The Equal Employment Opportunity Commission (EEOC) brought suit against Hosanna-Tabor for retaliation and the Church argued that the suit was barred because of the "ministerial exception," claiming that the teacher was a minister and that she had been fired for a religious reason — the teacher's threat to sue the Church violated their religious belief that Christians should resolve disputes internally.

The U.S. District Court for the Eastern District of Michigan granted summary judgment to Hosanna-Tabor on the teacher's ADA discrimination and retaliation claims, holding that the teacher's claim fell into the ministerial exception. In other words, the district court determined that the teacher was a ministerial employee and thus was barred from bringing an ADA claim against Hosanna-Tabor. The Court of Appeals for the Sixth Circuit reversed, deciding as a matter of first impression that the teacher was not a ministerial employee for the purposes of the ADA's ministerial exception because her duties were the same as a non-religious teacher and therefore that her claim was not barred.

The Supreme Court reversed the Sixth Circuit decision, determining that the teacher in question qualified as a minister and that requiring the Church to retain her would infringe on the Free Exercise Clause's protection of a religious group's right to shape its own faith and mission. In determining that the ministerial exception applied, Chief Justice Roberts examined the history of religious freedom. Then, in deciding whether this particular teacher qualified as a minister, the Court declined to adopt a "rigid formula," and instead noted that Hosanna-Tabor held out the teacher as a minister — as did the teacher herself — and that her duties reflected a role in "conveying the Church's message and carrying out its mission." Lastly, the Court balanced both parties' policy arguments, but ultimately concluded, "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."

Pennsylvania Overhauls Its Unemployment Compensation Law

In 2011, Governor Corbett signed into law Senate Bill 1030, amending several provisions of the state's Unemployment Compensation (UC) law. Designated as Act 6 of 2011, the law tightens eligibility requirements and revises computation of benefits for the purpose of stabilizing Pennsylvania's insolvent UC Trust Fund, controlling costs, and preventing abuse of the system by claimants. Projected annual savings to the Trust Fund are estimated at $133 million. Significant changes include technical provisions that will be applied by the PA Department of Labor and Industry ("L&I") and others of direct interest to employers, as noted below. A range of effective dates apply to the different provisions and employers and employees should be familiar with them.

First, starting with benefit years beginning on or after January 1, 2012, a claimant now must make an active job search for suitable employment and prove having done so to L&I in order to be eligible for UC benefits. At a minimum, the claimant will be required to register for employment search services offered by the PA Career-Link system within 30 days after first applying for benefits, post his/her resume on that database, and apply for positions with duties and wages similar to those in his/her previous jobs which are within a 45-minute commuting distance.

Second, starting with benefit years beginning on or after January 1, 2012, severance (*i.e.*, one or more payments made by an employer to an employee on account of separation from service, whether or not required by contract) in excess of 40 percent of the average annual wage as of June 30 of the preceding year (which is currently estimated at $17,853) will be offset against the employee's weekly benefit rate. More specifically, the amount of severance in excess of 40 percent of the annual average wage will be divided by the regular full time regular weekly wage the individual was receiving before separation to determine the amount of severance pay that is attributable to the week(s) after separation, and that amount will be offset against the applicable weekly benefit rate. If the attributable weekly severance equals or exceeds the claimant's weekly UC rate, the claimant will be ineligible for benefits in that week. This provision is inapplicable to severance pay agreements made prior to January 1, 2012. For many, this change will come as a surprise because historically, eligibility for UC benefits was unaffected by receipt of severance pay, and severance was not been offset against benefits otherwise payable. Given the effect of severance on UC benefits, departing employees offered severance may attempt to bargain for a greater payment to offset the loss.

Third, the law established a new voluntary Job Sharing Program to stave off potential layoffs. An employer facing the temporary layoff of at least ten percent of the employees in a designated unit may apply to L&I for approval of a shared work-plan. Under an approved plan, the employer may reduce the work hours of all employees in the unit by a set percentage (between 20% and 40%) instead of laying employees off. Each affected employee in the unit then receives a percentage of his/her weekly UC benefit rate equal to the percentage by which hours of work are reduced. This provision of the law will take effect once approved by the U.S. Department of Labor.

Fourth, Act 6 removes minimum mileage restrictions on when a referee can schedule a phone hearing. Now, upon request, a party to a UC hearing must be permitted to testify by phone, without regard to the distance of the hearing location from either party. This will make it easier for employees to testify and challenge UC benefits.

Fifth, the law expands the circumstances under which an employer is granted relief from charges to the employer's account from UC benefits paid to employees. Examples include when an individual's unemployment was directly caused by a major national disaster designated as such by the U.S. President and the person would have been eligible for disaster relief; or if an individual was separated from work due to a cessation of business of 18 months or less caused by a disaster. If a person subsequent to separation is engaged in part-time work by a base year employer, the part-time employer will be relieved from charges for benefits payable while the part time work is ongoing.

Finally, as of 2012, the maximum term of benefits has been reduced from 99 weeks to 86 weeks. The maximum weekly benefit amount for 2012 was frozen at the 2011 level of $573 with increases of 1.1 perecent to 1.5 percent for the period 2013 to 2018. An individual now must have 18 rather than 16 credit weeks to qualify for benefits, and earn at least $100 for every credit week (amount changes to at least 16 times the Pennsylvania minimum wage in January 2015). A person whose weekly benefit rate would be less than $70 will no longer qualify for benefits.

New Jersey Creates New Employee Notice Requirement

New Jersey now requires employers in the state to post and distribute to employees a New Jersey Department of Labor and Workforce Development (NJDOL) notice concerning records employers must keep under several New Jersey laws pertaining to wages, benefits, taxes and other contributions and assessments (*i.e.*, New Jersey's Wage Payment Law, Wage and Hour Law, Prevailing Wage Act, Unemployment Compensation Law, Temporary Disability Benefits Law, Family Leave Insurance Benefits Law, Workers' Compensation Law, and Gross Income Tax Act.). Codified at N.J.S.A §34:1A-1.11 through 1.14, the new law provides a mechanism for the state to suspend or revoke certain licenses necessary to do business in New Jersey (such as a certificate of incorporation or formation as a partnership or limited liability company) in the event an employer has failed, for one or more employees, to maintain and report every record regarding wages, benefits, taxes which the employer is required to maintain and report pursuant to relevant state laws and, in connection with that failure, has also failed to pay wages, benefits or taxes or other contributions and assessments as required by those laws.

NJDOL, which was charged with issuing the required form of notice as a regulation, published the six-page document on November 7, 2011. (*See* N.J.A.C. 12:2.) Since then, and in accordance with §34:1A-1.14 of the act, employers in New Jersey should have promptly posted the six-page notice and given a copy of it to anyone hired after November 7, 2011. In addition, all non-new hires should have been provided a copy by December 7, 2011.

Note that §34:1A-1.14 also prohibits an employer from discharging or discriminating against an employee because he/she has inquired/complained to the employer or the NJDOL about any possible violation of the new law or any state wage, benefit or tax law, or has instituted or participated in a related proceeding.

Under §34:1A-1.12, if the Commissioner of Labor determines that an employer has failed to maintain and report every required record and make required payments, he will, as an alternative to or in addition to actions taken under the underlying law, notify the employer of the determination and conduct an audit of the employer or its successor within 12 months of same. If upon audit the Commissioner determines the employer has continued fail to comply respecting records and payment, NJ DOL will afford the employer notice and a hearing, and may issue a determination directing the appropriate state agency to suspend one or more business licenses for some discrete period of time. Within 12 months of that determination, NJDOL will re-audit, and if non-compliance persists, the process will repeat except that at this juncture, the Commissioner can direct revocation of a license(s).

Violation of §34:1A-1.14 can result in conviction of a disorderly person offense and a fine of $100 to $1,000. If the employer is found to have discriminated against or discharged an employee in violation of this section of law, remedies can include lost pay and benefits *plus* punitive damages double that amount, legal costs, and reinstatement.

The New California Wage Theft Protection Act Is Now Effective

California enacted the Wage Theft Protection Act (AB 469) (CAWTPA), effective January 1, 2012, amending several sections of the state's Labor Code, broadening pay notice requirements, and increasing penalties for violations of wage-related statutes and regulations. The most significant change is that the act requires employers to provide certain information at the time of hire, but only to employees who are non-exempt. Employees exempt under California's wage and hour law and Industrial Welfare Commission Industry wage orders or covered by a union agreement generally do not have to receive the notice.

Under the CAWTPA, an employer must provide a notice to new hires which includes the following: rate(s) of pay and basis thereof (*i.e.*, hour, shift, day, week, salary, piece, commission,...), including overtime rate(s); allowances against the minimum wage; regular pay day; name of employer including any d/b/a name; physical address of the employer's main office and mailing address if different; the employer's telephone number; name, address, telephone number of the employee's workers' compensation carrier; and any other information deemed material and necessary by the Labor Commissioner. The employer must have the employee sign the notice to acknowledge receipt of it (or note the employee's refusal to sign on the form). In the event of changes to any of the information in the notice, the employer must notify the employee within seven day of the changes unless the change is reflected in a timely wage statement/pay stub that is compliant with California Labor Code 226.

California's Department of Labor Standards Enforcement (DLSE), which has enforcement authority under the CAWTPA, has published a template notice for use by employees and FAQs concerning the notice requirements. Notice must be provided to an employee in the language in which the employer communicates with him/her, and DLSE has published its template in numerous languages. A copy of the template is available at https://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.

Taking an aggressive approach, DLSE added several specific requirements beyond what the statute itself requires. For example, DLSE originally took the position that the new notice also was required to be given to incumbent employees, but since has conceded otherwise. The template notice published by DLSE also includes items not specified in the statute but which the agency contends are "deemed necessary by the Labor Commissioner" and thus required. These additional items include: the employee hire date; the employer's business form (*e.g.*, corporation, sole proprietor, etc.); name/address/telephone number of any other entity the employer uses to hire employees or administer wages or benefits excluding recruiting or payroll processing services (*e.g.*, employee leasing company, PEO, etc.); whether the employee's employment agreement is oral or written; name and signature of employee and date notice is signed; the name and signature of the employer representative and the date the notice was provided to employee; the workers' compensation policy number or certificate number for consent to self-insure; an explanation of which employees are not require to receive notice; a link to the text of Labor Code Section 2810.5; and other information regarding acknowledgement of receipt of the notice and changes to information set forth in the notice.

DLSE does not formally require that an employer use the template, but takes the position that any form of notice an employer creates must contain all of the items and information in the template. Further, the notice must be a separate document and cannot be made part of some other document, such as an offer letter or agreement. Because of the DLSE's rigidity, many employers may simply elect to use DLSE's form, but should take care not to indicate that there is an "employment agreement" where none exists. All employees hired since the beginning of 2012 should have received the notice.

Courts and Agencies Continue to Struggle with Limits on Arbitration Clauses

NLRB Holds that Arbitration Clauses Prohibiting Class Actions Violate Section 8(a)(1)

In its highly-publicized and controversial decision, the National Labor Relations Board (Board) held in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), that an employer violates the National Labor Relations Act "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing join, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." According to Chairman Pearce and Member Becker (Member Hayes was recused) "such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable."

The agreement at issue, which was a condition of employment with homebuilder D.R. Horton, provided that "all disputes and claims relating to the employee's employment...will be determined exclusively by final and binding arbitration" and that the arbitrator "may hear only Employee's individual claims" and "will not have the authority to consolidate the claims of other employees." During his employment, Michael Cuda provided notice to Horton that he intended to initiate class arbitration asserting that he and other superintendents had been misclassified under the Fair Labor Standard Act. Horton contested Cuda's notice, citing the language of Cuda's arbitration agreement barring arbitration of collective actions. Cuda filed an unfair labor practice charge and the Board's General Counsel issued a complaint alleging that Horton violated Section 8(a)(1). An Administrative Law Judge found that the agreement violated the Act because it would reasonably be understood by employees to prohibit the filing of a charge with the Board, but dismissed the allegation that the agreement's class action waiver was unlawful. The Board reversed this latter finding.

Section 7 of the NLRA states that employees shall have the right "to engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection." According to the Board in *Horton*, "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." To determine whether Horton's arbitration agreement unlawfully "interfered with or restrained" employees' Section 7 rights, the Board applied the multifactor test articulated in *Lutheran Heritage Villiage-Livonia*, 343 NLRB 375 (2004). Under this test, a policy or practice that does not explicitly restrain Section 7 activity will be found unlawful if: 1) employees would reasonably construe it to prohibit Section 7 activity; 2) it was promulgated in response to union activity; or 3) it has been applied to restrict the exercise of Section 7 rights.

Applying this test, the Board concluded that "the agreement at issue here...not only bars the exercise of rights at the core of those protected by Section 7, but implicates prohibitions that predate the NLRA and are central to modern Federal labor policy." In reaching this conclusion, the Board rejected the position of the General Counsel that "a class-action waiver is not *per se* unlawful, so long as the waiver makes clear to employees that they may act concertedly to challenge the waiver itself...." According to the Board, "[i]f a Section 7 right to litigate concertedly exists, then it defies logic to suggest...that requiring employees to waive that right does not implicate Section 7."

Significantly, the Board also held that there was no conflict between the rule it announced and the Supreme Court's pronouncements concerning the Federal Arbitration Act (FAA) in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the Court held that a California court's finding that a class action waiver contained in an arbitration clause in a contract of adhesion was unconscionable was preempted by the FAA, which permits such waivers. The Board distinguished *Concepcion* on the basis that the policy of the FAA upon which the Supreme Court relied — "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" — was less significant in the context of employment-related claims. According to the Board, "most class-wide employment litigation, like the case at issue here, involves only a subset of an employer's employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court [in *Concepcion*] — speed, cost, informality, and risk — when the class is so limited in size."

The Board concluded its decision by noting that "we need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waiver their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring availability of class-wide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis."

The Board's decision, if it stands, will have far-reaching consequences for employers as it renders every mandatory arbitration agreement that forecloses class arbitration subject to challenge. However, the decision is sure to be challenged in numerous cases, and employers should keep an eye out for further developments.

Relying on *Concepcion*, Pennsylvania District Court Grants Motion to Compel Individual Arbitration on Eve of Class Certification Hearing

In one of the first cases applying *Concepcion* in the Third Circuit, the district court in *Brown v. TrueBlue, Inc.*, No. 1:10-CV-0514, 2011 WL 5869773 (M.D. Pa. Nov. 22, 2011), held that an arbitration clause in an employment agreement that prohibited class arbitration and required that employees provide written consent to be represented in a lawsuit filed by another individual was valid and that the Supreme Court's decision constituted a change in the law that justified an employer's motion to compel arbitration fifteen months into litigation. In so ruling, the court concluded that *Concepcion* abrogated the Pennsylvania Superior Court's holding in *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) that an arbitration clause is unconscionable and unenforceable where it is "contained in an adhesion contract and unfairly favors the drafting party."

The case arose after two employees of TrueBlue, a temporary staffing agency formerly known as LaborReady, filed a putative class and collective action alleging violations of the Pennsylvania Minimum Wage Act and the Fair Labor Standards Act. Fifteen months after the filing of the plaintiffs' complaint, and three days prior the scheduled hearing on plaintiffs' motion for class certification, TrueBlue filed a motion to compel arbitration alleging that the plaintiffs' employment agreements required them to litigate any claims against TrueBlue in individual arbitrations. Plaintiffs opposed the motion, asserting that the arbitration agreements were unconscionable and that TrueBlue had waived its right to seek arbitration by waiting so long to file its motion to compel.

The court rejected both of the plaintiffs' arguments and stayed the case pending the outcome of the arbitrations. With respect to the issue of unconscionability, the court held that "a fair reading of *Concepcion* must lead the Court to conclude that *Thibodeau* cannot serve to invalidate an arbitration agreement" and that "the Federal Arbitration Act preempts Pennsylvania's unconscionability doctrine." Turning to the plaintiffs' waiver argument, the court held that while it was "troubled" that TrueBlue's motion to compel came fifteen months after the case began, "the reason for this delay was that *Concepcion* represented a significant change in the law [that] excuses Defendants' delay."

In reaching this conclusion, the *TrueBlue* court joined the rapidly growing number of courts that have held that the FAA preempts nearly all state law defenses to the enforcement of arbitration clauses. While it remains to be seen whether the Board's *Horton* decision will have any impact on courts' favorable view of arbitration provisions, it appears likely that employers will continue to be able to rely on well-crafted arbitration clauses to preclude court cases and class claims.

Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment.

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