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New York Labor Law Expands Permissible Wage Deductions

The New York State Legislature recently passed legislation that amends New York Labor Law Section 193 and significantly expands the list of deductions an employer may make from an employee's wages. Governor Cuomo signed the bill on September 7, 2012. The amendments will become effective 60 days thereafter and will remain in effect for three years.

Currently, New York Labor Law Section 193, as interpreted by the Department of Labor in recent opinion letters, limits permissible wage deductions by employers to the following payments: payments for insurance premiums, payments for pension or health and welfare benefits, contributions to charitable organizations, payments for U.S. bonds, payments for dues or assessments to a labor organization, and "similar" welfare benefit or pension payments that are for the benefit of and expressly authorized by the employee and do not exceed 10 percent of the employee's gross wages for the pay period.

The amendments greatly expand the list of permissible wage deductions to include, among others: discounted parking, gym membership dues, cafeteria and vending machine purchases at the employer's place of business, tuition and fees for educational institutions, day care, and before- and after-school care expenses. Further, subject to regulations

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NLRB Holds Prohibiting Union or Nonunion Employee Discussions of Workplace Investigations Unlawful

In a decision dated July 30, 2012, a divided National Labor Relations Board (NLRB) held that "by maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct," an employer violates Section 8(a)(1) of the National Labor Relations Act (NLRA). *Banner Health Sys.*, Case No. 28-CA-023438, 2 (N.L.R.B. July 30, 2012). Pursuant to Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7, which include the rights to self-organize, bargain collectively and engage in other concerted activities.

In *Banner Health System*, an employee technician allegedly had refused to heed his supervisor's instructions to utilize alternative equipment sterilization procedures in fulfilling his regular work duties. Thereafter, the employee met with a human resources consultant to discuss the situation and express concerns about his job security. The human resources consultant requested that he not discuss the matter with his co-workers while an internal investigation of his complaint was ongoing. However, she made no direct or specific threat of discipline if the instruction was not followed. Nevertheless, the NLRB held that the human resources

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Supreme Court Rules Pharmaceutical Sales Employees Exempt Outside Salespeople

In *Christopher v. SmithKline Beecham Corp.*, No. 11-204 (U.S. June 18, 2012), the United States Supreme Court ruled 5-4 that pharmaceutical sales representatives (PSRs) qualify as "outside salesmen" and are therefore exempt employees under the Fair Labor Standards Act (FLSA). This decision resolved a circuit split and overruled *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), which held PSRs are not exempt under the FLSA.

Given the strict regulation of the pharmaceutical sales industry, it is illegal for PSRs to sell prescription drugs. Instead, PSRs approach physicians to solicit a "nonbinding commitment" to prescribe the drugs sold by their employer in appropriate cases. The PSRs employed by SmithKline Beecham, who consistently worked more than 40 hours each week, were paid a base salary plus performance-based incentives, but were never paid overtime wages. They brought suit alleging their employer violated the FLSA by failing to compensate them for overtime.

The Ninth Circuit affirmed the district court's rejection of the employees' claim by holding that the PSRs were outside salesmen within the meaning of the FLSA exemption. The Supreme Court also affirmed, holding that, at least in the highly regulated environment of pharmaceutical sales, the PSRs were engaged in sales even though physicians do not actually purchase prescription drugs from them. The Court explained that the FLSA broadly defines "sale" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." It concluded the "catchall phrase 'other disposition' is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity," and that the PSRs' efforts to persuade physicians to prescribe their employer's drugs met this standard.

The Court declined to defer to the position of the U.S. Department of Labor (DOL) in its amicus brief that an employee does not make a "sale" unless he actually transfers title to the property at issue. Moreover, the Court found the DOL's interpretation was flatly inconsistent with the FLSA, which defines "sale" to include a "consignment for sale," since a consignment for sale does not involve the transfer of title.

NLRB Social Media Policy Guidance

As the use and prominence of social media increases, many employers have implemented policies to regulate employees' online conduct. In *Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371*, Case No. 34-CA-012421 (N.L.R.B. Sept. 7, 2012), the NLRB recently issued its first decision regarding an employer's social media policy. Costco Wholesale Corp.'s electronic posting rules prohibited employees from discussing or sharing each other's private matters, such as leaves of absence, ADA accommodations and workers' compensation injuries, and from sharing or transmitting employees' sensitive financial and other personal information, such as payroll, credit card and social security numbers, and addresses and telephone numbers. The policies also restricted employees from posting statements that "damage the Company, defame any individual, or damage any person's reputation . …" The NLRB invalidated these policies as overbroad, but it did not articulate any specialized criteria for evaluating whether social media use prohibitions restrain employee rights under the NLRA. Rather, the NLRB held that most of the challenged employee communications rules violated Section 8(a)(1) of the NLRA on the grounds that such restrictions could reasonably tend to "chill" employees in the exercise of their Section 7 rights. In other words, in the NLRB's view, Costco's broad rules could interfere with employees' rights to discuss their working conditions and make critical statements about the company. The NLRB did uphold certain of Costco's policies, including one requiring employees to use appropriate business decorum in communicating with others.

The NLRB's decision is largely consistent with the acting general counsel's three advice memoranda, including his most recent report, dated May 30, 2012, signaling that it will continue to take an expansive view of what constitutes protected employee speech in the world of social media. The acting general counsel's May 30, 2012 report regarding social media in the employment context analyzes the social media policies of seven companies and concludes that aspects of six of these policies are unlawful. As the report explains, an employer may not interfere with an employee's exercise of Section 7 rights to engage in concerted activity with respect to terms and conditions of employment and, in his view, a rule that could reasonably be construed by employees to prohibit Section 7 activity is unlawful. The report further explains that, "[r]ules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful." NLRB Office of the General Counsel, OM 12-59, *Report of the Acting General Counsel Concerning Social Media Cases*, 3 (2012). Accordingly, as the acting general counsel made clear, if the policy is overbroad, an employee may believe that he or she is restricted from discussing terms and conditions of employment on Facebook, Twitter or other social media platforms. On the other hand, rules that provide examples of specific prohibited conduct making clear that they do not cover Section 7 rights are lawful.

The first example of an overbroad policy instructed employees to not "'release confidential guest, team member or company information.'" The report explains that employees

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"would reasonably interpret such prohibitions to include information concerning terms and conditions of employment." The policy also warned employees against sharing confidential information with co-workers unless they need to know the information, and against discussing confidential information in the "'[b]reakroom,'" "'any other open area,'" "'at home'" or "'in public areas.'" This was deemed unlawful by the acting general counsel because confidential information could be construed to include working conditions, and the rule prohibits these discussions "virtually everywhere such discussions are most likely to occur."

Another company's policy instructed employers to ensure that their "'posts are completely accurate and not misleading.'" The report notes that this is overbroad because discussions or criticism relating to labor policy are protected under the NLRA so long as they are not maliciously false. The policy also forbade "'reveal[ing] nonpublic company information on any public site.'" The policy provided several categories of non-public information, including "'any topic related to the financial performance of the company'" and "'personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.'" The report concludes that these restraints are unlawful because they specifically encompass topics related to Section 7 activities.

Additionally, the acting general counsel examined a policy that prohibited employees from posting photos, music, videos and quotes and from using the employer's trademark or logo. The report explains that this rule is unlawful because employees could reasonably interpret this as prohibiting photos and videos of picket signs that include the company's trademark or logo. The report also finds unlawful a policy stating stated that "'[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline'" on the grounds that it applies to "a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees." Similarly, the report finds overbroad a company policy that prohibited employees from making "'disparaging or defamatory'" comments.

Many of the policies required that employees with questions speak with the employer's legal department or human resources. The report notes that where the underlying policy is unlawful, it is also unlawful to include a reporting requirement, as an employee may not be required "to secure permission from an employer as a precondition to engaging in Section 7 activities …" Similarly, a requirement that employees report any unusual or inappropriate social media activity was considered unlawful, as it could "encourag[e] employees to report to management the union activities of other employees," which violates the NLRA.

In the acting general counsel's view, the policies under examination also contained some lawful components. For example, a restriction on posting of confidential or attorney-client privileged information is lawful because it does not specifically refer to employees. In addition, a prohibition against harassment, bullying, discrimination or retaliation was considered lawful because it covers egregious conduct that would not be permissible in the workplace and would not reasonably be interpreted to not encompass Section 7 activity. In addition, an employer may lawfully prohibit employees from posting anything in the name of the employer or that could reasonably be attributed to the employer, as this could not reasonably be construed to relate to terms and conditions of employment.

Perhaps most helpful to employers, the report finds that Walmart's policy was lawful in its entirety, as "it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity." For example, Walmart's prohibition on "'inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct'" is lawful because it covers egregious conduct. In addition, the rule against disclosing confidential information was deemed lawful because the examples, which included technology, internal reports and procedures, demonstrate that it was not intended to cover Section 7 activity.

Ohio Court Holds Surviving Merger Entity Cannot Enforce Noncompete Agreement Absent Assignment

The Ohio Supreme Court, in a 4-3 decision affirming the lower courts, held that in the corporate merger context, the surviving company may be prevented from enforcing a restrictive covenant against an employee where express language allowing for assignment of the covenant is absent. In A*cordia of Ohio L.L.C. v. Fishel,* Slip Op. No. 2012-Ohio-2297 (May 24, 2012), the Ohio Supreme Court found that the employer, Acordia of Ohio LLC (Acordia), had no basis to enforce certain noncompetition agreements, which it had assumed control over as a result of a merger, because the agreements did not state that they could be assigned or carried over to successors. As such, the court held that the agreements, governed by Ohio law, were to be interpreted as operating between the employees and the original contracting employer.

In particular, Acordia sued employees of the acquired company to enforce noncompetition agreements they had entered into years earlier in connection with a series of other mergers. The agreements did not include a provision making them applicable to the company's legal successors and assigns. Acordia asserted that, in accordance with the state merger statutes, the rights and obligations of the target company continued uninterrupted as a matter of law and the employee contracts remained in force following the merger.

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Although the court acknowledged that the noncompetition agreements had been transferred from the predecessor company to the successor company as a matter of law by the merger, it concluded that the "merger did not alter the language of the agreements" and thus the employees' agreements pertained only to the specific companies with which they had originally been employed. Accordingly, in the court's view, the post-employment period for each employee began to run at the time of the merger involving the original contracting employer. Affirming the court of appeals, the court held that since "the previous iterations of Acordia, Inc. [the acquired company] had been merged out of existence more than two years before the employees left" the company, Acordia had no right to enforce the noncompetition agreements absent language extending them to successor employers. As the court further clarified, while Ohio merger law provides that "constituent companies continue postmerger as a unified company vested with the identical contracts of the merged companies," "following [the] merger, the surviving company obtain[ed] the same bargain agreed to by the preceding company, nothing more." In other words, according to the lead opinion, Acordia cannot enforce the noncompete agreements it acquired by merger as if it had stepped into the shoes of the original corporate entities.

The dissent pointed out that several courts construing similar statutes have reached the opposite conclusion in the merger context. According to the dissent, Acordia acquired the noncompetition agreements by operation of law, along with the ability to enforce the agreements "without regard to assignment." Thus, in the dissent's view, the lead opinion correctly concluded that contract principles dictate that agreements must be enforced pursuant to their terms, but incorrectly disregarded the fact that the entity entitled to enforce those agreements should have been determined by statute.

California Protects Religious Dress and Grooming in the Workplace

On September 8, 2012, California Gov. Jerry Brown signed into law Assembly Bill 1964 to amend the California Fair Employment and Housing Act (FEHA), which prohibits employment discrimination based on race, religious creed, color, national origin, ancestry and sex, among other protected classes. The new law, known as the Workplace Religious Freedom Act of 2012, provides that religious dress and grooming are protected religious observances under the FEHA. The law will take effect January 1, 2013. Assemb. 1964, 2011-2012 Leg. (Cal. 2012).

In particular, the Workplace Religious Freedom Act of 2012 expands the definition of "religious creed" to include religious dress and grooming practices as part of an individual's religious observance or belief. Additionally, under the law, "religious dress practice" includes the "wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." "Religious grooming practice" includes all forms of head, facial and body hair that are likewise part of observing an individual's religious creed.

Employers are required to reasonably accommodate the religious belief or observance of an employee unless the accommodation would pose an undue hardship on the conduct of the employer's business. Notably, the Workplace Religious Freedom Act of 2012 defines "undue hardship" for religious accommodation as it is defined elsewhere in the FEHA as significant difficulty or expense, rather than according to the less stringent *de minimis* standard that is applied to such claims under federal law. Therefore, under the new law, an accommodation that would require the individual to be segregated from the public or other employees would not be considered reasonable.

Invalidated Employment Provision of Arizona Immigration Law

In *Arizona v. United States*, No. 11-182, 12 (U.S. June 25, 2012), the United States Supreme Court held 5-3 that a provision of Arizona law enacted in 2010 that made it a crime for unauthorized aliens to seek or engage in work in the state was pre-empted by the federal Immigration Reform and Control Act of 1986 (IRCA). In relevant part, the Arizona law made it a misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona.

While IRCA imposes criminal and civil penalties on employers who violate the law, it imposes only civil penalties on unauthorized aliens seeking or engaging in unauthorized work. The Court concluded that, despite the fact that IRCA's express preemption provision was silent on the issue, the legislative history made it clear that Congress deliberately chose not to impose criminal sanctions on unauthorized aliens who seek or engage in employment. Since Arizona's law presented a "conflict in the method of enforcement," it was preempted by IRCA.

Homeland Security's Immigrant Work Permit Program

On June 15, 2012, the Department of Homeland Security (DHS) announced that it will not deport qualifying young adults brought into the United States illegally when they were children and will allow them to apply for employment authorization. The initiative, which has similarities to the DREAM Act, provides that those meeting the criteria will be eligible to receive deferred action for a period of two years, subject to renewal, and to apply for work authorization.

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More specifically, under the new directive, individuals who demonstrate that they meet the following criteria will be eligible for deferred action: (1) came to the U.S. under the age of 16; (2) have continuously resided in the U.S. for at least five years before June 15, 2012 and are now present in the U.S.; (3) are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the U.S. Coast Guard or armed forces; (4) have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and do not otherwise pose a threat to national security or public safety; and (5) are not over the age of 30. The DHS has stated that the use of prosecutorial discretion confers no substantive right, immigration status or pathway to citizenship.

Supreme Court Holds Union Fees Require Nonmember Consent

In *Knox v. Service Employees International Union*, Local 1100, No. 10-1121 (U.S. June 21, 2012), the United States Supreme Court held 7-2 that a public-sector union must provide the requisite "*Hudson* notice" and also receive affirmative consent from nonmembers prior to imposing a special assessment or other mid-year dues increase.

By way of background, states may establish "agency shop" arrangements for their public-sector employees, under which the employees may elect by majority vote that all bargaining unit employees will be represented by a union. All bargaining unit employees, whether they formally join the union or not, are charged dues to compensate the union for its work on behalf of the employees. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that a public-sector union may charge nonmembers for "chargeable expenses" related to collective bargaining but may not require nonmembers to fund the union's political and ideological activities. In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court established procedural requirements that a public-sector union must meet to collect fees from nonmembers. These requirements include providing notice, known as a *Hudson* notice, of the percentage of fees that will fund nonchargeable expenses and the opportunity for nonmembers to opt out of contributing to these expenses.

Here, the SEIU (a public-sector union) sent its annual *Hudson* notice in June 2005, informing bargaining unit employees that approximately 56 percent of its total expenditures would be dedicated to chargeable expenses and 44 percent would fund nonchargeable expenses, and giving nonmembers 40 days to opt out of contributing to the nonchargeable expenses. After the opt-out window under the annual *Hudson* notice had closed, the SEIU sent bargaining unit employees a letter indicating that, for a limited time, union fees would be raised in order to fund a SEIU political initiative. Nonmembers were not given an opportunity to opt out of the special assessment. Instead, nonmembers who had objected to the previous *Hudson* notice were required to pay only 56 percent of the new assessment, and employees who had not objected to the previous notice had to pay the entire assessment. Petitioners filed a class action on behalf of 28,000 nonmembers, arguing the union improperly required nonmembers who had objected to the original *Hudson* notice to pay 56 percent of an assessment devoted to political expenditures they found objectionable, and improperly denied nonmembers who had not objected to the original *Hudson* notice a chance to object to the special assessment.

The Court concluded there was no justification for the SEIU's failure to send a new *Hudson* notice when it implemented the special assessment, emphasizing that compelling nonmembers to pay for a union's political objectives amounts to compelled speech and compelled association under the First Amendment. Therefore, the Court stated that the procedures unions use to collect fees from nonmembers must be "carefully tailored to minimize the infringement" on their free speech rights. It ruled that when a public-sector union imposes a special assessment or other increase that was not contemplated in the annual *Hudson* notice, "the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent," *i.e.*, an opt-in feature.

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promulgated by the commissioner of the Department of Labor, employers will be able to deduct for the recovery of wage overpayments due to a mathematical or clerical error and the repayment of loans and salary advances. In addition to lifting the restrictions on permissible deductions, the amendments also will permit employers to increase offerings from service providers, such as health clubs and day care centers, for the benefit of employees.

Employers should keep in mind that deductions not made pursuant to a collective bargaining agreement will be subject to receipt of written consent from employees, which shall follow the written notice as to the terms and conditions of the payment and/or its benefits and details as to the manner of deductions. Employers must also notify employees prior to implementation of any substantial change in the terms or conditions of the payments, and keep each employee's authorization on file during employment and for six years thereafter. Further, there are limitations as to the total aggregate amount of certain deductions in a pay period and, except for deductions required or authorized by a collective bargaining agreement, employees will be able to revoke their wage deduction authorization at any time.

NLRB Holds Prohibiting Union or Nonunion Employee Discussions of Workplace Investigations Unlawful *(continued from page 1)*

consultant's instruction "had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights."

According to the NLRB, "[t]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." As the NLRB reasoned, a generalized concern with protecting the integrity of an internal investigation, the justification for the prohibition in this case, is not sufficient. Instead, an employer must first determine whether in any given investigation: (i) witnesses need protection, (ii) evidence is in danger of being destroyed, (iii) testimony is in danger of being fabricated, or (iv) there is a need to prevent a cover-up. Here, the employer's "blanket approach clearly failed to meet those requirements." The ruling in *Banner Health System* applies to union and nonunion employers given that both are covered by the NLRA's protection of concerted activity among any employees. Following this decision, employers should carefully analyze the four factors set forth by the NLRB and memorialize their conclusions prior to instructing an employee complainant not to discuss an active investigation of employee misconduct with co-workers.

***Employment Flash* provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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