Employment Flash

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In This Issue:

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SEC Adopts CEO Pay Ratio Rule

The U.S. Securities and Exchange Commission (SEC) recently adopted a final rule requiring public companies to disclose the ratio of annual pay of their chief executive to median annual pay of all employees. While the pay ratio disclosure is required annually, the median employee calculation, which can be based on total employee population or a statistical sampling, generally need only be performed once every three years. Compensation of employees may be adjusted to account for the cost of living in the jurisdiction where the chief executive resides. Further, certain non-U.S. employees may be excluded from the calculation pursuant to foreign data privacy laws or if all employees in a specific non-U.S. jurisdiction constitute less than 5 percent of employees. Exemptions apply to certain emerging growth companies, smaller reporting companies and foreign private issuers. The rule, which was mandated by Congress pursuant to the Dodd-Frank Act, will become effective January 1, 2017.

NLRB's New Joint Employer Standard

The National Labor Relations Board (NLRB) recently revised its joint employer standard. The NLRB held that a company can be a joint employer of staffing agency workers if the company has contractual authority to intervene with such workers' employment, even if it does not exercise such authority. *BFI Newby Island Recyclery*, 326 NLRB No. 186. Here, the NLRB found joint employer status between a company and its staffing agency for a union representation election of the agency's employees. The NLRB supported its determination because the company had indirect control and contractual authority over the essential terms and conditions of the agency employees, which included, "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance." The NLRB stated its new test requires a factual inquiry for every case.

New York Women's Equality Laws

On October 21, 2015, New York Gov. Andrew Cuomo signed a series of bills into law as part of his Women's Equality Agenda. The employment-related provisions include: (i) strengthening prohibitions on unequal pay based on sex, including by increasing liquidated damages penalties, (ii) preventing employers from prohibiting employees inquiring about, discussing or disclosing wages; (iii) expanding state sexual harassment law to cover all employers (not just those with fewer than four employees); (iv) allowing plaintiffs to recover reasonable attorneys' fees in employment sex discrimination suits; (v) prohibiting family status discrimination by employers; and (vi) requiring employers to provide pregnant employees with reasonable accommodations. The bills are scheduled to become effective January 19, 2016.

Second Circuit Interference and Discrimination Decisions

Facebook "Like" Is Protected Activity

On October 21, 2015, the Second Circuit affirmed an NLRB decision holding that a company's employment terminations based on employee Facebook posts violated the National Labor Relations Act. *Three D, LLC v. NLRB*, No. 14-3284. The affected employees included the author of a post asserting the employer failed to properly withhold taxes, causing the employees to owe additional amounts, as well as an employee who used the Facebook "like" feature to support the post. The court rejected the argument that the posts lost protection because they contained obscenities viewed by customers, holding they were made to further group action and not to disparage the employer.

Title VII Pleading and Rejection of Retaliation Claim Manager Rule

The Second Circuit recently held the pleading standard requirement of Rule 8 of the Federal Rules of Civil Procedure is satisfied when a plaintiff alleges the *prima facie* elements of a Title VII of the Civil Rights Act of 1964 (Title VII) claim in her complaint. *Littlejohn v. City of New York*, No. 14-1395. In *Littlejohn,* the court reasoned that while the Supreme Court holding in *Iqbal* heightened a plaintiff's duty under Rule 8 to allege enough facts to establish a plausible basis for relief, "what must be plausibly supported by facts alleged in the complaint is that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has at least minimal support for the proposition that the employer was motivated by discriminatory intent." The court specifically stated that a Title VII plaintiff need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. Rather, the plaintiff need only give plausible support to a minimal inference of discriminatory motivation.

Moreover, the court rejected the "manager rule" for Title VII retaliation claims, holding an employee who supports other employees in asserting their Title VII rights or personally complains about her employer's discrimination practices has engaged in a protected activity, regardless of whether the employee's job responsibility is also investigating Title VII violations.

Statistics Alone Can Prove Discriminatory Intent

In a case of first impression, the Second Circuit held that statistical evidence alone can be used to prove discriminatory intent if the evidence is statistically significant and makes other non-discriminatory explanations unlikely. *Burgis v. N.Y.C. Dep't of Sanitation*, No. 14-1640. Despite its holding, the court affirmed the district court's decision to dismiss the race and national origin promotion case, holding that the plaintiffs' statistical evidence did not provide sufficient detail to show discrimination. Moreover, the court recognized the plaintiffs' claims were undermined because they each had been previously promoted.

EEOC Investigation Review Limited

The Second Circuit held that judicial review of an Equal Employment Opportunity Commission (EEOC) investigation is limited to whether the investigation occurred, rather than the sufficiency of that investigation. *EEOC*, No. 14-1782. Here, the employer alleged that the EEOC did not meet its statutory obligation to conduct an investigation before bringing an enforcement action against it under Title VII. The court, though, held that the EEOC did conduct a sufficient investigation and recognized that an EEOC affidavit, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice. The court reasoned that the EEOC has expansive discretion under Title VII to investigate discrimination charges and emphasized that additional procedural requirements would be unnecessarily expensive and time consuming.

Ledbetter Fair Pay Act Not Applicable to Demotions

In 2009, the Lilly Ledbetter Fair Pay Act amended certain federal employment discrimination laws by resetting the statute of limitations with each new paycheck affected by a discriminatory action. The Second Circuit recently held that, while the Ledbetter Act resets the time limit for discriminatory compensation decisions, it does not change the statute of limitations for hiring, firing and demotion decisions. *Davis v. Bombardier Transportation Holdings (USA) Inc.*, No. 14-00289. The court reasoned that Congress enacted the Ledbetter Act to address situations where workers are not aware of discriminatory pay decisions at the time they are made, and because employees are immediately aware of demotion decisions and their impact on pay, they do not need the benefit of the Ledbetter Act in those cases.

Successor Asset Purchaser May Inherit Pension Withdrawal Liability

A purchaser of assets may be responsible for the multiemployer pension fund withdrawal liability incurred by a selling entity, even though the withdrawal liability was contingent and did not exist until after the purchase agreement was consummated. *Tsareff v. ManWeb Services, Inc.*, No. 14–1618. Here, the Seventh Circuit held that notice of contingent withdrawal liability, the extent of which is uncertain, may satisfy the successor liability notice requirement. Recognizing that courts have imposed successor liability on an asset buyer with pre-purchase notice of the claim if there is substantial continuity in the operation of the business after the sale, the court held that contingent notice may suffice where there is no actual notice. The court found such notice in light of the buyer's awareness in the due diligence process of the seller's union and pension obligations and references to potential withdrawal liability in the purchase agreement.

NLRB General Counsel's Tenure Invalid for Two Years

Lafe Solomon, the former acting general counsel of the NLRB, was found to have served in violation of the Federal Vacancies Reform Act of 1998 (FVRA) from January 5, 2011, to November 4, 2013, by the U.S. Court of Appeals for the District of Columbia. *SW General Inc. v. NLRB*, No. 14-1107. The complaint originated from an NLRB case during Solomon's tenure, where the employer was found to have committed an unfair labor practice. The employer contended that the unfair labor practice charge was invalid because Solomon served in violation of the FVRA. The D.C. Circuit agreed, holding that the FVRA prohibited Solomon from serving as acting general counsel from January 5, 2011, onwards on the grounds that Solomon had not served in the position of first assistant prior to his nomination, as required by the FVRA. The court indicated, however, that its decision does not retroactively undermine NLRB decisions made during Solomon's tenure where the employer did not timely raise a FVRA objection.

Union Dues Checkoff Survives CBA Expiration

The NLRB recently held that an employer's duty to deduct union fees and dues from paychecks and transmit those funds to the union continues after the expiration of a collective bargaining agreement (CBA) that establishes such an arrangement. *Lincoln Lutheran of Racine*, 362 NLRB 188. In so holding, the NLRB affirmed its reasoning in a similar decision *(WKYC-TV, Inc., 359 NLRB 30 (2012))*, which was overturned on procedural grounds by the U.S. Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). These decisions overruled the NLRB›s longstanding decision in *Bethlehem Steel,* 136 NLRB 1500 (1962), which held that an employer's obligation to check off union dues ceases when the CBA expires. The NLRB's new reasoning was, that upon the expiration of a CBA, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, which include dues checkoff, until the parties either negotiate a new CBA or bargain to impasse. The new decision applies prospectively.

NLRB Clarifies Successorship Under NYC Building Worker Law

The NLRB recently held that an employer is a successor with an obligation to recognize and bargain with the union representing its predecessor's employees even if it hires such employees as required by law. *GVS Properties, LLC*, 362 NLRB No. 194. Here, the new employer acquired several real estate properties that were maintained by a unionized contractor. New York City's Displaced Building Service Worker Protection Act (DBSWP) required the employer to retain the maintenance employees for a 90-day period after closing. When the union demanded recognition, the employer refused on the grounds that it was not a successor because it was not the employer of a requisite substantial and representative complement of employees until after the expiration of the DBSWP 90-day period. Indeed, after 90 days, the employer fired certain employees and hired new ones. The NLRB found that the employer became a successor at the time it assumed control of the predecessor's business and hired a majority of the predecessor workforce even though such hiring was required pursuant to the DBSWP. In rejecting the employer's argument that it did not voluntarily hire the employees, the NLRB stated the employer made the decision to purchase the buildings subject to the DBSWP.

NLRB Rejects Student Football Players' Union Petition

The NLRB unanimously dismissed a union petition to represent scholarship football players at Northwestern University. *Northwestern University*, 362 NLRB No. 167. On March 26, 2014, Region 13 of the NLRB issued a decision holding that such football players were employees eligible to unionize under the National Labor Relations Act (NLRA) and directed an immediate secret ballot election to determine whether the players should be represented by the College Athletes Players Association, the union that sought to represent them. (See June 2014 edition of *Employment Flash*.) In dismissing the petition, the NLRB did not address the issue of whether the football players were employees under the NLRA, but rather found that asserting jurisdiction would not "promote stability in labor relations." The NLRB reasoned that, because of the control exercised by the National Collegiate Athletic Association (NCAA) and athletic conferences over individual teams, labor issues directly involving only Northwestern's football team also would affect the NCAA, the Big Ten Conference and other member institutions. Furthermore, the NLRB noted that the majority of Northwestern's competitors are public colleges and universities over which the NLRB cannot assert jurisdiction.

Second Circuit Rules on FLSA Dismissal and Expert Fees

The U.S. Court of Appeals for the Second Circuit recently held that parties cannot stipulate to dismiss with prejudice a claim under the Fair Labor Standards Act (FLSA) pursuant to Rule 41 of the Federal Rules of Civil Procedure without approval by a court or the Department of Labor (DOL). *Cheeks v. Freeport Pancake House, Inc.*, No. 14-22. Rule 41 states that, subject to any "applicable federal statute," parties may file a stipulation of dismissal without a court order. The Second Circuit held that the FLSA fell within the scope of the "applicable federal statute" exception of Rule 41.

On a related note, the Second Circuit also recently held that expert fees are not recoverable under the FLSA. *Gortat v. Capala Bros., Inc.*, No. 14-3304-cv. At issue was whether the district court erred in reimbursing FLSA plaintiffs for costs incurred in retaining an expert accountant. The court reasoned that FLSA Section 216(b), which allows for the reimbursement of "costs of the action," does not explicitly authorize awards for expert fees. In reaching its decision, the court recognized Supreme Court precedent indicating that costs generally do not include expert fees. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006). However, because defendants also were found to be liable for wage and hour violations under New York Labor Law, the court remanded to determine if that law permitted reimbursement of expert fees.

Third Circuit Holds Paid Suspension Not an Adverse Action

The U.S. Court of Appeals for the Third Circuit joined the Second, Sixth and Eighth Circuits by holding that a paid suspension is not an adverse action in the discrimination context under Title VII. *Jones v. Southeastern Transp. Auth.*, No. 14-3814. In affirming an employer's motion for summary judgment, the Third Circuit reasoned that a paid suspension is not a refusal to hire or a termination of employment and does not change an employee's compensation or alter terms, conditions or privileges of employment because terms and conditions include a possibility of discipline.

California's Fair Pay Act

On October 6, 2015, California Gov. Jerry Brown signed into law the California Fair Pay Act, which broadens existing rules addressing gender wage differentials. Previously, it was illegal for an employer to pay different wage rates to opposite sex employees in the same establishment who perform jobs that require equal skill, effort, responsibility and conditions. The Fair Pay Act expands that rule by eliminating the requirement that the wage differential be within the "same establishment" and by prohibiting employers from paying opposite sex employees different wage rates for "substantially similar work," when viewed as a composite of skill, effort and responsibility. In addition, the Fair Pay Act expands existing law by requiring employers to affirmatively demonstrate that any wage differential that exists under a seniority or merit system (or other system that measures earnings by production) is based upon one or more factors other than sex. The Fair Pay Act authorizes employees who are discriminated or retaliated against for invoking or assisting in the enforcement of the act's provisions to recover in a civil action reimbursement for lost wages and benefits caused by the acts of the employer, including interest, as well as reinstatement and equitable relief.

California Arbitration Developments

The California Supreme Court recently enforced an arbitration provision in a form consumer contract that included a class action waiver. *Sanchez v. Valencia Holding Co.*, 61 Cal.4th 899 (2015). Here, the court deferred to the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 560 U.S. 923 (2010) and held that California's ban on class action waivers in arbitration agreements is preempted by the Federal Arbitration Act (FAA) and should not factor into an unconscionability analysis. The court also held the arbitration provision was not unconscionable, stating that an unconscionability determination rests on more than a "simple old-fashioned bad bargain" and must be unreasonably one-sided, both procedurally and substantively.

The U.S. Court of Appeals for the Ninth Circuit recently held that arbitration agreements requiring employees to arbitrate representative action claims under the California Labor Code Private Attorneys General Act of 2004 (PAGA) are unenforceable under California law. *Sakkab v. Luxottica Retail North America, Inc.,* No. 13-55184. The Ninth Circuit determination accords with the California Supreme Court holding that the FAA does not preempt California state law prohibiting waiver of representative actions. (See *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal.4th 348 (2014); June 2014 edition of *Employment Flash*.) The Ninth Circuit determination overrules decisions by California's four federal district courts, which declined to follow *Iskanian* and instead enforced PAGA waivers in arbitration agreements on the basis that the FAA preempts California's rule. (See December 2014 edition of *Employment Flash*.)

The U.S. Supreme Court denied review of *Iskanian* in January 2015 and, in June 2015, denied review of *Bridgestone Retail Operations v. Brown*, a PAGA waiver case decided on the same grounds as *Iskanian*. (See March 2015 edition of *Employment Flash*.)

California's Grocery Store Employee Hiring Law

California Gov. Jerry Brown recently signed into law Assembly Bill No. 897 (AB 897), which will become effective on January 1, 2016. AB 897 provides that upon a change in control of a grocery establishment, an incumbent employer is required to prepare a list of specified eligible grocery workers for a successor employer

and the successor employer is required to hire from this list during a 90-day transition period. AB 897 defines a "grocery establishment" as a retail store in California that is "over 15,000 square feet in size and that sells primarily household foodstuffs for offsite consumption." The definition exempts stores that have ceased operations for six months or more. Grocery workers are considered to be "eligible" for employment by a successor employer if their primary place of employment is at the grocery establishment that is subject to a change in control and they have worked for the incumbent employer for at least six months prior to the execution of the relevant transaction document. Managers, supervisors and confidential employees do not qualify as eligible workers.

California Court Certifies Employee Bag-Checking Class

A California federal court recently certified a class of approximately 12,400 employees who were subject to a bag check policy in an action for unpaid wages under California labor law. *Frlekin*, No. 3:13-cv-03451 (N.D. Cal.). Following shifts, store managers searched employees' personal bags for stolen merchandise, which the employees alleged took up to 30 minutes per day. The employees claim that such time should have been compensated as time worked under California law. Similar claims were rejected by the U.S. Supreme Court under the FLSA in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014). (See December 2014 edition of *Employment Flash*.)

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