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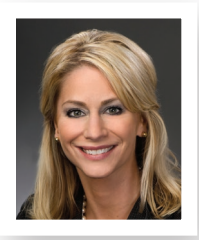
Your HR and Employment Law Update

December 2015

2015: A Year in Review



Katie Tesner

With 2015 almost wrapped up, it is a good time to highlight the cases and administrative guidance that packed the biggest punch in the workplace over the last year. Some of this year's biggest decisions carried a common theme: *revisionism*. Indeed, several of the nation's courts, administrative tribunals and agencies fashioned decisions and guidance that greatly departed from longstanding legal precedent, particularly when it came to the relationship between businesses and the individuals who provide services for those businesses.

Below are some of the biggest decisions of 2015 and what you should know about them:

Joint Employment

In August, the National Labor Relations Board ("NLRB") overturned three decades' worth of its own precedent by dramatically redefining the test for joint employment under the National Labor Relations Act ("NLRA") in *Browning-Ferris Industries of California, Inc.* Now, two or more entities will be considered joint employers of a single workforce if, at any time, it can be shown that one of the entities has direct control, indirect control, or merely the *potential* to control the terms and conditions of employment of another business's employees. Keep an eye out in 2016 for use of this new broadened test not only by the NLRB, but also by the Department of Labor ("DOL"), U.S. Equal Employment Opportunity Commission ("EEOC"), federal courts (who have often found that Title VII and the NLRA should be read and construed together), and organized labor.

Misclassification

The DOL threw its hat in the ring in July when it decided to weigh in on the debate over classification of workers as independent contractors instead of as employees. DOL Wage Administrator David Weil issued a

continued on page 2

Surviving Your Holiday Party

Rick Hepp

The idea of an office holiday party sounded perfect—celebrating together with a glass of egg nog, a nice dinner and maybe some dancing under the mistletoe—until a video turned up on YouTube showing Frank from accounting on top of the bar dancing naked.

This is not an article telling employers not to host holiday parties. In fact, celebrating a good year can boost office morale. But there are some things employers should be aware of, and do, before decorating the lobby with boughs of holly.

First, companies need to remind employees that office rules apply not only to work time but also to all company sponsored events, such as the holiday party. This should be done beforehand, perhaps in a memo, as part of a meeting with employees or by putting a note in paychecks. The notice should stress that the company wants employees to have a good

continued on page 3

2015: A Year in Review

continued from page 1

15-page Administrator's Interpretation warning employers that "most workers are employees", and that the "economic realities" six-factor test would be determinative, not titles and 1099's.

Wage & Hour

Companies who utilize interns should pay close attention to a decision by the U.S. Court of Appeals for the Second Circuit's in *Glatt et al. v. Fox et al*. In that case, the court rejected the DOL's traditional six-factor test (a test based upon guidance that had been around since the late-1960's) and announced a new "primary beneficiary test" for determining intern versus employee status. The primary beneficiary test essentially asks who really benefitted from the relationship, the intern or the employer. Although it is clear from the decision that intern status is a fact-intensive and highly individualized inquiry, employers may now consider the flexibility of this new test when developing and implementing internship programs.

Discrimination and Reasonable Accommodation

The U.S. Supreme Court handed down a pair of closely watched discrimination decisions in 2015—*Young v. UPS* (pregnancy discrimination) and *EEOC v. Abercrombie & Fitch* (religious discrimination).

Young made it significantly more likely that pregnant women denied workplace accommodations offered to other employees will succeed in their legal claims against the employers who denied them. The takeaway? If your business accommodates some temporary disabilities (such as provision of light duty), then you should also find a way to accommodate pregnancy—and cost is no excuse.

Abercrombie addressed whether an employer could be liable for a failure to accommodate under Title VII where no accommodation was explicitly requested. (Applicant Samantha Elauf, who wore a headscarf, or hijab, in accordance with her religious beliefs, was not hired by the fashion retail giant because her hijab did not comport with the company's "Look Policy"; however, Elauf never addressed her hijab or her need to wear it during the interview.) The Supreme Court's answer was ultimately "yes." Success in such a claim hinges only upon whether the need for religious accommodation was a motivating factor in the challenged employment decision—not whether the employer had actual knowledge of the need. As the Supreme Court pointed out, the more certain an employer is that an applicant will need an accommodation, the easier it will be to infer motive, which plainly discourages open dialogue in interviews.

Arbitration Clauses

Just a few short days ago, the U.S. Supreme Court dealt a brutal blow to class litigation and bolstered its position in *AT&T v. Concepcion* upholding class action waivers and the preemptive effect of the Federal Arbitration Act. The high court shot down a consumer class action against DirectTV and forced litigants into individual arbitration, signaling loudly to states hostile to arbitration that there is no getting around the federal preference for it.

Confidentiality Agreements

The Securities and Exchange Commission ("SEC") announced in April that it was instituting enforcement proceedings against a Houston-based firm relating to the whistleblower provisions of the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") for requiring employees to sign confidentiality agreements in connection with their participation in an internal investigation. According to the SEC, such confidentiality agreements could discourage potential whistleblowers from reporting violations of securities laws.

The SEC based its determination solely on the mere *possibility* that the provision could stymie the reporting of securities violations to the SEC. The import of the SEC's action extends well beyond the context of internal investigations. Employers subject to Dodd-Frank and their in-house counsel should be sure to undertake a thorough review all agreements, policies, codes of conduct and employee communications to ensure that nothing therein could be construed to impede communications with the SEC, or any government agency, to report violations of federal law.

Same Sex Marriage

Although admittedly not an employment law case, the U.S. Supreme Court's decision in *Obergefell v. Hodges* this past June extends into the workplace and demands that all employers re-evaluate their internal policies and procedures to comport with the law. *Obergefell* held that the right to marry is a "fundamental right" and that all 50 states must license marriages between two people of the same sex and must recognize a same-sex marriage lawfully licensed and performed out-of-state. Employers must therefore take steps to ensure that any benefits or leave is administered accordingly, which implicates, among other things, FMLA leave and health insurance.

This foregoing illustrations are by no means exhaustive, but provide a roadmap for issues to look out for in 2016.

KATIE TESNER is an attorney with the firm's Labor & Employment Practice Group. She focuses her practice on employment litigation and administrative hearings, specifically in the areas of discrimination, retaliation, harassment, wage and hour, unfair labor practices, non-competes, workers' compensation and unemployment. As a complement to her litigation practice, Ms. Tesner regularly counsels employers on hiring, discipline, termination, leave and reasonable accommodation decisions. Katie may be reached at (614) 223-9359 or ktesner@beneschlaw.com.

Surviving Your Holiday Party

continued from page 1

time but also expects them to act responsibly and avoid inappropriate behavior. It might also be appropriate to include in the notice examples of inappropriate behavior. It is further recommended that holiday parties be made optional. Finally, companies may also want to appoint someone as a chaperone for the party who can make sure issues that arise are dealt with quickly.

The reason is simple. Employers may be liable for harassment under Title VII of the Civil Rights Act of 1964 even though it occurred at a holiday party and not the shop floor. Under Title VII, conduct is unlawful if it is both (1) unwelcome and (2) severe and pervasive. Severe and pervasive is a sliding scale. One holiday party incident is less likely to impose liability, but it could if it follows previous acts of misconduct. And, there are definitely instances where one incident is enough, such as physical touching.

In addition, companies should consider whether it wants to serve alcohol and, if so, how alcohol consumption might be managed. For example, it might be appropriate to limit consumption by passing out drink tickets or having the bar open for only a certain amount of time. Serving food will provide some assistance in reducing the general intoxication level. Having the party at a restaurant or bar will help guard againt the employer having liability for injuries later caused by an intoxicated employee. At least, companies should hire a professional bartender and instruct that person not to serve anyone who is visibly intoxicated. Also, offering cab vouchers at the end of the night or arranging for alternative transportation may reduce liability.

Depending on the state, an employer may be liable for employees who consume alcohol at company functions based on common law negligence, supervisory responsibilities, or Dram Shop laws, which hold the provider of alcoholic beverages served to visibly intoxicated individuals liable for injuries cause during intoxication.

There is one final issue: What to do about Frank from accounting? At the very least, there should be a serious discussion with Frank about his inappropriate conduct and documentation of the discussion placed in his file. If his actions are part of an ongoing course of conduct, more serious discipline, up to and including termination, should be considered. Employers are within their rights to discipline employees who engage in misconduct at employer-sponsored events. The employer's duty is to take that action which is reasonably designed to end the harassment. This standard must drive the decision regarding the discipline to be imposed.

RICK HEPP is an attorney with the Benesch, Friedlander, Coplan & Aronoff's Labor & Employment Practice Group. He focuses his practice on employment litigation and counseling, administrative proceedings, and OSHA compliance. Rick may be reached at (216) 363-4657 or rhepp@beneschlaw.com.

Additional Information

For additional information, please contact:

Labor & Employment Practice Group

Maynard A. Buck (216) 363-4694 mbuck@beneschlaw.com
Joseph N. Gross (216) 363-4163 jgross@beneschlaw.com
Rick Hepp (216) 363-4657 rhepp@beneschlaw.com
Peter N. Kirsanow (216) 363-4481 pkirsanow@beneschlaw.com
Christopher J. Lalak (216) 363-4557 clalak@beneschlaw.com
Steven M. Moss (216) 363-4675 smoss@beneschlaw.com
Steven A. Oldham (614) 223-9374 soldham@beneschlaw.com
Lianzhong Pan 86-21-3222-0388 lpan@beneschlaw.com
Richard A. Plewacki (216) 363-4159 rplewacki@beneschlaw.com
Roger L. Schantz (614) 223-9375 rschantz@beneschlaw.com
John F. Stock (614) 223-9345 jstock@beneschlaw.com
Katie Tesner (614) 223-9359 ktesner@beneschlaw.com
Jennifer M. Turk (614) 223-9308 jturk@beneschlaw.com
Mark R. Waterfill (317) 685-6119 mwaterfill@beneschlaw.com
Robert A. Zimmerman (216) 363-4437 rzimmerman@beneschlaw.com

www.beneschlaw.com