Jackson Walker LLP

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2018 Employment and Labor Law Update: The Year of #MeToo

Class and Collective Action Waivers

- Three cases decided by Supreme Court on May 21, 2018:
  - *NLRB v. Murphy Oil USA*, No. 16-307
  - *Epic Systems Corp. v. Lewis*, No. 16-285
  - *Ernst & Young LLP v. Morris*, No. 16-300
- Do employment agreements requiring individual arbitration of employment-related disputes violate Section 7 of the NLRA?

United States v. United States

- Trump Administration (DOJ) advocated in favor of Epic, Murphy, and EY.
- The NLRB opposed the Trump Administration.

Epic Systems: Judge Gorsuch's Opinion for the 5-4 Majority

Epic Systems Corporation v. Lewis, 138 S.Ct. 1612 (2018)

- Class and collective action waivers in employment agreements with arbitration clauses are enforceable.
  - "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."

  138 S.Ct. at 1632

Janus v. AFSCME, 16-1466 (U.S. Supreme Court, June 27, 2018)

Can Public Sector Employees Be Required to Pay Union Dues (Or Agency Fees)?

- "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. … *Abood* was wrongly decided and is now overruled."

- "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."

Implications of *Janus*

- As to Right-To-Work laws?
- As to compelled speech arguments by employers (or others)? Impact on Purple Communications?
- As to licensed professions?

Important Cases the Supreme Court Might Decide in 2019

- *Altitude Express, Inc. v. Zarda*
  - Does Title VII's prohibition of sex discrimination by employers also prohibit discrimination based on sexual orientation?

- *Yovino v. Rizo*
  - Does the Equal Pay Act prohibit employers from considering a person's prior compensation when setting wages or salary?

What's New Under The National Labor Relations Act? (Pretty Much Everything)

- *Work Rules and Handbooks*
  - 2008-2016: NLRB considered any employment policy that employees could construe to prohibit concerted activity for mutual aid and protection to be unlawful.
    - *T-Mobile USA, Inc.*, 363 NLRB No. 171 (April 29, 2016) (work rule requiring employees to treat each other with respect and encouraging a positive work environment in the old NLRB's view went too far — employees could think this means they could not complain about wages and working conditions).
  - 2017 – Present: The New Rule About Work Rules.
    - When considering the legality of a policy or work rule, the NLRB will balance two (2) factors.
      - The nature and extent of potential impact on NLRA rights.

        v.
      - The business justifications for the policy or rule.

What's New Under the National Labor Relations Act? (Pretty Much Everything) (Cont'd.)

- *Work Rules and Handbooks (Cont'd.)*

The Boeing Company, 365 NLRB No. 154 (12/14/2017)

Issue:	Does Boeing's policy prohibiting employees from taking photos or video inside an assembly plant violate the employees' rights under NLRA § 7?
The ALJ's Decision:	Yes, it does. Employees have a right to preserve evidence of unsafe work conditions, improper job assignments, etc.
The NLRB's Decision:	No, it doesn't. Boeing has a right to protect confidentiality of its processes and the impact on employees in prohibiting taking photos or videos is relatively minor.

The Joint Employer Debacle

All In The Family

- 08/27/2016 – Everything changed.
- It all began with *Browning-Ferris Indus. of California*, 362 NLRB 186 (2015).
- The Historical Standard: Alleged joint employer must exercise actual control over terms and conditions of employment of separate company's employees.
- The New (For Now) Definition: *Browning Ferris Indus. of California*, 362 NLRB No. 186 (August 27, 2015): A company that has the ability to directly or indirectly control any terms and conditions of another company's employees is a joint employer.
  - What this meant to *BFI*.
  - Implications in numerous business contexts:
    - Franchisors; Parent/Subsidiaries; Contractors/Subcontractors; Purchases/Suppliers.

#MeToo And The NLRB (Signs The Board Gets It)

- *Colorado Symphony Association*, Case 27-CA-195026 (April 13, 2018) (employer violated section 8(a)(1) by refusing to provide information to union concerning pay equity — "investigating possible employer race or sex discrimination is a legitimate purpose related to a union's collective bargaining duties….").
- *Veritas Health Services, Inc.*, 31-CA-029713 (July 24, 2018) (employer policy prohibiting employees from speaking to the media "on behalf of [the company's] employees" and to direct all media inquiries to management violated section 8(a)(1)).
- *EZ Industrial Solutions*, 7-CA-193475 (Advice Memo., August 30, 2017) (released March 13, 2018) (employer violated sections 8(a)(1) and (3) by threatening and then discharging 18 employees who skipped work to participate in Day Without Immigrants march).

EEOC

- Obama Administration: Additional disclosures were required on next EEO-1 to be due March 31, 2018.
- Trump Administration: OMB suspended new rules under the Paperwork Reduction Act.
- Deadline ultimately extended to October 1, 2018; final.
- *Key Takeaway: If you have not filed your EEO-1, do so now (provided that you have 100 or more employees)*

Wage and Hour

- Supreme Court: Exemptions to exempt status no longer narrowly construed. *Encino Motorcars, LLC v. Navarro*.
- DOL:
  - DOL has sought comments for new proposed rule on what new salary test should be
  - Proposed rules were expected in 2018; not here yet.
  - *Key takeaway: If you changed your exemptions based on the Obama administration rules, hang tight. If not, for now, probably leave them where they are at the $455 per week test.*

Noteworthy Fifth Circuit Cases

- Changing stories will kill your case: *Robinson v. Jackson State University* (5th Cir. 2017) and *Caldwell v. KHOU-TV* (5th Cir. 2017).
- Teleworking not a reasonable accommodation for attorneys: *Credeur v. Louisiana* (5th Cir. 2017)
- Unlimited leave not a reasonable accommodation: *Moss v. Harris County Constable* (5th Cir. 2017)

Noteworthy Fifth Circuit Cases

- Employer's failure to sign arbitration agreement resulted in denial of motion to compel arbitration: *Huckaba v. Ref-Chem, L.P.* (5th Cir. 2018)
- Patient with dementia assaulted employee; employee claimed employer laughed and did nothing; employee sued; employer no longer laughing: *Gardner v. CLC of Pascagoula, LLC* (5th Cir. 2018)

Noteworthy Texas State Law Developments

- Noncompetes:
  - Blanket exclusion from industry held overly broad in *D'Onofrio v. Vacation Publications, Inc.* (5th Cir. 2018)
  - Speculation about employee's activity was not enough to show violation of non-competition covenant in *GE Betz v. Moffitt-Johnson* (5th Cir. 2018)
- Same sex harassment: comments about sex are not necessarily "because" of sex—*Alamo Heights ISD v. Clark* (Tex. 2018)


JW
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