Employment Flash

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US Supreme Court Rules That Filing Period for Constructive Discharge Runs From Resignation

On May 23, 2016, the U.S. Supreme Court ended a circuit split, ruling that the filing period for constructive discharge claims runs from the date of the employee's resignation as opposed to the date of the last discriminatory act. *Green v. Brennan*, No. 14-613 (2016). In this case, the plaintiff, a postal worker, had complained of race discrimination after being denied a promotion. The plaintiff alleged that his supervisors treated him poorly after he complained. Ultimately, two supervisors accused the plaintiff of intentionally delaying mail delivery — a criminal act. The Postal Service agreed not to pursue criminal charges if the plaintiff retired or relocated with a substantial pay cut, and the parties signed a settlement agreement to that effect. The plaintiff retired and — 41 days after submitting his resignation paperwork but 96 days after signing the settlement agreement — contacted the Equal Employment Opportunity Commission (EEOC) to report an unlawful constructive discharge. The U.S. Court of Appeals for the 10th Circuit held that the 45-day filing period for federal workers to initiate a complaint with the EEOC began running when both parties signed the agreement, as this constituted the last discriminatory act. Accordingly, because more than the applicable 90-day period for reporting violations to the EEOC had passed between the agreement and the plaintiff's report to the EEOC, the 10th Circuit found that the claim was time-barred. The Supreme Court disagreed and reversed the 10th Circuit's decision. The Court explained that the limitations period should be measured from the date of resignation and that to hold otherwise would allow the limitations period to run before a plaintiff could even raise a claim of constructive discharge — negating the remedial structure of Title VII of the Civil Rights Act of 1964 (Title VII) and defying common sense.

US Supreme Court Holds Company May Collect Attorneys' Fees in EEOC Suit

On May 19, 2016, in a unanimous opinion, the U.S. Supreme Court held that a company sued by the EEOC may collect attorneys' fees even where there is no ruling on the merits. In *EEOC v. CRST Van Expedited, Inc.*, No. 14-1375 (2016), the Court held the

U.S. Court of Appeals for the 8th Circuit's ruling — that the EEOC's failure to satisfy the presuit requirements under Title VII was not a "ruling on the merits" in favor of the employer and, consequently, the employer was not a "prevailing party" sufficient to trigger fee shifting under Title VII — was without basis. First, the Court noted beyond the black letter of Title VII, "Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not." Second, the Court observed that by not raising the argument at an earlier time during the litigation, the EEOC had abandoned its defense of the 8th Circuit's requirement that a party prevail on the merits in order to be awarded attorneys' fees and costs. The Court remanded the case for further proceedings consistent with its holding.

Obama Signs Federal Trade Secrets Act

On May 11, 2016, President Barack Obama signed the Defend Trade Secrets Act (DTSA) into law. The DTSA amends the federal Economic Espionage Act of 1996 to allow private companies to file federal civil lawsuits for the misappropriation of trade secrets. Prior to the enactment of the DTSA, companies could file such private civil lawsuits only under state law. Companies may now seek relief under both federal and state law, as the DTSA does not pre-empt state law.

Under the DTSA, "trade secret" is defined as "all forms and types of financial, business, scientific, technical, economic, or engineering information ... if (a) the owner thereof has taken reasonable measures to keep such information secret; and (b) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public." Misappropriation under the DTSA means either (i) the acquisition of another's trade secret by "improper means" such as theft, bribery, misrepresentation or (ii) the disclosure or use of such a trade secret without consent.

The DTSA includes an *ex parte* seizure provision that permits federal courts to "issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret" under certain limited circumstances. The DTSA also includes whistleblower protections providing civil and criminal immunity for the disclosure of a trade secret that is made to a government official or attorney for the purpose of reporting or investigating a suspected violation of law. Employers are required under the DTSA to provide notice of the whistleblower immunity to any employee in any contract governing the use of trade secrets or other confidential information.

The remedies available for violation of the DTSA include injunctive relief, damages for actual losses caused by misappropriation and damages for unjust enrichment. If a trade secret is willfully and maliciously misappropriated, a party also may be entitled to punitive damages and reasonable attorneys' fees.

DOL Issues Final Overtime Expansion Rule

On May 18, 2016, the Department of Labor (DOL) issued the final version of its overtime expansion rule. The new rule raises the minimum salary threshold required to qualify for the Fair Labor Standards Act's (FLSA) white collar exemptions from $455 to $913 per week (*i.e.*, from $23,660 to $47,476 per year). The changed rule is expected to affect 4.2 million American workers and raise wages for workers by $12 billion over the next 10 years. The final rule also calls for benchmarking the salary level equal to the 40th percentile of weekly earnings for full-time, salaried workers in the nation's lowest income region, with such salary level to be updated every three years. In addition, the final rule raises the overtime threshold from $100,000 to $134,004 for highly compensated workers. Although the DOL asked for comments on whether it should update the duties tests under the white collar exemptions, the final rule made no changes to such tests. In addition, employers now will be able to count bonuses and commissions toward as much as 10 percent of the salary threshold applicable to the white collar exemptions. The final rule is scheduled to take effect on December 1, 2016. The DOL overtime expansion rule does not pre-empt overtime rules established under state law. Accordingly, employers must continue to comply with both federal and state laws.

New Gender Nondiscrimination Regulations for Government Contractors

On June 14, 2016, the DOL Office of Federal Contract Compliance Programs (OFCCP) announced new regulations to interpret and implement Executive Order 11246's prohibition on workplace sex discrimination. The new regulations are applicable to government contractors and certain federally assisted contractors and subcontractors.

The final regulations prohibit discrimination on the basis of sex (unless sex is a bona fide occupational qualification), sexual harassment and the creation of a hostile work environment. The regulations define "sex" broadly to include: pregnancy, childbirth or related medical conditions; gender identity; transgender status; and sex stereotyping.

The sex-based discriminatory practices prohibited by the updated regulations include: denying transgender employees access to restrooms, changing rooms, showers or similar facilities designated for use by the gender with which such employees identify; discriminating against a man for taking parental leave based on the sex-stereotyped belief that women and not men should care for their children; making a distinction between married and unmarried persons that is not applied equally to men and women; and restricting job classifications on the basis of sex. The regulations also prohibit facially neutral policies or practices which could have a disparate impact on the basis of sex.

In updating the provisions on compensation discrimination, the regulations adopt the Lilly Ledbetter Fair Pay Act standard that deems discrimination to occur "any time" a contractor "pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice."

In expanding protections afforded to pregnant employees, the regulations require that contractors and subcontractors treat not only those affected by pregnancy, childbirth or related conditions the same for all employment-related purposes, but also those persons who may become pregnant. Contractors and subcontractors are obligated to provide protected employees with reasonable accommodations and must provide job-guaranteed medical leave to both male and female employees on the same terms such leave is provided for other medical conditions.

Regarding fringe benefits, the regulations explain that discrimination is prohibited even if the cost of providing a fringe benefit to members of one sex is greater than the cost of providing it to members of the other sex.

Finally, the regulations provide a list of nonrequired "best practices."

Fifth Circuit Upholds NLRB Election Rules

On June 10, 2016, in *Associated Builders and Contractors of Texas Inc. et al. v. National Labor Relations Board*, No. 15-50497, the U.S. Court of Appeals for the 5th Circuit affirmed a district court decision that upheld a National Labor Relations Board (NLRB) rule amending union election procedures. Among other things, the NLRB rule changes, which were adopted in December 2014 and became effective in April 2015, (i) limit the scope of the pre-election hearing, particularly the deferral of individual voter eligibility issues, (ii) require employers to disclose certain personal employee information to unions, and (iii) cumulatively shorten the time period between petition and election to less than 30 days. In an attempt to enjoin enforcement of the NLRB rule, Texas-based trade and advocacy associations unsuccessfully argued that the rule changes exceeded the NLRB's authority under the National Labor Relations Act and violated the Administrative Procedure Act.

EEOC Issues Final Rules on Employer Wellness Programs

On May 16, 2016, the EEOC finalized rules specifying the extent to which employer-sponsored wellness plans can comply with the Americans With Disabilities Act (ADA) by offering incentives. First, the EEOC amended its regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) to allow employers offering certain wellness programs to provide some financial and other incentives in exchange for an employee's spouse providing health information. However, the employer may not use that information to discriminate against the employee, and the maximum incentive attributable to a spouse's participation in a wellness program cannot exceed 30 percent of the total cost of self-only coverage. Additionally, incentives cannot be offered in exchange for the current or past health status information of an employee's children or in exchange for certain genetic information pertaining to an employee, an employee's spouse or an employee's children. The rule change does not alter the prohibition on the use of genetic information in making employment decisions. Second, the agency amended its regulations implementing Title I of the ADA to allow employers to offer limited incentives for wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations. Under the final ADA rule, the maximum incentive an employer may offer cannot exceed 30 percent of the total cost of coverage for an employee. Both the GINA and ADA rules contain confidentiality provisions to prevent the collection and sale of an employee's sensitive medical information and to prevent an impermissible shifting of health insurance costs onto employees. Both of these rules are scheduled to go into effect in 2017 and would apply to all workplace wellness programs.

EEOC Challenges Sexual Orientation Discrimination

On March 1, 2016, the EEOC filed two lawsuits against employers that had allegedly discriminated against employees on the basis of sexual orientation. The lawsuits were filed in U.S. district courts for the Western District of Pennsylvania and the District of Maryland, Baltimore Division. The EEOC's position is that harassment and other discrimination because of sexual orientation is prohibited sex discrimination under Title VII. In July 2015, in an agency federal sector decision, *Baldwin v. Dep't of Transp.*, Appeal No. 0120133080 (July 15, 2015), the EEOC determined that discrimination on the basis of sexual orientation violates Title VII because (i) sexual orientation as a concept cannot be understood without reference to sex, (ii) sexual orientation discrimination is rooted in noncompliance with sex stereotypes and gender norms, and (iii) sexual orientation discrimination punishes workers because of their close personal association with members of a particular sex, such as marital and other personal relationships.

OSHA Finalizes Workplace Injury Reporting Rule

On May 11, 2016, the Occupational Safety and Health Administration (OSHA) finalized a recordkeeping and reporting rule that will require employers to electronically report information about workplace injuries and illnesses. The new rule's reporting requirement will apply to all employers with 250 or more employees. Designated hazardous industries employers with between 20 and 249 employees also will be required to submit shorter summaries of injury data. Additionally, all employers are prohibited from taking retaliatory action against their employees for reporting work-related injuries and illnesses, and must notify employees of their ability to freely report any such injuries and illnesses. OSHA intends to make the injury data publicly available.

Under ERISA, Private Equity Funds With Same Sponsor May Be Liable for Pension Liabilities

On March 28, 2016, U.S. District Court for the District of Massachusetts concluded that two private equity funds with the same sponsor investing together in a distressed portfolio company may be liable for pension liabilities incurred by the portfolio company under the Employee Retirement Income Security Act of 1974 (ERISA). *Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund*, No. 10-10921-DPW (D. Mass. Mar. 28, 2016). Under ERISA, "trades or businesses" under "common control" are held jointly and severally liable for multiemployer pension plan withdrawal liabilities incurred by other members. On remand from the U.S. Court of Appeals for the 1st Circuit's ruling that at least one of the funds was engaged in a "trade or business," the district court then held that the second fund also was engaged in a "trade or business" and although neither fund individually owned sufficient equity in the portfolio company to establish the "common control" element, the two funds had formed a partnership together through their alleged "smooth coordination" in fund investments, control of the funds by the same general partners and similarities in governing instruments and operations. Such factors enabled the district court to conclude that under ERISA, the funds were liable for the deemed partnership's liabilities, specifically for its controlled-group liability for the portfolio company's pension obligations.

California Increases State Minimum Wage

On January 1, 2017, California's minimum wage will rise to $10.50 per hour for companies with at least 26 employees. The state's minimum wage will increase gradually on January 1 of each year thereafter until reaching $15 per hour on January 1, 2022. Employers with fewer than 26 employees will see the minimum wage rise to $10.50 on January 1, 2018, with a similar gradual increase in the minimum wage up to $15 per hour on January 1, 2023.

In addition, the salary threshold for California's overtime exemptions, which is directly tied to the state minimum wage, also will increase. In California, exempt employees must receive a salary of at least twice the state minimum wage for full-time employment (2,080 hours per year). Thus, when the minimum wage increases to $15, the annual salary threshold for exempt classification will increase accordingly from $43,680 (on January 1, 2017) to $62,400 (on January 1, 2022). Increased minimum wages also will lead to higher penalties for failure to comply with wage-and-hour laws and regulations, such as paid meal and rest breaks, overtime premiums and prompt payment of final wages.

Ninth Circuit Ruling Regarding FLSA Overtime Calculations

On June 2, 2016, the U.S. Court of Appeals for the 9th Circuit held that under the FLSA, an employer must include cash paid to its employees in lieu of benefits when calculating the regular rate of pay for overtime compensation. In *Flores v. City of San Gabriel*, the employer provided cash to its employees to purchase certain health benefits. An employee could opt for a cash payment instead, which would be added to the employee's regular paycheck, if the employee had access to alternative medical coverage. The employer did not consider the value of such cash-in-lieu-of-benefits payments when calculating the regular rate of pay for overtime compensation. The employer argued that cash-in-lieu-of-benefits payments should be exempt from the regular rate of pay calculation under FLSA Section 207(e)(2) because such payments are not made for "hours of employment." The court, however, found that such payments constitute compensation for work and should have been included in the regular rate of pay.

Employer May Round Work Start and Stop Times Under FLSA

On May 2, 2016, the 9th Circuit held in *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*, 2016 WL 1730403, that both the FLSA and the California Labor Code permit employers to round an employee's work start and stop times to the nearest quarter hour if the rounding practice is used in such a manner that will not result, over a period of time, in failure to compensate the employee properly for all the time that he or she actually worked. For example, it is permissible to institute a quarter-hour rounding policy, whereby the start time for an employee who clocks in at 7:57 a.m. is rounded to 8 a.m., provided that at the end of the day, if the same employee clocks out at 4:55 p.m., he or she is paid as if he or she worked until 5 p.m. The court held that a rounding policy is lawful even if there are some employees who are adversely impacted by the rounding over a period of time. The court explained that rounding time remains legal even though California state law requires premium pay for overtime work, so long as the rounding practice is applied in a neutral and mechanical manner as described in the example above. The court also held that the plaintiff's claim for one minute of added compensation, based on the employer's failure to compensate him when he inadvertently logged onto another system instead of the online timekeeping platform, amounted to nonrecoverable *de minimis* time.

San Francisco Employers Must Offer Paid Parental Leave

The San Francisco Paid Parental Leave Ordinance (PPLO) was signed into law on April 21, 2016. Under the PPLO, employers with employees working in the city or county of San Francisco must provide supplemental wage replacement to eligible employees taking leave to bond with a new child, in addition to providing the benefits required by the California Paid Family Leave law. As of January 2016, workers eligible for California's Paid Family Leave already could take up to six weeks of paid leave and receive benefits of approximately 55 percent of lost wages. Companies with employees in San Francisco city or county now must cover the remaining portion (45 percent) of eligible employees' lost wages during that six-week period. The PPLO takes effect in the following phases: January 1, 2017, for employers with 50 or more employees (regardless of location); July 1, 2017, for employers with 35 or more employees (regardless of location); and January 1, 2018, for employers with 20 or more employees (regardless of location). Companies with fewer than 20 employees are currently exempt from the PPLO.

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