Employment Flash

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Supreme Court Rejects Sixth Circuit Yard-Man Vested Benefits Presumption

The U.S. Supreme Court recently rejected the Sixth Circuit's presumption of lifetime vesting for retiree health care benefit provisions in collective bargaining agreements. *M& G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926. For over 30 years, under *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, the Sixth Circuit has held that where retiree health care benefit provisions are silent or ambiguous as to duration, the absence of a termination provision presumes the parties' intent to vest those benefits in perpetuity. In resolving a split between the Sixth Circuit and all other federal circuits, the Court indicated that principles of ordinary contract interpretation govern as opposed to a presumption of lifetime vesting.

Supreme Court Revives Pregnancy Discrimination Light Duty Case

On March 25, 2015, the U.S. Supreme Court vacated the Fourth Circuit's affirmance of employer summary judgment in Young v. United Parcel Service Inc., 707 F.3d 437. No. 12-226. The Fourth Circuit held that an employee could not support a discrimination claim against an employer for refusing her pregnancy-related lifting restrictions despite the employer's policies which allowed lifting restrictions in other contexts. Rather, the Fourth Circuit held that the employee could not show that similarly situated individuals outside the protected class received more favorable treatment. The Supreme Court disagreed and held the employee created a genuine dispute of material fact on this point, which precluded summary judgment. In doing so, the Supreme Court criticized and declined to significantly rely on the Equal Employment Opportunity Commission's 2014 pregnancy light duty guidance. See September 2014 edition of *Employment Flash*.

NY Wage Theft Protection Act Amended

New York Gov. Andrew Cuomo recently signed a bill reforming New York's Wage Theft Prevention Act. The reform, which has already taken effect, eliminates the requirement that employers annually notify and receive written acknowledgement from every employee regarding their rate of pay and allowances. Employers also need not provide annual notices to the Department of Labor on employee pay rate information. Employers must still provide a written notice to newly hired employees and detailed wage statements with each paycheck. The amendment also increases penalties for violations of the law and imposes successor liability. Further, the amendment assigns joint and several wage and hour liability to the 10 members with the largest percentage of ownership of any limited liability company. In signing the bill, Gov. Cuomo noted that the bill "contains some technical and substantive problems which the Legislature has agreed to address in additional legislation."

Senate and House Pass Resolution to Block NLRB's New Election Rules

Earlier this month, both the Senate and House of Representatives passed a resolution to block the final union election process rules promulgated by the National Labor Relations Board (NLRB) in December. These rules significantly increase the speed of NLRB collective bargaining union representation elections. See December 2014 edition of *Employment Flash*. The rules are scheduled to take effect April 14, 2015. Per a statement from the White House Office of Management and Budget, President Barack Obama is expected to veto the resolution. Should that happen, the Senate and House would each need a two-thirds vote to overturn the vote. Neither legislative body obtained such a margin in passing the resolution.

DOL Grants Same-Sex Spouses FMLA Rights

The Department of Labor (DOL) issued a final rule revising the regulatory definition of "spouse" under the Family and Medical Leave Act of 1993 (FMLA) to include eligible employees in legal same-sex marriages. Effective March 27, 2015, the final rule changes the regulatory definition of "spouse" to look to the law of where the marriage was entered into rather than where the employee resides. The definition expressly encompasses individuals in lawfully recognized same-sex marriages, common law marriages and marriages that were validly entered into outside of the United States if the marriage could have been entered into in at least one state. As a result, eligible employees may take FMLA leave to care for a lawfully married same-sex spouse, take qualifying exigency leave due to the same-sex spouse's military service or take military caregiver leave, regardless of their state of residence.

Employees Granted FMLA Leave May Still Bring FMLA Claim

In a case of first impression, the U.S. Court of Appeals for the District of Columbia held that an employee's FMLA-based interference and retaliation claims are viable even if the employee was ultimately allowed to take FMLA leave. *Gordon v. U.S. Capitol Police*, No. 13-5072 (D.C. Cir.). In *Gordon*, while the employee was permitted to take FMLA leave, she was told her manager was angered by her leave request, and she was subsequently ordered to take a fitness-for-duty examination. Consequently, the employee incurred missed wages and travel costs. The employee also alleged harm to her career prospects. The court held that an employer's acts, which have a reasonable tendency to "interfere with, restrain, or deny" an employee's FMLA rights, allow the claim to survive an employer's motion to dismiss. While the court's previous rulings recognized that an employer's discouragement may give rise to an FMLA claim, this holding goes one step further by not requiring the employee to show the discouragement stopped her from taking leave. Ineffective discouragement, the court reasoned, may still be discriminatory under the FMLA.

OFCCP Proposes New Sex Discrimination Rules

The Office of Federal Contract Compliance Programs (OFCCP) recently announced a proposal to update its rules prohibiting sex discrimination by federal contractors and subcontractors. The OFCCP's sex discrimination rules have not been updated since 1970, prompting OFCCP Director Patricia A. Shiu to comment that the OFCCP's "sex discrimination guidelines are woefully out of date and don't reflect established law or the reality of modern workplaces." The OFCCP's proposed revisions aim for consistency with current law in Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act and recent sex discrimination case law. Additions include a prohibition on disparate treatment based on dress or personal appearance and other forms of sex stereotyping, detailing of relevant factors to be considered in determining if employees are "similarly situated" for purposes of equal pay analysis and a clarification that child care must be available for men on the same terms as women.

NLRB Strikes Employer Confidentiality Provisions

The National Labor Relations Board (NLRB) recently held that an employer's confidentiality policies on human resources information, divulging information for an employee's benefit and client communications were unlawful. *Battle's Transp., Inc.*, 362 NLRB No. 17. First, the NLRB struck a confidentiality agreement provision that barred employees from disclosing "human resources related information" and "investigations by outside agencies." The board reasoned that employees could reasonably construe such a

prohibition as encompassing all terms and conditions of employment and restricting the discussion of protected activity, such as NLRB complaints. The NLRB then struck a provision which prohibited an employee from disclosing or divulging confidential information "for his or her own benefit or the benefit of others." The NLRB ruled such a provision could also limit protected concerted activity. Finally, the NLRB struck a policy which warned employees "not to communicate any … company business with our clients." The NLRB held that the clause was unlawfully vague and overbroad, limiting employees from discussing their own employment conditions.

NLRA Amendment Bill Introduced to Allow Extra Pay Without Union Consent

Sen. Marco Rubio, R-Fla., and Rep. Todd Rokita, R-Ind., recently introduced a bill called the Rewarding Achievement and Incentivizing Successful Employees (RAISE) Act. RAISE would amend the National Labor Relations Act to allow employers to give individual employees covered by collective bargaining agreements merit pay increases or bonuses without union approval. RAISE would make wages pursuant to a collective bargaining agreement a minimum floor that employers must pay, allowing employer discretion to pay additional compensation. Similar legislative measures have been introduced and voted down in the past, with unions historically opposing such measures as undermining collective bargaining.

Second Circuit Allows Class Certification Despite Individual Damages

The Second Circuit recently considered whether the U.S. Supreme Court's decision in Comcast Corp. v. Behrend, 133 S.Ct. 1426, overruled Second Circuit law that class certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure cannot be denied merely because damages have to be ascertained on an individual basis. *Roach v. T.L. Cannon Corp.*, 778 F.3d 401. At issue was the denial of class certification in a wage and hour employment class action where the Northern District of New York found that Comcast permits certification under Rule 23(b)(3) only when damages are measurable on a classwide basis. The Second Circuit vacated and held that *Comcast* does not mandate that such certification require a finding that damages are capable of measurement on a classwide basis. Prior to *Comcast,* it was well-established Second Circuit law that the need to ascertain damages on an individual basis was not sufficient to defeat class certification. In *Roach*, the Second Circuit refused to read Comcast as overruling this law, recognizing its decision was consistent with other circuits.

New York Increases Tipped Worker Minimum Wage

New York State's acting labor commissioner ordered an increase in the minimum wage rate from $5 to $7.50 per hour for tipped workers in the service and hospitality sectors, effective December 31, 2015. The $7.50 wage rate applies only to tipped workers who would make at least the state's general minimum wage rate of $8.75 per hour if gratuities are calculated into their total hourly wage. If such workers make less than $8.75 per hour, including gratuities, they must receive New York's general minimum wage. Further, the $7.50 wage rate will be increased to $8.50 for tipped workers in New York City if the general minimum wage for New York City workers is increased to $11.50 per hour.

DOL Home Care Final Rule Partially Vacated

The Department of Labor's (DOL) proposed rule on companionship services and its exemption under the Fair Labor Standards Act (FLSA) has been partially vacated by a district court. *Home Care Association of America v. Weil*, No. 1:14-cv-00967 (D.D.C.). The FLSA exempts minimum wage and overtime coverage for employees providing "companionship services" for individuals who are unable to care for themselves because of age or infirmity. 29 U.S.C. § 213(a)(15). Provisions of the DOL's Home Care Final Rule would have required minimum wage and overtime coverage to home care workers employed through third-party agencies or other businesses. Further, the Rule would have narrowed the definition of "companionship services" to include only the provision of certain fellowship activities and protection services, while requiring any provision of "care" to be attendant to such fellowship and protection and limited to less than 20 percent of the total hours worked per person per workweek. The Weil court found that the DOL exceeded its authority by limiting the use of the "companionship services" FLSA statutory exemption. The DOL has appealed.

Supreme Court Denies Review of Arbitration Decisions

The U.S. Supreme Court recently denied review of two significant arbitration-related decisions, Iskanian v. CLS Transportation of Los Angeles (59 Cal. 4th) and Opalinski v. Robert Half Int'l, Inc. (761 F.3d 326). In last year's controversial decision in Iskanian, the California Supreme Court held that arbitration agreements with mandatory class action waivers are generally enforceable but that the Federal Arbitration Act does not pre-empt California state law prohibiting waiver of representative actions under the California Private Attorneys General Act (PAGA). See June 2014 edition of *Employment Flash*. California's four federal districts have each

declined to follow Iskanian and instead have enforced PAGA waivers in arbitration agreements on the basis that the FAA pre-empts California's rule. See December 2014 edition of *Employment Flash*. The U.S. Supreme Court has not ruled on application for review in Bridgestone Retail Operations v. Brown — a PAGA waiver case decided on the same reasoning as Iskanian.

In *Opalinski*, the Third Circuit held that a court, not an arbitrator, must decide whether class claims should be arbitrated where an arbitration agreement does not address the issue. After two employees filed a class action under the Fair Labor Standards Act for overtime, the employer compelled arbitration on an individual basis. After the arbitrator rendered a partial decision finding that the claims could be arbitrated on a class basis, the employer moved to vacate the arbitration award and the district court denied the request. The Third Circuit reversed and held that the availability of class arbitration is a question for a court to decide unless the parties unmistakably provide otherwise. The employees then unsuccessfully sought Supreme Court review, arguing that the Court should resolve a question left open by its 2013 decision in *Oxford Health Plans v. Sutter*, and what the employees perceived as a split among the Circuit Courts.

California Appeals Court: No Failure-to-Prevent Claim Where Harassment Not Actionable

A California appeals court has held that an employee has no viable claim for failing to prevent sexual harassment where the jury finds that the sexual harassment is not sufficiently severe or pervasive as to result in employer liability. *Dickson v. Burke Williams, Inc.*, No. B253154 (Cal. Ct. App.). A jury previously awarded $285,000 to an employee who alleged that she was subject to harassing and discriminatory conduct by two male customers. Although the jury found the employer was not liable for actual harassment or discrimination, it nevertheless held the employer liable for failure to take reasonable steps to prevent the conduct from occurring. In reversing the jury verdict, the court reasoned that the jury's finding the employee did not suffer an adverse employment action precluded the employee from recovery.

MyE-Verify Expansion Covers Additional States

MyE-Verify, a Department of Homeland Security free Internet-based resource that allows workers to participate in the employer E-Verify work eligibility process, has expanded to cover 16 additional states. E-Verify is used by more than 500,000 employers nationwide to verify employment eligibility of new hires. MyE-Verify provides account holders a secure account to use E-Verify related services. These include the ability to lock one's Social Security number to prevent misuse and to use "Self Check" to check employment eligibility against E-Verify records. As part of an eventual national rollout, MyE-Verify is now available to individuals in Arizona, California, Colorado, the District of Columbia, Idaho, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, South Carolina, Texas, Utah, Virginia and Washington.

Certain Spouses of H-1B Visa Holders May Apply for Work Authorization

Beginning May 26, 2015, certain H-4 dependent spouses of H-1B visa holders will be able to apply for work authorization pursuant to a final rule issued by the Department of Homeland Security. The H-1B visa category permits foreign nationals to work in the United States in specialty occupations. Spouses and unmarried children of H-1B visa holders are eligible for the H-4 visa category. Under the final rule, H-4 dependent spouses may apply for work authorization if they are married to an H-1B holder who either: (1) is the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker, or (2) has been granted an extension of H-1B status beyond the six-year limit under Sections 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000. Eligible H-4 dependent spouses will be required to file a Form I-765, Application for Employment Authorization.

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