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Message From the Chair

by Domenick Carmagnola

Welcome to another excellent addition of the *Labor and Employment Law Quarterly*. As you have undoubtedly heard me proclaim at a seminar, meeting or Labor and Employment Section (LAES) event, this publication is one of the crown jewels of our section, and a terrific member benefit. I hope you enjoy the wonderful array of interesting, informative and resourceful articles contained in this issue.

We recently concluded the NJSBA Annual Meeting in Atlantic City. For those in attendance, you know it was a terrific event, and hugely successful. The attendance set another new record. The seminars were first rate and the event provided an excellent opportunity to get up to date on the latest developments in our area, and to network. In that regard, the LAES once again held its luncheon at Angelo's Fairmount Tavern. The section presented an excellent program on the *Winters v. North Hudson Regional Fire & Rescue* case and an update on recent National Labor Relations Board decisions, including *D.R. Horton, Inc*. Many thanks to Paul Kleinbaum for coordinating and moderating these panels, which were well attended and well received.

While the Annual Meeting and the luncheon were terrific events, they were bittersweet as well. This year marked the 'retirement' of Pat Stanton, who is leaving the great state of New Jersey for more southern pastures. No one is sure what retirement means for Pat, beyond a change in geographic location. We do know, however, that no matter what he becomes involved in, he will bring great dedication, compassion and talent with him. In recognition of Pat's commitment to the New Jersey State Bar Association, the LAES, the Sidney Reitman American Inn of Court, and his friends and colleagues in the bar honored him at our section business meeting and at our section luncheon in Atlantic City. The section presented Pat, a past chair of the section, past executive director of the Reitman Inn of Court and one of the driving forces behind its creation, with a token of our appreciation and recognition for all

of his contributions to the section over the years. In addition, we had some fun with him at the section luncheon by providing him with some additional 'gifts' from past section chairs. Special thanks to Nancy Smith, Angelo Genova and Cheryl Stanton for their wonderful comments about Pat at the luncheon. They truly captured the essence of what made him such a special member of our section and a friend to us all.

From a personal standpoint, Pat has been a wonderful mentor and friend; I owe him a great debt of gratitude for all of the help and support he has provided me over the years. I know I speak for all of the members of our section when I wish Pat nothing but the best as he makes his way south.

The NJSBA Mid-Year Meeting will be in Las Vegas this year. As we have done many times in the past, the LAES will be presenting a program. Section member Peter Frattarelli has graciously agreed to coordinate it. Please let one of us know if you would like to participate on the panel. It is sure to be an excellent seminar and meeting.

As always, please let me know if you have any suggestions for meetings, events, seminars, committees, and the like, or if you or someone you know would like to become more involved in the section and to help foster our mission.

Message From the Editor

by Anne Ciesla Bancroft

The summer issue of the *Labor and Employment Law Quarterly* is full of insightful and interesting articles for beach reading during these last days at the shore. Arnold Shep Cohen comments on the Supreme Court's different approaches to sovereign immunity under the Family and Medical Leave Act (FMLA). Dena Calo and Kathryn Dugan continue the discussion of liability under the FMLA in their analysis of the Third Circuit's decision in *Haybarger v. Lawrence County Adult Probation and Parole*.

The summer *Quarterly* also addresses recent developments under the Fair Labor Standards Act (FLSA), including Nicole Amato's review of the presumption of public access to FLSA settlements and Martha Keon's and Matthew Hank's explanation of the new test for joint employer status.

In addition, Eric Stuart and Chris Coxson, and Steven Berlin, address recent actions by the National Labor Relations Board (NLRB) in their respective articles on the NLRB employee rights notice-posting requirements and NLRB efforts to restrict class action waivers in employment agreements.

Ivan Mendez also updates us on the status of recent disparate impact cases discussed in the March 2012 issue. Denise Keyser and Amy Bashore review the Equal Employment Opportunity Commission's recent clarification of the "reasonable factors other than age" defense. Shira Lazinger Kreiger analyzes discrimination claims based on "perceived" membership in a protected class under the much-discussed decision in *Cowher v. Carson & Roberts*. The Honorable Joyce Krutick Craig explains the impact to an employee of waiving benefits under the Employee Retirement Income Security Act.

Finally, while many of these recent developments may paint a challenging picture for employers in New Jersey, Lynne Hook explains that it could be worse, with a practical overview for New Jersey, or any, employers doing business in California—or "New Jersey West." ■

Inside this issue

Commentary

A Distinction Without a Difference: The Supreme Court Reverses Itself on Sex Discrimination and Medical Leave

by Arnold Shep Cohen

In 2003 and 2012, the Supreme Court ruled on the application of sovereign immunity to state workers under the Family and Medical Leave Act (FMLA).[1] It came to opposite conclusions in two cases discussing virtually identical FMLA provisions. It was right the first time and wrong the second time.

In *Coleman vs. Court of Appeals of Maryland,*[2] the Supreme Court invoked sovereign immunity and restricted the FMLA precedent it established in *Nevada Department of Human Services v. Hibbs.*[3] Under *Coleman,* a state is now protected by sovereign immunity from an action under the FMLA when an employee is denied a "self-care" leave. *Hibbs*, on the other hand, permitted a FMLA action against a state entity for a "family care" leave claim. The distinction drawn by the Supreme Court between family care and self-care leaves is without support in the FMLA or its legislative history, is inconsistent with the reasoning in *Hibbs*, and appears to demonstrate the extent to which the Supreme Court will go to protect states' rights and restrict the rights of employees.

The Supreme Court held in *Hibbs* that state governments can be sued for damages for violating the FMLA rights of employees to take time off for family care emergencies. In *Coleman*, however, the Supreme Court reversed ground and held that states cannot be sued if they do not permit their employees to take time off for their own personal medical problems. Both leaves are protected under the FMLA, and are equally viable. Still, in a convoluted plurality opinion for himself and three justices, Justice Anthony Kennedy reasoned that while there was evidence of sex discrimination in cases where workers seek leave to care for a family member, there is no evidence of such discrimination to support a guarantee of a leave to care for oneself. Thus, the Supreme Court dismantled the linchpin of the *Hibbs* decision, evidence of sex discrimination, permitting sovereign immunity to attach.

Justice Kennedy wrote, "[t]here is nothing in particular about self-care leave, as opposed to leave for any personal reason, that connects it to gender discrimination."[4]

Justice Ruth Bader Ginsburg, in a powerful dissent, discredited that claim. She documented that the history of the FMLA "in its entirety, is directed at sex discrimination."[5] She concluded that "it is impossible" for Justice Kennedy's conclusion to be correct.[6]

In *Hibbs*, an employee of the Nevada Department of Human Resources (NDHS) took FMLA leave to care for his ailing wife. The FMLA entitles an eligible employee to take up to 12 work weeks of unpaid leave for a "serious health condition" in the employee's family (the "family care" provision).[7] The NDHS first granted the plaintiff's request for a full 12 weeks of FMLA leave, but eventually informed him that he had exhausted that leave and had to report to work by a certain date. When he failed to do so, NDHS terminated his employment. He then sued.

The Supreme Court, in *Hibbs,* held that state employees may sue in federal court over a state's failure to comply with the FMLA's family care provision. It reasoned that Congress may abrogate the state's 11th Amendment immunity from suits in federal court if it makes its intention to abrogate unmistakably clear in the language of a statute, under a valid exercise of its power under Section 5 of the 14th Amendment.[8] It held that the FMLA satisfies the "clear statement rule" enunciated in *Kimel v. Florida Bd. of Regents.*[9] In the exercise of its Section 5 power, Congress may enact so-called "prophylactic legislation" that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct,[10] but it may not attempt to redefine

substantively the states' legal obligations.[11] The test for distinguishing appropriate prophylactic legislation from substantive redefinition is that valid Section 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[12]

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. The Supreme Court has long held that statutory classifications that distinguish between males and females are subject to heightened scrutiny[13](*i.e.*, they must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives").[14] When it enacted the FMLA, Congress had before it significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the states, which was weighty enough to justify the enactment of prophylactic Section 5 legislation.

The standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than the rational-basis test. Still, the Supreme Court in *Hibbs* found that Congress established a broad enough pattern of state constitutional violations to justify this prophylactic legislation.[15] The *Hibbs* Court found that the impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family care giving, and that men lack such familial responsibilities, was significant.

Relying on the precedent in *Garrett,*[16] the Court concluded that Congress's chosen remedy, the FMLA's family care provision, is "congruent and proportional to the targeted violation."[17] The Court mentioned that Congress had already tried unsuccessfully to address this problem through Title VII of the Civil Rights Act of 1964[18] and the Pregnancy Discrimination Act.[19] It deduced that where previous legislative attempts have failed, such problems may justify added prophylactic measures in response. By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. It certainly did not find that the congressional intent to issue a remedy was limited to family care.

In *Coleman*, however, Justice Kennedy concluded that suits against the states under the self-care provision are barred by sovereign immunity.[20] He reasoned that the federal system states that as sovereigns the states are immune from damages suits unless they waive that defense. Although Congress may also abrogate the states' immunity pursuant to its powers under Section 5 of the 14th Amendment, it must make that intention "unmistakably clear in the language of the statute."[21] It added that Congress also "must tailor" legislation enacted under Section 5 "to remedy or prevent conduct transgressing the Fourteenth Amendment's substantive provisions."[22]

The plurality concluded that sex-based discrimination that supported allowing family care suits against states is absent with respect to self-care actions. It found that the plaintiff's three primary arguments to the contrary were unpersuasive.

One, the plaintiff maintained that the self-care provision addresses sex discrimination and sex stereotyping. The Court concluded that the provision, standing alone, is not a valid abrogation of the states' immunity from suit.[23]

Two, the plaintiff argued that the self-care provision is a necessary adjunct to the family care provision sustained in *Hibbs*. The Court found that the argument that the provisions work in tandem to ensure the equal availability of total FMLA leave time to women and men, despite their different leave usage patterns, was unconvincing and did not comply with the requirements of *City of Boerne, supra*.[24]

Three, the plaintiff maintained that the self-care provision helps single parents keep their jobs when they get ill. The Court concluded, however, that while most single parents happen to be women, this statistic demonstrates, at most, that the self-care provision was directed at remedying neutral leave restrictions that have a disparate effect on women.[25]

In dissent Justice Ginsburg vigorously reasoned that it would make scant sense to provide job-protected leave for a woman to care for a newborn, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby. She deduced that allowing states to provide no pregnancy-disability leave at all, given that only women can become pregnant, would obviously "exclude far more women than men from the workplace."[26]

The self-care provision in the FMLA was enacted, in part, to protect pregnant women from discrimination if they had medical reasons for taking leave from work. Justice Ginsburg added that the statute does not specifically mention gender or pregnancy because doing so would further stigmatize women and give employers incentives to hire men. As a result, this healthcare provision, as with family care provisions, is gender neutral. Thus, she argued cogently that the reasoning of *Hibbs* for family care clearly also applies to self-care.

Justice Ginsburg continued that the plurality's statement that Congress lacked "widespread evidence of sex discrimination ...in the administration of sick leave," misses the point.[27] In enacting the FMLA, Congress heard evidence that existing sick-leave plans were inadequate to ensure that women were not fired when they needed to take time out to recover their strength and stamina after childbirth.[28] The self-care provision responds to that evidence by requiring employers to allow leave for "ongoing pregnancy, miscarriages... the need for prenatal care, childbirth, and recovery from childbirth."[29]

The self-care provision of the FMLA entitles all employees to up to 12 weeks of unpaid, job-protected leave for a serious health condition.[30] Rather than singling out pregnancy or childbirth, it has broader coverage. Contrary to Justice Kennedy's analysis, this reading does not mean that the self-care provision lacks the requisite congruence and proportionality to the identified constitutional violations. Rather, Congress made plain its rationale for the prescription's broader compass: to ward off the unconstitutional discrimination it believed would attend a pregnancy-only leave requirement. This purpose was not an invitation to invoke sovereign immunity. Justice Ginsburg's analysis cogently demonstrates that the reasoning of *Hibbs* applies equally to *Coleman*. There is no valid rationale for distinguishing family care and self-care. To conclude otherwise is intellectual chicanery, which fails to draw its essence from the language, history, and intent of the FMLA. ■

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Endnotes

1. 29 U.S.C. § 2601 *et seq.*
2. 132 S. Ct. 1327 (2012).
3. 538 U.S. 736 (2003).
4. 132 S. Ct. at 1337.
5. *Id*. at 1340.
6. *Id*. at 1342.
7. 29 U.S.C.A. §2612(a)(1)(C).
8. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2000).
9. 528 U.S. 62 (2000).
10. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).
11. *Kimel*, *supra*, at 88.
12. *City of Boerne*, 521 U.S. at 520.
13. *Craig v. Boren*, 429 U.S. 190, 197-199 (1976).
14. *United States v. Virginia*, 518 U.S. 515, 533 (1996).
15. *South Carolina v. Katzenbach*, 383 U.S. 301, 308-313 (1996).
16. 531 U.S. at 374.
17. 132 S. Ct. at 1347.
18. 42 U.S.C.A. §2000e *et seq.*
19. 42 U.S.C.A. §2000e(k).
20. *See* 29 U.S.C.A. §2612(c)(1)(D).
21. 538 U.S. at 726.
22. 132 S. Ct. at 1330, *citing*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999).
23. *Id*. at 1330.
24. *Id*. at 1331.
25. *Id*.
26. *Id*. at 1346.
27. *Id*. at 1335.
28. *Id*. at 1346, *citing*, S. Rep. No. 103–3, p. 29 (1993), 1993 U.S.C.C.A.N. 3 at 31.
29. S. Rep. No. 103-3, p. 29 (1993).
30. 29 U.S.C.A. §2612(a)(1)(D).

Third Circuit Finds Individual Liability for Supervisors in Public Agencies Under the Family Medical Leave Act

by Dena B. Calo and Kathryn E. Dugan

In a case of first impression, the Third Circuit Court of Appeals recently decided that a supervisor in a public agency may be subject to individual liability under the Family Medical Leave Act (FMLA).[1] In *Haybarger v. Lawrence County Adult Probation and Parole*, the Third Circuit reviewed and ultimately reversed the district court's granting of summary judgment to the plaintiff's supervisor on the plaintiff's claim under the FMLA.[2]

Factual Background

The plaintiff in *Hayberger* was an office manager for Lawrence County Adult Probation and Parole.[3] Beginning in 2001, the plaintiff's supervisor was William Mancino, the director of probation and parole.[4] During the plaintiff's employment, she suffered from Type II diabetes, heart disease and kidney problems, which forced her to miss work frequently to seek medical attention.[5] Mancino repeatedly wrote in the plaintiff's annual performance evaluations that she needed "[t]o improve her overall health and cut down on the days that she misses due to illness."[6] The plaintiff also testified that Mancino repeatedly asked her why she breathed heavily and why she needed to visit the doctor so often.[7]

On March 23, 2004, Mancino formally disciplined the plaintiff by placing her on a six-month probation that required weekly informal progress assessments and formal monthly meetings. Following the probationary period, Mancino advised his supervisors that the plaintiff's job performance had not improved, and that the plaintiff should be terminated.[8] Mancino did not have the direct authority to terminate the plaintiff; nevertheless, he advised his supervisors to dismiss her.[9] Finally, in a meeting on Oct. 4, 2004, Mancino and his supervisors advised the plaintiff of her termination. Thereafter, the plaintiff sued Lawrence County Probation, the county of Lawrence, and Mancino under the Americans with Disabilities Act, the Pennsylvania Human Relations Act, the Rehabilitation Act and the FMLA.

Procedural History

Mancino moved for summary judgment before the district court on the plaintiff's FMLA claim against him in his individual capacity. The district court held that, while FMLA permits individual liability against supervisors at public agencies, the plaintiff failed to present sufficient evidence to hold Mancino individually liable.[10] The district court held that an individual supervisor is an "employer" for FMLA purposes only if he or she has "sufficient control over the [employee's] conditions and terms of employment."[11]

The district court further held that an employer has adequate control if he or she "has the authority to hire and fire."[12] The district court found that Mancino lacked final authority to fire the plaintiff and, therefore, did not have sufficient control over the plaintiff's employment to impose individual liability on him. Thus, the district court granted Mancino's motion for summary judgment.[13] The plaintiff appealed, contending there was a genuine dispute of material fact regarding whether Mancino was her employer under the FMLA and subject to individual liability.[14]

The Third Circuit's Holding

The Third Circuit first addressed whether Mancino was an employer under the FMLA such that he could be subject to individual liability as a supervisor. To ascertain whether Congress intended to permit individual liability under the FMLA, the Third Circuit looked at the FMLA's language.[15] The court found that the FMLA's language, coupled with the applicable regulations, confirmed the FMLA permits individual liability. Specifically, the court recognized the regulations state that "[e]mployers…include any person acting, directly or indirectly, in the interest of a covered employer, and any public agency."[16]

The court further explained that the regulations explicitly provide that "individuals such as corporate officers 'acting in the interest of an employer are individually liable for violations of the requirements of FMLA.'"[17] Moreover, the court explained that in promulgating the regulations, the Department of Labor responded to concerns of imposing individual liability by noting that the Fair Labor Standards Act (FLSA), which defines employer similar to the FMLA, already holds "corporate officers, managers and supervisors acting in the interest of an employer…individually liable."[18]

In sum, after analyzing the FMLA and the regulations, the court determined that supervisors employed by public agencies can be subject to individual liability under the FMLA.

Next, the court went on to determine whether Mancino was an employer for purposes of the FMLA. The court again looked to the statutory language of the FMLA, which states that an employer includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."[19] The court found the language meant that an individual is subject to FMLA liability when he or she exercises "supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation" while acting in the employer's interest.[20]

The court went on to explain that in analyzing an individual supervisor's control over an employee under the FLSA and the FMLA, most courts look at the "economic reality" of the employment situation, examining whether the individual supervisor carried out the functions of an employer with respect to the employee.[21] The court noted the Second Circuit previously held that some of the relevant factors in ascertaining the economic reality of an employment situation include whether the individual: 1) had the power to hire and fire the employee, 2) supervised and controlled employee work schedules or conditions of employment, 3) determined the rate and method of employment, or 4) maintained employment records.[22] The court then recognized that the Second Circuit has cautioned that courts must consider "any relevant evidence" and "no one of the four factors standing alone is dispositive."[23]

Based on the above analysis, and after reviewing the totality of the circumstances and the employment situation of the plaintiff, the Third Circuit found the district court's grant of summary judgment, based solely on a determination of Mancino's authority to independently hire or fire an employee, was inappropriate. Therefore, the Third Circuit vacated the district court's ruling and remanded for further proceedings.[24]

Advice for Attorneys and Employers

This case has significantly broadened liability for individuals under the FMLA. Employers should carefully train supervisors to be aware of the FMLA guidelines and be familiar with their responsibilities regarding these regulations. Supervisors should be aware that their decisions concerning other employees can implicate their own liability under the FMLA. As an organization, employers should be conducting investigations to make sure decisions are properly being made by supervisors, especially decisions involving employees with medical issues. Organizations must ensure that the supervisors, who are influencing decision makers regarding employees' employment, are not putting the organization at risk for liability. Hence, it is important that supervisors are properly trained. Finally, attorneys practicing in the area should be aware of the Third Circuit's reliance on the FLSA precedent in interpreting FMLA matters. ■

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Endnotes

1. 29 U.S.C. § 2601 *et seq.*
2 667 F.3d 408, 410 (3d Cir. 2012).
3. *Id.* at 410.
4. *Id.*
5. *Id.*
6. *Id.*

7. *Id*.
8. *Id*. at 411.
9. *Id*.
10. *Id*. at 412.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*. at 413.
16. *Id*. (*citing* 29 C.F.R. § 825.104(a)).
17. *Id*. (*citing* 29 C.F.R. § 825.104(d)).
18. *Id*. (*citing* Summary of Major Comments for FMLA Regulations, 60 Fed. Reg. 2180, 2181 (Jan. 6, 1995)).
19. *Id*. at 417 (*citing* § 2611(4)(A)(ii)(I)).
20. *Id*. (*citing Riordan v. Kempiners*, 831 F.2d 690,694 (7th Cir. 1987)).
21. *Id*.
22. *Id*. at 418.
23. *Id*. (*citing Herman v. RSR Sec. Servs.*, 172 F.3d 132,139 (2d Cir. 1999)).
24. *Id*. at 419.

Brumley v. Camin Cargo Control, Inc., et al.: FLSA Settlements Entitled to the Presumption of Public Access

by Nicole M. Amato

A recent decision from the United States District Court for the District of New Jersey by the Honorable Jose Linares, *Brumley v. Camin Cargo Control, Inc., et al.*,[1] has solidified the jurisprudence in this jurisdiction that wage-claim settlements between parties concerning the Fair Labor Standards Act (FLSA) cannot be sealed from the public's view, absent exceptional circumstances. The court's decision emanates, in large part, from the underlying mission of the FLSA, strongly rooted in the public policy of safeguarding America's workforce and protecting the public's right to transparency and access to information concerning the laws and protections provided by the FLSA.

Background and Holding

Brumley v. Camin Cargo Control involved three FLSA suits brought collectively by 112 plaintiffs against defendants Camin Cargo Control, Inc., Carlos Camin and Claudio Camin, alleging overtime violations and retaliation.[2] After four years of litigation, the parties executed a settlement agreement resolving all three cases.[3] The defendants moved, pursuant to New Jersey Local Civil Rule 5.3, to have the settlement agreement sealed, a motion supported by all parties.[4]

The court denied the defendants' motion and refused to seal the settlement. The court's holding was based on its finding that there is a "strong presumption in favor of keeping settlement agreements in FLSA wage-settlement cases unsealed and available for public view," and that settlements regarding FLSA matters are judicial documents subject to a presumption of public access.[5]

The District Court's Analysis

The court began its analysis by outlining the requisite four-point standard for a motion to seal, pursuant to New Jersey Local Civil Rule 5.3.[6] The court explained that it was required to make findings on each of the following four points in making its determination: "(a) the nature of the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available."[7]

The court determined the first two points to be satisfied by finding that the defendants' moving papers adequately described the nature of the materials sought to be protected, and that the interest in protecting confidentiality in general settlement agreements may be a valid public interest warranting protection, noting the defendants' citation to New Jersey's "strong public policy in favor of settlement."[8] The court declined to rule on the last prong, requiring a showing of no less restrictive alternative, finding that the defendants failed to effectively rebut the existing presumption of access necessary to seal the documents.[9]

The crux of the court's decision comes with its analysis of the third prong, which required the defendants to demonstrate they would suffer a clear "serious injury" if the motion to seal were denied. The defendants claimed disclosure of the settlement terms would cause reputational harm to their business given the potential message of admitted wrongdoing that would accompany their monetary payment to the plaintiffs.[10] The defendants further claimed that disclosure would serve no public interest because the settlement pertained only to the involved parties, and its terms did not involve matters of public concern or health and safety.[11]

The court began its analysis by looking to the stated purpose of the FLSA set forth in the act itself.[12] The court explained that there are only two permissible methods for resolving claims *between the parties* for back wages pursuant to the FLSA, both of which require third-party oversight.[13] First, an employee may proceed pursuant to 29 U.S.C. § 216(c) under the supervision of the secretary of labor, whereby payment may be made

in full and accepted by the employee.[14] Once accepted by the employee, he or she effectively waives his or her right to proceed in federal court for both the unpaid wages and corresponding liquidated damages.[15] Alternatively, as was the case in *Brumley*, the employee may bring a private action pursuant to 29 U.S.C. § 216(b), where the court may enter a stipulated judgment on behalf of the parties, who are likely to be properly represented, after having "scrutinized the settlement for fairness."[16]

As the court noted in *Brumley*, "there has been a broad consensus established amongst the courts that FLSA settlements are unlike ordinary settlements with confidential terms."[17] The court relied upon two seemingly prevailing rationales for its varying treatment of FLSA settlements:

1. the general public interest in the content of documents upon which a court's decision is based, including a determination of whether to approve a settlement; and
2. the 'public-private character' of employee rights under the FLSA, whereby the public has an 'independent interest in assuring that employees' wages are fair and thus do not endanger the national health and well-being.'[18]

The general public's interest in all judicial documents has its roots in our democratic form of government, which overtly encourages transparency in the judicial system as a branch of government bestowing upon the people the right to keep a "watchful eye" on its workings.[19] Judicial documents are routinely afforded the presumption of the right to public access.[20] This presumption is not unconditional, however, as courts retain discretion to override the presumption if justified.[21] Routine settlements between parties, which are not customarily approved or decided upon by the court, are often considered private documents rather than judicial documents.[22] FLSA settlements, on the other hand, inherently require oversight and approval by the court, thus bringing the settlement under the purview of the court's jurisdiction and responsibility. Once the court is involved in the resolution, "the fact and consequences of [its] participation are public acts."[23]

The notion of the public's inherent interest in FLSA matters emanates from the stated purpose of the act itself. As early as 1945, the Supreme Court, in *Brooklyn Savings Bank v. O'Neil*,[24]characterized the rights granted to employees under the FLSA as having a "private-public character," finding that an employee's right to wages and the corresponding liquidated damages for late payment cannot be waived or compromised.[25] The Supreme Court highlighted Congress's intent to protect the labor workforce from substandard wages, noting that "the statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce."[26]

The strong underlying objectives of the FLSA clearly guided the court in *Brumley* to its determination that a presumption of access attaches to FLSA wage-settlement agreements and that there is a "strong presumption" in favor of keeping such settlements unsealed and available to the public. Upon finding that a presumption of access did, in fact, apply to the settlement at hand, the *Brumley* court then looked to whether that presumption could be overcome by the circumstances presented in the case before it. The court cited cases holding that neither the presence of a confidentiality clause in the settlement nor the potential for reputational harm, as the defendants claimed, will meet the standard necessary to overcome this longstanding presumption of public access.[27]

With regard to the confidentiality clause, the court cited to the case of *Prater v. Commerce Equities Management Co., Inc.*[28] In *Prater*, the court plainly stated that "the fact that a settlement agreement contains a confidentiality provision is an insufficient interest to overcome the presumption that an approved FLSA settlement agreement is a judicial record, open to the public."[29] While the court noted the fact that the defendants cited no authority to support the proposition that reputational harm is a justifiable concern to overcome the presumption of access, the court, in making its determination, cited to authority that stated quite certainly it *was not*.[30] The court relied upon *Newman v. General Motors*,[31] which involved a magistrate's refusal to seal judicial opinions and related transcripts pursuant to Local Civil Rule 5.3.[32] Although the *Newman* case did not involve the FLSA, the defendants claimed, in part, that they would suffer the injury of "reputational harm based on the risk of public miscomprehension of the materials," much like the defendants claimed in *Brumley*.[33] The *Newman* court found that reputational harm was insufficient grounds to overcome the presumption of access to public records.[34]

An analysis of the court's decision in *Brumley* reveals the clarity with which the Judiciary approaches matters concerning the FLSA and its stated goals. The court quickly determined that any personal interest the defendants had in protecting their business's reputation was simply no match for the longstanding public policy underlying the FLSA to safeguard the public's access to information.

Conclusion

If there is something to be extracted from *Brumley's* analysis, it is that employers will continue to be held to higher standards in matters of FLSA compliance, accountable not only to their own workers but to the public as well. Given these high standards, and the judicially mandated transparency that accompanies them, employers should examine their business practices to ensure they are in compliance with the FLSA. Proactive compliance will go a long way toward helping employers protect their business, including its integrity and reputation. ■

Nicole M. Amato is an associate with Nukk-Freeman & Cerra, P.C., which is headquartered in Short Hills and devoted to the representation of businesses in employment law matters.

Endnotes

1. 2012 WL 1019337, at *1 (D.N.J. March 26, 2012).
2. *Id.*
3. *Id.* at 2.
4. *Id.*
5. *Id.* at 6 (citations omitted).
6. *Id.* at 2.
7. *Id.* (*citing* Loc. Civ. R. 5.3(c)(2)).
8. *Id.* at 3.
9. *Id.* at 7.
10. *Id.* at 4.
11. *Id.*
12. *Id.*
13. *Id.* at 5.
14. *Id.*
15. *Id.*
16. *Id. See also Lynn's Food Stores, Inc. v. United States,* 697 F.2d. 1350, 1354 (11th Cir. 1982).
17. *Brumley v. Camin Cargo Control, Inc, et.al.,* 2012 WL 1019337, at * 5.
18. *Id.* (*citing Hens v. Clientlogic Operating Corp.*, 2010 U.S. Dist. LEXIS 116635, at *6-7 (S.D.N.Y. Nov. 2, 2010)).
19. *Dees v. Hydrady, Inc.,* 706 F. Supp. 2d 1227, 1244-1245 (M.D. Fla. 2010). *See also Nixon v. Warner Communications, Inc.,* 98 S. Ct. 1306, 1312 (1978).
20. *Nixon v. Warner Communications, Inc.,* 98 S. Ct. 1306, 1312 (1978).
21. *Id.*
22. *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002). *See also Hens v. Clientlogic Operating Corp.*, 2010 WL 4340919, at *2 (S.D.N.Y. Nov. 2, 2010).
23. *Jessup v. Luther*, 277 F.3d at 929.
24. 65 S. Ct. 895, 900-904 (1945).
25. *Id.* at 902-903.
26. *Id.* at 902.
27. *Brumley v. Camin Cargo Control, Inc., et.al.,* 2012 WL 1019337, at*7.
28. 2008 WL 5140045 (S.D. Tex. Dec. 8, 2008).
29. *Id.* at *10.
30. *Brumley v. Camin Cargo Control, Inc., et.al.,* 2012 WL 1019337, at *4, 7.
31. 2008 U.S. Dist. LEXIS 105492 (D.N.J. Dec. 31, 2008).
32. *Id.* at 1.
33. *Id.* at 13.
34. *Id.* at 13.

The Third Circuit Sets Forth a New Test for Joint-Employer Status Under the FLSA

by Martha Keon and Matthew J. Hank

The Third Circuit recently set forth a new test for joint-employer status under the Fair Labor Standards Act (FLSA) in the context of a parent company providing shared services to its subsidiaries in *In re: Enterprise Rent-a-Car Wage & Hour Employment Practices Litigation*.[1]

At the time of the events in question, Enterprise Holdings, Inc., was the parent company and sole stockholder of 38 domestic subsidiaries operating rental car agencies. Plaintiff Nickolas Hickton, a former assistant manager at one of the subsidiaries, filed a nationwide collective action in the United States District Court for the Western District of Pennsylvania, alleging he and other similarly situated managers were misclassified as exempt, and were due back wages for overtime under the FLSA. Hickton sued both the subsidiary and Enterprise Holdings, alleging that Enterprise Holdings was liable as a joint employer. After the district court granted summary judgment to Enterprise Holdings on the ground that it was not a joint employer, and thus not liable under the FLSA, Hickton appealed to the Third Circuit, arguing that summary judgment was improper because, on the evidence before the district court, a reasonable jury could conclude that Enterprise Holdings was a joint employer under the FLSA.

The Third Circuit disagreed. The court of appeals began its analysis by citing the statute, which defines "employer" broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[2] The court then noted that the FLSA's implementing regulations provide that an entity may be found to be a joint employer "[w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."[3] The court also cited Third Circuit precedent holding that the degree of control over essential terms and conditions of employment is the touchstone for joint employer status under the FLSA:

> [W]here two or more employers exert significant control over the same employees—[if] from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' under the FLSA.[4]

Because no existing Third Circuit opinion had squarely set forth an analytical framework for determining when sufficient control exists to create joint-employer status under the FLSA, the Third Circuit surveyed the opinions of other federal appellate courts and the district courts within the Third Circuit.[5] Although the Third Circuit regarded these authorities as instructive, it concluded that, without amplification, they could not serve as a test for determining joint employment under the FLSA. Accordingly, the Third Circuit provided its own analytical framework.

The court noted that the test for joint employment under the FLSA must be broader than the test used under other statutes, such as the Age Discrimination in Employment Act (ADEA) and Title VII, because the FLSA provides for joint-employment status where there is "indirect" as well as "direct" control over the relevant employees.[6] It then held that courts must begin the joint-employer analysis by considering whether the alleged employer has or exercises the following:

1. authority to hire and fire employees;
2. authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits and hours;
3. day-to-day supervision, including employee discipline; or
4. control of employee records, including payroll, insurance, taxes and the like.[7]

The court stressed, however, that the analysis may not end with evaluation of those factors. The four criteria are not exhaustive, and district courts must, therefore, take into account any other, unspecified, "real world" indications of "significant control."[8] Further, whatever factors the district court takes into account must be balanced; no one factor will necessarily be determinative.

Because *Enterprise* requires district courts to consider 'real world' indications of 'significant control' that the Third Circuit did not attempt to delimit, the decision leaves some ambiguity concerning how much control is too much. An examination of the Third Circuit's application of the *Enterprise* test to the facts of the case, however, dispels some of that uncertainty, and gives employers reason to take heart.

Hickton marshaled what, at first blush, might appear to be significant evidence of control. Enterprise Holdings provided shared services—including employee benefit plans, rental reservation tools, a central customer contact service, insurance, technology, legal services, business guidelines, and human resources services. The human resources services included providing job descriptions, best practices, training materials, performance review forms, and compensation guidelines. During 2005, representatives of Enterprise Holdings had recommended the subsidiaries not pay overtime wages to assistant managers who were employed by certain subsidiaries. Enterprise Holdings stressed the shared services were optional in the discretion of the subsidiaries, which paid for the services via dividends and management fees. However, Hickton argued significant control was demonstrated by the fact that the same three individuals who were Enterprise Holdings' directors were also the only board members of each of the subsidiaries.

Notwithstanding that array of evidence, the Third Circuit concluded Enterprise Holdings was *not* a joint employer of Hickton, even though the "fact of the interlocking directorates and the nature of the business being conducted by the parent and subsidiaries" weighed in favor of the plaintiff.[9] Examining the four factors, the court held:

> Enterprise Holdings, Inc. had no authority to hire or fire assistant managers, no authority to promulgate work rules or assignments, and no authority to set compensation, benefits, schedules, or rates or methods of payment. Furthermore, Enterprise Holdings, Inc. was not involved in employee supervision or employee discipline, nor did it exercise or maintain any control over employee records.[10]

The court rejected the argument that Enterprise Holdings exercised significant control in these areas by virtue of providing guidelines and manuals. The court found there was no record evidence the guidelines and manuals were mandatory directives, and the evidence instead showed they were merely suggested policies and practices, the subsidiaries had the discretion regarding whether to adopt them, and Enterprise Holdings' recommendations were akin to those of a third-party consultant.[11] The court concluded it was readily apparent that Enterprise Holdings "exercised no control, let alone significant control, over the assistant managers."[12] The Third Circuit, therefore, affirmed summary judgment in Enterprise Holdings' favor.

Employers may draw several lessons from *Enterprise*:

- Although the black-letter law of *Enterprise* is not radically different from the black-letter law of other jurisdictions, the Third Circuit's conclusion that Hickton could not satisfy the *Enterprise* test even though he had some evidence of control, suggests that plaintiffs asserting a joint-employer theory in the Third Circuit face a steep climb. For example, in the franchise context, where franchisors typically exercise no more control over franchisees' employees than Enterprise Holdings exercised over the employees of its subsidiaries, it is unlikely a franchisor would be held to be a joint employer under the *Enterprise* test.
- Even though the *Enterprise* test for joint-employer status under the FLSA is easier for a plaintiff to satisfy than the test for joint-employer status under other statutes, and the *Enterprise* test presents a fact-bound inquiry, the outcome in *Enterprise* suggests summary judgment is a realistic possibility, even for companies that exercise some control over the primary employer.
- Under the *Enterprise* test, however, to avoid joint-employer status, a holding company, franchisor, or parent company providing shared services to a subsidiary, franchisee, or affiliate should make certain the shared services really are optional, and must avoid exerting day-to-day control over the essential terms and conditions of employment of the employees of the recipient of the shared services.

- Because the Third Circuit emphasized the *Enterprise* test represents the most permissive test for joint-employer status, companies facing joint-employer claims under other statutes, such as Title VII, may argue that, if the plaintiff cannot satisfy the *Enterprise* test for joint-employer status under the FLSA, he or she cannot satisfy the more difficult test for joint-employer status under other statutes. This defense is significant because the law in the Third Circuit for determining joint-employer status under Title VII and other statutes is not thoroughly developed. The *Enterprise* test, therefore, gives companies a new tool for arguing by analogy in non-FLSA cases that joint-employer status does not exist.

Martha Keon and Matthew Hank are shareholders in the Philadelphia office of Littler Mendelson P.C., the nation's largest law firm exclusively devoted to representing management in labor and employment law matters.

Endnotes

1. 2012 U.S. App. LEXIS 13229 (3d Cir. June 28, 2012).
2. *Id.* at *11 (*citing* 29 U.S.C. § 203(d)).
3. *Id.* at *11-12 (*citing* 29 C.F.R. § 791.2(b)).
4. *Id.* at *12-13 (*citing NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3d Cir. 1982)).
5. *Id.* at *12-15.
6. *Id.* at *15-16.
7. *Id.* at *16.
8. *Id.* at *16-17.
9. *Id.* at 18-19.
10. *Id.* at *21-22.
11. *Id.* at 22.
12. *Id.*

NLRB Employee Rights Notice Posting: Permissible Rulemaking or Agency Overreach? Has the Board Disturbed the Congressional Sound of Silence?

by Eric C. Stuart and Christopher R. Coxson

Two United States District courts reached different conclusions regarding the National Labor Relations Board's (NLRB) employee rights notice posting initiative. The NLRB created this initiative by issuing a final rule[1] on Aug. 30, 2011, requiring six million employers covered by the National Labor Relations Act (NLRA) to post in the workplace an NLRB-prescribed notice of employee rights.[2] As a result of the split of authority, the NLRB voluntarily withdrew the initiative pending appeal.

The outcome of this litigation has significant implications for the NLRB regarding the extent of its authority. While organized labor applauded the initiative, the business community (including the United States Chamber of Commerce and the National Association of Manufacturers) has pointed to the notice posting rule as an example of the agency's hyper-partisan efforts to tilt the balance in favor of unions. Additionally, the notice appears to be a component of the NLRB's efforts to expand protections for unrepresented employees under Section 7 of the act.

The NLRB-promulgated notice informs employees of the NLRA right to form or join unions, engage in collective bargaining, and strike. It provides employees with a detailed list of employer unfair labor practices, and a smaller list of union unfair labor practices.[3] The rule also: 1) creates a new unfair labor practice for employers who fail to post the notice,[4] 2) establishes a presumption of bad faith (unlawful motive) applicable in future unfair labor practice cases,[5] and 3) permits the NLRB to toll the NLRA's six-month statute of limitations in future unfair labor practice cases involving jobsites where the notice is not posted.[6]

The rule was initially scheduled to take effect on Nov. 14, 2011. The NLRB postponed the implementation date to allow for enhanced education and outreach to employers, particularly those who operate small and medium-sized businesses. The new effective date for implementation of the rule was to be Jan. 31, 2012. Business groups then challenged the rule in actions before the federal district courts in the District of Columbia[7] and South Carolina.[8] In the face of those lawsuits, the NLRB announced, on Dec. 27, 2011, a second delay in the notice-posting initiative, to April 30, 2012. According to the NLRB, this delay "would facilitate the resolution of the legal challenges" to the rule.[9]

The current NLRB most certainly views its authority as extremely broad, and its action in promulgating the rule seemingly tests the limit of the agency's authority under the act. Under present law, unless an employer is *first* found to have committed an unfair labor practice, there is no express statutory provision in the NLRA requiring employers to post any notice of employee rights. Now, despite the absence of specific statutory authority, the NLRB argues that it has inherent administrative authority to promulgate a notice-posting rule pursuant to Section 6 of the NLRA, which provides:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.[10]

Business groups contend that the absence of statutory authority is evidence of congressional intent, as Congress included express notice-posting requirements in most federal labor and employment laws (*e.g.*, the Railway Labor Act, which pre-dated the NLRA, OSHA, Title VII of the 1964 Civil Rights Act, etc.). Moreover, since the Wagner Act was passed in 1935, Congress amended the NLRA in 1947, 1959, and 1974, but never added a specific notice-posting requirement.

Two District Court Decisions

On March 2, 2012, in *National Association of Manufacturers v. NLRB, supra,* the U.S. District Court for the District of Columbia upheld the NLRB's authority to promulgate the rule but enjoined two of the rule's enforcement provisions. The court struck the provisions creating a new unfair labor practice, rationalizing that it is the sole province of Congress to enact such a measure. The court struck the section tolling the statute of limitations for the filing of unfair labor practice charges where the employer fails to post along the same lines. Both the *National Association of Manufacturers* and the NLRB cross-appealed the district court's decision to the D.C. Circuit.

On April 13, 2012, in *Chamber of Commerce of the United States v. NLRB, supra,* the U.S. District Court for South Carolina granted summary judgment invalidating the final rule in its entirety. The court held that the NLRB lacks statutory authority to promulgate the rule and that the agency violated the Administrative Procedure Act.[11]

The district court observed:

> Congress made extensive revisions to the NLRA in 1947, 1959, and 1974, yet never found the need to include a notice posting provision. The Board also went seventy-five years without a notice-posting rule, but it has now decided to flex its newly-discovered rulemaking muscles.[12]

Following the South Carolina decision, the U.S. Court of Appeals for the District of Columbia Circuit, which retained jurisdiction on appeal from the D.C. District Court's decision, issued a temporary injunction against the rule.[13] Oral argument on that appeal is scheduled for Sept. 2012. The NLRB's Office of General Counsel then subsequently agreed that the agency would *not* apply the rule anywhere in the country unless the Fourth Circuit or the U.S. Supreme Court reversed the South Carolina District Court decision.

Recently, on June 15, 2012, the NLRB appealed the South Carolina decision to the Fourth Circuit. Although the circuit courts' decisions will sort out whether private businesses can be forced to post the notice, further appeal (to the U.S. Supreme Court) and delay is possible. Until a final decision is issued, most employers are not required to post the NLRB's notice. The only exception is for government contractors who are still required to post the employee rights notice mandated by President Barack Obama in 2009, under Executive Order 13496.

Judicial rebukes have not dampened the NLRB's desire to push its agenda forward. On June 18, 2012, the NLRB announced an unprecedented "outreach program," including a dedicated webpage, to insure employees are aware of their ability to file unfair labor practice charges against employers, even in unrepresented workplaces.[14] Additional NLRB initiatives are being undertaken concerning social media policies, and certain at will employment provisions.

From a management perspective, if the employee rights notice posting requirement is ever lawfully implemented, employers may consider posting a companion notice educating employees on the company's position regarding unions, unionization and labor law rights generally. Moreover, the NLRA rights notice and NLRB outreach program likely will foster pointed inquiries from employees. Employers should provide supervisors with specific training regarding the nuances of employee-protected concerted activity under Section 7 of the NLRA. Thus, whether the notice is required to be posted, the NLRA will remain highly relevant to employees and employers in all six million workplaces covered by the act. ■

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Endnotes

1. Final Rule, "Notification of Employee Rights under the National Labor Relations Act," 76 Fed. Reg. 54,0006 (Aug. 30, 2011). The rule required employers to "post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures." For employers who customarily communicate with their employees about personnel rules or policies using intranet or internet sites, the rule requires employers to also post the notice prominently on the site.

2. Board member Brian Hayes dissented from the final rule, observing that "the Board clearly lacks the statutory authority to order affirmative notice-posting in the absence of an unfair labor practice charge filed by an outside party." 76 Fed. Reg. at 54,037-42.
3. The rule does not, for example, inform employees of their right to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues beyond amounts required for representational purposes. *See Communications Workers v. Beck*, 487 U.S. 735 (1988).
4. 29 C.F.R. § 104.210.
5. 29 C.F.R. § 104.214(b).
6. 29 C.F.R. § 104.214(a).
7. *National Association of Manufacturers et al. v. NLRB,* 2012 WL 691535 (D. D.C.).
8. *Chamber of Commerce of the United States et al. v. NLRB*, 2012 WL 1245677 (D. S.C.).
9. http://www.nlrb.gov/news/nlrb-postpones-effective-date-rights-posting-rule-april-30.
10. 29 U.S.C. §156.
11. *Chamber of Commerce of the United States et al. v. NLRB, supra at* *15.
12. Congressional silence on the NLRB's notice posting authority was a determining factor in the court's analysis: "Perhaps the Board should have heeded the admonition of Simon and Garfunkle: 'And no one dared / disturb the sound of silence.' Simon & Garfunkel, *The Sound of Silence*, on Sounds of Silence (Columbia Records 1966)," *Id.* at fn. 19.
13. *National Association of Manufacturers v. NLRB*, Case No. 12-5068 (D.C. Cir. April 17, 2012).
14. http://www.nlrb.gov/news/nlrb-launches-webpage-describing-protected-concerted-activity.

The NLRB Attempts to Restrict Class Action Waivers in Employment Agreements

by Steven M. Berlin

The recent decision of the National Labor Relations Board (NLRB) in *D.R. Horton, Inc.*, now on appeal, calls into question the enforceability of employment agreements that prohibit any collective or class actions, whether or not the agreement also requires arbitration of disputes.[1] As a result, currently there is no clear rule regarding the enforceability of such contract provisions. Two things remain certain, however: the Federal Arbitration Act (FAA) strongly favors arbitration agreements of employment disputes[2] and Section 7 of the National Labor Relations Act (NLRA) also favors the rights of employees to "engage in concerted activities for the purpose of…mutual aid or protection."[3]

The FAA provides for resolution of disputes through arbitration.[4] The U.S. Supreme Court has construed the FAA as reflecting a strong federal policy in favor of arbitration, and has therefore enforced employment agreements that waive the right to a jury trial and mandate arbitration as the sole means of resolving disputes. This position was evidenced in *Circuit City Stores, Inc. v. Adams*.[5] Subsequently, in a 2009 decision in *14 Penn Plaza LLC v. Pyett*, the Supreme Court also found that an arbitration provision between an employer and a union that precluded an employee from filing a discrimination claim in court was enforceable.[6]

Not surprisingly, in cases such as *Martindale v. Sandvik, Inc.* (finding that the waiver-of-rights provision "not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action"),[7] New Jersey courts have made clear that the general policy is in favor of arbitration of disputes, including disputes arising out of an employer-employee relationship.

As recently as last year, many employers were left with the hope, if not the impression, that not only were arbitration agreements enforceable, but such contracts could go so far as to prohibit collective claims under the Fair Labor Standards Act (FLSA)[8] or class claims under Federal Rule of Civil Procedure 23, thereby shielding employers from liability for any potential collective or class actions.[9] This impression was based upon the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.[10] In that case, the Court was presented with the issue of whether or not arbitral class action waivers are enforceable in a consumer contract. The district court and Ninth Circuit Court of Appeals denied AT&T's attempt to compel arbitration of a class claim under California law, finding that the arbitration clause was unconscionable, as it prohibited consumers' use of class action in litigation or arbitration. The Supreme Court, however, reversed, noting that a California law prohibiting arbitral class action waivers violated the intent of the FAA.

While the *Concepcion* decision did not involve an employment contract, employers nevertheless found the implications of the decision to be quite positive. Many employers interpreted the Supreme Court's ruling as carving out a clear pathway leading to the elimination of potential class actions via employment contracts that contain a waiver of an employee's right to bring a class or collective action. This pathway, however, may now be closed off just one year later by the NLRB in *Horton*.

Unlike *Concepcion*, *Horton* involved an actual employment contract that provided all employment claims could only be determined via arbitration, and the only claims that could be brought were individual claims. Therefore, lawsuits, as well as class or collective claims, were prohibited. The plaintiff asserted he and a class of other employees were misclassified as exempt from federal overtime requirements in violation of the FLSA. As a result, the plaintiff filed a notice of intent to arbitrate on behalf of him and a purported class of other similarly situated employees. His employer, however, deemed the notice to arbitrate as defective because of the prohibition in the employment contract of any class

or collective claims. The plaintiff then filed an unfair labor practice charge with the NLRB. After investigation, the NLRB issued a complaint alleging that the contract violated Section 8 of NLRA, which makes it an unfair labor practice to interfere with employees in the exercise of their rights guaranteed under NLRA's Section 7.[11]

While the NLRB administrative judge held that the waiver provision of the employment contract did not violate Section 8, the NLRB itself reversed. The NLRB found the waiver provision was in violation of Section 8 because it barred employees from exercising substantive Section 7 rights by prohibiting class or collective claims in any forum. The NLRB did not have a problem with arbitration being the manner for resolution of disputes, it was just concerned about the employees' waiver of their right to assert collective or class actions, regardless of forum.

The *Horton* case is currently on appeal to the Fifth Circuit. In the interim, *Horton* stands for the proposition that an employee's rights to engage in concerted activities via a class or collective action cannot be waived, and a contract purportedly waiving such rights is not enforceable as it frustrates the substantive right to collective action under Section 7. Therefore, as far as the NLRB is concerned, employers can no longer insulate themselves from class or collective actions by agreement with their employees, and employees now have a strong weapon for combatting any collective and class waivers.

Notably, however, besides being up on appeal, the *Horton* decision remains under scrutiny. Not every subsequent decision has followed the proposition set forth by the NLRB, and there remains much inconsistency with regard to the enforceability of collective and class waivers. The U.S. District Court for the Northern District of California recently held, in *Sanders v. Swift Transportation Co. of Arizona, LLC,* that *Horton* would not be considered in reaching its conclusion that an employer's motion to compel arbitration of the individual claims of the plaintiff in a putative class action should be granted, when an arbitration agreement existed that restricted class action and collective claims.[12]

Similarly, the U.S. District Court of Georgia, in *Palmer v. Convergys Corp.*, was presented with the defendants' motion to strike a collective action claim under the FLSA in light of a waiver of class and collective actions signed by the plaintiffs.[13] The court ultimately found that the plaintiffs effectively waived their right to bring a collective action when they each signed an employment application, and granted the defendant's motion to strike the plaintiffs' collective action allegations. In a footnote, the court indicated that it would not follow the *Horton* decision, as "it does not meaningfully apply to the facts of the present case," but provided no further detail regarding the manner in which *Horton* did not apply.

Further, the U.S. District Court for the Central District of California, in *Johnmohammadi v. Bloomingdales, Inc.,* was faced with the question of whether an arbitration agreement with class/collective action restrictions violated the NLRA in light of the *Horton* decision.[14] The court distinguished the NLRB's decision when it granted an employer's motion to compel arbitration, as it found that *Horton* involved an arbitration agreement that was a condition of employment, whereas the *Johnmohamaddi* plaintiff had the option of opting out of arbitration agreement.

Most recently, in *Nelsen v. Legacy Partners Residential, Inc.,* the Court of Appeals of the State of California rejected *Horton* in ruling an arbitration agreement prohibiting class claims contained within an employee handbook to be enforceable.[15] In so ruling, the court noted it was not bound by the federal administrative interpretations of the NLRA, and that "[t]he subject matter of the [*Horton*] decision—the interplay of class action litigation, the FAA, and section 7 of the NLRA—falls well outside the Board's core expertise in collective bargaining and unfair labor practices."

While it remains to be seen whether the *Horton* decision will be reversed on appeal, or which jurisdictions will follow the NLRB's decision, it is important to note that this case is not without limitation. Importantly, *Horton* leaves open the theory that some class and collective litigation waivers contained within arbitration agreements might, in fact, be enforceable, provided an employee can still bring a class or collective action in a judicial forum. If an employee has some type of forum in which to bring a class or collective action, his or her Section 7 rights have not been frustrated and the waiver provision is enforceable. Therefore, even under *Horton's* very pro-class and pro-collective action decision, class and collective action waivers regarding forum can still be enforceable because a violation of Section 7 rights will only be found if no forum is left available for an employee to bring class or collective claims.

The ultimate impact of *Horton* on employment

contracts is yet to be determined. The NLRB in *Horton*, however, has left employers with a very clear message: One must not interfere with or infringe upon an employee's Section 7 rights to class and collective litigation. Until the Fifth Circuit issues its decision, employers must remain cautious in mandating or enforcing class or collective action waivers as a condition of employment since doing so risks NLRB charges for unfair labor practice. ■

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Endnotes

1. 357 NLRB No. 184 (Jan. 6. 2012).
2. 9 U.S.C. § 1, *et seq.*
3. 29 U.S.C. § 157.
4. 9 U.S.C. § 1, *et seq.*
5. 532 U.S. 105 (2001).
6. 556 U.S. 247 (2009).
7. 173 N.J. 76 (2002).
8. 29 U.S.C. § 216(b).
9. Fed. R. Civ. P. 23.
10. 563 U.S. __, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011).
11. National Labor Relations Act, Sec. 7, 29 U.S.C. § 157; Sec. 8, 29 U.S.C. 158(a)(1).
12. 2012 WL 523527 (N.D. Cal. Jan. 17, 2012).
13. 2012 WL 425256 (M.D. Ga. Feb. 9, 2012).
14. No. CV 11-6434 (C.D. Cal. Feb. 23, 2012).
15. *Nelson v. Legacy Partners Residential, Inc.* (Cal. Court of Appeals, First Appellate District, Division One, July 18, 2012).

Update Re: State of New Jersey Quickly Settles Disparate Impact Lawsuit Regarding Police Sergeant's Promotion Exam

by Iván A. Méndez Jr.

In an article[1] published in the March 2012 issue of this publication, I discussed the unusually speedy resolution of *United States v. State of New Jersey*,[2] as contrasted to a similar disparate impact case pending in the United States District Court for the Eastern District of New York, *United States of America v. City of New York*.[3] Both cases involved disparate impact lawsuits filed against state and municipal employers related to the hiring and promotion of Hispanic and African-American employees. Two significant developments have taken place since the publication of that article.

First, on March 8, 2012, the court in the *City of New York* case ruled that black and Hispanic applicants who were denied firefighter jobs, or whose hiring was delayed because of race discrimination, were entitled to $128,696,803 in gross lost wages.[4] The court noted, however, that "[t]he City will have the opportunity to reduce this amount significantly by proving the interim earnings of claimants in individual proceedings."[5] In addition to imposing a penalty of over $100 million in back wages, the court previously required the city to pay the court monitor's fees, which are already in the hundreds of thousands of dollars, and will likely exceed $1 million once the litigation is brought to its conclusion.[6] This development is yet another reminder to employers facing disparate impact lawsuits of the potential astronomical costs of defending disparate impact litigation

Second, on June 12, 2012, United States District Judge Katharine S. Hayden approved the settlement in *United States v. State of New Jersey*,[7] bringing this case to a final resolution. Judge Hayden's 57-page opinion addressed 468 written objections to the settlement, and the intervention bid by a group of Paterson police officers. Judge Hayden also addressed the merits of the disparate impact claims presented by the plaintiff, finding that the plaintiff "has adduced strong evidence that the State's promotional process for police sergeants runs afoul of Title VII."[8]

Additionally, Judge Hayden evaluated the fairness, adequacy, and reasonableness of the proposed relief, which included: "(1) the requirement that ten jurisdictions obtain pre-approval before certifying candidates for promotion; (2) back pay to claimants; (3) priority promotions for eligible claimants in thirteen jurisdictions; and (4) the creation of a new examination for future administrations."[9] The judge categorically addressed the objections to each of these different categories of relief, and concluded that "the settlement is reasonable, fair, adequate, and consistent with federal law."[10]

In closing, Judge Hayden observed that "[t]he parties' resolution of the issues reflects a conscientious and careful settlement, reached after lengthy litigation."[11]

The widely divergent results obtained by the city of New York and the state of New Jersey should serve as a stern warning to employers facing disparate impact litigation of the potential costs associated with long, protracted litigation. ■

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Endnotes

1. *See* Iván A. Méndez Jr., State of New Jersey Quickly Settles Disparate Impact Lawsuit Regarding Police Sergeant's Promotion Exam, *N.J. Labor and Employment Quarterly*, Vol. 33, No. 3 (March 2012).
2. 10 Civ. 00091 (D.N.J.).
3. 07 Civ. 2067 (E.D.N.Y.).
4. *United States v. City of New York*, No. 07 Civ. 2067, 2012 U.S. Dist. LEXIS 30989, at *71 (E.D.N.Y. March 8, 2012).
5. *United States v. City of New York*, No. 07 Civ. 2067, 2012 U.S. Dist. LEXIS 30989, at *71 (E.D.N.Y. March 8, 2012).
6. *See* Draft Remedial Order, *United States v. City of New York*, 07 Civ. 2067 (No. 743-1), at 27.
7. *See* Opinion, *United States v. State of New Jersey*, 10 Civ. 00091 (No. 71).
8. *Id*. at 14.
9. *Id*. at 34.
10. *Id*. at 50.
11. *Id*. at 57.

At Long Last: EEOC Clarifies "Reasonable Factors Other Than Age" Defense

by Denise Keyser and Amy Bashore

Years after two United States Supreme Court decisions redefined the parameters of the "reasonable factors other than age" (RFOA) defense under the Age Discrimination in Employment Act (ADEA),[1] the Equal Employment Opportunity Commission (EEOC) has finally released new regulations incorporating the Court's construction of this employer safe harbor.[2] While, to some extent, this is old news given the holdings in *Smith v. City of Jackson*[3] and *Meacham v. Knolls Atomic Power Lab.*,[4] the new regulations do provide the EEOC's gloss on those decisions, as well as important guidance on how the agency will approach cases in which an employer asserts this defense. Unfortunately for the business community, however, this guidance may undercut certain aspects of the Supreme Court's rulings.

In *Smith*, the Court ruled that, while the ADEA did authorize relief on a disparate impact theory, "the scope of [such] liability under ADEA is narrower than under Title VII,"[5] despite the many similarities between the two statutes.[6] While both permit otherwise prohibited employment actions where the protected class in question is a *bona fide* occupational qualification or BFOQ,[7] the ADEA includes the RFOA defense, which is not replicated in Title VII. Thus, the ADEA permits a business to take "any action otherwise prohibited under [the statute] where the differentiation is based on reasonable factors other than age[.]"[8]

The *Smith* Court found this provision to be "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[9] The Court also ventured that "intentional discrimination on the basis of age has not occurred at the same level as discrimination against those protected by Title VII."[10] Thus, the Court concluded that Congress, when it enacted the ADEA, intended to provide less protection for some types of age differentiation than that provided in Title VII for similar actions involving classifications protected by that earlier law.

Based on this analysis, the Court rejected the EEOC's argument that the RFOA defense could succeed only when justified, like the BFOQ defense, by "business necessity."[11] Under *Smith*, the RFOA defense is evaluated, as the term suggests, on a "reasonableness" standard. Provided the challenged practice is "not unreasonable," an RFOA defense may succeed.

In *Meacham*, the Court focused on the burdens of proof and production with respect to the RFOA defense, and concluded that the employer asserting the RFOA affirmative defense bears both the burden of production and persuasion.[12]

With *Smith* and *Meacham*, the Supreme Court firmly rejected the EEOC's circumscribed reading of the RFOA provision and the regulations then in place, which had advanced that interpretation. On the heels of these decisions, the EEOC set to work revising its regulations and its position on the RFOA.

The new regulations, to a large extent, track the *Smith* and *Meacham* holdings. But they also expand upon those decisions, offering the EEOC's thoughts on considerations "relevant to whether a practice is based on a reasonable factor other than age[.]" Some of those considerations are self-evident, such as "[t]he extent to which the factor is related to the employer's stated business purpose" and "[t]he extent to which the employer defined the factor accurately and applied the factor fairly and accurately[.]"[13]

Other factors seem to cut against the Supreme Court's interpretation, and could have the practical effect of requiring employers to make a type of business necessity showing. For example, the EEOC suggests the following considerations are relevant to the RFOA defense:

1. The extent to which...managers and supervisors were given guidance or training about how to apply the [age related] factor and avoid discrimination;

2. The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
3. The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
4. The degree of harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely effected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.[14]

The EEOC endorses a case-by-case evaluation of these factors, stating that "[n]o specific consideration or combination of considerations need be present" to establish the RFOA defense, and no one of the listed considerations will be automatically determinative.[15] Most of the considerations are—to say the least—not crystal clear. What sort of 'training' does the EEOC envision? What type and degree of employer assessment is needed? And, doesn't the degree of harm/burden analysis seem more akin to a business necessity framework than one based on the lower standard of reasonableness? Given the open-ended nature of many of the factors, and the case-specific approach, it may be more difficult than the Supreme Court intended for employers to dispose of these cases on summary judgment, or even to prevail at trial. To date, no reported decisions have considered the EEOC's new guidance, so it is too soon to tell if courts will defer to the regulations as an accurate codification of *Smith* and *Meachem*, or whether the regulations, like their previous incarnation, will receive a cold reception from the courts.

The ADA and Title VII are, of course, federal statutes. The New Jersey Law Against Discrimination (NJLAD) contains neither the ADEA's RFOA language nor the two statutes' BFOQ terminology. However, after concluding that the plaintiff's NJLAD claim should be analyzed using federal cases, in *Giammario v. Trenton Bd. of Educ.*,[16] the New Jersey Superior Court applied the ADEA's RFOA defense to a claim of disparate impact related to a facially neutral provision in a collective bargaining agreement. The EEOC's new RFOA regulation is, therefore, likely to impact, and perhaps control, New Jersey state law disparate impact age discrimination claims as well. ■

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Endnotes

1. 29 U.S.C. § 621, *et seq.*
2. 29 C.F.R. § 1625.7.
3. 544 U.S. 228 (2005).
4. 554 U.S. 84 (2008).
5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*
6. *Smith*, 544 U.S. at 240.
7. ADEA, 29 U.S.C. § 624(f)(1); Title VII 42 U.S.C. § 2000e-2(e).
8. 29 U.S.C. § 623(f)(1).
9. *Smith*, 544 U.S. at 240.
10. *Id.* at 241.
11. When an employment practice, including the test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. *Id.* at 244. *See also* 29 C.F.R. § 1625.7(d) (2004).
12. *Meacham*, 554 U.S. at 93-95.
13. 29 C.F.R. § 1625.7(2)(i)(ii).
14. 29 C.F.R. § 1625.7(2)(ii)-(v).
15. 29 C.F.R. § 1625.7(3).
16. 497 A.2d 199, 202, 203-04 (N.J. Super. 1985). *See also Kaplan v. State*, 2012 N.J. Super. Unpub. LEXIS 1802, at *17 (N.J. Super. July 26, 2012) (citing *Giammario's* recitation of the RFOA defense in an NJLAD case with approval).

Cowher v. Carson & Roberts: Implications of the Appellate Division's Recent Ruling Concerning Hostile Work Environment Claims Under the LAD

by Shira Lazinger Krieger

The Appellate Division's recent decision in *Cowher v. Carson & Roberts*[1] opened the door to an arguably new type of hostile work environment claim based on "perceived" membership in a protected class, resulting in a flurry of discussion in New Jersey's employment law field.

On April 18, 2012, the Appellate Division rejected a trial court's granting of summary judgment on a hostile work environment claim despite admitted evidence of continuous anti-Semitic slurs uttered by supervisors in the plaintiff's workplace. The trial court dismissed the claim because it concluded New Jersey did not recognize a cause of action based upon *perceived* membership in a protected group *other than disability*. Accordingly, because the plaintiff claiming a hostile work environment was *not*, in fact, Jewish, the trial court found for the defendants.

On appeal, the Appellate Division reasoned that a plaintiff alleging an anti-Semitic hostile work environment in violation of the New Jersey Law Against Discrimination (LAD) must demonstrate that: "the defendant's conduct (1) would not have occurred but for the employee's [Judaism]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable believe that (4) the conditions of employment are altered and the working environment is hostile or abusive."[2] However, the court adjusted this previously accepted standard to also protect those individuals *perceived* to be members of *other protected classes* (and not just those with a perceived disability) enumerated by the LAD.

After analyzing prior holdings involving LAD claims based on religious discrimination and perceived disabilities, the Appellate Division explained "there is no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the Act and does not protect those who are perceived to be members of a different class...."[3] Thus, if the plaintiff in *Cowher* could have demonstrated he experienced discrimination based on the perception he was Jewish, his claim could be covered by the LAD.[4]

The Appellate Division's holding posed the question of whether the defendants could remove themselves from culpability by submitting that individual(s) making the discriminatory remarks at issue did *not* perceive the plaintiff as being part of the protected class. The court addressed this question head on, noting that in prior cases likewise involving facially discriminatory conduct, the courts inferred the plaintiff's perceived status spurred the conduct. Thus, the courts had prevented legitimate claims from being too easily defeated by self-serving denials related to perception.

However, a question still remains regarding whether the Appellate Division's decision affects situations where a supervisor *knows* an employee is not a member of a protected class, and the employee is *aware* of the supervisor's state of mind, yet the supervisor proceeds to make stereotypical remarks (related to a protected class) toward the employee that would rise to the level of being severe and pervasive. Plaintiffs might argue this scenario *would* be protected, citing to the remedial nature of the LAD, and hostile work environment case law focusing on the harassing conduct as opposed to the plaintiff's subjective response and the defendant's subjective intent. Conversely, defendants might contend, among other things, that allowing such circumstances to give rise to actionable hostile work environment claims would completely undercut any other limitations the Appellate Division set in *Cowher*, and otherwise expand the LAD beyond its purpose.

As a result of the Appellate Division's ruling in *Cowher*, in hostile work environment claims brought pursuant to the LAD, parties and courts will likely shift their focus toward the discriminatory statements and conduct, and away from the issue of whether the plaintiff is a member of a specific protected class. Consequently, employers may see an influx of hostile work

environment claims in light of the expanded standard. Accordingly, employers should periodically publish and distribute anti-harassment policies, including grievance procedures, to their employees, and conduct training sessions addressing unlawful harassment. They may be able to rely upon their policies and procedures to exculpate them from or limit liability, or otherwise utilize them in an attempt to resolve any disputes with employees before they reach litigation. ■

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Endnotes

1. *Cowher v. Carson & Roberts et. al.*, 40 A.3d 1171 (N.J. Sup. Ct. App. Div. 2012).
2. *Cowher v. Carson & Roberts et. al.*, 40 A.3d at 1176.
3. *Id.* at 1179.
4. *Id.*

Do The Math!
Why Employees Shouldn't Waive ERISA Benefits

by The Honorable Joyce Krutick Craig

All too frequently, employees who are about to enter into a severance or separation agreement with their employers are led down a garden path quite detrimental to their long-term interests. These severance agreements generally contain a waiver of claims under the Employee Retirement Income Security Act (ERISA)[1] welfare benefits in exchange for what is usually an inadequate lump-sum of money as compared to the expected value of welfare benefits.

ERISA welfare benefits are not vested benefits.[2] Health insurance benefits and long-term disability benefits are probably the most important, and most expensive, of the non-vested welfare benefits. An employee who has accepted a severance package may be entitled to health insurance under the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986.[3] However, when COBRA benefits end, the employee who has waived ERISA welfare benefits must search for health insurance in the private market at a cost most cannot afford. The purchase of long-term disability benefits by individuals is usually prohibitively expensive.

These benefits are crucial for employees who are out on disability, particularly short-term disability. Because these employees have already begun receiving benefits under the ERISA plan, language protecting their rights to receive ERISA welfare benefits must be inserted into the severance agreement to protect them in the event the plan or the employer attempts to deny or terminate long-term disability benefits. The language must unequivocally state that the employee is *not* waiving the right to sue the plan, the plan administrator, the insurance company, etc., for *non*-vested ERISA welfare benefits under the plan.

The employee's attorney must be cognizant of the difference between vested pension rights and non- vested ERISA welfare benefits, and craft the agreement so the employee retains the right to sue under the ERISA plan for the non-vested ERISA rights such as long-term disability. The failure to do so costs the client the right to 60-70 percent of their salary for the life of the policy (usually to age 65 or full retirement age, and sometimes (although rarely) for life), along with continuation of ancillary benefits such as waiver of premiums for life and continued health insurance premiums at employee rates.

This article discusses a brief history of ERISA and congressional intent on its passage, the threshold issue of whether the severance agreement itself is an ERISA plan, the validity of waivers of ERISA welfare benefits, and the cost of such waivers. In conclusion, the article suggests that attorneys representing employees be cautious about allowing clients to enter into such waivers.

ERISA—A Brief History[4]

In 1974, Congress passed the Employee Retirement Income Security Act.[5] The stated purpose for the passage of the act, in pertinent part, was:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities...to provide for the general welfare and the free flow of commerce,... that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring

> the equitable character of such plans and their financial soundness....
>
> It is hereby further declared to be the policy of this Chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.[6]

The movement for federal regulation and uniformity in employee benefits plans in 1978 focused primarily on pension benefits. Health plans were not an issue at that time. However:

> Congress expressly stated in a "savings clause" that health insurance provided to ERISA-protected employees should continue to be state regulated.[7] Nonetheless, Congress made it abundantly clear from the definitions it set forth that Congress intended ERISA to regulate health insurance plans. The language states in pertinent part:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability....[8]

The major thrust of ERISA was to pre-empt state laws that conflicted with the federal scheme.[9] Congress also limited employee rights.[10] Specifically, an employee covered by an ERISA plan who has had services denied is limited to a suit for the cost of the services denied, assuming that he or she has paid for the services.[11] In the alternative, the employee may seek an injunction to require that the company provide the benefits.[12] A negligence suit is barred because it "relates to" an employee benefit plan. Supreme Court jurisprudence in the area has had a substantial effect, by essentially leaving the health care consumer injured by the denial of healthcare services without a remedy.

The question of whether a federal law pre-empts a state statute was presented to the Supreme Court in 1983 when it was called upon to determine whether ERISA pre-empted the New York Human Rights Law.[13] Ruling that the New York statute did indeed "relate to" an employee benefit plan, the Court concluded that: "a law "relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."[14] The Court further noted that "Congress used the words "relate to' in 514(a) in their broad sense."[15]

Following the logic of the Court's decision in the 1987 case of *Shaw v. Delta Airlines, Inc.*, the Court decided two cases concerning ERISA pre-emption.[16] The Court heard the argument for both cases, and on the same day, Justice Sandra Day O'Connor delivered both opinions. In *Pilot Life Insurance Co. v. Dedeaux*, an employee and beneficiary covered by a long-term disability policy brought an action in state court for "Tortious Breach of Contract," "Breach of Fiduciary Duties," and "Fraud in the Inducement."[17] Noting the "expansive sweep of the pre-emption clause,"[18] Justice O'Connor stated that "the common law causes of action raised in Dedeaux's complaint, each based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under 514(a)."[19] Referring specifically to the provisions for civil enforcement in the federal courts, she noted that:

> In sum, the detailed provisions of 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.[20]

In the companion case, *Metropolitan Life Insurance Co. v. Taylor*, the Court decided "whether these state common law claims are not only pre-empted by ERISA, but also displaced by ERISA's civil enforcement provision, 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), …to the extent that complaints filed in state courts purporting to plead such common law causes of action are removable to federal court under 28 U.S.C. 1441(b)."[21] The plaintiff in this case brought an action in state court to enforce an employment contract and to collect damages for "mental anguish caused by breach of this contract, as well as immediate reimplementation of all benefits and insurance coverages ...."[22] The Court had no difficulty concluding that the cause of action "related to" an ERISA plan, and was therefore pre-empted.[23] Holding that the cause of action was removable to federal court,[24] Justice O'Connor noted that "pre-emption is ordinarily a federal defense to the plaintiff's suit."[25]

The Court also wrote: "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."[26]

Drawing an analogy to Section 301 of the Labor-Management Relations Act of 1947,[27] and quoting Senator Williams[28] (who was an ERISA sponsor), Justice O'Connor concluded that in enacting ERISA, Congress intended total pre-emption.[29]

Is Your Severance Agreement an ERISA Plan?

Even before allowing a client to sign a severance agreement, counsel should be diligent in determining whether the proposed agreement itself constitutes an ERISA plan. If the employer has a written severance policy or plan that applies to all employees, it will be considered an ERISA plan, and any attempts to bring an action for enforcement in state courts will be preempted.[30] On the other hand, an individual contract with an employee tailored for that employee will generally not be considered an ERISA plan.[31] Should counsel feel that an enforcement action may become necessary, he or she should be aware of this issue at the outset. If the preference is for enforcement in state court, and the employer has a written severance plan, counsel should try to create a severance agreement tailored to the individual employee that differs from the employer's plan, so state court enforcement will be available.

Waiver of ERISA Benefits

In 1996, the U.S. Supreme Court considered the issue of whether an employer could amend a plan with reference to early retirement benefits upon waiver of "employment related claims."[32]

Citing two important cases, the Court noted that ERISA neither requires employers to provide welfare benefit plans, nor dictates the type of welfare benefit plans an employer should provide.[33] In answer to the question of "whether this provision of ERISA prevents an employer from conditioning the receipt of early retirement benefits upon the participants' waiver of employment claims," the Court held that it did not.[34] The Court did not, however, decide whether conditioning a severance agreement upon waiver of ERISA welfare benefits violated the act.

The waiver of benefits issue has come before the U.S. Court of Appeals for the Second Circuit several times. In *Sharkey*, a case in which an employee executed a general release upon entering into a lump-sum severance agreement, the Court noted:

> The validity of a waiver of pension benefits *under ERISA* is subject to closer scrutiny than a waiver of general contract claims. *Finz v. Schlesinger,* 957 F.2d 78, 81 (2d Cir.), cert. denied, 121 L. Ed. 2d 38, 113 S. Ct. 72 (1992); *Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan,* 935 F.2d 1360, 1367 (2d Cir. 1991). The essential question is "whether, in the totality of the circumstances, the individual's waiver of his right can be characterized as 'knowing and voluntary.'" *Laniok,* 935 F.2d at 1368. We see no reason to apply a lower level of scrutiny to waivers of severance claims under ERISA than we do to pension claims.[35]

Thus, *Sharkey* stands both for the proposition that an employee may waive ERISA benefits and claims, and that the same level of scrutiny applies to severance claims regarding pension claims. In another case, the court paraphrased its decision in *Sharkey*, noting: "ERISA waivers require closer scrutiny by the district court than waivers of general contract claims."[36] In remanding the case to the district court, the court directed that: "the district court must determine (1) which, if any, of the benefits Yak seeks are governed by ERISA; (2) Yak's employment status; and (3) 'the circumstances surrounding the execution of the release.'"[37]

Before a court will find that an employee has waived benefits under an ERISA plan, it will inquire into "whether, in the totality of the circumstances, the individual's waiver of his right can be characterized as 'knowing and voluntary.'"[38] If the employee was not represented by counsel when he or she entered into the waiver of welfare benefits, this becomes a crucial inquiry, because the employee may not have understood the significance of the waiver. However, if the employee was represented by counsel, it is likely a court will find the employee knowingly and voluntarily waived the welfare benefits when he or she signed the severance agreement.

In 1988, the Third Circuit dealt with this issue, and held that employees can waive claims against their employers if they do so knowingly and willingly.[39]

Cuchara, an excellent case factually, decided by the Third Circuit in 2005, is illustrative of the problem with employees signing such waivers. In *Cuchara*, the employee, Stephen William Cuchara, had long suffered from Guillian Barre syndrome.[40] He disclosed this fact to his employer, Gai-Tronics Corporation, when he was hired in 2002 as a certified public accountant. Soon after he began working for Gai-Tronics, he informed his supervisor that his long work hours exacerbated his disability; however, the employer did nothing to alleviate this problem. Approximately 11 months after he was hired, he was informed that he was to be fired.[41] However, the company:

> offered him a severance package that consisted of: (1) four week's salary; (2) two week's of vacation pay; (3) an option for continuation of medical and dental health benefits through January 2003; and (4) the potential to continue COBRA coverage for an additional seventeen months after January 2003. In exchange for the severance package, however, Appellees required Cuchara to sign an Agreement and General Release ("Release") waiving all existing claims against Appellees, including but not limited to any claims under *Title VII*, the *Americans with Disabilities Act ("ADA")*, the *Pennsylvania Human Relations Act* ("PHRA), the *Employee Retirement Income Security Act ("ERISA")*, and the common law of any state. The Release provided Cuchara a twenty-one day period to consider whether to sign and advised him to consult an attorney before signing....Specifically, it noted in capital letters on the signature page: "EMPLOYEE HAS BEEN ADVISED THAT HE HAS AT LEAST TWENTY-ONE (21) CALENDAR DAYS TO CONSIDER THIS AGREEMENT AND GENERAL RELEASE AND HAS BEEN ADVISED IN WRITING TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTION OF THIS AGREEMENT AND GENERAL RELEASE."[42]

He signed the release 21 days after receiving it, and apparently did not consult an attorney. The court also noted that some days later (although the date wasn't known), Cuchara signed another document "admitting that he signed the Release, had been advised to retain counsel, and did not wish to revoke the Release."[43]

The opinion explained as follows:

> On December 4, 2003, Appellants filed the action against Appellees, alleging violations of Title VII, the ADA, the PHRA, and ERISA. The Complaint also alleged state law claims for breach of the Release, fraudulent inducement, and loss of consortium on behalf of Ronaleen Cuchara. Appellees filed a motion to dismiss.[44]

The district court granted that motion.[45] The dismissal was appealed to the Third Circuit.[46]

The court enumerated the factors it considers in determining whether an employee's waiver is valid:

> "(1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received the benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law."[47]

The court also noted it could consider "whether there is evidence of fraud or undue influence, or whether enforcement of the agreement would be against the public interest."[48]

Applying these factors, the court concluded that Cuchara's waiver was knowing and willful and that although he was not an attorney and did not engage one, he was a professional who was educated and took his time to consider the agreement before signing it.[49] The court also found no evidence of undue influence or duress, and noted that for a finding of duress there would need to be a showing of a threat of bodily harm.[50] Moreover, the appellant received consideration for entering into the agreement. Thus, under the totality of the circumstances, the Third Circuit held the waiver to be valid, and affirmed the dismissal.[51]

What lessons can be learned from *Cuchara*? First, it will be significantly easier to set aside a waiver if the employee is not well educated. Second, if the employee took a great deal of time to consider the waiver before signing it, this will not work in the employee's favor. Third, if there was consideration (*i.e.* some salary paid), this too will not work in the employee's favor. Lastly, establishing undue influence or duress is extremely difficult, and, at least in the Third Circuit, duress must be established by a showing of a threat of bodily harm.

What Does an Employee Risk in Waiving Welfare Benefits?

The fact pattern in *Cuchara* provides an illustrative example. Cuchara waived his right to employee healthcare benefits. Let's assume Cuchara was 50 years old, that he terminated his employment under the same agreement as contained in the cited case, and that he lived in New Jersey. His waiver would send him to the private insurance market once his COBRA benefits terminated. As an example, if he purchased a health maintenance organization plan with a $30 deductible from Carrier A in Dec. 2011, he would pay $1,637 per month. If he purchased it from Carrier B, he would pay $2,400.70 per month.[52] Let's assume he lives to age 75, or for an additional 300 months. At Carrier A's rate his health insurance will cost $491,100 over his lifetime. At Carrier B's rate his health insurance would cost $720,210 over his lifetime. If Cuchara preferred to purchase a plan allowing him to choose his own providers, he could purchase an 80 percent pay/20 percent coinsurance with a $1,000 deductible from Carrier A for $3,779 or Carrier C for $4,573.17.[53] His lifetime cost for the Carrier A plan would be $1,133,700 and for the Carrier C plan $1,371,951.

Now let's look at what Cuchara actually received and engage in a cost/benefit analysis. We do not know his actual salary or the cost of his health insurance, so let's assume for our purposes that he received $1,500 a week, and that his share of the cost of health insurance was $187.18.[54] His severance agreement provided for two weeks paid vacation, an option for one year of continued medical and dental insurance, and an option for COBRA benefits for 17 months after the end of the one year continued medical and dental benefits.[55] Using our hypothetical numbers, he received:

- Four weeks salary, estimated at $6,000
- $3,000 vacation pay
- $2,246.16 in health benefits for a year (should he accept it)
- $3,182.06 in COBRA benefits for 17 months (should he accept it)
- All for a grand total of $14,428.22.

Assume Cuchara accepted the year of health benefits and the additional 17 months of health benefits under COBRA. Did Cuchara get a good deal? Obviously not! He traded a claim to recover for the loss of $491,100 in lifetime health insurance benefits for the paltry sum of $14,428.22.

This illustration demonstrates in stark monetary terms the risk of waiving ERISA welfare benefits in severance agreements.

Conclusion

Attorneys representing employees before they enter into severance agreements need to be mindful of whether that agreement constitutes an ERISA plan itself, and, if enforcement would be best in state court, take steps to tailor the client's agreement to the individual, so a company's severance plan does not apply.

Attorneys should *not* waive ERISA welfare benefits in severance agreements whenever possible.

As a general rule, the severance agreement language usually says the employee waives his or her rights under both federal and state law to a laundry list of things, but expressly states the waiver does not apply to vested ERISA rights. Such an agreement leaves the employee unprotected if the plan and/or the insurer decided to deny or terminate disability benefits. However, if the attorney understands the distinction between vested ERISA rights and non-vested ERISA rights (welfare benefits), and refuses to allow the employee to sign such an agreement, the attorney should instead insert language

such as "the employee does *not* waive his/her right to sue the plan, plan administrator, insurance company and/or the employer for non-vested ERISA welfare benefits under the plan and reserves the right to sue the appropriate party under the plan for any and all non-vested ERISA welfare benefits under the plan." The client is then well protected. ■

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Endnotes

1. 29 U.S.C. 1001 *et seq.*
2. 29 U.S.C. 1051(1).
3. 42 U.S.C. 1396a.
4. This section was first published by this author in Managed Care Grievance Procedures: The Dilemma and the Cure, 21 *JNAALJ* 336, 339 (Fall 2001).
5. 29 U.S.C. 1001.
6. *Id.*
7. 29 U.S.C. 1144(b).
8. 29 U.S.C. 1002(1).
9. 29 U.S.C. 1144(a) (providing that the statute supersedes a state law that "relates to" an employee benefit plan).
10. 29 U.S.C. 1132.
11. *Id.*
12. 29 U.S.C. 1132(a)(1)(B).
13. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88 (1983).
14. *Id.* at 96-97.
15. *Id.* at 98.
16. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).
17. *Dedeaux*, 481 U.S. at 44.
18. *Id.* at 47.
19. *Id.* at 48.
20. *Id.* at 54.
21. *Taylor*, 481 U.S. at 60.
22. *Id.* at 61.
23. *Id.* at 62.
24. *Id.* at 67.
25. *Id.* at 63.
26. *Id.* at 63-64.
27. 29 U.S.C. 141-185(a).
28. The senator stated: "It is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under Section 301 of the Labor Management Relations Act." *Taylor*, 481 U.S. at 66 (*quoting* 120 Cong. Rec. 29933 (1974)).
29. *Id.* at 67.
30. *See, e.g., Bakersky v. ITT*, No. 89-3425XX, 1990 U.S. Dist. LEXIS 3177, at *14-15 (D.N.J. March 21, 1990).
31. *Id.*
32. *See Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).
33. *Id.* at 887 (*citing Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 91 (1983); *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 511 (1981)).
34. *Id.* at 888.
35. *Sharkey v. Ultramar Energy Limited*, 70 F.3d 226, 231 (2d Cir. 1995) (emphasis in original).
36. *Yak v. Bank Brussels Lambert, BBL (USA) Holdings Inc.*, 252 F.3d 127, 131 (2d Cir. 2001).
37. *Id.*
38. *Sharkey,* 70 F.3d at 231.
39. *Coventry v. United States Steel Corp.,* 856 F.2d 514, 522-24 (3d Cir. 1988) (holding under ADEA).
40. *Cuchara v. Gai-Tronics Corporation,* 129 Fed. Appx. 728, 729 (3d Cir. 2005).
41. *Id.*
42. *Id.* at 729-30
43. *Id.* at 730.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 731.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 732-33.
52. NJ Individual Health Coverage Program Standard Health Benefits Plan Rates available at http://www.state.nj.us/dobi/division_insurance/ihcseh/ihcrates.htm (note: plans submit their rates monthly and thus the charts are updated monthly). Site visited Dec. 3, 2011, and Jan. 2, 2012.
53. *Id.*
54. *Id.*
55. *Cuchara,* 129 Fed. Appx. at 730.

New Jersey West: What is New and Dangerous on the Horizon in California Employment Law

by Lynne M. Hook

A New Jersey employer with a few employees in California, or many, should be informed about the employment law landscape in California. This article provides a practical overview of some important employment law requirements on the West Coast.

Initial Employment Matters

Effective Jan. 1, 2012, under Labor Code Section 1024.5, employers who perform background checks as a matter of course must be aware that California has strictly limited credit checks on a non-exempt employee. Credit checks are permissible primarily in instances where the employee has access to personal financial, proprietary or confidential information, or cash totaling $10,000 or more during the workday.[1]

In addition, California's Employment Development Department (EDD) requires that all employers provide new California employees with current state EDD pamphlets on unemployment insurance, state disability insurance and paid family leave as well as workers' compensation information. The law also requires that employers provide employees with a company policy against sexual harassment.[2]

As of 2012, each new employee must receive a Wage Theft Prevention Act statement under Labor Code Section 2810.5.[3] The Wage Theft Protection Act statement includes the rate and basis of pay, allowances, regular payday, and the name, address and telephone number of the employer and its workers compensation carrier. Employers will be required to provide this statement again if the information (other than pay rate reflected on a pay stub) changes, and should keep an acknowledgement that the employee received the statement in the employee's personnel file.

Once the Job Begins

Overtime and Breaks

In California, non-exempt employees are eligible for overtime compensation for worked in excess of eight hours per day, 40 hours per week, or for any hours worked on the seventh consecutive workday. Hours in excess of eight on a seventh consecutive workday must be reimbursed at the twice the regular rate of pay.[4] Time paid on account of holiday, vacation, bereavement, sick days, or jury duty does not need to be included for purposes of computing overtime pay, as these are not 'hours worked.' These requirements apply to any employee who works full-day increments in California (even temporarily) and is paid from California.[5]

Under California wage and hour law, non-exempt employees must be provided with one unpaid meal period of at least 30 minutes no later than the end of the fifth hour worked.[6] The employee must be relieved of all duties during the meal period, and may leave the workplace. Non-exempt employees are permitted to take a 10-minute rest period in the middle of every four-hour segment of work. Practically speaking, the rest break generally works like this:

- One 10-minute break for shifts between three and a half and six hours.
- Two 10-minute breaks for shifts of more than six hours and up to 10 hours.
- Three 10-minute breaks for shifts of more than 10 hours and up to 14 hours.

Thus, in a typical eight-hour day the employee receives two rest breaks and one meal period. The minimum 30-minute meal period must be reflected on the time record with a start and stop time. If work prevents an employee from taking a rest break or meal period, the employer owes the employee one hour of additional pay at the regular rate.

To the relief of many employers, a recent California Supreme Court opinion clarified that employers have to provide rest breaks and meal periods, but do not have to ensure they are taken.[7]

Finally, employers must post the required state Industrial Welfare Commission wage order for their work force(s).[8] This posting provides employees with basic information about wages, breaks and meal periods, and working conditions.

Harassment Avoidance

In addition to having and providing employees with a harassment avoidance policy, employers with more than 50 employees must train supervisors located in California through classroom, webinar or e-learning for two hours every two years.[9]

Leaves of Absence

California recognizes several unique categories of leave. Generally, these leaves include:

- California Military Spouse Leave Law—Employers with 25 or more employees must provide an employee who is married to a member of the U.S. Armed Forces, National Guard or Reserves up to 10 days of unpaid leave while the member is home on leave from deployment to a combat zone during military conflict. The employee must provide the employer with notice within two days of learning of the leave of his or her spouse, including the dates of leave and documents certifying the military leave.[10]
- Civil Air Patrol Leave—Employers with 15 or more employees must provide an employee who is a volunteer member of the California wing of the Civilian Auxiliary of the U.S. Air Force up to 10 days per year to respond to an emergency operation. The employee must have been employed for at least 90 days prior to the start of the leave, and must provide documentation from the Civil Air Patrol.[11]
- Pregnancy Disability Leave—An employee who is disabled by pregnancy, childbirth or a related medical condition, and works for an employer with five or more employees, is eligible to take pregnancy disability leave (PDL), or to transfer to a less strenuous or hazardous position or to less strenuous or hazardous duties if the transfer is medically advisable. A woman is disabled by pregnancy if, in the opinion of her healthcare provider, she is unable, because of pregnancy, to work at all or to perform any one or more of the essential functions of her job without undue risk to herself, the successful completion of her pregnancy, or to other persons. Disabled includes severe morning sickness and the need for prenatal care. The PDL is for any period(s) of actual disability caused by pregnancy, childbirth or related medical conditions, up to four months per pregnancy. Employees taking a PDL or transfer are guaranteed reinstatement to the same or, where permissible, comparable position where one is available. PDL will run concurrently with any leave provided by the federal Family and Medical Leave Act, where applicable. Effective in 2012, employers must continue to provide health coverage under any applicable group health plan for an employee eligible for PDL up to the maximum of four months in a 12-month period.[12]
- California Family Rights Act—Under the California Family Rights Act (CFRA), employers with 50 or more employees must provide up to 12 weeks of leave for qualifying reasons similar to those under the FMLA, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions covered by the PDL.[13]
- Organ or Bone Marrow Donor Leave—Employers of 15 or more employees must provide employees with a paid leave of absence of up to 30 days and five days respectively in a one-year period to be an organ or a bone marrow donor. The employee must use up to two weeks of accrued sick or vacation leave for organ donors and five days for bone marrow donors. The employee will have continued coverage under the company group health plan during the leave.[14]
- Drug and Alcohol Rehabilitation—Employers of 25 or more employees must permit employees who enroll in a formal treatment program rehabilitation leave as a reasonable accommodation on a full-time or part-time basis for periods of up to 90 days. As with any other sick leave, the leave may include a combination of sick time, vacation time, and leave without pay. Leave does not need to be granted where termination for prior acts is warranted.[15]
- Parental Leave For School Participation—Employers with 25 or more employees must permit employees unpaid leave for school appearances, provided the employee gives his or her supervisor reasonable advance notice of the need for the leave.[16]

- Victims of Domestic Violence Leave—Employers who employ 25 or more employees must provide unpaid leave to employees who are victims of domestic violence in order to seek judicial relief that helps ensure the health, safety, or welfare of the employee or a child, or as otherwise required by applicable law. The employee must provide reasonable notice where the leave is foreseeable. If unforeseeable, the employee must certify the leave by producing a police report, court order or other courtroom evidence, or a note from a medical professional or counselor.[17]

California also provides for election officers' leave,[18] voting leave,[19] and crime victims' leave.[20]

California is one of several states to provide state insurance benefits to employees during otherwise approved leaves of absence for family medical reasons. Following a seven-day unpaid waiting period, employees are entitled to paid family leave (PFL) benefits for up to six weeks in any 12-month period for leave caused by: a) the birth of a child of the employee or the employee's domestic partner; b) the placement of a child in connection with adoption or foster care; c) the serious health condition of a child of the employee, spouse or domestic partner; or d) the serious health condition of the employee's spouse, parent, or domestic partner.[21] Employees on PFL are not otherwise entitled to any reinstatement rights, unless provided by other applicable federal or state law.

Compensation Issues

Although sick leave is an optional benefit, employers who provide it to their employees in California will have to comply with 'kin care' leave. California permits employees who earn sick leave to use up to half of their annual sick leave accrual to care for an ill child, parent, spouse or domestic partner, as defined by law.[22]

Vacation is also treated differently in California than in most states. Each year, employees may accrue whatever number of hours of vacation the employer decides is appropriate. Once that accrual cap is reached, the employee will no longer accrue time until some of the vacation reserve is used. Accrued vacation is vested, and is carried from one calendar year to the next. Employees do not lose accrued vacation benefits. Employees must also be compensated for accrued but unused vacation time at the time of termination, along with final pay.[23]

Employers in California must now retain payroll records for three years, and employees are entitled to keep personal records of hours worked.[24] Labor Code Section 226 has a long list of items that must appear on the pay stub, and is a frequent source of class action activity in California.[25] In addition, the Labor Code requires both a copy of the itemized wage statement and a record of deductions be retained within California.

Termination of Employment

Wages earned and unpaid, including accrued vacation or paid time off, are due and payable immediately upon involuntary discharge.[26] Upon voluntary termination, an employee is entitled to all wages within 72 hours, or on his or her final day of work pursuant to Labor Code Section 202.

After the employment relationship ends, although non-competes are not permissible in California, employers have other options to protect confidential information and trade secrets, such as reasonable non-solicitation restrictions. Many employers ask employees to sign confidentiality agreements that require employees to return all company property, data, materials, customer information and documents upon termination and prevent employees from using any such information in soliciting business from customers.

Conclusion

California is a dynamic business environment that permits free movement of employees from one company to another, unlike many other states. California also is an active employment litigation arena. The Department of Fair Employment and Housing receives nearly 20,000 charges of employment discrimination each year from California residents. In order to manage a successful business, a California employer must familiarize itself with the state's employment laws and observe the many unique employee rights in the Golden State.

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Endnotes

1. Cal. Lab. Code § 1024.5
2. Cal. Gov't Code § 12950(b).
3. A sample form is available on the Division of Labor Standards Enforcement website at http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.
4. Cal. Lab. Code § 510.
5. *Sullivan v. Oracle Corporation*, 541 Cal.4th 1191 (2011).
6. Cal. Lab. Code §226.7.
7. *Brinker v. Superior Court*, 2012 WL 1216356 (Cal., April 12, 2012).
8. *See* http://www.dir.ca.gov/iwc/wageorderindustries.htm.
9. Cal. Gov't Code § 12950.1(a).
10. Cal. Mil. & Vet. Code § 395.10.
11. Cal. Lab. Code §§ 1500 – 1507.
12. Cal. Gov't Code § 12945.
13. Cal. Gov't Code §12945.2 and §19702.3.
14. Cal. Lab. Code § 1510.
15. Cal. Lab. Code § 1025.
16. Cal. Lab. Code § 230.8.
17. Cal. Lab. Code § 230.1.
18. Cal. Elec. Code § 12312.
19. Cal. Elec. Code § 14000.
20. Cal. Lab. Code § 230.2.
21. Cal. Unemp. Ins. Code §2601.
22. Cal. Lab. Code §233.
23. Cal. Lab. Code § 202.
24. Cal. Lab. Code § 1174.
25. Cal. Lab. Code §226.
26. Cal. Lab. Code § 201