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— *Labor & Employment Law* —
Defending Employer's Rights

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$228 Million Wage-and-Hour Class Action Settlement to Be Paid By FedEx

FedEx Corp is paying $228 million to settle a class action brought by FedEx Ground drivers in California. The 2,300 drivers claim that the company improperly misclassified them as independent contractors instead of employees. As a result of the misclassification, FedEx improperly deprived them of wages and benefits they would normally receive and forced them to cover their own business expenses. The settlement was reached after the Ninth Circuit Court of Appeals found that the drivers were not independent contractors because the company had broad authority to dictate the way drivers carry out their job. The operating agreement between FedEx and the drivers allowed drivers to supply their own trucks and pay for their own uniforms, but then included specifications for the size and maintenance of the trucks as well as the condition of the uniforms. FedEx also required the drivers to pick up and deliver packages within certain geographic and time windows, and also provided training for on job performance and interacting with customers.

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DISCRIMINATION

Disparate Treatment / Religious Bias

The United States Supreme Court held that an unsuccessful Muslim job applicant did not need to inform retailer Abercrombie & Fitch that she wore her headscarf for religious reasons, and that a company's otherwise-neutral policy must give way to the need for an exception. Here, Abercrombie & Fitch refused to hire Samantha Elauf, a practicing Muslim, because the headscarf she wore pursuant to her religious obligations conflicted with the company's employee dress policy. The company stated they refused to hire her, even though she was qualified, because her headscarf violated the company's "look policy" which forbade "caps." Abercrombie stated that Elauf never mentioned her faith, nor did she ask for an exception to the dress code. Accordingly, the company argued that disparate treatment should not apply unless the applicant first shows that the employer had actual knowledge of the need for an accommodation. The Supreme Court, however, held that in order to prevail in a disparate-treatment claim, an applicant need only show that the need for an accommodation was a motivating factor in the employer's decision. The Court drew a distinction between motives and knowledge, ruling that the intentional discrimination provision prohibits certain motives, regardless of knowledge. The Court stated that an employer who refuses to hire someone based on a desire to avoid having to provide an accommodation may still be found to have violated Title VII even if there was only an unsubstantiated suspicion that an accommodation would be necessary.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. (2015) ___ U.S. ___.

Designation of Female-Only Correctional Positions in Women's Prisons is not Discriminatory

The Ninth Circuit Court of Appeals held that the Washington Department of Corrections did not discriminate against male correctional officers on the basis of sex when they designated a number of female-only correctional positions in women's prisons. The Department's creation of a narrow category of female-only job assignments is a "bona fide occupational qualification reasonably necessary to the normal operation" of the women's prisons. A facially discriminatory employment practice, such as positions being designated as female-only positions, may be permitted if sex (gender) is a bona fide occupational qualification. To justify discrimination under the BFOQ exception, an employer must show, by a preponderance of the evidence that: (1) the job qualification justifying the discrimination is reasonably necessary to the normal operation of that particular business or enterprise; and (2) sex (gender) is a legitimate proxy for determining whether a correctional officer has the necessary job qualifications. The Court stated that the because of this demanding legal standard, BFOQ exceptions are far and few between. However, the unique context of prison employment is one area where courts have found gender-based classifications justified. Here, the Department produced evidence that it went through an exhaustive process of investigation, hiring of experts, consultations with other states, and a well-reasoned decision-making process in determining which positions would be female-only.

Teamsters Local Union No. 117 v. Wash. Dep't of Corr. (June 12, 2015, Ninth Cir.) ___ F3d. ___.

RETALIATION

$1 Million Jury Verdict for Retaliation.

Plaintiff, a Mexican-American who worked in parking enforcement for the City of Beverly Hills, alleged racial harassment, discrimination, and retaliation. Plaintiff alleged that her supervisor operated a racial website in plain view. Plaintiff claimed that when she lodged a complaint with her manager and human resources, that she was subjected to sustained discrimination and retaliation, and was demoted from a supervisory position. Plaintiff further alleged that after she complained about continuing harassment, discrimination, and retaliation, that her manager threatened her job. Defendants argued plaintiff: (1) was a bad supervisor; (2) brought all of the workplace ostracism on herself; and (3) only made the harassment claim three days after she was questioned about her breach of confidentiality regarding a performance review of a subordinate. The jury found in favor of defendants on the harassment and discrimination claims, but found in favor of plaintiff on the retaliation claim and awarded her $1,000,000.

Elisa Lopez v. City of Beverly Hills, et al., (June 26 2015) Los Angeles Superior Court, Case Number: BC 513593.

WAGE AND HOUR

Uber Driver Is An Employee and Not An Independent Contractor According To The California Labor Commissioner

The California Labor Commissioner ruled that a San Francisco driver suing Uber for expenses is an employee and not an independent contractor. The hearing officer ruled that Uber must reimburse this driver for approximately $4,000 for bridge tolls, mileage and other expenses she incurred while working as an Uber driver last year. The Commissioner held that Uber acted similar to an employer when it supplied her with an iPhone so she could access the Uber smartphone app. Uber also has an application for employment process which includes banking and residence information as well as the prospective driver's social security number. The Commissioner stated, "even though Uber holds itself out as a neutral technological platform designed to connect drivers and passengers, the reality is that Uber is involved in every aspect of the business. Here, because the driver is performing an integral part of the business, this raises a red flag for the court to look more closely at the other elements of the independent contractor test." Uber claims that the drivers are actually running their own small business, but in reality, the driver's work does not involve any managerial skills, cannot affect profit or loss, and aside from their car, the drivers have no investment in the business.

Uber Driver Is Employee, Not Contractor: Calif. Commissioner, Law360 (June 17, 2015), Kurt Orzeck.

Department of Labor Unveils Overtime Expansion Plan

The U.S. Department of Labor has proposed a rule that would broaden federal overtime pay regulations to raise the minimum threshold to qualify for the FLSA's "white collar" exemption to $50,440. The proposal comes as a result of President Obama's directive to the Labor Secretary of the United States to "modernize and streamline" the regulations on exemptions from the FLSA's minimum wage and overtime pay requirements.

Under current regulations, employees need to meet certain job duties-related tests and be paid at least $455 per week ($23,660 annually) on a salary basis to be exempt from minimum wage and overtime requirements under the FLSA exemptions for executive, administrative, professional, outside sales and computer employees. The proposal will raise that salary level to $970 per week ($50,440 annually). The proposed regulations include changes to the duties tests applicable to the white collar exemptions. The agency is seeking input on five issues, including what if any changes should be made to the tests, and whether or not the FLSA should follow California's example which requires a worker to spend at least 50% of their time on exempt duties to qualify for an exemption. While unions support the proposal for setting the salary threshold as a clear line that's easy to interpret, other groups (including the National Retail Federation) believe that the DOL's proposal will "turn managers into "rank-and-file" hourly workers and will take away the career opportunities offered by private sector entrepreneurs and job creators that are the true path to middle-class success."

Labor Department Unveils Massive Overtime Expansion Plan, Law360 (June 30, 2015), Ben James.

Company May Be Penalized For Labor Code Violations of a Subcontractor, But Only If the Company Is Aware Of the Violations

The California Court of Appeal held that a company which is unaware of the Labor Code violations of one of its subcontractors cannot be penalized for the violation. Here, Anschutz Entertainment Group (AEG) contracted with Levy Premium Foods to manage food and beverage services at AEG's multiple entertainment ventures in southern California. Levy contracted with Canvas Corporation to provide workers to sell the refreshments. Several vendors filed a class action against AEG, Levy and Canvas asserting that the companies willfully misclassified the workers as independent contractors to save money and in violation of California Labor Code. The Court held that while it is unlawful for an employer to engage in the act of willfully misclassifying an individual as an independent contractor, because there was no evidence that AEG or Levy were aware that Canvas had misclassified employees, neither AEG nor Levy could be penalized under the Labor Code.

Noe v. Superior Court (2015) ___ Cal.App.4th ___.

OTHER

Forum Selection Clause Unenforceable When Contrary To California Public Policy

The California Court of Appeal held that a mandatory forum selection clause, which required a California employee to bring litigation in Texas under Texas law, will not be enforced where doing so would bring a result contrary to public policy of California. Rachel Verdugo, an Associate Director of the Irvine, California office of Alliantgroup signed an employment agreement that designated Texas and Texas law in a combined forum selection and choice-of-law provision. Alliantgroup's corporate headquarters are in Texas. When she brought a class action alleging violations under the California Labor Code, the court dismissed her action based upon the forum selection clause.

The Court of Appeal reversed, however, finding that a mandatory forum selection clause may not bring a result contrary to public policy. The Court stated when claims at issue are based on unwaivable rights created by California statutes, the party seeking to enforce the forum selection clause bears the burden of proving that enforcing the clause "will not diminish in any way" substantive rights under California law. Verdugo's rights under the Labor Code to timely receive pay, meal and rest breaks, and wage statements, are unwaivable and Alliantgroup could not meet their burden.

Verdugo v. Alliantgroup (2015) ___ Cal.App.4th ___.

Right To Arbitrate Can Be Waived By Employer Who Fails To Timely Request It

The California Court of Appeal held that an employer can waive its right to enforce an arbitration agreement when the employer fails to request arbitration and acts inconsistently with its right to arbitrate. When Julio Oregel signed an employment application for PacPizza, it contained an "Agreement to Arbitrate" any employment-related dispute. When Oregel filed a class action suit against PacPizza for Labor Code violations, PacPizza answered the complaint, denying all allegations, but failed to allege the existence of the agreement to arbitrate. Finally, 17 months and 1,300 attorney hours later, PacPizza demanded arbitration. In determining that they had waived their right to arbitrate, the Court looked at a number of factors including, whether the party's actions are inconsistent with the right to arbitrate, the timing of the request, and prejudice to the opposing party. Here, even assuming the validity of the arbitration agreement, the evidence tipped in the favor of finding a waiver because PacPizza engaged in substantial conduct inconsistent with its claimed right to arbitrate by twice failing to assert the affirmative defense of the arbitration agreement.

Oregel v. PacPizza LLC (2015) ___ Cal.App.4th ___.

IN THE TRENCHES

$8.7 million Wage-and-Hour Class Action Paid to 19,000 Temporary Workers By Manpower Inc.

Manpower Inc., a temporary-employment agency, has settled a wage and hour class action for $8.75 million. The more than 19,000 temporary workers allege that Manpower failed to provide them with accurate wage statements. The class accused Manpower of intentionally and willfully mailing paychecks for California employees from Texas, causing the temp workers to receive their check at least 2-3 days following the pay day. While the court did not take issue with this delay and did not award waiting time penalties, which only apply to final wages of employees who have been fired or have quit, the court did find that Manpower had failed to provide their start date of the pay period for which the workers were being paid.

Manpower Pays $8.7M To 19K Temps For Pay Stub Claims, Law360 (June 22, 2015), Kurt Orzeck.

Nude/Semi-Nude Dancers Land $6.5 Million Wage and Hour Jury Verdict Against Paradise Showgirls Club

Quincece Hills filed a class action against her employer Paradise Showgirls for unlawfully taking a portion of the gratuities or tips given to the dancers by customers.

The jury returned a verdict for the dancers finding that the club had wrongfully misappropriated the dancers' tips.

Quincece Hills, et al., v. Todd & Katie Inc. dba Paradise 2000 aka Paradise Showgirls, LA Daily Journal, Verdicts and Settlements (June 5, 2015) Los Angeles Superior Court, Case Number: BC437919.

$4 Million Wage-and-Hour Class Action Settlement to Be Paid By Warner Music Group

Warner Music Group has agreed to pay over $4 million to settle a wage and hour class action brought by former interns who claimed they were unlawfully denied minimum wage. Each of the over 4,500 interns will receive $750 for each academic semester they worked as an intern, with a max payout of $1,500. The complaint alleged that the interns were exempt from minimum wage requirements, and accused Warner of a centralized, nationwide internship program in which they had to work at least 15 hours per week. The plaintiff's all say they got no academic credit for at least part of their internships, and all claim to have received little to no supervision.

Warner Music Strikes $4.2M Deal to End Intern Wages Suit, Law360 (June 9, 2015), Y. Peter Kang.

$2 Million Wage-and-Hour Class Action Settlement to Be Paid By Wells Fargo

Jennifer Morales, an account executive, contended that Wells Fargo misclassified her and other employees as exempt employees and failed to pay them for overtime pay or missed meal or rest periods.

Wells Fargo is settling with the class of approximately 500 account executives for $2 million.

Jennifer Morales et al., v. Wells Fargo Insurance Services USA Inc., LA Daily Journal, Verdicts and Settlements (June 5, 2015) U.S. District Court for the Northern District of California, Case Number: 3:13-cv-03867-EDL.

$1.5 Million Wage-and-Hour Class Action Settlement to Be Paid By Home Depot

Home Depot settled a class action lawsuit with a group of former employees who claimed Home Depot failed to promptly pay their wages due in violation of the law.

John Barrera Jr., et al., v. Home Depot USA Inc., LA Daily Journal, Verdicts and Settlements (June 19, 2015) U.S. District Court for the Northern District of California, Case Number: 5:12-cv-05199-LHK.

As always, please do not hesitate to contact any of our attorneys if you have any questions or comments.

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