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— Labor & Employment Law —

Defending Employer's Rights

Labor and Employment Law Update

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In This Issue

EEOC Unveils Updated Equal Pay Data Rule

The U.S. Equal Employment Opportunity Commission (EEOC) unveiled a revised version of its proposal to expand pay data collection from federal contractors and other employers with more than 100 workers. One important revision is pushing back the date of the first required employer report from September 30, 2017 to March 31, 2018. This change will allow employers to compile the information from employees' W-2 reports, which are calculated based on the calendar year. The new rule requires federal contractors and other employers with more than 100 workers to provide even more pay data in addition to data already collected from EEO-1 reports that provide the federal government with workforce profiles that are sorted by race, ethnicity and gender. The EEOC maintains the additional data will help identify possible pay discrimination and assist employers in promoting equal pay in their workplaces.

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DISCRIMINATION / CONSTRUCTIVE DISCHARGE / STATUTE OF LIMITATIONS

U.S. Supreme Court Holds Statute Of Limitations Period Does Not Begin To Run Until the Date the Employee Submits His Resignation – It Does Not Begin When Plaintiff Agrees to Resign in the Future

The U.S Supreme Court held that in a case for constructive discharge, the statute of limitations does not begin to run until the employee actually resigns – and does not begin to run when the employee agrees to resign. Here, plaintiff, a postal service employee, claimed he was denied a promotion because he was African-American. On December 16, 2009 plaintiff entered an agreement with the Postal Service where it agreed not to pursue criminal charges for allegedly delaying the mail in exchange for Plaintiff agreeing to retire or relocate to another city at a lower salary. On February 9, 2010 plaintiff resigned. On March 22, 2010, Plaintiff sued the Postal Service for constructive discharge in violation of Title VII of the Civil Rights Act. The Supreme Court held that the 45 day period to contact the EEOC did not begin to run until plaintiff submitted his resignation paperwork, because the resignation was necessary before plaintiff could file suit for constructive discharge.

Green v. Brennan (May 23, 2016, U.S. Supreme Court) Case number 14-613.

DISCRIMINATION / RETALIATION

Court Holds that Former Marketing Director Can Sue for Discrimination and Retaliation Against the Regents of the University of California.

The California Court of Appeal found Plaintiff/employee's allegations that her supervisor became "hostile and snippy" and began eliminating her "main responsibilities" after she was diagnosed with a heart condition were sufficient to proceed with a lawsuit. The actions of her supervisor led Plaintiff Moore to believe that her supervisor was trying to get rid of her, which eventually did happen when Moore was terminated because of "lack of work" and budgetary constraints. The Court found that (1) Moore's rapid ascension in the department; (2) her supervisor's belief that Moore was not healthy enough for the job; and (3) her supervisor's failure to follow policies or procedures provided sufficient evidence to proceed with her lawsuit, and that the reasons for her termination may have been untrue or were a pretext for disability discrimination.

Moore v. The Regents of the University of California (June 20, 2016) ___ Cal.App.4th ___.

WAGE AND HOUR / "ROUNDING" TIME TO QUARTER HOUR AFFIRMED

Employer's Rounding Policy Regarding Employee's Timekeeping Comports With Federal Rounding Regulation

Plaintiff Andre Corbin filed collective and class actions against Time Warner alleging violations of the Fair Labor Standards Act and California employment laws. The class alleged that Time Warner's online timekeeping platform, Kronos Connect, which employees use to clock in and out of work, had deprived them of earned wages, specifically overtime. The timekeeping platform rounded each time stamp recorded to the nearest quarter-hour.

The Ninth Circuit held that the federal rounding regulation has long endorsed rounding practices to record "employee's starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour." (29 C.F.R. Section 785.48(b))

Courts have regularly upheld the validity of an employer's neutral rounding policy. Here, Time Warner's policy was facially neutral because it rounded all employee time punches to the nearest quarter-hour without regard for whether the rounding benefitted the employer or the employee. It was also facially neutral because sometimes the employees gained minutes and compensation, and sometimes they lost minutes and compensation. Therefore, Time Warner's rounding policy comported with the federal regulation.

Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership, (U.S. Court of Appeals for the Ninth Circuit) Case number: 13-5562.

LABOR LAW

Ninth Circuit Affirms Arbitrator's Broad Discretion in Deciding Union/ Employer Disputes

The Ninth Circuit Court of Appeals held that in labor law matters, an arbitrator's interpretation of an agreement and findings of fact must be upheld as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority. Here, the union and the employer disagreed about the employer's timing to terminate the agreement between them, and the parties submitted their dispute to an arbitration panel. When the panel found in favor of the union, the employer sued in federal court. The Ninth Circuit held that, due to the centrality of the arbitration process to stable collective bargaining relationships, courts reviewing labor-arbitrator awards must afford a "nearly unparalleled degree of deference" to the arbitrator's interpretation of the parties' agreement and findings of fact. Further, the public policy exception to this strict rule ordinarily requiring courts to enforce arbitrator's decisions is narrow and only applies when the award "runs contrary to an explicit, well-defined, and dominant public policy, which must be referenced to positive law and not from general considerations of supposed public interest."

Southwest Regional Council of Carpenters v. Drywall Dynamics Inc., (U.S. Court of Appeals for the Ninth Circuit) Case number: 14-55250.

NLRB

Employer Threats and Promises to Avoid Unionization - NLRB Orders Trucking Company to Recognize a Union and Bargain with It

The National Labor Relations Board (NLRB or Board) ordered a trucking company to recognize and bargain with a union after concluding that its "hallmark" violations of the National Labor Relations Act (NLRA) would make a fair election improbable. The NLRB ordered Hogan Transports Inc. to negotiate with Teamsters Local 294 after finding the company violated the NLRA (1) by threatening employees with loss of their jobs if they joined a union, (2) by promising and granting a wage increase as a way to defeat the unionization effort, and (3) by refusing to accept the rescission of a worker's resignation.

The Board stated, "the company committed three hallmark violations of the act, which are likely to affect election conditions in the bargaining unit for an extended time." "Although some of the employees who were part of the workforce when the violations took place are no longer employed by the company, 18 of the 48 employees at the time of the violations are still employed, and would recall those events.

The employees alleged that an official of the company told them that jobs might be lost if they voted to unionize, because a discount supermarket that served as the site's sole contract might opt to take its business elsewhere. The Board also found that the company did not submit sufficient evidence to demonstrate that it had decided to implement the July 2013 wage increase before it became aware of the unionization effort.

Consolidated cases: *Hogan Transports Inc. and Teamsters Local 294 and International Brotherhood of Teamsters and Mansfield Teetsel*, (National Labor Relations Board) Case numbers: 03-CA-107189, 03-CA-108968 and 03-CA-111193.

The National Labor Relations Board Does Not Have Authority To Order an Award of Attorneys' Fees To The Successful Party

The D.C. Circuit Court held that the NLRB overstepped its authority when it ordered a Hawaii hotel to reimburse the Board and labor union for litigation expenses, finding that the Board's powers are limited to those it has been granted by Congress. The NLRB asserted that, like a federal court, it had the "inherent authority" to order an employer to cover attorneys' fees incurred by the Board and a union that accused the company of labor violations. The Circuit Court disagreed and held that, "contrary to the Board's apparent belief, it is not a court of law or equity; it exercises only the powers granted by the Congress." The Circuit Court did, however, find it reasonable for the NLRB to order the company to publicly read to employees a remedial notice about the NLRB's decision and its pledge not to violate the law.

The court found that, even though an administrative law judge had decided that the company had violated the NLRA when it (1) fired a union activist, (2) barred union representatives from hotel property, and (3) halted contributions to employee's retirement plans, the NLRB's order for the company to reimburse the NLRB general counsel for litigation expenses tied to the dispute was not within its power.

HTH Corp. et al., v. National Labor Relations Board, (U.S. Court of Appeals for the D.C. Circuit) Case number: 14-1222.

NLRB Orders Hawaii Hotel to Stop Punishing Workers Involved In Efforts to Unionize

A National Labor Relations Board judge ordered the operators of a Hawaii hotel to stop punishing or threatening to punish workers involved with the Local 5 Health Care and Hospitality Workers Union after finding management violated the National Labor Relations Act three times. The judge ordered the hotel to cease anti-union activity, strike from its records its discipline of two workers who pushed a third to join the union, and to post notice of its workers' rights to unionize in English and the local languages. The union filed complaints with the NLRB, alleging management at the hotel had attempted to suppress a union campaign. Specifically, the union claimed management: (1) unfairly gave a written warning to two maintenance workers who solicited a third to sign a union authorization card; (2) called a meeting that implied workers could lose their jobs if they unionized; and (3) threatened to ban two workers from the property for handing out pro-union leaflets.

Hotel management had issued written warnings to a maintenance engineer and utility housekeeper, who it claimed had interfered with another employee's work by harassing him and even threatening to kill him if he did not join the union, according to the opinion. One month prior to the written warnings, the executive vice president of operations held meetings in which he discussed the ongoing union activity with workers. The union characterized the sessions as explicit threats to employees considering joining the union, and the judge again sided with the union's version of events. The judge stated, "I find that a reasonable employee attending the meetings would have reasonably understood that the hotel's highest level of management was fed up and angry with their union organizing and noisy protests and was telling them to stop." The judge also found the hotel violated the NLRA when a hotel security guard told employees they could not hand out pro-union leaflets to their fellow employees anywhere on the premises, rather than just where it interfered with the hotel's primary public operations.

Aqua-Aston Hospitality LLC et al. and UNITE HERE! Local 5, (National Labor Relations Board) Case numbers: 20-CA-154749, 20-CA-157769, 20-CA-160516 and 20 -CA-160517.

NLRB Election Rule Survives 5th Circuit Challenge

The Fifth Circuit Court of Appeals recently upheld the National Labor Relations Board's rule streamlining the union election process. The rule, which took effect in April 2015, made a number of changes to NLRB procedures such as putting off employer challenges to voter eligibility issues until after an election and eliminating a 25-day delay that normally occurs between the time a regional director directs an election and the election itself. The new rule has been called the "ambush election rule" by critics who say that shortening the time between a union petition and election does not give employers enough time to make their case to workers about unionization. The Associated Builders and Contractors of Texas Inc. (ABC) argued that the sweeping changes in the new rule depart from the plain language and legislative history of the NLRA, and that the changes exceeded the board's statutory authority.

The Court said the rule, on its face, did not violate either the National Labor Relations Act or the Administrative Procedure Act, and that the Board was within its bounds to create it. The Court stated, "Here, the Board identified evidence that elections were being unnecessarily delayed by litigation and that certain rules had become outdated as a result of changes in technology. It conducted an exhaustive and lengthy review of the issues, evidence and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions. Because the board acted rationally and in furtherance of its congressional mandate in adopting the rule, the ABC's challenge to the rule as a whole fails." The Court also held that the rule changes to the pre-election hearing did not exceed the bounds of the Board's statutory authority under the NLRA.

Associated Builders and Contractors of Texas Inc. et al. v. National Labor Relations Board, (U.S. Court of Appeals for the Fifth Circuit) Case number: 15-50497.

IN THE TRENCHES

$8.6 Million Settlement for Disability Discrimination and Denial of Reasonable Accommodation Paid by Lowe's Home Centers.

Lowe's agreed to pay $8.6 million to settle allegations that it violated the Americans with Disabilities Act (ADA) and engaged in a pattern and practice of discrimination against employees with disabilities. The EEOC alleged that Lowe's fired employees and

failed to provide reasonable accommodation to them when their medical leaves exceeded Lowe's 240-day maximum leave policy. The EEOC also alleged that Lowe's violated the ADA by terminating individuals who were regarded as disabled, had a record of disability, and/or were associated with someone with a disability.

U.S. Equal Opportunity Commission v. Lowe's Companies Inc., et al., LA Daily Journal, Verdicts and Settlements (June 3, 2016) U.S. District Court for the Central District of California, Case number: 2:16-cv-03041-AB-FFM.

CIVIL RIGHTS/POLICE

Defense Verdict for City of Alameda Against Claims of False Arrest and Excessive Force

Plaintiff Glover sued the City of Alameda and Officer Ortega for false arrest and excessive force. Glover claimed that he called the police to report a car alarm that had been going off for several hours. Glover alleged that when he criticized Officer Ortega for the delay in responding to the call, that officer Ortega became angry, punched him and arrested him. Officer Ortega contended that plaintiff was the aggressor, and that he lawfully arrested Glover for threatening an officer and interfering with an officer's duties. When several witnesses corroborated the officer's version of the events, the jury found that Ortega was not negligent and returned a defense verdict.

Glover v. City of Alameda, et al., LA Daily Journal, Verdicts and Settlements (June 17, 2016) Alameda Superior Court, Case number: RG13689988.

Defense Verdict For County of Los Angeles Against Claims of Excessive Force and Wrongful Death

Salvador Zepeda Jr. was fatally shot by Los Angeles County Sheriff's Deputies. His parents, girlfriend and son sued the deputies and the County of Los Angeles for excessive force and wrongful death. Plaintiffs contended that the deputies used excessive force and committed battery, resulting in Zepeda's wrongful death. Plaintiffs argued Zepeda was not in a gang and was not armed at the time. The deputies contended that their use of force was reasonable because they were responding to a call of "shots fired." They contended that when they arrived on the scene, Zepeda was crouched between two cars, that he reached for a gun, and that they shot Zepeda because they feared for their lives.

Zepeda, et al. v. County of Los Angeles, LA Daily Journal, Verdicts and Settlements (June 17, 2016) Los Angeles Superior Court, Case number: BC450200

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

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