SHAWE
ROSENTHAL LLP

E-UPDATE

December 30, 2019

RECENT DEVELOPMENTS

EEOC Rescinds Policy Statement Objecting to Mandatory Arbitration Agreements.

The EEOC has announced the rescission of a 1997 policy statement in which it objected to the use of agreements that required employees to resolve employment disputes solely through arbitration.

In 1997, the Equal Employment Opportunity Commission issued the *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, disfavoring the use of mandatory arbitration agreements. (Although such guidance is not law, it provides insight into the agency's interpretation of the law and is often relied upon by employers and courts). Observing that, since that time, the U.S. Supreme Court has issued numerous arbitration cases affirming the use of such agreements, the EEOC has now rescinded the policy statement and directed that its staff should not rely upon it in investigation or litigation.

The policy statement had instructed EEOC staff to disregard the existence of such agreements in processing and investigating a charge, and even in bringing suit. The EEOC had also stated that it may challenge such agreements as violations of employment discrimination laws. Now, it appears that EEOC will not find such agreements necessarily a violation. However, there may be little impact with regard to charge processing, as the Supreme Court has recognized that an arbitration agreement does not preclude an employee's ability to file an administrative charge. In addition, the EEOC may proceed with an investigation as to any suspected violation of the law and seek relief for the employee, regardless of such agreement, as the agency would not be a party to the agreement.

NLRB Returns to Standard That Dues Checkoff Provision Expires With CBA.

In *Valley Hospital Medical Center*, the National Labor Relations Board returned to the longstanding precedent that dues-checkoff provisions – a contractual requirement that employers automatically deduct union dues from employee paychecks, and remit the dues to the union – are enforceable only for the duration of the applicable collective-bargaining agreement (CBA) reached by the parties. Thus, an employer's refusal to continue dues checkoff following expiration of a CBA does not violate the National Labor Relations Act

Prior to 2015, and for more than 50 years, it was settled Board law that dues checkoff provisions lapsed when the CBA establishing the checkoff requirement expired. In its controversial 2015 decision in *Lincoln Lutheran of Racine*, however, the Obama Board held that an employer had a statutory obligation to continue checking off dues after the expiration of the CBA that established the checkoff arrangement. After *Lincoln Lutheran*, an employer who ceased checking off union dues following CBA expiration, and without first notifying and bargaining with the union, committed an unlawful unilateral change, in violation of Section 8(a)(5) of the National Labor Relations Act.

While dues checkoff is a mandatory subject of bargaining, well-established case law created a category of mandatory subjects that are uniquely contractual in nature. This category of mandatory subjects includes management rights clauses, no-strike/no-lockout agreements, arbitration, union security, and, prior to *Lincoln Lutheran,* dues checkoff. The Board has now found that because dues checkoff is rooted in contract, it is enforceable only for the duration of the contract. Thus, for that reason, dues checkoff is excepted from the unilateral change doctrine requiring an employer to notify and bargain with the union prior to implementing a change to employee terms and conditions of employment.

Following this decision, employers may lawfully unilaterally cease deducting union dues from its employees' paychecks when a CBA expires.

NLRB Reinstates Arbitral Deferral Standard.

In another about-face from positions taken by the National Labor Relations Board under the Obama administration, the Board announced the reinstatement of its longstanding arbitral deferral standard, which it uses to decide when to defer to an arbitrator's grievance decision as to whether an employee's discipline or discharge violates the National Labor Relations Act.

In United Parcel Service, Inc., the Board overruled the 2014 case of *Babcock & Wilcox Construction Co., Inc*. In *Babcock,* the Board overturned longstanding precedent and stated that, even if the arbitration procedures appear to have been fair and regular and the parties have agreed to be bound by the results of arbitration, it would not defer to an arbitral decision unless (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.

Now, the Board has returned to the standard that was first articulated in the 1955 case of *Spielberg Mfg. Co*. Under the reinstated standard, the Board will defer to the arbitrator's decision where: (1) the arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, (3) the arbitrator considered the unfair labor practice issue, and (4) the arbitrator's decision is not clearly repugnant to the Act.

The Board further noted that *Babcock* also substantially altered the prearbitral standard for deferral to grievance arbitration proceedings and to prearbitral grievance settlements in unfair labor practice cases alleging unlawful discharge or discipline. Under *Babcock,* the Board would only defer to grievance arbitration proceedings where the parties in a collective-bargaining relationship explicitly authorized an arbitrator to decide the unfair labor practice issue, and the Board would not defer to grievance settlement agreements that did not meet the new requirements for postarbitral deferral. These holdings have likewise been overruled in *United Parcel Service, Inc.*

In its press release regarding this change, the Board states that the restored standards "better promot[es] the strong federal policy in favor of arbitration as the parties' agreed-upon mechanism for resolving employment disputes." Certainly, the change supports employers' ability to proceed with arbitration as a resolution of disputes under the NLRA.

Federal Regulations May Provide Guidance as to Maryland's Wage-Hour Law.

The Maryland Court of Special Appeals held that, where provisions under the federal Fair Labor Standards Act and Maryland's Wage-Hour Law are substantially similar, the federal regulations interpreting that FLSA provision are "persuasive authority as to the correct interpretation of Maryland law."

In *Poe v. IESI MD Corp.,* the issue concerned the payment of overtime for an employee paid on a day rate basis, i.e. he was paid a specified amount of money per day rather than per hour. Day rate employees are entitled to overtime pay for all hours worked over 40 in a workweek. By federal regulation, the overtime rate for day rate employees is calculated by totaling the amount received under the day rate in the workweek and dividing by the total hours worked, and then paying extra half-time pay at that rate for all hours worked in excess of 40 (rather than, as is the case for most overtime situations, one-and-a-half times for hours over 40). There is no corresponding state regulation.

The employee argued that the federal regulation should not influence the interpretation of state law. The Court disagreed, noting the similarity between the federal and state statutes and the fact that state claims generally succeed or fail together with FLSA claims. The Court acknowledged that there are situations in which federal and state regulations diverge, however the day rate overtime calculation is not one of them. As the Court noted, nothing in Maryland's statutory language or regulations prohibits employers from relying on the federal regulation. Nor is it necessary for Maryland to promulgate its own regulation to assist in the interpretation of Maryland law. Thus, the federal day rate overtime regulation is persuasive authority as to the application of Maryland law, which is enhanced by its long-standing existence and the undoubted reliance upon it by numerous Maryland employers over that period.

This case provides some comfort to Maryland employers that they can generally look to federal regulations to provide guidance on analogous provisions under the state's Wage-Hour Law. Of course, this decision issues from the intermediate appellate court, and it is possible that the highest appellate court – the Maryland Court of Appeals – could arrive at a different conclusion if and when this issue is brought before it.

TAKE NOTE

Court Approval Is Not Required To Settle FLSA Claims Through Offers of Judgment. The U.S. Court of Appeals for the Second Circuit concluded that the Fair Labor Standards Act does not require judicial approval for settlement through a Rule 68(a) offer of judgment.

Federal Rule of Civil Procedure 68(a) provides:

> At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com

The general understanding has been that the settlement of FLSA claims requires the approval of either the Department of Labor or a federal court. The issue before the Second Circuit in *Yu v. Hasaki Restaurant, Inc.* was "whether FLSA claims fall within the narrow class of claims that cannot be settled under Rule 68 without approval by the court (or DOL)." The Second Circuit found that they did not, as there is no clear expression in the FLSA of congressional intent to exempt the statute from the operation of Rule 68. Accordingly, Rule 68's mandate that stipulated judgment "must" be entered should be given effect.

NLRB Allows Limitation on Wearing of Union Insignia on Selling Floor. In *Wal-Mart Stores, Inc.,* the National Labor Relations Board addressed whether a dress code policy that limits, but does not prohibit, the wearing of union insignia violates the National Labor Relations Act.

Wal-Mart maintains a dress code policy permitting employees to wear logos and insignia, including union insignia, provided that the logos or graphics are no larger than the employee's name badge and are "non-distracting" in nature. Indeed, Wal-Mart had permitted employees to display union insignia that complied with its policy. This charge, however, resulted from Wal-Mart's prohibition of a pro-union pin that was larger than the size permitted in the dress code policy. An administrative law judge founds that Wal-Mart failed to demonstrate special circumstances requiring that the logos and graphics be "small" and "non-distracting," and thus the policy violated Section 8(a)(1) of the NLRA.

In *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), the Board divided workplace rules into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful under the National Labor Relations Act. The Board first found that the *Boeing* framework for analyzing facially neutral work rules was the appropriate standard for determining the lawfulness of the dress code policy. Next, the Board found that the maintenance of the rule had both lawful and unlawful applications. The Board held that the rule was lawful as to its application to areas of Wal-Mart's stores where employees encounter customers in the course of performing their jobs (the "selling floor"). The Board reasoned that Wal-Mart's justifications for the policy – enhancing customer service and protecting merchandise from theft and vandalism – outweighed the effect on an employee's right to wear union insignia. The Board, however, found that the rule was unlawful as to its application to work areas away from the selling floor, where Wal-Mart's above justifications were much weaker. There, the Board reasoned that Wal-Mart's justifications did not outweigh the impact on employees' right to wear union insignia.

The takeaway here is that the Board will scrutinize content-neutral dress code rules on a case-by-case basis. Thus, an employer must be prepared to offer legitimate business justification for rules that limit the wearing of union insignia. But this decision indicates that the Board may be more accepting of such rules in customer-facing areas of an employer's operation, while being less forgiving where the rules are applicable to other work areas, absent a strong justification for the rule by an employer.

Different Standards Apply to Equal Pay Act and Title VII Pay Discrimination Claims. The U.S. Court of Appeals for the Second Circuit held that a plaintiff does not need to establish a violation of the Equal Pay Act in order to maintain a pay discrimination claim under Title VII.

As the Second Circuit noted in *Lenzi v. Systemax, Inc.*, although both laws prohibit pay differentials based on sex, they are subject to different standards. Under the EPA, a plaintiff is entitled to equal work for equal pay, which requires a showing that the plaintiff performed equal work to an employee of the opposite sex but received unequal pay. Under Title VII, however, the plaintiff must show that they were subject to discrimination in pay because of sex – which does not necessarily require a showing that there were comparators of the opposite sex in substantially equal positions.

Although the Second Circuit noted that an employer could discriminate against a female employee by paying her less than male peers performing equal work, that is not the only way to effect discrimination under Title VII. The Second Circuit offered the example of a female employee hired for a unique position who is paid less than she would have been paid if she were male. As the Second Circuit stated, "a claim for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex hold an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production or any other factor other than sex." (Internal quotations omitted).

In the current case, the female plaintiff showed that she was paid below market rate for her position while male executive peers were paid above market rate. The Second Circuit found that "these statistical differences permit an inference of discrimination." Moreover, the plaintiff offered evidence that her supervisor, who was the CFO, made pervasive disparaging remarks about his ex-wife and females, which also suggested a discriminatory motive. Taken together, these circumstances were enough to support a claim for pay discrimination under Title VII.

NLRB Orders Approval of McDonald's Settlements, Avoids Joint Employer Designation. The National Labor Relations Board has ordered the approval of settlements of complaints that the Board's General Counsel issued in 2014 under the Obama administration in which the GC had sought to hold McDonald's liable, under a joint employer theory, for various unfair labor practices against the franchisees' employees in connection with the Fight for $15. In so doing, the Trump Board retreated from the Obama Board GC's assertion of joint employer status.

In 2018, the Board's General Counsel and McDonald's presented settlements in *McDonald's USA, LLC* resolving the unfair labor practices. The settlements were denied by an administrative law judge (ALJ), who found that the settlements did not provide sufficient remedies for a joint employer finding, as had been previously sought by the General Counsel. On appeal, the Board ordered the ALJ to approve the settlements, which provided an immediate remedy for every substantive violation alleged in the complaints (i.e. that in response to employees' advocacy for a higher wage, the employers threatened employees, promised benefits to them, interrogated them, and surveilled employee activity protected under the National Labor Relations Act).

Of particular interest, the Board addressed the joint employer issue by noting that the relief provided would be the same, other than a broader notice-posting requirement. It also stated that settlement involves compromise, and that it does not require "full remedy" in the context of a settlement. But, of more significance, the Board went on to observe that "the General Counsel's stated purpose in filing the complaints was 'to clarify the relationship between franchisor and franchisee' under Board joint-employer law." The Board noted, however, that it had generally not held franchisors and franchisees to be joint employers. Moreover, it stated that its proposed rule on joint-employer status may render this case moot, as the standards set forth in a final rule (which is anticipated in the near future) would supplant any joint-employer standards issued in this case. The actions of the Board in this case strongly reiterates its intention to retreat from the expansive interpretation of joint employer status under the Obama administration.

Limiting Backpay to Arbitration Proceedings is Unlawful, According to NLRB. In *Kelly Services*, the National Labor Relations Board concluded that an arbitration agreement provision prohibiting employees from receiving backpay or other monetary compensation through NLRB proceedings is unlawful.

Employees were required to execute an arbitration agreement as a condition of their employment. The agreement permitted employees to file charges with the Board and other administrative agencies, but mandated that all claims for monetary relief be pursued through arbitration. Consequently, the agreement prohibited employees from obtaining backpay or other monetary relief through NLRB remedies.

As the Board set forth in the 2017 case, *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), workplace rules are divided into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful under the National Labor Relations Act. The Board applied *Boeing* to find that the provision restricting monetary relief to arbitration was an unlawful Category 3 rule. First, the Board reasoned that the provision unlawfully restricts employees' right to access to the Board and its processes by prohibiting employees from receiving backpay and other monetary compensation through Board proceedings. By making it impossible for employees to obtain a monetary remedy from the Board, the agreement disincentivizes employees from filing a Board charge in the first place. Second, the provision was an attempt to limit the Board's exercise of its statutory powers to remedy unfair labor practices, including the provision of backpay.

The lesson here is that employers should avoid arbitration agreement language restricting an employee's right to monetary relief to arbitration proceedings. We note that this language also frequently appears in severance agreements. There is a critical distinction, however. In that context, although an employer must permit the employee to file charges with the Board and other federal agencies (like the Equal Employment Opportunity Commission), we believe that the employer may require the employee to waive the right to recover monetary relief arising from such charges. In that instance, the employee is receiving monetary benefits (i.e. severance pay) in lieu of such relief.

No Retaliation Where Documentation Supports Job Elimination and Termination for Performance. In a case that reiterates the importance of documentation, an employer avoided liability for an employee's retaliation claim under the False Claims Act where it was able to demonstrate the legitimacy of its decision to eliminate her position and that she had performance issues that pre-dated her whistleblower complaint.

In *Musser v. Paul Quinn College*, the plaintiff alleged that she had been terminated in retaliation for making a whistleblower complaint about fraud under the False Claims Act. The U.S. Court of Appeals for the Fifth Circuit, however, found that the employer had offered a legitimate non-retaliatory reason for the termination – a departmental reorganization that resulted in the elimination of her position and her poor performance.

With regard to the reorganization in particular, the employer was able to show that her job duties were reassigned to other, existing employees and no one was hired to replace her. Although the plaintiff argued that the decision did not actually result in cost savings, the Fifth Circuit noted that cost was not the only stated reason for the reorganization – it was also to streamline staff. Moreover, even if, in hindsight, the decision did not result in cost savings, that would only establish that the reason was mistaken, not dishonest, and, as the Fifth Circuit asserted, its role is not to second-guess business decisions.

In addition, the employer was able to demonstrate a history of poor performance resulting in discussions about possible termination that pre-dated the whistleblower complaint. This evidence also undermined the plaintiff's retaliation claim.

The lesson for employers here is the importance of detailed, accurate and contemporaneous documentation. Although such documentation may not prevent an employee from asserting a claim, it will enable the employer to defend itself effectively.

Employer's Good Faith Belief as to Employee's Misconduct Sufficient to Support Termination. In a case that offers good news to employers, the U.S. Court of Appeals for the Eighth Circuit held that an employer's good faith belief that the employee had engaged in workplace misconduct supported its termination decision, despite its inability to prove such misconduct.

In *Rinchuso v. Brookshire Grocery Co.*, a male employee was fired following a Human Resources investigation into a complaint that he had viewed pornography at work. HR interviewed four female co-workers who stated that he had viewed porn, gambled, and touched them inappropriately. As part of the investigation, IT reviewed his computer but was unable to determine conclusively if he had viewed porn. The employee, while denying any viewing of porn, admitted to visiting sports and dating sites on his computer. The Eighth Circuit found that, even though there was no conclusive evidence that he had violated the employer's internet and conduct policies, the interviews with the co-workers and his own admissions provided a good faith basis for his termination.

Often employers believe that they must have conclusive evidence of misconduct – akin to the "smoking gun" in a criminal case. There is a reluctance to rely on "hearsay evidence" – i.e. he said/she said situations. Hearsay, however, is a rule of evidence in a court of law and not the workplace. Employers may make decisions based on co-worker statements, even if they cannot be conclusively proven, as long as their belief is reasonable and rational.

NEWS AND EVENTS

Honor - We are delighted to announce that Shawe Rosenthal has once again been recognized by *U.S. News and World Report* and *Best Lawyers in America*© in the 2020 "Best Law Firm" rankings. We were honored with a top Tier 1 ranking in the Baltimore Metropolitan Area in the areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor and Employment Law.

Honor - We are pleased to announce that ten of our individual attorneys have again been recognized by Super Lawyers, a national rating service of outstanding lawyers. Our 2020 Super Lawyers honorees are Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, and Elizabeth Torphy-Donzella. In addition, Super Lawyers selected Paul D. Burgin as a "Rising Star." Shawe Rosenthal attorneys were recognized in the areas of "Employment & Labor" and "Employment

Litigation: Defense." Attorneys are selected for recognition based on independent research, peer nominations, and peer evaluations. The honorees are deemed to be in the top 5% of practitioners in the state.

Victory – Darryl G. McCallum assisted in the successful defense of a major food and drink manufacturer against failure to accommodate claims under the Americans with Disabilities Act.

Media - Lindsey A. White was quoted in a December 3, 2019 Daily Record article, "Maryland law still unclear on medical cannabis use by employees," by Heather Cobun. Lindsey offered comments on the need for further guidance from the state on employer obligations towards medical marijuana users.

Activity - Eric Hemmendinger prepared comments on behalf of the Wage & Hour Defense Institute to the U.S. Department of Labor's proposal to clarify its interpretation of the fluctuating workweek (FWW) method of computing overtime. The WDHI is a national network of recognized practitioners in wage and hour litigation.

Article – Fiona W. Ong's Top Tip from the November 2019 E-Update, "Winter Is Coming… What Are the Rules on Pay for Weather-Related Business Closures?" was featured on SHRM.org, the website for the Society on Human Resource Management. (Subscription required, but article is accessible on our website).

TOP TIP: New Year, New Minimum Wage Rates in the Mid-Atlantic.

Although the federal minimum wage remains $7.25, Maryland's minimum wage is subject to an annual increase, with the next increase coming on January 1, 2020 – from $10.10 to $11.00 per hour. The tipped wage rate remains at the federal level of $3.63 per hour. (The tipped wage rate for tipped employees, together with any tip credit, must meet the minimum wage. Employers are responsible for making up any shortfall.) Employers must also display the current minimum wage poster, available here.

As we discussed in our April 10, 2019 E-lert on new Maryland laws, this increase comes as the result of legislation that gradually increases the state rate to $15.00 over the next several years. Different schedules of increases apply depending on the size of the employer. Our E-lert provides further details about the law.

Also, New Jersey is increasing its rate to $11.00 per hour (from $10.00). Agricultural, seasonal, and small (fewer than 6 employees) employers in New Jersey are subject to a reduced rate of $10.30 per hour (up from $8.85). New Jersey's tipped wage rate is increased to $3.13 (from $2.63). The required poster is available here.

This is also a good time to remind employers that many other states and local jurisdictions have minimum wage rates above the federal rate, including the following throughout the Mid-Atlantic region:

- Montgomery County, Maryland: $13.00 per hour for employers with more than 50 employees and $12.50 per hour for employers with 50 or fewer employees. This is scheduled to increase on July 1, 2020 to $14.00 per hour for larger employers, to $13.25 for mid-sized and certain other employers, and $13.00 for small employers. Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.
- Prince George's County, Maryland: $11.50 per hour. The required Wage-Hour Abstract poster is available here.
- Delaware: $9.25 per hour. The required poster is available here.
- District of Columbia: $14.00 per hour, with a tipped wage of $4.45 per hour. The rate will increase to $15.00 per hour on July 1, 2020. The required poster is available here.
- West Virginia: $8.75 per hour. The required poster is available here.

Employers should ensure that they are complying with the applicable minimum wage rates, and also updating the required posters as necessary.

RECENT E-LERTS

Please take a moment to enjoy our recent E-lerts:

- The NLRB Provides Two More Gifts – Employers May Restrict Nonbusiness Use of E-Mail, Require Confidentiality During Investigations by Chad M. Horton, December 18, 2019
- NLRB Delivers A "Holiday Gift" To Employers: New Union Election Timelines by Chad M. Horton, December 13, 2019
- Department Of Labor Issues Final Rule On Regular Rate Exclusions From Overtime Calculations by Eric Hemmendinger, December 12, 2019

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- NLRB To Expand Definition of Effective Recommendation of Discipline? By Chad M. Horton December 27, 2019.
- Extraordinary Employee Misconduct: Monkeying Around in the Workplace! by Paul D. Burgin, December 18, 2019.
- Sick Leave for Service Animals? by Fiona W. Ong, December 11, 2019.
- FMLA to Care for an Adult Child? by Fiona W. Ong and Elizabeth Torphy-Donzella, December 4, 2019 (Selected as "noteworthy" by Employment Law Daily).

Shawe Rosenthal LLP
One South Street, Suite 1800, Baltimore, MD 21202
(410) 752-1040 www.shawe.com