SHAWE ROSENTHAL LLP

# E-UPDATE

August 31, 2024

## RECENT DEVELOPMENTS

### The Latest Regulation to Fall by the Wayside – The DOL's 80/20 Tipped Employee Rule

The Department of Labor's final rule governing tipped employees has a tangled history, but the U.S. Court of Appeals for the Fifth Circuit has now struck down the rule, which has been in place since 2021. And in so doing, it provided a stark illustration of how courts will approach agency regulations following the Supreme Court's overturning of the *Chevron* doctrine, under which courts had typically given broad deference to agency regulations, earlier this year.

**Tipped Employees and the Tip Credit.** Under the FLSA, an employer of tipped employees can satisfy its obligation to pay those employees the federal minimum wage by paying those employees a lower direct cash wage (no less than $2.13 an hour) and counting a limited amount of its employees' tips (no more than $5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage and the federal minimum wage. (Notably, many states have enacted higher minimum wage rates, including for tipped employees, or have eliminated the tipped rate altogether). This partial credit is known as the "tip credit." Tipped employees are those who customarily and regularly receive more than $30 per month in tips (including servers, bartenders, and nail technicians). The DOL has recognized that many tipped workers serve in a "dual jobs" situation, in which they are employed in both a tipped and non-tipped occupation. The tip credit may be applied only against the time spent in the tipped occupation.

**The 80/20 Rule.** Starting in 1988, the DOL took the position that an employer may not take a tip credit for time an employee spends on non-tip producing duties if the time spent on those duties exceeded 20% of the employee's workweek. This rule, known as the 80/20 rule, became a controversial subject that shifted with presidential administrations. It was briefly rescinded in 2009 under President Bush, then reinstated by the Obama administration. It was then again rejected by the Trump DOL, which issued a final rule that was to take effect in 2021, providing that an employer may take a tip credit for any amount of time (without limitation) that an employee in a tipped occupation performs related non-tipped duties contemporaneously with their tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

Immediately following the transition, the Biden DOL delayed the effective date of the Trump-era rule. As discussed in detail in our October 2021 E-Update, the Biden DOL then issued a final rule asserting that work that is part of the tipped occupation is the work that produces tips as well as a non-substantial amount of work that assists the tip-producing work. With regard to the assisting work, DOL reinstated the 80/20 rule with some modification. The final rule provided that if an employee performed work that directly supports tip-producing work either exceeding 20 percent of all of the hours worked during the employee's workweek or (this was new) exceeding 30 continuous


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

minutes, the employee was not performing labor that is part of the tipped occupation, and the employer could not take a tip credit for that time.

**Background of the Case.** Several restaurant associations immediately challenged the 2021 final rule in *Restaurant Law Center v. DOL*. The associations requested a nationwide preliminary injunction to prevent the rule from taking effect while the merits of the case were litigated. The federal district court denied the request for a preliminary injunction, finding that the associations failed to make the necessary showing that they would suffer irreparable harm if the injunction were not granted. But, as discussed in our May 2023 E-update, the Fifth Circuit found that the associations had, in fact, made such a showing and remanded the case to the federal district court to reconsider its denial of the preliminary injunction specifically in line with the Fifth Circuit's ruling. We expected a nationwide preliminary injunction to issue shortly.

But to our surprise, the district court once again refused to enjoin the rule, as discussed in our July 2023 E-Update. It also found that the DOL's interpretation of the FLSA with regard to tipped workers, as set forth in the final rule, was entitled to deference under the *Chevron* doctrine (under which courts would defer to agency interpretation where such interpretation is not unreasonable and where Congress has not specifically addressed the issue in question). It therefore found the rule to be lawful. Once again, the district court's ruling was appealed to the Fifth Circuit.

**The Fifth Circuit's Ruling.** And once again, the Fifth Circuit has reversed the district court, striking down the final rule as contrary to the clear statutory language of the Fair Labor Standards Act and therefore unlawful. Further, according to the Fifth Circuit, by "impos[ing] a line-drawing regime that Congress did not countenance, it is arbitrary and capricious."

Of particular note, following the district court's decision, the U.S. Supreme Court overturned the *Chevron* doctrine in June 2024 (as discussed in our June 28, 2024 E-lert). This means that courts will now independently evaluate agency regulations, like this final rule, to determine if they appropriately effectuate the law. And in so doing, the Fifth Circuit found that "the logical knots into which DOL invites us to tie ourselves further confirms that its interpretation is not the best reading of the statute."

The Fifth Circuit found that, in establishing the rule, the DOL inappropriately focused on individual tasks rather than the occupation itself. Specifically, according to the Fifth Circuit, being engaged in a tipped occupation "cannot be twisted to mean being engaged in duties that directly produce tips, or in duties that directly support such tip-producing duties (but only if those supporting duties have not already made up 20 percent of the work week and have not been occurring for 30 consecutive minutes) and not engaged in duties that do not produce tips." The Fifth Circuit found that the DOL's rule "applies the tip credit in a manner inconsistent with the FLSA's text" and is therefore unlawful.

The Fifth Circuit also went on to address whether the rule was arbitrary and capricious, essentially meaning that it is an interpretation of the law that Congress did not intend. Here, the DOL drew a line that focused on a tipped employee's tip-producing duties and on the amount of time the employee spends on supporting duties. The Fifth Circuit found that line "discounts many core duties of an occupation when those duties do not themselves produce tips," contrary to the FLSA's language. It further noted the rule's "inconsistent treatment of supporting work based only on the work's duration" – a requirement that is found nowhere in the FLSA's text. As the Fifth Circuit


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

notes, the DOL's rule "replaces the Congressionally chosen touchstone of the tip-credit analysis—the occupation—with one of DOL's making—the timesheet."

Based on the fact that the rule fails on two separate grounds, the Fifth Circuit vacated the rule in its entirety. This means that the rule is no longer in effect across the nation.

**What this means for Employers.** As we noted in our June 28, 2024 E-lert, the Supreme Court's overturning of the *Chevron* doctrine will undoubtedly lead to more challenges to agency regulations and a greater willingness by courts to strike down such regulations as unlawful or arbitrary and capricious. Whether or not employers support such regulations, this will lead to greater uncertainty in how to interpret and apply the laws in question. And as for employers of tipped employees, this ruling means that they are no longer tied to the 80/20 rule in utilizing the tip credit for tipped workers.

## Employers - Be VERY CLEAR When Including Arbitration Agreements in Online Applications

Employers must pay particular attention to "the realities of the digital realm" when requiring arbitration agreements as part of an online application process. Thus, in *Marshall v. Georgetown Memorial Hospital*, the U.S. Court of Appeals for the Fourth Circuit refused to compel arbitration of an applicant's failure to hire claim although the arbitration agreement was contained – or in actuality, buried – in the employer's online application materials. (Note that our Top Tip this month discusses other arbitration agreement issues that employers should consider).

**Background of the Case.** When applying for the first time, an applicant was required to scroll through (and was directed to read) a "Pre-Employment Statement" that included an arbitration agreement before reaching a space for an e-signature, with an acknowledgement that "By checking the box above next to the `I ACCEPT' button, I am . . . agreeing to the PRE-EMPLOY[ME]NT STATEMENT which contains the Agreement to Arbitrate[.]" An applicant could not submit an application until they checked the box and provided an e-signature. The applicant in this case went through this process in 2016, and was not hired at that time.

But when she re-applied in 2020, there was a different process. As a returning user of the online application system, the applicant's prior information was populated into the current application, and she could make changes. At the top of the webpage was a "submit" button, but only by scrolling down the page would a returning applicant see the pre-employment statement with the pre-populated acceptance of the arbitration agreement. A returning applicant was not, however, **required** to scroll down the page in order to submit a new application.

**The Court's Ruling.** The Fourth Circuit found that the 2020 process did not provide the applicant with reasonable notice of the arbitration agreement. It was not sufficient that the applicant could have scrolled down to see the arbitration agreement – she was not on notice that the following screens included a contractual arbitration provision. The Fourth Circuit found that a party's duty to read a contract "does not morph into a duty to ferret out contract provisions when they are contained in inconspicuous hyperlinks, or can be found only by scrolling down through additional screens."


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

In addition, the Fourth Circuit rejected the employer's argument that a statement at the top of the webpage - that the application and application process were subject to arbitration under state law - should have put the applicant on notice that an agreement was somewhere in the application materials. As the Fourth Circuit noted, the statement did not refer to the actual terms of the agreement, but rather conveyed that the application was already subject to arbitration by operation of state law.

**Lessons for Employers.** It is important for employers that wish to include arbitration agreements in online applications to ensure that the applicant is aware of the arbitration provision and that they specifically agree to it. Some possible ideas to consider include:

- Providing a clear and conspicuous notice at the top of the application that it contains an arbitration agreement;
- Requiring applicants to scroll through the agreement in order to reach a submission button;
- Requiring applicants to acknowledge by signature specifically that they are aware of and agree to the arbitration agreement; and
- Stating in the agreement that it applies to the current as well as any future applications.

## TAKE NOTE

**Yes, the FMLA Paperwork Matters.** And "[e]mployers must be able to investigate and address plausible allegations that employees have been dishonest in their medical leave claims," according to the U.S. Court of Appeals for the Fourth Circuit.

In *Shipton v. Baltimore Gas and Electric Company*, the employee was approved in August 2017 for intermittent leave under the Family and Medical Leave Act for diabetes-related episodes of hypoglycemia, and the approval was renewed in January 2018. In April 2018, he took off two days due to diabetes-related neuropathy. The employer informed him that the existing FMLA certification covered only hypoglycemia. The employee thought that his certifications covered all diabetes-related conditions and that he could use FMLA leave for neuropathy. The employer also questioned whether the employee could safely operate a commercial vehicle, which was part of his job. In response, he submitted a letter from his doctor, stating that he had not suffered from hypoglycemia since 2017. He then submitted a new medical certification for his neuropathy, which was approved. Nonetheless, the employer terminated his employment based on "conflicting medical documentation." The employee sued, alleging interference with his FMLA rights and retaliation. The federal district court threw out his claims, granting summary judgment for the employer.

On appeal, the Fourth Circuit noted that the employer had an honest belief that the employee did not take FMLA leave for an approved purpose, and the termination decision was based on this belief. As the Fourth Circuit stated, "The record demonstrates conflicting paperwork, and therefore [the employee]'s argument that just because he submitted a later request nullifies the claim of misconduct is incorrect." The Fourth Circuit went on to emphasize that employers can investigate and terminate employees for their dishonest use of medical leave, and such action does not constitute interference or retaliation under the FMLA. The Fourth Circuit reiterated the principle that it "do[es] not sit as a kind of super-personnel department weighing the prudence of employment decisions," but rather its role is to "determine whether the employer's reason was legitimate and nondiscriminatory at the


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

time and not whether the reason was wise, fair, or *even correct*." The fact that the employee can now explain the discrepancies does not impact the employer's reasoning at the time of termination.

This case provides reassurance to employers that they can – and should – take action when it appears that an employee is not being honest about their use of medical leave. Of course, any investigation should be appropriately thorough, and any decision should be legitimate and reasonable – and consistent with how other employees are treated for similar misconduct.

**Pay Attention to the EEOC's Emails about Uploads to the Portal!** In last month's E-Update, we discussed a case in which the EEOC's upload of the dismissal and notice of right to sue, without more, was not sufficient notice to the charging party or her attorney, which meant that the 90-day period for filing suit did not begin to run until later. We suggested that wise employers may wish to confirm that the EEOC has emailed notice of the upload to the employee and employee's attorney – and now a case from the U.S. Court of Appeals for the Eighth Circuit reinforces that point.

In *McDonald v. St. Louis University*, in response to the employee's request for a right-to-sue letter, the EEOC sent an email to the employee's attorney stating that "a new document was added to" the portal, along with a link to the portal. The new document was the requested right-to-sue letter and dismissal of the charge. Although the lawyer read the email, as well as the reminder email a week later, he did not access the portal because he lost the password. Almost six weeks later, he emailed the EEOC to request the letter, which was subsequently emailed to him. The employee then filed suit 137 days after the first email (which was 87 days after the final emailed letter). The federal district court threw out the case for being untimely filed outside the 90-day filing period, and the employee appealed, arguing both that her filing was timely and that even if it was not, the 90-day period should be equitably tolled (i.e. in effect, excused).

The Eighth Circuit ruled that the employee, through her attorney, received sufficient notice of her right to sue through the first email, which told them to check the EEOC portal. It also found no reason for equitable tolling, noting that the attorney made little effort to access the portal, or even inform the EEOC that he could not do so (and by the way, it is possible to reset the password – there is a "Forgot Password?" button on the log-in page). Moreover, when the EEOC finally emailed the actual notice of right to sue, there was still 41 days left in the 90-day filing period.

So this case emphasizes the need for employers and employees (and their attorneys) alike to pay close attention to EEOC emails about new information/documentation in the portal. And to learn how to use the "Forget Password?" button.

**Remember that It's Easier to Prove Retaliation than Harassment.** As most employers know, Title VII prohibits not only discrimination or harassment based on race, ethnicity, religion or gender, but also retaliation for opposing any unlawful practice (e.g. complaining about discrimination or harassment). But the standards for proving each are different, and a recent case from the U.S. Court of Appeals for the First Circuit reminds employers that a lower standard of proof applies to retaliation cases.

In *Stratton v. Bentley University*, the employee asserted various discrimination claims as well as a retaliation claim. The federal district court granted summary judgment for the employer, finding that, even assuming all facts in the employee's favor, the employee's claims had no merit as a matter of


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

law. On appeal, the First Circuit affirmed the district court's decision, but took the opportunity to clarify the standard that applies to retaliation claims.

In order to succeed on a retaliation claim, a plaintiff must show that (1) they engaged in protected activity; (2) they suffered some materially adverse action; and (3) the adverse action was causally linked to their protected activity. Previously, in order to establish a materially adverse action, a plaintiff was required to show conduct that was so "severe or pervasive that it materially altered the conditions of her employment." However, in *Burlington N. & Santa Fe Ry. Co. v. White*, the U.S. Supreme Court set forth the appropriate standard for materially adverse actions in the context of retaliation claims, finding that they are not limited to actions affecting the terms and conditions of employment. Rather, it covers actions that "could well dissuade a reasonable worker from making or supporting a charge of discrimination" – a much lower standard. And the First Circuit clarified that its prior, higher standard was no longer appropriate, and has been replaced with *Burlington-Northern's* "might-have-dissuaded" standard.

In our practice, we often see cases in which an employee is unable to establish that they have been subjected to unlawful discrimination or harassment, but they are able to prove retaliation. So employers must be careful to ensure that the treatment of employees who have complained about discrimination or harassment is legitimate and consistent with the treatment of non-complaining employees.

**A Religious Accommodation Claim May Be Based, in Part, on Non-Religious Terms.** In the context of religious exemptions to COVID vaccine mandates, several U.S. Courts of Appeals have addressed the standard by which a claim based on employee's mingled personal/religious belief should be evaluated under Title VII. The latest of these rulings comes from the U.S. Court of Appeals for the Seventh Circuit.

Title VII prohibits discrimination on the basis of religion, among other things, and requires employers to provide reasonable accommodations to resolve conflicts between an employee's religious beliefs or practices and workplace policies or requirements, absent an undue hardship. In companion cases *Passarella v. Aspirus, Inc.* and *Bube v. Aspirus Hospital, Inc.*, employees were denied their requests for exemptions from the employer's vaccine mandate because the employer determined that their concerns were more rooted in safety than religion. They sued for failure to provide a reasonable accommodation, and their claims were dismissed by the federal district courts, one of which observed that "the use of religious vocabulary does not elevate a personal medical judgment to a matter of protected religion."

On appeal, however, the Seventh Circuit reversed the district courts' dismissals. In so doing, it referenced the Equal Employment Opportunity Commission's COVID guidance as well as other precedent that "a religious objection to a workplace requirement may incorporate both religious and secular reasons." With this ruling, it joined the Eighth and Sixth Circuits.

Notably, these decisions addressed the sufficiency of the employees' claims at the beginning of the case, before discovery occurs. In order to survive a motion to dismiss, a plaintiff's complaint must contain enough factual assertions, if assumed to be true, that will support a claim for relief under the applicable law (in this case, Title VII). As the Seventh Circuit observed, as long as an accommodation request can be read "as plausibly based in part on an aspect of the plaintiff-


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

employee's religious belief or practice, that is enough to survive a motion to dismiss." Once discovery has concluded, however, the employer may be able to attack the sincerity of the professed religious belief, at which point the district court's statement above may become more relevant.

**NLRB Will No Longer Accept Disputed "Consent Orders."** In the latest u-turn, the National Labor Relations Board states that it will no longer accept "consent orders" where an Administrative Law Judge resolves an unfair labor practice case on terms proposed by the Respondent (typically an employer) but objected to by both the Charging Party (typically a union) and the NLRB's General Counsel. (Not all parties must consent to a "consent order," unlike a settlement agreement, which does require all-party consent).

In a 1971 case, the Board accepted a consent order over the objection of the General Counsel and charging party, finding that such consent order would promote the purposes and policies of the Act and offered a "full remedy" for the violation. But in subsequent cases, the Board approved consent orders that only "substantially remedied" the unfair labor practices. In 2016, however, the Obama Board issued a decision, *Postal Service*, in which it returned to the full-remedy consent order standard. Only a year later, the Trump Board reversed course in *UMPC*, holding that consent orders should be approved if deemed reasonable by the ALJ and the Board.

But now, in *Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras*, the Biden Board states that it will no longer accept consent orders to which both the Charging Party and the General Counsel object, even if a full-remedy is proposed. The Board contends that the practice "does not facilitate a truly mutual resolution of labor disputes." Rather, it "seems contrary to the Board's Rules and Regulations, creates administrative difficulties and inconveniences, and tends to interfere with the prosecutorial authority of the General Counsel."

This is an unfortunate development for employers, who previously may have been able to resolve matters on reasonable grounds, even if the General Counsel and/or union were not being realistic. This will likely result in fewer resolutions and more onerous settlement agreements – at least until there is another change in administration and another reversal of position.

**Maryland's Wage Laws Do Not Apply to Workers Outside the State.** The U.S. Court of Appeals for the Fourth Circuit has confirmed that only employees performing at least some work in Maryland are covered by Maryland's wage laws.

The application of a law outside of its jurisdiction is known as extraterritoriality, and there is a presumption against extraterritoriality. In *Poudel v. Mid Atlantic Professionals, Inc. dba SSI*, two employees worked for a Maryland-based company as interpreters in Afghanistan. After their employment ended, they brought claims for unpaid wages under Maryland's Wage Payment and Collection Law (MWPCL) and Wage and Hour Law (MWHL). The federal district court dismissed their claims, and they appealed to the Fourth Circuit.

The Fourth Circuit upheld the dismissal of their claims. It confirmed that the presumption against extraterritorial application of Maryland law applies to the wage laws. Although the Fourth Circuit found that the company was an employer within the meaning of the MWPCL, and that there is a strong public policy to ensure the payment of wages lawfully due, it also found that the employees were required to perform at least some work in the state in order for the wage laws to apply. The Fourth Circuit rejected the argument that working for a Maryland company that performed payroll in


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

the state was sufficient to trigger coverage of the wage laws. It also rejected the argument that a choice of Maryland law provision in the employees' employment agreements is sufficient to defeat the presumption against extraterritoriality, noting that the issue of what law governs the agreement to be separate from the issue of the applicability of state wage laws.

Although this case is helpful in establishing that the wage laws do not apply to workers providing services entirely outside Maryland, there may be a closer question with regard to remote employees who report directly to a Maryland office and whose services are not so clearly tied to another jurisdiction. This is an issue that arises under Maryland unemployment insurance law, as well as under the forthcoming paid Family and Medical Leave Insurance (FAMLI) program, as further detailed in our May 31, 2024 E-Update.

## NEWS AND EVENTS

**Honor –** We are delighted to announce that, for the 18th consecutive year, Shawe Rosenthal LLP has been ranked in the top tier of Maryland labor and employment law firms by *Chambers USA: America's Leading Lawyers for Business* – one of only two firms in the state to receive this prestigious recognition.

In addition to the firm's ranking, eight Shawe Rosenthal partners were honored as leading individual labor and employment law practitioners – the most (by far) of any firm practicing labor and employment law in Maryland. They are: Managing Partner Gary L. Simpler, as well as Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Mark J. Swerdlin, Parker E. Thoeni, and Of Counsel, Teresa D. Teare, and Elizabeth Torphy-Donzella.

**Honor –** We are delighted to announce that J. Michael McGuire has been named the Litigation – Labor and Employment "Lawyer of the Year" in the Baltimore area by *The Best Lawyers in America*© 2025. Ten other attorneys were also recognized by *Best Lawyers*: Bruce S. Harrison, Eric Hemmendinger, Darryl G. McCallum, Fiona W. Ong, Stephen D. Shawe, Gary L. Simpler, Mark J. Swerdlin, Parker E. Thoeni, Teresa D. Teare, and Elizabeth Torphy-Donzella. In addition, two other attorneys were recognized by *The Best Lawyers in America: Ones to Watch© 2025:* Veronica Yu Welsh and Courtney B. Amelung. Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation.

## TOP TIP: Some Lessons for Employers on Arbitration Agreements

Many employers have chosen to require employees to sign arbitration agreements, in which the employer and employee agree to arbitrate most employment disputes. As we discussed in our blog post on arbitration agreement issues, such a choice may or may not be optimal for a particular employer. But for those employers who wish to impose such a requirement, a recent court decision offers employers guidance on potential concerns that may arise in drafting and presenting employee arbitration agreements. (Note that we discuss specific issues with arbitration agreements in online applications elsewhere in this E-Update).

**Make Sure the Provisions Are Mutual**. In *Ronderos v. USF Reddaway, Inc.*, the U.S. Court of Appeals for the Ninth Circuit upheld a lower court's decision invalidating the employee's arbitration


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

agreement. The Ninth Circuit found that the agreement was both procedurally and substantively unconscionable – meaning under applicable state law that one of the parties lacked meaningful choice in deciding whether to agree and the contract contained terms unreasonably favorable to the other party. Among the problematic provisions included the following:

- The filing provision was one-sided, in that it imposed a notice requirement on the employee, but not the employer, by which the employee must send the employer notice by using a particular form in a particular manner.
- The filing provision also set a one-year statute of limitations for filing a claim that applied to the employee, but not the employer. The court also found issue with the fact that the one-year period was significantly shorter than the amount of time that employees typically have to bring employment-related cases. In addition, it deprived employees of the benefit of the continuing violations doctrine, in which employees can rely on related unlawful conduct that occurs outside the limitations period. And finally, the one-year period began to run from the date that the claim arose, rather than when the employee knew or reasonably should have known about the claim.
- The agreement contained a carve-out for the employer – but not the employee – to go to court to obtain a preliminary injunction. The court shot down the employer's arguments that the carve-out was only to prevent the employee from violating a confidentiality agreement or disclosing trade secrets (the carve-out identified those as examples, but did not limit its scope to those violations) and that employees do not require emergency injunctive relief (as many employment statutes authorize courts to grant employees such relief).

We suggest that employers make any such requirements mutual, to the extent possible, so as to avoid the contention that the agreement is unfair. As the *Ronderos* court noted, "not all one-sided terms are unconscionable, but the party seeking to enforce a one-sided term must provide at least some reasonable justification for such one-sidedness based on business realities."

**Think About How the Agreement Is Presented.** In the *Ronderos* case, the court also found several procedural issues with the arbitration agreement, including the following:

- The employee was required to sign the pre-printed arbitration agreement immediately as part of the job application process, without any chance to negotiate the agreement (aka a "contract of adhesion"). Although not illegal in and of itself, courts will scrutinize such contracts more closely to ensure overall fairness. But employers should consider whether such contracts are truly necessary for rank-and-file employees without bargaining power and without the education or experience to fully understand the agreement. They might also consider giving employees time to consult with an attorney regarding the agreement – even if most employees would not bother to do so.
- The agreement's cost-splitting provision was confusing and an unlawful surprise. The agreement stated that the costs of arbitration and arbitrator fees would be split equally – but a California law prohibits employers from requiring employees to pay such costs in an adhesion contract. While the agreement also contained a generic statement that the provision would not apply where "statutory provisions" required otherwise, there was no way for the employee to know that California law prohibited the 50-50 split – or that California law even


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

applied to his contract, since there was no choice of law provision specific to the cost-splitting provision. As we noted in our blog post, employers should strongly consider paying the majority of any costs and fees.

## RECENT BLOG POSTS

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

- Federal Court Finds FTC Non-Compete Rule Unlawful. by Parker E. Thoeni, August 28, 2024
- No, You Can't Fire Employees for Threatening to Strike! by Chad Horton, August 20, 2024
- Just Because It Worked Before Doesn't Make It a Reasonable Accommodation Now… by Fiona Ong, August 16, 2024
- But The Applicant Didn't Tell Me They Were Disabled… by Fiona Ong, August 9, 2024
- Extraordinary Workplace Misconduct: With this drill, I thee wed…? by Fiona Ong, August 2, 2024


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