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News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - July 2017

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By: Frank J. Del Barto

Practices: Employment, Labor & Benefits

SAVE THE DATE: SEPTEMBER 28, 2017 - ANNUAL SEMINAR

On Thursday, September 28, 2017, the Employment, Labor and Benefits group will hold its annual seminar at the Doubletree Hotel, 75 West Algonquin Road, Arlington Heights, Illinois. Registration begins at 8:00 a.m. The program, which will run from 8:30 a.m. to 11:30 a.m., has been submitted for 2.5 hours HRCI and MCLE general recertification credit.

The program will include panel discussions on the Trump Administration's impact on various employment and employee benefit laws, the significant increase in employee fraud and embezzlement, and protecting your company's confidential information or trade secrets from improper disclosure or theft.

Please Save the Date in your calendar and look for additional information.

THE SEVENTH CIRCUIT PROVIDES GUIDANCE ON INVOLVING AN INFREQUENTLY LITIGATED TYPE OF EMPLOYER PRACTICE

By Chaelin Shin (Summer Associate)

It is a struggle for employers to go through various discrimination complaints brought against them by employees, especially when the complaints involve an infrequently litigated category under Title VII. The *AutoZone* case provides guidelines on how to deal with those cases.

Recently, the Seventh Circuit granted summary judgment for AutoZone in a Title VII case, where the plaintiff, an African American employee at AutoZone, alleged to have been discriminated against. One of the stores that he was stationed in was located in a neighborhood where the population consisted largely of Hispanics. The plaintiff sued AutoZone alleging that he was transferred out of that store in an effort to make it a "predominately Hispanic" store.

The governing provision in this case was subsection (2) of 42 U.S.C. § 2000e-2(a), which specifies an employment practice to be unlawful if an employer "limit[s], segregate[s], or classif[ies]" employees by "race, color, religion, sex, or national origin" "in any way which would deprive or *tend to deprive* any individual of employment opportunities or otherwise adversely affect" the employee's employment. Title VII cases are not often litigated under this subsection, but rather under subsection (1) ("it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge" or "to discriminate against any individual …

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because of … race, color, religion, sex, or national origin."). For those who are unfamiliar with subsection (2), it might be difficult to discern the difference between the two subsections. The Seventh Circuit, in *AutoZone*, provided guidance as to how the two subsections could be different.

First, the Court pointed out a major difference between the subsections, which is that an employer can violate the second subsection, but not the first, if its action "*tend[s]* to deprive any individual of employment opportunities." This means that an employer can still be liable even if the action it engaged in does not specifically entail an "adverse employment action," as long as it had some *tendency* to deprive an employee of any employment opportunities.

However, the Court emphasized an employee must provide evidence that the employer's action in question had at least some detrimental effect on her working conditions, such as demotion, or reduction in pay or benefits. Therefore, it must be noted that a "purely lateral transfer" will not be deemed to have even a *tendency* of deprivation and consequently will not violate subsection (2). Because the working conditions of the plaintiff in *AutoZone* was virtually unchanged after his transfer, the Court concluded that a reasonable jury could not have found that AutoZone is liable under Title VII due to lack of evidence.

As a result, employers should understand that they will not be completely off the hook simply because they did not engage in any "adverse employment action." The scope of subsection (2) is broad so as to include even a *tendency* to deprive employment opportunities as violation of Title VII. In order to refrain from falling within the ambit of subsection (2), employers should be wary of their actions that could create negative impacts on an employee's working conditions.

AN INCREASE IN THE SALARY LEVEL - STILL A LIKELY POSSIBILITY
By Frank Del Barto

On June 27, 2017, the U.S. Department of Labor ("DOL") sent a Request for Information ("RFI") related to the overtime rule to the Office of Management and Budget for its review. When published, the RFI will provide the public an opportunity to comment. As a result of this RFI, there is still a very good chance that the current salary level for an exempt employee ($23,660 per year) will increase in the near future.

Recall that the DOL published a Notice of Proposed Rulemaking in July 2015, and invited interested parties to submit comments. The DOL received and reviewed over 270,000 comments before issuing a Final Rule that was to become effective on December 1, 2016. As we discussed in several client webinars, the Final Rule increased the salary level for the executive, administrative and professional employee exemption from $455 per week ($23,660 per year) to $913 per week ($47,476 per year), increased the salary level for the highly compensated employee exemption from $100,000 per year to $134,004 per year, and established a mechanism that would automatically increase these salary levels every three years, beginning on January 1, 2020.

In order to prepare for the December 1, 2016 compliance date, many clients spent a significant amount of time reviewing all employee salary levels and job duties. Then, on November 22, 2016, a Texas court enjoined the implementation of the Final Rule. As this litigation proceeded, the DOL asked for several extensions to file briefs in the case in order to better understand the new Secretary of Labor's (Alexander Acosta) position on the

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salary-level increase requirement. On June 7, 2017, Secretary Acosta testified before an appropriations committee that he agrees that the salary level should be increased, but he disagreed with how the Obama administration implemented the change. In short, the salary level will increase in the near future.

Once the RFI is published, because it will likely cover other wage-related topics, we encourage all clients to review the RFI, and consider commenting on those areas that impact their business and their ability to attract and retain employees while competing in the global economy. Along the way, the Firm will continue to provide guidance for planning purposes. Please continue to look for additional articles and webinars on this topic as information becomes available.

SUPREME COURT TO DECIDE FATE OF CLASS ACTION WAIVERS DURING OCTOBER, 2017 TERM
By David J. Stein

You, the Human Resources Director, just got called down the hallway to the President's office. You walk down the hallway. "Shut the door," he says. "We were just served with a class action complaint claiming that we have misclassified all of our mid-level plant managers across the country as exempt employees."

The Complaint was filed by a single, disgruntled employee in your Central Illinois plant, but asks for a certification of all similarly situated individuals across the nation. The President tells you to call Masuda Funai and ask them what the company's exposure is based on the filing of a class action complaint.

Luckily, the employment agreements for all mid-level plant managers contain an arbitration clause stating that any disputes must be resolved through binding arbitration in Chicago, Illinois. The arbitration clause also contains a provision whereby the employee has waived his right to bring a class action against the company, and has also waived his right to participate in any class actions against the company. You think you are safe from the worst, a national class action case under the Fair Labor Standards Act. The employee should only be able to proceed on an individual claim, in arbitration, significantly reducing the company's monetary exposure. Not so fast, the lawyers say. It is unclear whether class action waiver provisions in arbitration clauses are enforceable. Luckily, the United States Supreme Court will provide some clarity during its October, 2017 term this fall.

The dispute over the enforceability of class action waiver provisions began several years ago, when the National Labor Relations Board ("NLRB") declared such provisions unenforceable in two cases, called, *D.R. Horton and Murphy Oil*. The NLRB ruled that the class action waivers are unenforceable because such provisions violate an employee's right to protected, concerted activity (i.e. organizing with other employees). The Fifth Circuit Court of Appeals, based in Texas, reversed the NLRB's ruling in both cases, holding that despite the protections of the NLRB, the Federal Arbitration Act ("FAA") permits employers and employees to enter into enforceable agreements containing an arbitration provision with a class action waiver. Several other courts across the country agreed with the Fifth Circuit.

In May, 2016, the Chicago based Seventh Circuit issued its opinion in the Lewis v. Epic Systems case, where it disagreed with the *D.R. Horton and Murphy Oil* decisions. The Seventh Circuit sided with the NLRB, declaring that class action waiver provisions were unenforceable. Shortly thereafter, the California based Ninth Circuit agreed with the Seventh Circuit in *Ernst & Young v. Morris*.

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Luckily for employers, the Supreme Court agreed to resolve the dispute in January, 2017. The Court declined to hear argument in the case during its Spring, 2017 term because of the potential for a 4-4 tie vote. Now, with Justice Neil Gorsuch providing the ninth vote, the Court is set to decide the case this fall. Given the makeup of the Supreme Court with Justice Gorsuch now on the bench, look for employers to score a victory with the Supreme Court rejecting the Seventh and Ninth Circuit, and accepting the Fifth Circuit's view permitting enforcement of class waiver provisions. Regardless of the outcome of the case, this important issue is one that all employers must be aware of heading into the fall of 2017.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.

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