FIRST CHAIR

UNITING LEGAL COMMUNITIES TO RECOGNIZE EXCELLENCE

Developments in Wage and Hour Law

The U.S. Department of Labor Issues 19 Opinion Letters

- In June 2017, Secretary of Labor Alexander Acosta announced that the DOL would resume issuing opinion letters
- In January 2018, the DOL started doing so and reinstated seventeen George W. Bush Era opinion letters which were issued in January 2009, but later withdrawn by the Obama Administration
- The reinstated opinion letters cover a wide variety of topics including salary deductions, on-call time, bonuses, and employee classifications
- To date, the DOL has issued only two more opinion letters:
  - Compensability of frequent rest breaks required by a serious health condition
  - Compensability of travel time

New Overtime Rule Anticipated in 2019

- In August 2017, the Obama overtime rule that would have doubled the minimum salary level for overtime exemptions under the FLSA was invalidated
- The court did not rule that an increase in the salary-level threshold was outright improper, but only that the revised rule went too far
- Following the court's ruling, the DOL accepted comments on the FLSA overtime regulations, including:
  - Whether updating the salary level for inflation would be an appropriate basis for setting the salary level
  - Whether a test for exemption that relies solely on the duties performed by an employee would be preferable to a salary test
- A Notice of Proposed Rulemaking on a new salary level is anticipated in early 2019

The DOL Plans to Clarify the Regular Rate of Pay Regulations

- The DOL announced that it intends to amend the FLSA regulations pertaining to regular rate of pay
- Under the FLSA, employers must pay employees at least one-and-one-half times their "regular rate of pay" for hours worked in excess of 40 hours per workweek
- The DOL agenda does not make clear what changes the agency intends to make, but the rules currently address how bonuses, deductions, and other payments factor into the calculation of an employee's regular rate of pay
- A Notice of Proposed Rulemaking is scheduled for September 2018

U.S. Supreme Court Rejects Narrow Construction of FLSA Exemptions: *Encino Motocars, LLC v. Navarro*

- In April 2018, the U.S. Supreme Court ruled that auto service providers at car dealerships are exempt from overtime under a unique FLSA exemption for " "salesm[e]n . . . primarily engaged in . . . servicing automobiles."
- The Supreme Court decision has broad significance because the opinion rejected the long-standing principle that FLSA exemptions should be construed narrowly
- Instead, FLSA exemptions should be given "a fair reading"
- Employers still have the burden of proving that the employee is exempt, but the standard to do so is less stringent

New Payroll Audit Independent Determination (P.A.I.D) Program

- In March 2018, the DOL Wage and Hour Division announced a new pilot program through which employers may settle potential overtime and minimum wage claims under the FLSA
- Under P.A.I.D, employers can voluntarily disclose wage and hour violations to the DOL, and the DOL will supervise a settlement of any monetary claims arising from such violations with any affected employees
- The program is purely voluntary
  - Employers volunteer to self-disclose
  - Employees may choose to accept the back pay being offered by the employer as full settlement of the potential claim, or decline the offer and file suit
- Under the DOL-supervised settlement, employers will not have to pay liquidated damages or civil monetary penalties

California Supreme Court Adopts New Independent Contractor Test: *Dynamex Operations West, Inc. v. Superior Court*

- In April 2018, the California Supreme Court upended the prevailing understanding of the independent contractor-employee distinction under California law
- The Court declined to apply the multi-factor *Borello* test that had been used since 1989 and instead adopted the ABC test
- The ABC test requires employers to show that a worker:
  - Is free from its control and direction;
  - Performs work that is outside the usual course of the hiring entity's business; and
  - Is engaged in an independently established trade, occupation or business of the same nature as the work performed by the hiring entity
- An employer must meet each of the three elements for an independent contractor classification to hold up for purposes of the California wage orders
- This decision is a significant blow to companies in California that rely heavily on independent contractors

New DOL Guidelines for Internships

- In January 2018, the DOL announced that it would replace the six-factor test it had used for years to determine whether interns are employees for purposes of the FLSA
- Instead, it decided to adopt the primary beneficiary test that has been favored by numerous Courts of Appeal
- The primary beneficiary test examines the "economic reality" of the intern-employer relationship
- In connection with its change in enforcement practice, the DOL issued a Fact Sheet, which lists seven factors for determining if an intern is an employee
  - The factors address compensation, training, academic credit, the extent to which the internship is tied to the intern's formal education, accommodates the intern's academic commitments, and provides significant educational benefits

New NLRB Guidance on Employee Handbooks

- During the Obama Administration years, the NLRB focused on limiting company attempts to place boundaries on employee communications in union and non-union shops
- During the current administration, the Board is rolling back this approach
- The Board overruled the prior standard that if a the rule does not explicitly restrict protected activity, it will still violate the NLRA if employees would reasonably construe the language to prohibit Section 7 activity
- Established a new standard that focused on the balance between a rule's impact on Section 7 rights and an employer's right to maintain discipline and productivity
  - Ambiguities in rules are no longer interpreted against the drafter
  - Facially neutral rules should not be interpreted as banning all activity that could conceivably be included
  - Created three categories of categories of rules: (1) rules that are generally lawful to maintain; (2) rules warranting individual scrutiny; and (3) rules unlawful to maintain

QUESTIONS?

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