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The Employment Law
AUTHORITY

Today's Hot Topics in Labor & Employment Law — July/August 2010

This Issue

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U.S. Supreme Court Tackles Arbitration Case

Finds Question Of Enforceability Must Be Decided By Arbitrator

On June 21, with Justice Antonin Scalia writing for a 5-4 majority, the U.S. Supreme Court issued an important decision for employers that are utilizing or are considering adopting arbitration agreements. The Court addressed the enforceability of an arbitration agreement (included as part of an employment contract), which stated that the arbitrator determines the enforceability of the contract. According to the majority, because the employee in this case challenged his employment contract as a whole, rather than specifically challenging the provision in the agreement granting the arbitrator the authority to determine enforceability (the "delegation provision"), the agreement to arbitrate must be evaluated by the arbitrator, not a court. *Rent-A-Center, West, Inc. v. Jackson*, No. 09–497, U.S. Supreme Court (June 21, 2010).

Factual Background

Antonio Jackson was employed by Rent-A-Center, West, Inc. At the time of hiring, he signed an agreement, entitled "Mutual Agreement to Arbitrate Claims," as a condition of his employment. A section entitled "Claims Covered By The Agreement" stated that all "past, present or future" disputes arising out of Jackson's employment with Rent-A-Center must be submitted to arbitration. Another section, designated

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And Portland Makes 40!

Ogletree Deakins Opens Office In Pacific Northwest

Continuing its aggressive growth strategy, Ogletree Deakins opened its newest office in Portland, Oregon in July. This is the fifth office the firm has opened this year (the other new offices are in Las Vegas, Denver, Orange County and Minneapolis), giving Ogletree Deakins 40 offices nationwide.

This represents the firm's first foray into the Pacific Northwest. According to Managing Shareholder Kim Ebert, "We have long felt the need to be in this region of the country, but had to identify the right lawyers. The firm now can truly provide our clients with first class service coast to coast."

The "right lawyers" are David Symes and Leah Livey, both of whom join Ogletree Deakins as shareholders. Symes, formerly with Perkins Coie in Portland, represents employers in litigation and arbitration across a variety of industries. He has successfully handled complex, multiple plaintiff, and class action litigation and also has substantial experience in enforcing and defending noncompetition agreements.

Lively joins Ogletree Deakins from the Portland office of Lane Powell, where she chaired the firm's Labor and Employment group. In her practice, Lively defends employers from claims of harassment, discrimination, retaliation, wrongful discharge, and wage and hour violations. She has extensive litigation experience having successfully tried more than 40 jury trials in multiple states and jurisdictions.

Both lawyers have been listed in *Chambers USA*'s "America's Leading Lawyers for Business" in the Labor & Employment category the last three years. "We are extremely fortunate to have two accomplished attorneys as part of our firm and leading our efforts in the Pacific Northwest," Ebert said. ■

EXECUTIVE ORDER 13496 (EMPLOYEE POSTING RULE) UPDATE

Answers To Employers' Common Questions

Executive Order 13496's employee notice posting requirement became effective June 21, 2010. While no clause implementing the requirement has been finalized by the Federal Acquisition Regulation (FAR) Councils, an interim clause has been issued. Below are common questions regarding this new requirement for federal contractors and subcontractors.

Q: Where do I have to physically post the notice in my building?

A: When and if you receive a contract or subcontract containing FAR 52.222-99 or -40, and you determine that you are covered by FAR's provisions, the notice must be posted where employees covered by the National Labor Relations Act (NLRA) "engage in contract-related activity." Employees not covered by the NLRA include agricultural laborers, domestic workers, independent contractors, supervisors, and employees who work for employers subject to the Railway Labor Act (RLA).

Whether or not you are currently "non-union" does not matter in determining whether the employee notice must be posted; the trigger for posting is having a covered federal contract or subcontract.

Q: Must I post the employee notice electronically?

A: The final rule requires that you physically post the employee notice *and* post it electronically if you "customarily" electronically post notices regarding the terms and conditions of employment (*e.g.*, your employee handbook is online, or you customarily correspond with employees regarding work issues via email). If you do post the notice electronically, you must post a "prominent" link to the employee notice contained on the Office of Labor-Management Standards' website.

Q: May I post the notice electronically instead of posting it physically in my workplace?

A: No. Electronic posting cannot be used as a substitute for physical posting.

Q: Are there any exemptions to having to post the notice?

A: Yes. The posting requirements do not apply to: (1) federal contracts entered into before June 21; (2) contracts entered into after June 21 that do not include FAR 52.222-99 or -40; (3) contracts below $100,000 or subcontracts below $10,000 which are not necessary to the performance of the prime contract; (4) contracts/subcontracts for work exclusively performed outside of the United States; (5) grants or loans (such as Medicare and Medicaid) that constitute "federal financial assistance"; (6) states or political subdivisions; and (7) companies subject to the RLA. Other exemptions also may apply.

For additional information, visit our website at www.ogletreedeakins.com/publications. ■

Ogletree Deakins

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VETS-100 REPORTING MAY COST CONTRACTORS

Court Finds Liability Under False Claims Act

A federal appellate court recently ruled that a government contractor could be held liable under the False Claims Act (FCA) for knowingly or recklessly failing to comply with its VETS-100 reporting obligations. The practical significance of this decision is that if employees of government contractors submit inaccurate VETS-100 reports or neglect to file the reports altogether, liability may exist under the FCA. *Kirk v. Schindler Elevator Corp.,* No. 09-1678-cv, Second Circuit Court of Appeals (April 6, 2010).

Daniel Kirk, a Vietnam veteran, worked as a management-level employee for a predecessor of Schindler Elevator Corp. When Schindler merged with Kirk's employer, the reorganization left Kirk in a non-managerial position, from which he promptly resigned. Kirk then filed a lawsuit in federal court, claiming that Schindler Elevator defrauded the government by failing to comply with the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA). VEVRAA requires that federal contractors submit VETS-100 reports, which provide information on the number of veterans employed by the contractor.

The Second Circuit Court of Appeals found that the facts as alleged by Kirk showed that Schindler Elevator had no mechanism in place to identify veterans covered by VEVRAA. Thus, the company had knowingly supplied a false record, the court held, because it had nothing upon which to base the information in its VETS-100 reports. As a result, the court reinstated Kirk's lawsuit . For a full analysis of this case, visit www.ogletreedeakins.com/publications. ■

Ogletree Deakins State Office Round-Up

ALABAMA

The Eleventh Circuit Court of Appeals recently dismissed a lawsuit brought by a former manager for the Tuscaloosa Housing Authority who claimed that she was fired in retaliation for filing a charge of race discrimination. The court found that the manager failed to show that the performance-related reasons cited by her employer were false. *Tiggs-Vaughn v. Tuscaloosa Housing Authority*, No. 09-15485 (July 2, 2010).

CALIFORNIA

The Ninth Circuit Court of Appeals recently held that a group of drivers may pursue their state law wage claims against EGL Inc. According to the court, the provision in agreements signed by the workers stating that Texas law applies is unenforceable because the statutory claims "do not arise out of contract, involve the interpretation of any contract claim, or otherwise require there to be a contract." *Narayan v. EGL Inc.*, No. 07-16487 (July 13, 2010).

COLORADO*

Governor Bill Ritter has signed two new laws (HB 1284 and SB 109) that clarify the regulation of medical marijuana. Although the primary focus of the laws is the curtailment of Colorado's rapidly expanding medical marijuana industry, there are provisions that will assist employers in setting firm limits on employees' use of medical marijuana.

FLORIDA

The Eleventh Circuit Court of Appeals recently rejected a lawsuit brought by an employee who claimed that he was fired in retaliation for his willingness to serve as a witness in an internal bias complaint. The court found that merely being listed as a witness does not constitute protected "opposition" under Title VII. *Thampi v. Manatee County Bd. of Comm'rs*, No. 09-16139 (June 30, 2010).

INDIANA*

The Seventh Circuit Court of Appeals recently held that an Indiana health care provider's policy of complying with patients' wishes to be treated only by white health care workers can create a racially hostile work environment for non-white employees. *Chaney v. Plainfield Healthcare Center*, No. 09-3661 (July 20, 2010).

MINNESOTA*

The Minnesota Supreme Court recently ruled that the state whistleblower statute does not contain a job duties exception that bars employees who report illegal conduct or suspected illegal conduct as part of their job duties from bringing a claim under the statute. The employee's responsibilities are relevant, however, in determining whether the employee made the report in "good faith" for the purpose of exposing illegal conduct. *Kidwell v. Sybaritic, Inc.*, Nos. A07-584, A07-788 (June 24, 2010).

NEVADA*

The Occupational Safety and Health Administration (OSHA) has opened its first office in the state of Nevada. According to OSHA, Nevada's state OSHA plan has not lived up to the federal government's expectations. OSHA is pressuring state plan programs such as Nevada's to "ramp up" their enforcement efforts.

NEW JERSEY*

On July 6, the New Jersey Department of Labor (NJDOL) issued proposed rule N.J.A.C. 12:56-5.8 concerning the use of time clocks and rounding practices by employers. Noting the confusion caused by the discrepancy between the state rules (which require payment for "all hours worked") and the federal rules (which permit rounding), the NJDOL's proposal simply calls for a verbatim adoption by the state of the federal rules on this issue.

NORTH CAROLINA

The Fourth Circuit Court of Appeals recently held that an employer must pay severance benefits to its former president and CEO. The court rejected the company's argument, based on the "after-acquired evidence" defense, that it would have fired the executive for cause under his employment agreement. *Rinaldi v. CCX Inc.*, No. 09-1622 (July 16, 2010).

OHIO*

Effective July 2, Ohio employers with 50 or more employees are required to provide two weeks of unpaid leave for an employee who is the spouse, parent or a person who has or had custody of a member of the uniformed services when that member is deployed or injured. Under the Ohio Military Family Leave Act, the requirement for such leave applies without regard to whether the employer has 50 employees within 75 miles of the worksite.

SOUTH CAROLINA*

The South Carolina Illegal Immigration Reform Act went into effect for *all* South Carolina employers on July 1, 2010. The Act prohibits employers in South Carolina from employing unauthorized aliens and establishes additional steps that smaller employers must now take to verify the work status of new hires.

TEXAS

In a case of first impression, the Texas Supreme Court recently held that the Texas Commission on Human Rights Act (TCHRA) sets the exclusive remedy for claims arising out of alleged sexual harassment in the workplace. "Where the gravamen of a plaintiff's case is TCHRA-covered harassment," the court wrote, "the Act forecloses common-law theories predicated on the same underlying sexual harassment facts." *Waffle House Inc. v. Williams*, No. 07-0205 (June 11, 2010).

**For more information on these state-specific rulings or developments, visit www.ogletreedeakins.com.*

ORGANIZED LABOR'S FOCUS SHIFTS FROM EFCA TO THE NLRB

*by Harold P. Coxson, Jr.**

As we approach the November 2nd mid-term Congressional elections, chances for passage of the Employee Free Choice Act (EFCA) grow dimmer and dimmer. The union lobby lacks the votes in the Senate to stop a filibuster to take EFCA to the floor, and members in both Houses of Congress are reluctant to take on tough labor votes so close to the election. Now, even passage of an EFCA alternative bill, which might allow "quickie" union representation elections within two or three weeks from a union petition and include limitations on free speech rights of employers, seems unlikely before the November election (but watch the post-election "lame duck" session).

What has not diminished is the unions' push for EFCA-like "reforms" through the National Labor Relations Board (NLRB), especially now that the unions have a solid three-vote majority of former union lawyers serving on the Board (and the prospects for a heavily pro-union General Counsel). While the business community must remain vigilant regarding EFCA and other labor law "reform" legislation, the battleground clearly has shifted to the regulatory front – namely, the NLRB.

NLRB Composition

The NLRB is finally up to its five-member complement, after operating as a two-member Board for over two years. On June 22, the Senate confirmed Board Members Mark Gaston Pearce (D) and Brian Hayes (R). Both had been nominated by President Barack Obama in July 2009. The term for Member Pearce, who had been serving a "recess" appointment, now extends to August 2013, while Member Hayes has been confirmed to fill an existing term which expires in December 2012.

They will join Chairman Wilma Liebman (D) and Board Member Peter Schaumber (R), whose terms expire in August 2011 and August 2010, respectively. The fifth Board member, Craig Becker, the controversial former Assistant General Counsel of the Service Employees International Union (SEIU) and the AFL-CIO, was blocked for confirmation to a full term by the Senate, but will continue to serve as President Obama's "recess appointee" until Congress adjourns at the end of 2011.

President Obama also named career NLRB lawyer Lafe Solomon as the "Acting General Counsel" following the resignation of former General Counsel Ronald Meisburg. Solomon was appointed under the Federal Vacancies Reform Act of 1998. His experience includes 10 years as the Director of the NLRB's Office of Representation Appeals and he has served on the staffs of 10 different Board members.

When Member Schaumber's term expires this August, many expect a political "package" to be proposed by the President consisting of a Republican replacement as Board member and most likely a Democratic union lawyer for the General Counsel's position.

NLRB Rebuked by Court's *New Process Steel* Decision

Initially, the new NLRB is rushing to issue new decisions reversing NLRB precedent while the Board still consists of five members. At the same time it also will have its hands full reconsidering a series of cases previously decided by the two-member Board following the U.S. Supreme Court's stunning rebuke to the Board's authority to issue such rulings.

In a strongly worded 5-4 decision authored by departing Justice John Paul Stevens in *New Process Steel v. NLRB* on June 10, the Court ruled that the NLRB did not have the authority to issue two-member Board orders. That means that hundreds of relatively non-controversial decisions issued by Democrat Wilma Liebman and Republican Peter Schaumber are now invalid.

By way of background, as 2007 came to a close the NLRB consisted of four members with one vacancy, with the recess appointments of two of the four sitting members set to expire at the end of the Congressional session. That would leave the Board with only two members. Senate Majority Leader Harry Reid refused to recess or adjourn the Senate, thus denying then-President George W. Bush the opportunity to fill the vacant seats with "recess" appointments. Thus, when the vacancies occurred they were never filled. The Board operated with only two members for 27 months, from January 2008 to April 2010, during which it continued to decide over 600 less controversial cases while deferring consideration of over 100 cases where the two members could not agree or that would reverse NLRB precedent.

It was that practice which the Supreme Court rejected in *New Process Steel* on the basis that Section 3(b) of the National Labor Relations Act – the "delegation clause" – authorizes the Board to delegate its powers only to a "group of three or more members." That group must maintain a membership of three in order for the delegation to remain valid.

The U.S. Chamber of Commerce filed a very influential *amicus curiae* brief with the Supreme Court urging that the Board lacked authority to issue orders as a two-member Board. In words that will be long remembered, Justice Stevens wrote that "the Rube Goldberg-style delegation mechanism employed by the Board in 2007 – delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group – is surely a bizarre way for the Board to achieve the authority to decide cases with only two members."

The Court's ruling further stated: "We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances."

* Hal Coxson is a principal with Ogletree Governmental Affairs and a shareholder in the law firm of Ogletree Deakins in the Washington, D.C. office.

Justice Stevens concluded with the following memorable words: "Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

As a result of this decision, on July 1 the Board requested that its orders from the 96 two-member decisions pending in all federal courts of appeals be remanded to the Board for further consideration. Each of the remanded cases will be considered by a three-member panel of the Board which will include Chairman Liebman and Board Member Schaumber. Consistent with Board practice, the other Board members not on the panel will have the opportunity to participate in the case if they so desire.

While some courts have complied with the Board's request to remand the cases, others have refused to enforce the Board's order – inviting the argument that the Board has no mechanism to reconsider the decision. For example, the Eighth Circuit Court of Appeals denied enforcement in *NLRB v. Whitesell Corp.* (June 10, 2010) and *NLRB v. American Directional Boring, Inc.* (June 24, 2010).

In other recent action related to the *New Process Steel* decision, the new NLRB consisting of all five members announced that it had ratified the December 2007 temporary delegation to the General Counsel of all litigation authority that normally would have required Board approval, such as the decision to seek section 10(j) injunctive relief. The new Board also ratified all personnel and administrative decisions made during that time frame.

Pending Issues

Although the new Board has been distracted by the *New Process Steel* decision, there are several significant issues that have been recently decided or are awaiting Board action.

Member Becker's Recusal Stance

NLRB Member Becker, who is believed to be the first member to have worked for a labor union immediately prior to service on the Board, recently announced that he would not recuse himself from cases involving local unions affiliated with his former employer, the Service Employees International Union (SEIU). That issue was a point of contention during Member Becker's Senate confirmation hearing.

In *Pomona Valley Hospital Center*, 355 NLRB No. 40 (June 8, 2010), which involved an SEIU local union, Member Becker wrote that he would adhere to the ethical standards he agreed to uphold as described in the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635) and Executive Order 13490 ("Ethics Commitments by Executive Branch Personnel"). While he acknowledged that those standards include significant restrictions on deciding cases involving former clients he represented in the two years preceding his swearing in, Member Becker said that he would not recuse himself from the cases of local SEIU unions (since SEIU is a separate legal entity from its local affiliates).

"The battleground clearly has shifted to the regulatory front – namely, the NLRB."

As to whether he had pre-judged issues reflected in his controversial writings on labor policy as a law school professor and union lawyer, Member Becker declared: "a 'reasonable person' appearing before the Board will distinguish between the roles I played as an advocate and a scholar in the past and the position I now hold as a Member of the NLRB." However, he agreed to recuse himself from consideration of the *Dana Corp.* case, involving pre-recognition bargaining, in which he had written an *amicus curiae* brief filed by the United Auto Workers and the AFL-CIO.

Since then, the NLRB's Inspector General has ruled that Member Becker did not violate ethics rules by deciding *St. Barnabas Hospital and Committee of Interns and Residents, Local 1957, SEIU.*

Members-Only, Minority Bargaining

A group of 46 labor law professors led by Professor Charles Morris is again pressing the Board (through the filing of a 69-page brief) to engage in rulemaking to advance "members-only, non-majority bargaining." Under this proposed rule, an employer would be required to bargain with a minority of employees about their wages, hours and working conditions simply because they are members of a union, but outside the concept of "majority rule" and "exclusive representation" of all employees in a bargaining unit.

This would result in small, fragmented bargaining units confronting a single employer, where multiple unions would represent only a minority of employees in a single workplace. On the other hand, in the words of Professor Morris, "minority-union bargaining will allow unions to grow the natural way that most associations grow – by starting small and growing larger with experience and achievement."

In *Dick's Sporting Goods*, Case 6-CA-34821 (June 22, 2006), the NLRB's General Counsel refused to issue a complaint against an employer that had refused to bargain with a minority, members-only union. The General Counsel's Memorandum "underscore(d) that the statutory obligation to bargain is fundamentally grounded on the principle of majority rule."

Electronic Balloting in Union Representation Elections

The new Board has taken its first steps toward making significant changes in the area of union representation elections. Many expect rulemaking (or simply a guidance memorandum) shortening the period between a union's filing of an election petition and the election itself. Currently, the Board's goal is 42 days, and the average was 38 days last year.

However, the Board is expected to reduce the time for the election to two to three weeks from the filing of the petition, thus reducing the period for employers to communicate with their employees about the company's perspective on unionization. The inability of the employer to communicate means that employees would be prevented from casting a fully informed vote.

Now there's another concern. On June 9, the Board published a request

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DOL CLARIFIES FMLA DEFINITION OF "SON OR DAUGHTER"

Extends Leave To Persons With No Biological Or Legal Relationship To Child

The U.S. Department of Labor (DOL) recently issued an "Administrator's Interpretation" on the definition of "son or daughter" under the Family and Medical Leave Act (FMLA). The federal law allows workers to take up to 12 weeks of unpaid leave during any 12-month period for a number of reasons, including for the adoption or the birth of a child or to care for a son or daughter with a "serious health condition." The interpretation, issued by Nancy Leppink, Deputy Administrator of the DOL's Wage and Hour Division, would broaden the definition of persons who stand *in loco parentis* so as to include employees in same-sex or other non-traditional relationships (without regard to their legal or biological relationship with the child).

The FMLA defines "son or daughter" to include a biological or adopted child, and a "foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*." The FMLA regulations define "*in loco parentis*" to include those with day-to-day responsibilities to care for *and* financially support a child.

According to the new interpretation, employees with no biological or legal relationship with a child may stand *in loco parentis* and be eligible for FMLA-protected leave. Significantly, the interpretation construed the regulations such that an employee who intends to assume the responsibilities of a parent need not provide both day-to-day care and financial support.

Thus, according to the interpretation, an employee in a same-sex relationship will now qualify for leave to care for his or her partner's child, even if the employee has not legally adopted the child. In addition, an employee who will share child-raising responsibilities with the child's biological or adopted parent would be entitled to leave for the child's birth or to bond with the child following placement.

Further, the interpretation finds that whether an employee stands *in loco parentis* to a child is not based upon whether that child has both biological parents but depends on several factors. Courts have considered the child's age, the degree to which the child is dependent on the person, and the extent to which the individual exercises duties associated with parenthood in determining *in loco parentis* status.

According to Alfred Robinson, a shareholder in Ogletree Deakins' Washington, D.C. office who previously served as the acting Administrator of the DOL's Wage and Hour Division: "While the DOL called this Administrator's interpretation a 'clarification,' it actually is a departure from the FMLA regulatory requirements that a person have day-to-day care responsibilities for and financially support a child in order to stand *in loco parentis*. This interpretation is intended to reflect the changing dynamics of family structures but, simultaneously, creates compliance challenges for employers. Employers should review their FMLA policies and other documents to ensure that they do not conflict with this new interpretation."

Robinson suggested, "Employers may want to review their practices in examining the family relationship responses on medical certification forms used when an employee's family member has a 'serious health condition'. The new interpretation states that a 'simple statement' on a family relationship is all that is required to establish *in loco parentis.* The existing regulations permit employers to require reasonable documentation or a family relationship statement. Thus, where no biological or legal relationship is disclosed on the certification form, employers may want to identify other documentation it may request to confirm that a person stands *in loco parentis* to a child." ■

"NLRB WATCH"

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for information related to the procurement and implementation of electronic voting services for remote and on-site union elections. "Electronic balloting" by telephone, email or the Internet may soon replace traditional secret ballot elections, which are protected by NLRB agents and observed by a union and employer observer to prevent last minute campaigning, voting fraud and other misconduct. Also, just as with postal ballots (which the Board will order in rare cases where the employees are geographically dispersed), electronic balloting would limit the time for employers to communicate with employees about the election. The free speech restrictions on postal ballots begin with the mailing of ballots to employees; presumably the same rule would apply to the mailing of electronic balloting instructions.

Additional Resources

There are many other significant issues that soon will be addressed by the NLRB. One way to stay up-to-date on these developments is to attend the "Not Your Father's NLRB" program on December 9-10, 2010 in Las Vegas (see the enclosed flyer). In addition, the U.S. Chamber of Commerce recently launched a new publication entitled "NLRB *Insight,*" which is co-authored by Ogletree Deakins' Hal Coxson and Chris Coxson. The pair also wrote the 76-page publication "The National Labor Relations Board in the Obama Administration: What Changes to Expect," which is available on the Chamber's website. ■

DOL Addresses Meaning Of "Clothes" Under FLSA

The U.S. Department of Labor (DOL) recently clarified the definition of "clothes" under Section 203(o) of the Fair Labor Standards Act (FLSA). Section 3(o) provides that time spent "changing clothes or washing at the beginning or end of each workday" is excluded from compensable time under the FLSA if the time is excluded from compensable time pursuant to "the express terms or by custom or practice" under a collective bargaining agreement. The DOL now has concluded that this exemption "does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job."

New To The Firm

Several new lawyers have recently joined the firm. They include: Sarah Kirk and Justin Scott (Atlanta); Stephen Benjamin (Columbia); Jennifer Gokenbach (Denver); Martin Rodriguez (Houston); Judy Sha (Los Angeles); Andrea Kiehl (Minneapolis); Patricia Matias (Orange County); Tara Pfeifer (Philadelphia); James Glunt, Philip Kontul and Mariah Passarelli (Pittsburgh); Tiffany Cox (San Antonio); Michelle Leetham (San Francisco) and Phillip Russell (Tampa).

"ARBITRATION"

continued from page 1

as "Arbitration Procedures," included a provision which stated that, "The Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable."

In February 2007, Jackson filed a discrimination suit against Rent-A-Center in federal district court in Nevada. Rent-A-Center then filed a motion under the Federal Arbitration Act (FAA) to force Jackson to resolve his claims through arbitration. Jackson argued that the arbitration agreement is "unenforceable in that it is unconscionable." Rent-A-Center countered that because Jackson had agreed that the arbitrator would have exclusive authority to resolve disputes about the enforceability of the agreement, the issue of unconscionability was for an arbitrator, not the court, to decide.

The trial judge granted Rent-A-Center's request and compelled arbitration. The Ninth Circuit Court of Appeals reversed, holding that a court must decide whether the agreement is enforceable. The case ultimately reached the U.S. Supreme Court.

Legal Analysis

The question before the Justices was whether the provision in the Arbitration Procedures section of the contract that delegates resolution of the conscionability issue to the arbitrator is valid under the FAA. The validity of so-called delegation provisions – agreements to arbitrate threshold issues concerning an arbitration agreement – are governed under Section 2 of the FAA.

The Court ruled that a challenge to the contract as a whole "does not prevent a court from enforcing a specific agreement to arbitrate." If, however, a party challenges the validity "of the precise agreement to arbitrate" under Section 2, the federal court must consider the challenge before ordering compliance with that agreement.

As a result, the Court reasoned, "in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone." Even where that is not the case, the majority held, "we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." Thus, unless he specifically challenged the delegation provision contained in the Arbitration Procedures section of his contract, the Court must treat it as enforceable, "leaving any challenge to the validity of the Agreement as a whole for the arbitrator."

Justice Scalia and the majority found that Jackson had challenged only the validity of the contract as a whole and not the delegation provision. None of Jackson's substantive unconscionability challenges – for example, that the agreement's coverage was one-sided in that it required arbitration of claims an employee was likely to bring but not claims Rent-A-Center was likely to bring – was specific to the delegation provision. On the contrary, Jackson argued that the "entire agreement" favors Rent-A-Center and that the limitations on discovery further his "contention that the arbitration agreement as a whole is substantively unconscionable." Thus, the Court reversed the Ninth Circuit's decision.

According to Ron DeMoss, General Counsel at Rent-A-Center and who argued this case before the Supreme Court, "It helped our case that we had a very fair and reasonable arbitration agreement. In fact, Justice Ginsburg remarked that our employment arbitration agreement was more favorable than most."

Justice John Paul Stevens, writing for the dissent, took issue with the majority's claims about the underlying contract: "Its breezy assertion that the subject matter of the contract at issue – in this case, an arbitration agreement and nothing more – 'makes no difference,' ... is simply wrong." If Jackson's unconscionability claim is correct, "it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate." Thus, according to the dissent, it was necessary for the Court to resolve the merits of Jackson's unconscionability claim in order to decide whether the parties have a valid arbitration agreement under the FAA.

Practical Impact

According to Jill Garcia, a shareholder in Ogletree Deakins' Las Vegas office, "*Rent-A-Center* is an excellent decision for employers nationwide, and particularly those in the Ninth Circuit. The ability to enter into arbitration agreements, whether with consumers, employees or franchisees, is a cornerstone in day-to-day business operations. Employers would be wise to revisit their existing agreements and ensure they include a provision which specifically delegates the question of enforceability to the arbitrator."

Jeffrey Winchester, also a shareholder in the firm's Las Vegas office, adds a warning for employers: "Based on this ruling, delegation clauses are likely to come under attack by plaintiffs seeking to avoid arbitration of claims. Employers should consider taking steps to highlight the delegation clause, such as printing the clause in bold, using large font, and including language whereby the employee acknowledges that, by signing the agreement, he or she is waiving the right to have a court determine the enforceability of the agreement, as well as waiving the right to have his or her statutory claims heard in court." ■

SECOND CIRCUIT STRIPS PHARMACEUTICAL SALES REPS OF THEIR EXEMPT STATUS

Case Returned To Lower Court To Determine Companies' Overtime Liability

A federal appellate court recently held that pharmaceutical sales representatives did not fall under either the "outside sales" or "administrative" exemptions to the Fair Labor Standards Act (FLSA), and that, accordingly, they had been misclassified and are entitled to unpaid overtime. The overtime to which the workers could be entitled is significant, because they typically work 12-hour days, travel for their jobs, and attend after-hours events as part of their marketing efforts. ***In re Novartis Wage and Hour Litigation,*** *09-0437-cv, Second Circuit Court of Appeals (July 6, 2010).*

Factual Background

Sales representatives at two pharmaceutical companies brought separate overtime class actions in which they claimed that their employer had misclassified them as exempt employees (who are not entitled to overtime pay). The reps claimed that they are not covered by either the "outside sales" or "administrative employee" exemptions.

Legal Analysis

In a consolidated opinion addressing both cases, the Second Circuit Court of Appeals considered Novartis' position that their reps are covered by either the outside sales exemption (because they are marketing and selling products), or the administrative employee exemption (because they are highly compensated and exercise sufficient discretion and independent judgment in their jobs). The court first decided that the reps did not qualify for the outside sales exemption because they never actually sell product; rather they provide information about the product and encourage doctors to prescribe it. Without selling their product (by making a deal that results in the transfer of the item in exchange for money), the reps cannot qualify for the outside sales exemption.

Novartis asked the court to focus on the fact that physicians are asked to "commit" to prescribing a specific drug. But the court noted that, by definition, physicians do not commit to buying a Novartis product. Rather, physicians must prescribe drugs appropriate for their patients and cannot make binding commitments. The court was further influenced by the fact that it is difficult to tie the reps' compensation directly to the results of their marketing efforts. After considering these factors, the court held that the reps do not qualify for the outside sales exemption.

The Second Circuit also considered whether the reps are exempt administrative employees and found that they have little discretion over their sales strategy or methods. Rather, the sales reps are trained in how to question physicians to determine why they may be hesitant to prescribe certain drugs, are taught four "social styles" to use depending on a physician's response to a sales call, and are provided with specific "core messages" to convey during each sales call.

The court also found that the reps play no role in formulating the company's core messages, written marketing materials, or advertising messages. In fact, they are specifically instructed not to deviate from the core message or company-provided written materials. The court was particularly persuaded by one rep's testimony that Novartis expects the reps to act like "robots." Given those indicators that the reps' jobs are highly formulaic and lack independent discretion, the court rejected the claim that they are covered by the administrative exemption.

Based on the court's ruling that the reps are not covered by either exemption, the cases will now be remanded to the lower courts to determine the appropriate damages.

Practical Impact

The Second Circuit is only the second federal appellate court to address the classification of sales reps under the FLSA. The Third Circuit Court of Appeals ruled earlier this year that reps exercise sufficient discretion and independent judgment to qualify for the administrative exemption. There is currently a rep classification case pending in the Ninth Circuit, and other appellate courts may be asked to consider the question as well. The disagreement among the courts may bring the issue before the U.S. Supreme Court.

In the meantime, the Second Circuit's decision poses a serious challenge for pharmaceutical companies classifying reps as exempt. Pharmaceutical companies, particularly those doing business in New York, Connecticut, and Vermont, should closely examine the classification of their reps and the basis for any exemptions. In addition, the federal Department of Labor (DOL) made it clear through the *Novartis* case that it does not think reps working for pharmaceutical companies are exempt, so the DOL may increase enforcement of overtime payments to reps in the wake of this decision.

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While the court held that neither exemption applies to the Novartis reps, there may be more flexibility in applying the administrative exemption to reps at other companies that may allow more latitude and independent discretion. Companies should examine the duties of their reps and work with counsel to assess their level of independent discretion.

Deborah Hesford DosSantos, a shareholder in Ogletree Deakins' Boston office, notes that "pharmaceutical companies likely face a unique challenge in allowing reps to exercise autonomy while still complying with strict federal regulations regarding pharmaceutical marketing. Companies should consider working with their counsel to develop a plan that is consistent with both wage and hour law and other industry regulations." If it is not feasible to allow reps a greater level of discretion and autonomy, companies should carefully consider reclassifying reps as nonexempt, and may need to limit their travel time and after hours work. ■