Hunton Employment & Labor Perspectives Blog
Hunton & Williams LLP
August 2015

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Broader 'joint employer' standard upheld by NLRB

August 31, 2015

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In a long-awaited ruling, the National Labor Relations Board on Thursday upheld a controversial shift in the standard for determining "joint employer" status in a closely watched case that is expected to reverberate through the franchising world.

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NLRB Overturns Decades of Precedent by Reviving "Traditional" Joint-Employer Test

August 28, 2015

In a ruling that redefines the concept of employment in the United States, the National Labor Relations Board yesterday issued its much-anticipated decision in *Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery*, 362 NLRB No. 186 (2015). The decision rewrites and drastically expands the definition of who is a "joint employer" under the National Labor Relations Act. Businesses have been bracing for this decision for several months, and now that it has been released, it appears their worst fears have been realized.

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D.C. Circuit Upholds DOL Rule Barring Third-Party Employers From Overtime, Minimum Wage Exemptions for Home Care Workers

August 26, 2015

On Friday, August 21, 2015, the U.S. Court of Appeals for the District of Columbia Circuit upheld the U.S. Department of Labor's ("DOL") 2013 rule extending FLSA overtime and minimum wage protections to employees of home health care agencies who provide "companionship services" or live-in domestic care. The rule modified an exemption that was part of a 1974 amendment to the Fair Labor Standards Act ("FLSA") that required domestic service workers to receive overtime and minimum wage, but excluded from those requirements employees who provide companionship services or live in the home where they work. Under the 2013 rule, the exemption for companionship services and live-in care only applies to workers employed by individuals or families who are receiving the care, not to employees of third-party home care providers. The 2013 rule also narrowed the definition of companionship services. Specifically, a worker only falls under the companionship exemption if the worker is employed directly by members of a household where the worker provides "fellowship and protection" (i.e. socializing with and monitoring the safety of elderly or infirm people) or if the worker provides daily living assistance, such as dressing and grooming, in conjunction with fellowship and protection, but does not spend more than twenty percent of their time providing such assistance.

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Fifth Circuit Holds Unaccepted Rule 68 Offers to Named Plaintiffs Do Not Moot Individual or Class Claims

August 24, 2015

On August 12, 2015, the Fifth Circuit held that an unaccepted Rule 68 offer of judgment to a named plaintiff in a class action does not render the plaintiff's claim moot. In *Hooks v. Landmark Indus., Inc.*, No. 14-

20496 (5th Cir. 2014), the Fifth Circuit joined the minority of Circuit Courts—Second, Ninth, and Eleventh Circuits—and held that an unaccepted Rule 68 offer is a legal nullity, with no operative effect. The majority of the Circuit Courts to decide this issue —Third, Fourth, Sixth, Seventh, Tenth, and Federal Circuits—have all held that a complete Rule 68 offer moots an individual's claim.

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NLRB Punts in Northwestern Union Election

August 21, 2015

On August 17, the NLRB declined to assert jurisdiction over Northwestern University's scholarship football players, holding that doing so "would not serve to promote stability in labor relations." The Board dismissed the election petition filed by the Steelworkers-backed "College Athletes Players Association" (CAPA) and directed that the ballots (which were uncounted and had been impounded) be destroyed. Although the outcome obviously pleased Northwestern (and the Big Ten, other bowl subdivision conferences and the NCAA), the Board's opinion leaves key questions unanswered. Among these are whether college scholarship football players should be deemed employees; why the NLRB took the case in the first place given its view that it would be nearly impossible to effectively regulate labor relations in the Big Ten; and why CAPA targeted Northwestern. A summary of key rulings and some observations follow below.

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Second Federal Court Upholds NLRB's Ambush Election Rules

August 17, 2015

On July 29, 2015, the U.S. District Court for the District of Columbia held that the National Labor Relations Board ("NLRB") had authority to adopt its new "ambush election" rules. These new rules, which became effective on April 14, 2015, made dramatic changes to the NLRB's traditional rules governing union representation elections. The rules shortened the length of representation elections from approximately 40 days to as short as 11 days. In addition, the rule prevents employers from legally challenging an election until after its workers have voted. Business groups across the country have now begun the process of challenging these rules in federal courts. As we previously reported, the U.S. District Court for the Western District of Texas has already dismissed one set of petitioners' challenges and upheld the ambush election rules. However, on August 10, the petitioners filed an appeal asking the Fifth Circuit to overturn the decision.

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EEOC Rules Title VII Prohibits Sexual Orientation Discrimination

August 13, 2015

In its recent decision in *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015), the EEOC ruled that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, despite the fact that Title VII does not explicitly include sexual orientation or gender identity in its list of protected bases.

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Can a Transgender Employee Use the Restroom Associated With His or Her Gender Identity?

August 12, 2015

More and more employers are faced with the following question — can a transgender employee use the restroom associated with his or her gender identity? According to federal governmental agencies, the answer seems to be yes.

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NLRB's New Rule May Change the Way Employers Conduct Investigations

Month Day, Year

In *American Baptist Homes of the West d/b/a Piedmont Gardens ("Piedmont Gardens*"), 362 NLRB 139 (June 26, 2015), the NLRB overruled longstanding precedent protecting the confidentiality of employee witness statements and adopted a new rule that balances the union's need for the witness statement with the employer's "legitimate and substantial confidentiality interests." Since 1978, employee witness statements received by employers have been automatically exempt from disclosure to unions, no matter the circumstances. Now, as a result of *Piedmont Gardens*, an employer who cannot establish that it has a legitimate confidentiality interest that outweighs the union's interest must disclose witness statements to the union in full. This will likely force employers to change the way they conduct investigations.

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DOL Issues Guidance Claiming Most Workers Are Employees – Not Independent Contractors – Under the FLSA

August 10, 2015

On July 15, 2015, the Department of Labor ("DOL") issued guidance which it claims is designed to reduce the misclassification of employees as independent contractors under the Fair Labor Standards Act ("FLSA"). This guidance boldly claims that "most workers are employees under the FLSA's broad definitions." Based on this

guidance, the DOL will likely aggressively argue that workers are employees subject to the FLSA – not independent contractors.

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