LABOR & EMPLOYMENT WORKFORCE WATCH

A GUIDE TO THE EMPLOYMENT LAW DEVELOPMENTS MOST LIKELY TO IMPACT YOUR BUSINESS

JULY 2019

IN THIS ISSUE

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Get Ready – EEOC to Begin Collecting Pay Data Starting July 15, 2019

by Evan Blankenau

For businesses with 100 or more employees, now is a good time to begin reviewing internal systems and coordinating with vendors to collect employee pay information to submit to the EEOC. Many employers are already familiar with the EEO-1 Component 1 survey, which requires submission of employment data categorized by race/ethnicity, gender, and job category. For the first time, however, the EEOC will begin collecting employee pay information categorized by race, ethnicity, and sex. On July 15, the EEOC launched a web-based portal (https://eeoccomp2.norc.org/) for employers to upload their data. Employers have until September 30, 2019 to provide employee pay information for calendar years 2017 and 2018. The EEOC's attempts to gather pay data have been embroiled in litigation since 2017 when the Trump administration halted the collection of the pay data, which was implemented in the waning years of the Obama administration. In March 2019, a district court in Washington, D.C. ordered the EEOC to collect employee pay data by September 30, 2019. Although the Department of Justice is appealing the district court's order to collect the pay data, the Department of Justice did not request a stay from the order, which means the September 30 deadline remains in place. Considering the potential complexity for compiling the pay information, and the fast approaching deadline, employers should get a jump start and begin compiling the relevant information now.

DOL Proposes New Salary Threshold for FLSA's Overtime Exemptions

by Jeff McPhaul

On March 7, 2019, the U.S. Department of Labor (the DOL) issued a proposal to increase the salary threshold for employees to be classified as exempt from the overtime pay requirements of the federal Fair Labor Standards Act (the FLSA) pursuant to the so-called "white collar" exemptions — administrative, executive, and professional. Under the DOL proposal, the minimum salary for the white collar exemptions would increase from $455 per week ($23,660 annually) to $679 per week ($35,308 annually). This means that employees who make less than approximately $35,000 per year would be automatically eligible for overtime in the amount of one and one-half times their regular hourly rate for all hours worked in excess of 40 in a workweek. The DOL also dramatically increased the salary level for the highly compensated employee exemption from $100,000 to $147,414. However, the DOL's proposal does not include automatic annual increases to the minimum salary level or the highly compensated test. The DOL anticipates issuing a final rule later this year and that rule becoming effective sometime in January 2020.

Nieto and *New Prime* Expand the Scope of the Transportation Exemption Under the FAA

by Ricardo Lopez

Recent state and federal cases continue to explore and define the reach of the Federal Arbitration Act (FAA). In *Nieto v. Fresno Beverage Company, Inc.* (2019) 33 Cal.App.5th 274 a California Court of Appeal upheld a trial court's determination that the plaintiff truck driver who made strictly in-state deliveries of defendant employer's products, was nonetheless engaged in interstate commerce, and therefore exempt from the FAA. Section 1 of the FAA renders the FAA's requirements inapplicable to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—the so-called "transportation worker exemption." In *Nieto*, the plaintiff driver sued his former employer claiming violations of California laws providing for meal and rest breaks and daily overtime. The defendant argued that the matter should be resolved in arbitration, notwithstanding the FAA exemption, because the plaintiff had signed an arbitration agreement and the exemption did not apply to purely intra-state workers like *Nieto*. The trial court disagreed, and the Court of

Appeal affirmed. According to the *Nieto* Court, interstate commerce existed because the goods were deemed to be in the stream of interstate commerce, although the plaintiff himself never crossed state lines. *Nieto* comes on the heels of the decision of the Supreme Court of the United States in *New Prime Inc. v. Oliveira*, which expanded the transportation workers exemption under the FAA to include independent contractors providing interstate transport. Employers seeking to enforce arbitration agreements under the FAA should be aware of *Nieto* and *New Prime* and conform any agreements arguably subject to the transportation worker exemption to comply with applicable state arbitration law.

Massachusetts' Highest Court Holds that Employees Paid on Commissions are Entitled to Overtime and Sunday Pay

by Richard D. Glovsky

Massachusetts law permits employers to pay inside salespeople on a commission only basis, provided that the employer guarantees at least the minimum wage for all regular hours worked. However, according to a recent decision from the Massachusetts Supreme Judicial Court, *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019), inside sales employees paid on a 100% commission basis are additionally entitled to pay for overtime hours worked and premium pay for work on Sundays. In *Sullivan*, inside sales employees brought suit seeking additional pay for overtime worked. The employer pushed back, noting that each employee always earned weekly commissions equal to or greater than the minimum wage for each of the first forty-hours worked and one-and-a-half times the minimum wage for each hour over forty. The Court sided with the employees, and rejected the employer's attempt to retroactively characterize earned commissions as overtime pay. The Court held that the employer's position conflicted with the purposes of the overtime statute, which includes encouraging the employment of more people, and the compensation of employees for the burden of a long workweek. Massachusetts employers should review their pay practices for commissioned employees in light of the *Sullivan* decision.

Certain Texas Employers Must Provide Paid Sick Leave to Employees

by Lani Durio

Two pending lawsuits have further complicated the paid sick leave ordinances in Dallas and San Antonio. The ordinances, originally effective August 1, 2019, require many private employers in San Antonio and Dallas to provide their employees up to 8 days of paid sick leave per year. Although the Dallas ordinance went into effect as scheduled, it was subject to an immediate lawsuit in which the plaintiffs are currently seeking injunctive relief. On the other hand, implementation of the San Antonio ordinance is stayed until December 1, 2019, as a result of a court order in the lawsuit challenging the ordinance. Because the Texas Legislature recently ended its session without passing a proposed bill prohibiting such ordinances, any near-term relief from compliance with the ordinances is likely to come from the lawsuits.

The City of Austin passed a similar local ordinance, initially set to take effect August 1 as well. However, the Austin ordinance is currently enjoined by court order after a Texas appellate court found the ordinance to be unconstitutional and preempted by the Texas Minimum Wage Act. The issue is currently on appeal to the Texas Supreme Court. Given the injunction and the pending appeal, the City of Austin is postponing the effective date for its Earned Sick Time Ordinance until the Texas Supreme Court issues a ruling. Any such ruling could also affect the validity of the Dallas and San Antonio ordinances.

All three city ordinances are similar, each requiring private employers of any size to provide paid sick leave to their employees, accrued at one hour of paid sick leave for every thirty hours worked. Workers are permitted to accrue up to 64 hours of paid sick leave each year, if their employer has at least fifteen employees. Employers with less than fifteen employees must provide up to 48 hours of permitted leave. Employers must also issue a monthly accounting or similar notice to their employees, apprising them of their then–available accrued paid sick leave. In addition, Dallas and San Antonio employers must include a notice of employee rights and remedies under the respective ordinances in the employee handbook, if applicable. Violations may result in a civil fine of up to $500 per violation.

Employers with San Antonio- and Dallas-based employees should prepare for these upcoming changes, as necessary, considering the status of the pending lawsuits. To learn more about the Dallas paid sick leave ordinance, read our recent Quick Study.

2019 Texas Legislative Update

by Sean Kilian

The end of the 2019 Texas legislative session, which ran until May 27, brings new challenges for employers. With the signing of HB 3703 (effective Sept. 1, 2019), Texas expanded the list of conditions for which doctors may prescribe low-THC cannabis under the state's Compassionate Use Program. Additionally, with the signing of HB 1325 (effective immediately) Texas legalized the production of certain hemp products and the purchase of certain consumable hemp products, including CBD oil.

CBD oil is a non-intoxicating product that is used to treat epilepsy and has been studied for a variety of other applications. However, CBD oil can contain trace amounts of THC, the intoxicating substance in cannabis that is prohibited by most drug-free workplace policies. Because both new laws effectively increase the availability of substances containing THC, employers should consider how their drug-free workplace policies interact with such substances, and whether their duty to make reasonable accommodations for persons with disabilities extends to permitting use of such products.

For Dallas and San Antonio employers, a bill that failed to become law will create additional challenges. SB 15 would have prohibited municipalities from adopting ordinances that create terms of employment in conflict with state or federal law. Such a law would have preempted the paid sick leave ordinances recently enacted in Dallas and San Antonio. In the absence of such a law or successful legal challenges to the ordinances, most Dallas and San Antonio employers must prepare to comply with paid sick leave ordinances by August 1, 2019.

Finally, Austin employers will get no relief from the city's ban-the-box ordinance, after SB 2488 failed to become law. The bill would have banned Texas political subdivisions from adopting ordinances that regulate a private employer's ability to request criminal history information from applicants or employees. For now, Austin remains the only city in the state to have passed a ban-the-box ordinance.

New York City Bans "Hairstyle Discrimination"

by Richard Reibstein

On Feb. 18, 2019, the New York City Commission on Human Rights released new legal enforcement guidance stating that "grooming or appearance policies that ban, limit, or otherwise restrict natural hairstyles or hairstyles associated with Black people generally violate the NYCHRL's [New York City Human Rights Law] anti-discrimination policies." The Commission noted that grooming and appearance policies affect many communities, but focused its legal guidance on policies "addressing natural hair or hairstyles most commonly associated with Black people, who are frequent targets of race discrimination based on hair." According to the Commission, a grooming or appearance policy prohibiting natural hair and/or treated/untreated hairstyles to conform to the employer's expectations "constitutes direct evidence of disparate treatment based on race" and violate the City's Human Rights Law. The Commission identifies the following policies it contends would fall within this category:

(A) A grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots, or fades which are commonly associated with Black people.

(B) A grooming policy requiring employees to alter the state of their hair to conform to the company's appearance standards, including having to straighten or relax hair (i.e., use of chemicals or heat).

(C) A grooming policy banning hair that extends a certain number of inches from the scalp thereby limiting Afros.

Lastly, the guidance cautions that employers may not ban, limit, or restrict natural hair or hairstyles associated with Black communities to promote a certain corporate image due to customer preference or under the guise of speculative health or safety concerns.

Nothing in the new guidance prevents an employer from requiring all workers to wear their hair up or in a net for legitimate health or safety reasons. However, the guidance states that employers are required to consider alternative ways to meet the health or safety concerns prior to imposing a ban or restricting hairstyles, such as the use of hair nets, hair ties, or alternative safety equipment.

Ninth Circuit Holds *Dynamex's* ABC Test Applies Retroactively

by Ricardo Lopez

In April 2018, the California Supreme Court issued its groundbreaking opinion in *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal.5th 903. In *Dynamex*, the Court articulated an "ABC" test to determine, in the context of claims brought under the California Industrial Commission Wage Orders ("IWC Wage Orders"), whether workers are employees or independent contractors. To establish that a workers is an independent contractor under the ABC test, a principal must meet three "prongs":

(A) that the worker is free from the control of the hiring entity in connection with work performance – both under the performance contract and in fact;

(B) that the worker performs work outside the hiring entity's usual business; and

(C) that the worker is customarily engaged in an independent business of the same nature as the work performed.

Since *Dynamex* was issued, state and federal courts have grappled with whether the new test articulated in this decision applies retroactively. On May 2, 2019, the Ninth Circuit held in *Gerardo Vazquez v. Jan-Pro Franchising International Inc.*, 923 F.3d 575 (9th Cir. 2019), that the California Supreme Court's decision in *Dynamex* applied retroactively to the plaintiffs in that case. In *Jan-Pro*, a putative class of janitors sued for unpaid minimum wages and overtime, alleging that the defendant had created a "three-tier" franchising model in the effort to avoid a direct employment relationship with the janitors. In determining whether the plaintiffs were independent contractors, the Ninth Circuit applied the ABC test articulated in *Dynamex*, and ultimately held that the class members were misclassified. The *Jan-Pro* court recognized that *Dynamex* did not explicitly address the issue of retroactivity, but took it upon themselves to expand the application of the ABC test. On July 22, 2019, the Ninth Circuit issued an order granting a petition for panel rehearing and withdrew its decision in *Vazquez*. Instead, the Ninth Circuit will certify the question of retroactivity to the California Supreme Court. We will closely monitor this case for any new developments.

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