HOT TOPICS IN EMPLOYMENT LAW

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CHAPTER 1

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Celina Joachim is a partner in Baker & McKenzie's Houston office and certified in labor and employment law by the Texas Board of Legal Specialization. She represents management in all aspects of labor and employment law, including employment litigation, counseling and traditional labor law. Her experience includes defending employers in cases involving employment discrimination, retaliation, whistleblower laws, workers' compensation retaliation claims, wage and hour, breach of employment contract, ERISA, and other employee-related tort claims. She is active in the Firm's pro bono and community service endeavors and is the Co-Chair for the Houston office Diversity Committee.

Practice Focus

- Ms. Joachim regularly advises clients with regard to human resources and employment matters. She is also seasoned in advising on Office of Federal Contract Compliance Programs (OFCCP) related matters, including implementation of affirmative action plans, as well as other federal government contractor issues. She also conducts training for management, human resources personnel, and all levels of staff regarding various employment law issues, including discrimination and harassment matters, leave laws, equal employment opportunity and OFCCP matters, and hiring, discipline, and discharge issues.

Representative Legal Matters

- Served as lead associate in bench trial victory in large ERISA § 204(h) notice class action.
- Won multimillion dollar AAA arbitration while second chair in breach of executive agreement case on behalf of energy trading company.
- Argued and won Texas appeal on behalf of property management company in case where court affirmed summary judgment to employer on all claims including pregnancy discrimination and breach of contract.

Professional Honors

- Leadership Council on Legal Diversity Fellows Program, 2014
- Houston Business Journal's 40 Under 40 Award Winner, 2014

Education

- University of Houston (J.D.) (2004)
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Other

- Proficient in Spanish; enjoys reading, movies, travel, and playing with son and daughter.

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I. INTRODUCTION

There have been several interesting developments with respect to federal employment laws in 2015. For example, the National Labor Relations Board's (NLRB) Office of the General Counsel issued guidance regarding employer rules and policies. The NLRB also issued a decision setting a new and broad standard for joint employer liability. This paper provides a brief summary of some of the recent NLRB developments, wage and hour developments, and discrimination developments in 2015.

II. NLRB DEVELOPMENTS

A. Memorandum on Employer Rules

On March 18, 2015, the National Labor Relations Board's (NLRB) Office of the General Counsel issued a Memorandum outlining those employer rules found to pass muster under the National Labor Relations Act (NLRA) and those found to be unlawful.

Section 7 of the NLRA gives both union and non-union employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRB continues to aggressively pursue employers for violating employees' Section 7 rights based on common employer rules policies, including those addressing confidentiality and proprietary information; employee conduct toward the company and supervisors, other employees and third parties; communications with the media and other outside parties; company logos, copyrights and trademarks; photography and recording; electronic communications; leaving work; access to the workplace; and conflicts of interest. The General Counsel has mandated that cases involving these issues are referred to the Division of Advice during investigation, which allows the General Counsel's involvement in shaping the enforcement agenda.

With respect to confidentiality policies, the Memorandum notes that confidentiality policies such as the following, among others, would be unlawful under the NLRA because they are overbroad and restrict disclosure of employee information:

- "Do not discuss customer or employee information outside of work, including phone numbers [and] addresses." (internal quotations omitted)
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.. Do not discuss work matters in public places."

The Memorandum notes that the following policies were "facially lawful":

- "No unauthorized disclosure of business secrets or other confidential information." (internal quotations omitted);
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."
- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

While the March 18 Memorandum provides insight into how the General Counsel and the NLRB are likely to view key employee policies, the rationale provided for the different outcomes in some cases is unclear at best. In addition, many policies found to be unlawful were clearly driven by the employer's well-intentioned desire to address other public policy and regulatory concerns such as protection of proprietary information, prevention of insider trading and anti-trust violations, and compliance with the SEC's Regulation FD (Fair Disclosure) or disclosure requirements under FTC regulations. In order to balance these and other competing interests, it is clear that employers cannot eliminate compliance risk by simply adopting the "lawful" language cited in the Memorandum.

The NLRB has been evaluating cases independently of the General Counsel's agenda and the General Counsel's position has been rejected by the NLRB (and federal courts) in numerous cases. Nonetheless, employers who have not updated their employee handbooks, codes of conduct, proprietary information and confidentiality agreements or other policies where such provisions often arise should do so now. Employers can expect continued enforcement in 2015, and the precise wording of employer policies and work rules can make all the difference when it comes to assessing their validity under the NLRA, while also ensuring that good corporate governance is not compromised.

B. Joint Employer Liability Under *Browning-Ferris*

Joint employer liability is fast becoming the prevailing trend to reach U.S. companies for labor and employment law violations in state and federal courts and by administrative agencies, including the DOL and the Equal Employment Opportunity Commission (EEOC). On August 27, 2015, the NLRB joined that trend in its decision in Browning-Ferris Industries of California ("Browning-Ferris"), 362 NLRB No. 186, establishing a broader and far more labor-friendly definition of "joint employer" under the National Labor Relations Act (NLRA).

Browning Ferris Industries of California ("BFI") operates a recycling facility and outsourced several positions - sorters, screen cleaners and janitorial services - to a staffing agency Leadpoint Business Services ("Leadpoint"), which provided BFI full-time, part-time and on-call workers under a temporary labor agreement. The NLRB abandoned a long-established standard for determining joint employer status and replaced it with a new, more easily met standard. Under the new standard, the NLRB held the relationship of BFI to Leadpoint's employees was sufficient to establish joint employer status.

Under the NLRB's new standard, two or more unrelated companies may be found joint employers of the same employees under the NLRA "if they share or codetermine those matters governing the essential terms and conditions of employment." To determine this, the NLRB will look to the following:

- Whether there is a "common-law" employment relationship between the potential joint employer ("user firm") and the labor provider's ("supplier firm") employees; and
- Whether the user firm has meaningful control over the supplier firm's employees, whether or not exercised either directly or indirectly.

Factors used to determine the common law relationship and control are extremely broad under the NLRB's new standard when considered in the context of outsourcing, and include not only traditional matters such as hiring, firing, discipline, supervision and direction, and determining the manner and method of work, but now also include factors such as wages and hours, number of workers supplied, scheduling, seniority, overtime, and work assignment.

Most businesses use outsourced labor in some form, be it security, maintenance, mail room or copying services, secretarial, janitorial, catering, administrative or other on-call or temporary general labor. Unless this decision is overturned, some of those businesses may be considered joint employers under the new standard, opening them up to liabilities not previously contemplated. For instance, a user firm employer could now be responsible for bargaining with the subcontractor employees' union regarding "terms and conditions it possesses the authority to control" such as rates, work rules, discipline, etc. Joint employer user firm employers could now also be jointly liable for unfair labor practices. This will potentially cause numerous issues in heavily subcontracted industries with expansive geographic distribution.

There is significant uncertainty about the potential impact of the NLRB's new joint employer standard on franchisors, and what types of indirect controls will or will not subject a franchisor to joint employer status under the NLRB's new ruling. The NLRB noted in its *Browning-Ferris* decision that the particularized features of franchisor/franchisee relationship were not present in the outsourcing context before it. The NLRB General Counsel's amicus brief also argued that the Board "should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand." In any event, franchisors should be prepared for claims against them for joint employer liability before the NLRB and elsewhere. In August 2015, the NLRB Board denied a request by McDonalds for a detailed explanation of what it means to be a joint employer in the context of the cases pending against that franchise company.

Joint employer liability is a consistent line of attack in today's era of administrative and judicial enforcement of employment laws. It is likely that the barrage of labor-friendly decisions floated by this joint employer trend will continue.

III. WAGE/HOUR AND COLLECTIVE ACTIONS

A. Proposed Amendments to FLSA "White Collar" Exemptions

The US Department of Labor (DOL) finally published the long-awaited proposals to amend the "white collar" exemptions for executive, administrative, professional, and highly compensated exempt employees. The DOL's proposed changes seek to significantly increase the minimum salary an employee must earn to qualify for a white collar exemption, or for the highly compensated employee exemption. The proposed overtime rules may also make changes to the exempt duties tests as well. What those potential changes are, however, remain unclear.

Over a year ago President Obama announced his intention to modify the overtime regulations, which were last updated in 2004. In March 2014, President Obama directed Labor Secretary Thomas Perez to "modernize and streamline" the regulations. Through the proposed regulations, the DOL "seeks to update the salary level required for exemption to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of nonexempt employees, thus making the executive, administrative and professional exemption easier for employers and workers to understand and apply." According to the DOL, once effective, the new overtime rules would immediately make nearly 5 million additional workers eligible for overtime in the US. Others estimate the proposal would impact more than 10 million workers.

The DOL's proposed amendments contain three key changes to the current FLSA regulations:

- Set the minimum salary required to qualify for the white collar exemptions (the administrative, executive, and professional exemptions) at the 40th percentile of weekly earnings for full-time salaried workers. Based on 2013 data, this would amount to a minimum salary of $921 per week or $47,892 annually. The DOL projects that in 2016, when the rule will likely take effect, the 40th percentile will be about $970 per week, or $50,440 annually. This increase, if approved, would almost double the current salary basis -- which is at least $455 per week or $23,660 annually.
- Increase the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers. In 2013, this was $122,148 annually. This too is a large increase over the current salary basis of at least $100,000 annually. The DOL did not forecast what the amount might be in 2016.
- Establish a mechanism for automatically updating the minimum salary and compensation levels for these exemptions going forward.

Surprisingly, the proposal does not contain any specific changes to these exempt classifications' duties requirements "at this time." Instead, the DOL only

> "seek[s] to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted"

and

> "invites comments on whether adjustments to the duties tests are necessary, particularly in light of the proposed change in the salary level test."

The DOL sought comments on the following issues:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?
- Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employees primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests structure?
- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

The DOL also sought comments on a variety of other issues throughout the proposal. The final regulations are not expected to go into effect before 2016.

B. DOL Misclassification Guidance

As part of its efforts to curtail misclassification of workers, on July 15, 2015, the Department of Labor (DOL) Wage and Hour Division issued guidance through an administrator's interpretation to provide guidance to employers regarding how to determine whether workers are employees or independent contractors. Though this sort of interpretation does not have the force and effect of law, the guidance serves as a reminder to employers about the DOL's misclassification enforcement agenda while stressing the broad scope of the employment relationship under the Fair Labor Standards Act (FLSA).

The guidance also consolidates and summarizes the "economic realities" factors used by courts and provides examples under those factors. The following are the six "economic realities" factors addressed in the guidance:

- Is the work performed by the worker integral to the company's business (the more integral, the more likely an employee)?
- What is the nature and degree of control by the company (the more control, the more likely an employee)?
- Does the worker's managerial skill affect his/her opportunity for profit or loss?
- How does the worker's relative investment (in tools, training, etc.) compare to the company's (the more investment the more likely an independent contractor)?
- Does the work require special skill and initiative?
- Is the relationship between the worker and employer permanent or indefinite (the more permanent the more likely an employee)?

The guidance provides numerous examples under these factors. For instance, with respect to whether work is integral to the company, the guidance notes that carpenters are integral to the business of a construction

company that frames residential homes (and is more indicative of an employee/employer relationship). However, a software developer's work may not be integral to a construction company (and is more indicative of an independent contractor relationship).

The guidance also closes by declaring that "most workers are employees under the FLSA's broad definitions."

C. Discrimination Developments

1. Religious Discrimination

On June 1, 2015, the U.S. Supreme Court issued its opinion regarding religious discrimination under Title VII of the Civil Rights Act of 1964 in *EEOC v. Abercrombie & Fitch Stores, Inc.* 135 S. Ct. 2028 (2015). In it, the Supreme Court held that:

> "[t]o prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need."

The company declined to hire an otherwise qualified Muslim woman applicant because her hijab, or head scarf, violated its "look policy," a dress code policy that prohibited the wearing of caps. The EEOC brought the lawsuit on behalf of the applicant and prevailed in the District Court, but the Tenth Circuit reversed and awarded the company summary judgment because the company did not have actual knowledge or the applicant's need for a religious accommodation. The company argued that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his/her need for an accommodation. The Supreme Court overturned the Tenth Circuit, and in an 8-1 decision, determined as follows:

- To avoid summary judgment, an applicant need only show that his/her need for a religious accommodation was a motivating factor in the decision not to hire, not that the employer had actual knowledge that the religious nature of the practice.
- An employer who acts with the motive of avoiding an accommodation may violate Title VII even if the employer has no more than an unsubstantiated suspicion that accommodation would be needed.
- Neither the applicant's request for accommodation nor the employer's certainty that the religious practice exists are necessary conditions of liability.
- Title VII demands favored treatment religious practices, not mere neutrality towards them.

D. Sexual Orientation Discrimination

1. Executive Order 13672

On July 21, 2014, President Obama banned discrimination based on sexual orientation and gender identity with Executive Order 13672 (which amends Executive Order 11246). The corresponding final regulations, which took effect in April 2015, require federal government contractors to take affirmative steps to prevent discrimination based on sexual orientation and gender identity. For federal contractor employers, this includes amending internal policies, such as an equal employment opportunity policy, to include sexual orientation and gender identity. It also means federal contractors should communicate support for the final rule in job advertisements and solicitations as well as government contracts and subcontracts.

2. EEOC Enforcement on LGBT Issues

The EEOC has strengthened efforts on behalf of lesbian, gay, bisexual and transgender ("LGBT) workers. The EEOC's Strategic Enforcement Plan lists coverage of LGBT individuals under Title VII's sex discrimination provisions as an enforcement priority for FY2013-2016. Among other things, the EEOC has filed lawsuits on behalf of transgender employees. The EEOC also recently held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII. *See David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).

E. Pregnancy Discrimination

On March 25, 2015, the U.S. Supreme Court issued its highly anticipated decision in *Young v. UPS*. 135 S. Ct. 1338 (2015). *Young* addresses the question of whether, under the Pregnancy Discrimination Act ("PDA"), women who are affected by pregnancy, childbirth, or a related medical condition must be treated the same for employment purposes in terms of their ability or inability to work. The Supreme Court held that a plaintiff may make a *prima facie* case under the PDA by demonstrating that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work.

The petitioner in *Young* worked as a delivery driver. She became pregnant and informed her employer that based on her doctor's advice, she could not lift over twenty pounds during her pregnancy. She requested to return to her regular job or to perform temporary light duty. The employer provided accommodations such as light duty to three types of employees: those injured on the job; those who seek accommodation under the ADA; and those who lose their Department of Transportation (DOT) certification (such as drivers who became blind

and could no longer perform their duties). As such, Young's pregnancy and subsequent need for accommodation were not covered under the employer's light duty policy. The employer therefore denied her request and placed her on unpaid leave during her pregnancy. Eventually, she lost her health insurance.

After returning to work post-pregnancy, Young sued her employer in the District Court for the District of Maryland, claiming that it violated the PDA by failing to provide her with the same accommodations as it provided to nonpregnant employees who had similar lifting restrictions. The district court granted summary judgment in UPS's favor, and determined that its decision not to accommodate Young's lifting restriction was based on "gender-neutral criteria." It also found that Young failed to demonstrate a *prima facie* case of discrimination since there was no evidence that UPS had animus directed specifically at pregnant women like Young. On appeal, the Fourth Circuit affirmed and called the accommodation policy "pregnancy-blind." The Fourth Circuit held that the language in the PDA holding that pregnant women "shall be treated the same" did not create a separate cause of action; otherwise, the PDA would require that employers treat pregnant employees preferentially. Moreover, Young's limitation was temporary and was not a restriction on her ability to perform major life activities, so it would not be covered under the ADA.

In her petition for writ of certiorari, Young argued that the Fourth Circuit's decision directly conflicts with the plain language of the PDA, which requires employers to treat

> "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."

Young offered evidence that when a UPS employee is unable to lift more than twenty pounds because of a disability under the ADA or an injury that renders him or her ineligible for DOT certification, the company will accommodate that employee; however, it refused to accommodate Young in the same way, even though she was similar in her "ability or inability to work."

UPS maintained that its policies are fairly applied. In addition, it argued in its opposition brief to the Supreme Court that Young's case is not an appropriate case for the issue raised. The 2008 amendments to the ADA (known as the ADAAA) now consider such things as "lifting" to be major life activities. Under the ADA, individuals with a "lifting" restriction may request a reasonable accommodation under the ADA. However, according to UPS, Young's lifting restriction and subsequent request for accommodation occurred prior to the ADAAA's enactment, and the law is not retroactive. Thus, UPS insisted that this case is not a "proper vehicle" for interpreting the PDA since Young's scenario would likely be covered by the ADAAA.

The Supreme Court determined that:

> "a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"

Under the *McDonnell Douglas* burden-shifting framework, the employer may then provide legitimate non-discriminatory reasons for its denial of an accommodation. If the employer does so, the plaintiff may offer evidence that the employer's reasons are pretextual. Ultimately, the Supreme Court determined that the Fourth Circuit's decision must be vacated and remanded because Young created a genuine dispute of material fact regarding the company's accommodation of others "similar in their ability or inability to work."

F. Disability Discrimination

In *Hooper v. Proctor Health Care Inc.*, No. 14-2344, 2015 U.S. App. LEXIS 18630 (7th Cir. Oct. 26, 2015), a bipolar doctor sued his health clinic former employer for disability discrimination under the Americans with Disabilities Act ("ADA") after he was fired for failure to return to work. The district court granted the clinic's motion for summary judgment and the Seventh Circuit affirmed, finding that the doctor had failed to state a failure to accommodate claim, that such a claim would have failed even if it were properly stated, and that the doctor failed to allege facts which would allow a reasonable juror to find in his favor on a general disability discrimination claim under the ADA.

Fearing that his bipolar disorder might interfere with his ability to perform his duties, the doctor informed the clinic's human resources department of his condition and inquired about medical leave while he sought treatment and evaluation. The clinic placed the doctor on paid medical leave pending an independent medical examination. The examining psychiatrist approved the doctor's return to work without need for any accommodations, but suggested a few accommodations which might ease any burden on the doctor. The doctor remained absent from work for several weeks after receiving clearance to return, despite several attempts by the clinic to reach him, because he was confused as to when the psychiatrist's approval became effective (and thus, when he could return to work). The clinic sent a letter warning that he would be

fired if he did not return, and followed through in accordance with the clinic's policy.

With regard to his failure to accommodate claim, the court noted that the doctor's complaint merely invoked ADA discrimination and included the word "accommodation," without pointing to any facts which would put the clinic on notice of a failure to accommodate claim. Further, the court noted that even if the claim had been properly pleaded, it must fail because the doctor's examining psychiatrist approved the doctor for return to work without any required accommodations. Next, the court found that the doctor's general ADA discrimination claim must fail under the "indirect" method of proof because the doctor presented no evidence of similarly situated individuals and could not show that his failure to meet legitimate job expectations (i.e., showing up for work) was a mere pretext. Finally, the court found that the doctor's general ADA discrimination claim must fail under the "direct" method of proof because he could not show any connection between a Human Resources representative's one-off comment about a rocky relationship with her bipolar mother-in-law and the doctor's firing four months later. Thus, the court concluded that all of the doctor's claims must fail and affirmed the trial court's grant of summary judgment.