CLIENT ALERTS & INSIGHTS

June Kicks Off with a Flurry of Labor and Employment Law Developments and Activity

JUNE 8, 2017

Authors: Adam Primm

DOL Actions Undercut Obama Administration on Joint Employers and Independent Contractors

In the past week, the U.S. Department of Labor ("DOL") under new Labor Secretary Alex Acosta has moved to dismantle a series of the Obama Administration's rules and guidance regarding employment regulation.

First, on June 7, the DOL withdrew two guidance letters issued by the Obama Administration discussing the misclassification of workers as independent contractors and joint employment. The DOL announced that the withdrawals do not change employers' legal responsibilities under the Fair Labor Standards Act or the Migrant and Seasonal Agricultural Worker Protection Act.

The independent contractor guidance was issued in July 2015 and opined that most workers are employees, rather than independent contractors. The guidance deemphasized the degree to which a business controls an individual's work, focusing instead on a multi-factor test aimed at determining whether the worker is economically dependent on the employer or in business for him or herself. The result of the guidance was a narrower window to correctly classify workers as independent contractors and a test without bright-lines to guide employers.

The DOL's January 2016 administrator's interpretation regarding joint employment followed the National Labor Relations Board's decision in *Browning-Ferris* that said a company and its contractor could be joint employers if the company had indirect or a reserved right to control the contractor, even if such right was not exercised. This decision departed from the previous standard that required a joint employer to have exerted direct and immediate control over hiring, firing, discipline, supervision, and direction.

Now, both interpretations are off the books.

DOL Delays Prior Appeal of the Persuader Rule

Additionally, on June 2, the DOL asked the Fifth Circuit Court of Appeals to hold the DOL's appeal of a judge's order blocking the Persuader Rule in abeyance. In March 2016, the DOL published a revised Persuader Rule that required attorneys involved in union organizational campaigns to file broad public disclosures about their own and their law firm's compensation related to these efforts. Traditionally, only an attorney's direct communication with a client's employees regarding union activity had to be reported, but the new rule expanded the disclosure requirements to advice that "indirectly persuades" a client's employees regarding union organizing or collective bargaining, even if no direct contact occurred. The revised rule was barred by a permanent injunction in November

2016, which the DOL appealed at the time. This action comes on the heels of Secretary Acosta discussing his intention to rescind the Persuader Rule in an op-ed in the Wall Street Journal (click here for summary).

Second Circuit Upholds NLRB Ruling on Workplace Recording Ban

On June 1, the Second Circuit Court of Appeals affirmed the National Labor Relations Board's 2015 ruling in *Whole Foods Market Group, Inc.*, 363 NLRB No. 87 (2015), regarding the Company's rules banning employees from making workplace recordings.

Whole Foods maintained two written rules banning employees from recording conversations, phone calls, images, or company meetings without authorization. The Board found that those rules violated employees' rights under Section 7 of the National Labor Relations Act ("NLRA") to make audio and visual recordings when acting in concert in the workplace. Whole Foods argued that the policies were designed to eliminate the chilling effect on the employees' expression of views that would exist if they were concerned about being recorded. Whole Foods sought to protect spontaneous and honest dialogue. Although the Board has recognized that employers may have an overriding interest to overcome the employees' right to make workplace recordings (for example, the Board had previously found that a no photography policy protecting medical patients' privacy rights was an overriding interest), it found Whole Foods' justification failed to rise to that level.

Before the Second Circuit, Whole Foods continued to argue that its policies protected employee rights by encouraging them to speak freely. Nonetheless, the Court agreed with the Board and found that the bans are overbroad because they are "not limited to controlling those activities in which employees are not acting in concert." However, the Second Circuit acknowledged that Whole Foods could "craft a policy that places some limits on recording" without running afoul of the NLRA, therefore meeting its interests by "narrowing the policies' scope." To do so, Whole Foods would have to redraft its policies to explicitly show that the company does not intend to prohibit all recordings, including recordings protected by Section 7, but specifically detail the non-protected recordings it intends the policies to cover.

If you have any questions on this topic please contact a member of our Labor & Employment Practice Group.

Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Peter Kirsanow at pkirsanow@beneschlaw.com or 216.363.4481.

Steve Moss at smoss@beneschlaw.com or 216.363.4675.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.