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Employment Cases and Regulations to Watch in 2012

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While 2012 may not be the game-changing year of the decade in labor and employment law, anticipated legislation and expected court rulings will nonetheless have profound effects on the landscape for both employers and employees. From highly anticipated Supreme Court rulings on health care reform to regulatory issues involving the National Labor Relations Board, here is a rundown on some of the new year's more significant expectations.

2012 Cases to Watch

Supreme Court on Health Care Reform. The Patient Protection and Affordable Care Act of 2010 (PPACA), better known as health care reform, continues to move forward despite ongoing litigation and Congressional opposition. While the new health care reform package is not *per se* an employment statute, it will significantly affect the calculus for health care costs most employers will be paying (15 DLR S-52, 1/24/12).

An important issue that the U.S. Supreme Court will be called on to determine is whether Congress has the power to require individuals to choose between purchasing health insurance or paying a penalty. Intertwined with this issue are other PPACA provisions that forbid insurers from turning away applicants and prohibit the consideration of pre-existing conditions as a condition of providing coverage.

With 26 states challenging the constitutionality of the PPACA, the lower courts remain divided. So far, only the U.S Court of Appeals for the Eleventh Circuit has struck down the mandate, holding that the PPACA oversteps Congressional authority and cannot be justified by the constitutional power to regulate interstate commerce or to levy taxes. The U.S. Court of Appeals for the Sixth Circuit has upheld the PPACA's constitutionality, while the Fourth and D.C. circuits have ruled that the plaintiffs did not yet demonstrate standing to challenge the law.

If it's any indication about the importance of the case, the Supreme Court has allocated five and a half hours for oral argument, instead of the customary single hour. The court will hear from the U.S. Department of Justice, a representative on behalf of the 26 challenging states, and the National Federation of Independent Businesses. With oral argument scheduled for March and a decision due in late June, health care reform will continue to be a focal point of heated debate, and a matter of great significance to virtually everyone. Meanwhile, employers struggle to plan for the future when bottom-line costs may hinge upon the outcome of this case.

D.R. Horton Inc. Last year, the Supreme Court issued its landmark decision in *AT&T Mobility LLC v. Concepcion*, holding that the Federal Arbitration Act (FAA) preempts state laws that invalidate class action arbitration waivers (81 DLR AA-1, 4/27/11). However, in *D.R. Horton Inc.*, the National Labor Relations Board (NLRB) recently ruled that it is a violation of the National Labor Relations Act (NLRA) to require employees to sign arbitration agreements that prevent employees from pursuing employment-related claims on a class or collective basis (5 DLR AA-1, 1/9/12). According to NLRB, insistence upon such waivers is an unfair labor practice.

In so ruling, NLRB held that employee rights to join together as a class for pursuing common employment claims against employers is protected, concerted activity under Section 7 of the NLRA. Furthermore, NLRB held that employers placed an unlawful restraint on protected labor rights when requiring employees to enter into mandatory arbitration agreements that waive class action rights. NLRB drew distinctions between *AT&T Mobility* and the decision in *Horton* by reasoning

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that an agreement imposed on an employee under the NLRA is materially distinguishable from a consumer agreement between a cellular customer and a cell phone provider, as was the case in *AT&T Mobility*. Furthermore, *Horton* involves the interplay between two federal statutes, whereas *AT&T Mobility* involved state versus federal law.

The road to final decision on this issue may yet be long and protracted. The NLRB decision is sure to be followed by review in a federal appeals court, and likely, considered further in the Supreme Court. At a minimum, NLRB's decision in *D.R. Horton* should remind employers that protected, concerted activity under the NLRA is not limited to disputes with labor organizations.

Christopher v. SmithKlineBeecham Corp. d/b/a GlaxoSmithKline. The Supreme Court has granted *certiorari* to review the U.S. Court of Appeals for the Ninth Circuit's decision in *Christopher v. SmithKlineBeecham Corp. d/b/a GlaxoSmithKline*, which held that the Fair Labor Standard Act's (FLSA) outside sales exemption, which exempts such workers from the overtime pay provisions of the law, applies to pharmaceutical sales representatives (228 DLR AA-1, 11/28/11). With a recent influx of lawsuits that challenge the long-accepted application of the outside sales exemption to pharmaceutical sales representatives, this decision will have a far-reaching impact on the pharmaceutical industry.

To qualify for the outside sales exemption, an employee's primary duty must be to make sales or obtain orders or contracts for services. The employee must also be regularly engaged *away from the employer's place of business* when performing exempt duties. The Department of Labor (DOL) takes a narrow view when interpreting this exemption, urging that the primary duty of pharmaceutical sales representatives is not making sales because federal regulations preclude them from selling directly to physicians. Rather, according to DOL, these employees merely secure nonbinding purchase commitments from physicians.

The U.S. Court of Appeals for the Second Circuit adopted this narrow view in *In re Novartis Wage and Hour Litigation* (16 DLR AA-1, 1/25/12), and held that pharmaceutical sales representatives were not exempt from the overtime pay provisions of the FLSA. Several district courts, including the Northern District of Illinois, the Southern District of Florida, and the District of Connecticut, also endorsed this view and rejected availability of the outside sales exemption when classifying pharmaceutical sales representatives. In contrast, other district courts, including the Southern District of Indiana, the Eastern District of Texas, and the Eastern District of Pennsylvania, have ruled in favor of allowing the exemption for sales personnel in the pharmaceutical industry in cases either pending or anticipating review on appeal.

In addition to deciding whether the outside sales exemption may properly be applied to pharmaceutical sales representatives, the Supreme Court will also address whether deference should be given to an *amicus* brief prepared by DOL, interpreting the contours of the outside sales exemption. In *Novartis*, the Second Circuit ruled that DOL's interpretation of its own regulations was entitled to deference, while in *SmithKline*, the Ninth Circuit held that deference was inappropriate where the *amicus* brief argued for departure from pharmaceutical industry norms to which the secretary of labor had acquiesced for more than 70 years.

While the Supreme Court's ruling in *SmithKline Beecham* will have its most significant impact on the pharmaceutical industry, other industries may be affected as well. Depending upon how the case is decided, employers with sales-related workers who do not actually close deals may be forced to rethink their FLSA exemption classification methodology.

Brinker International Inc. v. Superior Court. Initially filed almost eight years ago, the *Brinker International* case has since been embroiled in a battle on the question of whether employers must ensure that employees take meal and rest breaks, or merely make them available under California law (143 DLR AA-1, 7/25/08). The class consists of almost 60,000 persons, and the case has generated enormous interest.

With oral arguments heard by the California Supreme Court last November, a decision is due in early 2012. The parties recently briefed the issue of whether the court's ruling should be applied retroactively, or prospectively only. The plaintiffs argue that a prospective-only application of the decision would hurt low-income employees and benefit employers, while the employer, along with the California Employment Law Council, has argued that retroactive application of the decision would open a floodgate of class actions. In addition, Brinker International asserted that the California law requiring employers to offer a meal period for every five consecutive hours worked was not sufficiently clear to employers so as to constitute fair notice of their statutory obligations. As the logic of this position goes, should the court rule against Brinker International, the decision should be prospective only.

If the court rules in favor of stricter meal period standards, employers will be forced to police meal periods and breaks taken by employees, even if that means rocketing compliance costs. New policies and procedures might be necessary in response to which employees would face discipline for not taking required breaks. Lawsuit filings might well soar, with employers liable for up to four years of missed meal periods and breaks.

If the court rules in favor of Brinker International and finds that employers only need to make meal and break periods available, then the floodgate issues will be largely moot. Courts will need to do more individualized analysis on facts about why breaks were missed, and focus more on cases in which the employer had a policy of depriving employees of the meal periods and breaks. The upcoming ruling will further provide guidance on what cases are appropriate for class certification.

Not only will this case have implications for employers in California, but in addition, it will affect employers who have out-of-state residents that work temporarily in California. And because California employment law trends often migrate east, employers outside of California will be paying close attention to this ruling. Restaurant groups in the state have spent millions of dollars fighting similar cases over the years, and the decision may provide some much-needed clarity that will ease tensions between employers and employees about break issues.

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2012 Regulations to Watch

NLRB Union Election Rule. Late last year—shortly before NLRB was expected to lose its quorum—the board published a final rule implementing significant changes to long-standing representation election procedures (245 DLR AA-1, 12/21/11). Unless there is judicial or legislative intervention, the final rule will take effect April 30, 2012.

The final rule will likely result in most union representation elections taking place within 15-20 days after the date on which a representation petition is filed, a much shorter time frame than available under current rules and procedures. This shortened election cycle places most employers at a serious disadvantage when it comes to educating employees about the pros and cons of union representation, and will present logistical issues associated with training supervisors about how to lawfully respond to union organizing activity. It also leaves employees with less time to consider all the facts when making their choice on whether they wish to be represented by a union, and could limit understanding the long-term consequences of such decisions.

The new rule also implements changes that will further disadvantage employers who seek to have a meaningful voice in the union representation process. Hearings to determine appropriate bargaining units will be confined to ''questions of representation.'' NLRB hearing officers will have discretion to determine whether there should be a hearing about the appropriateness of the composition of a bargaining unit. Hearing officers will also have discretion to exclude eligibility evidence and may deny submission of post-hearing briefs. Preelection requests for review are effectively eliminated under the rule and NLRB will not become involved with such issues until *after* an election has taken place. Employees will cast their ballots *prior* to eligibility issues being resolved. The supervisory status of employees—if challenged—will be determined *after* the election which creates a new array of procedural and timing issues, not to mention the possibility of invalidating already-conducted elections.

Given these changes in NLRB election procedures, employers should develop lawfully tailored contingency plans as soon as possible. It is likely employers will experience substantially increased union organizing activity after April 30.

Posting Notice Rule Under NLRB. NLRB recently issued a new notice-posting requirement, mandating that virtually all employers display a large (11 by 17 inch) Notice of Employee Rights, informing employees about rights under the NLRA. Those raising issue with this new posting requirement argue that the notice blatantly promotes unionization, and that the mandate to post extends beyond NLRB's authority to enforce existing law.

Opponents of the notice-posting rule further point out that the notice contains selected information about employee rights that seem to suggest a bias toward unionization instead of an unbiased statement of legal rights.

Because of challenges to the new rule, its implementation date has been pushed back several times, currently to April 30, 2012 (247 DLR A-10, 12/27/11).

DOL's Proposed Persuader Activity Rule. DOL has also become involved in the union labor relations fray, issuing its own proposed rule changes that some feel are designed to enhance union organizing efforts (214 DLR AA-1, 11/4/11).

The Labor Management Reporting and Disclosure Act (LMRDA) will impose new burdens on employers, labor relations consultants and law firms to file disclosure reports when they are retained to ''persuade'' employees about whether or not to embrace unionization (118 DLR A-7, 6/20/11).

Oftentimes, employers turn to labor lawyers for legal advice or to other outside consultants for nonlegal advice and guidance in connection with union organizing issues. The new rule issued by DOL requires employers to report any agreement or financial arrangements they may have with such third parties when those persons are performing ''persuader'' activities. The new rule may significantly impact attorneys who, under current LMRDA requirements, are not required to report activities when giving legal advice to clients. There is no equivalent requirement that unions file such reports if they hire labor ''persuaders.''

The new DOL approach will require reports on many activities that are generally not presently reportable, such as: proposing or drafting employer policies with an objective of remaining union free; coaching or counseling supervisors about how to deal with employees in a union campaign setting; or providing informational materials to employers for consideration and distribution to employees about issues pertaining to union representation. Even webinars and seminars aimed at educating employers about how to remain union free could trigger the duty to report under new regulations.

Looking Forward.

This year, there are important cases and new regulations on the radar that portend significant impact on employers, and may call for employers to rethink many of their employment policies and procedures. Employers should keep close watch on these new developments, and where appropriate, seek the advice of labor and employment counsel to ensure compliance and avoid unwarranted or unneeded litigation.