Upcoming Events

At the Winter meeting in Amelia Island, we had a great session with the ADR Section entitled: "Hold on, Class, it's not time to waive goodbye just yet!" Daniel C. Gerhan, Director and Senior Litigation Counsel at Boston Scientific Corporation and Jeff Kelsey, Managing Director – Employment Law at Federal Express Corporation presented, with Wystan Ackerman did a great job of presenting on the issue. If you have not already done so, please check out the paper.

This summer in Hawaii, our topic is "You don't have to go home, but you can't stay here," Dealing with difficult issues in law firms. We are partnering with the Life, Health and Disability Section and the Law Practice Management Section to discuss the difficulties of balancing the realities of legal work and business with insight into employment law topics, including practical issues such as dealing with older, unproductive partners; succession planning; attorneys with health or dependency issues; motivating millennials; and, working with female attorneys who are pregnant. We are pleased to report that Thayla Painter Bohn, VP Corporate and Human Resources, at American Fidelity Assurance Company and Jeff Kelsey, Managing Director – Employment Law at Federal Express Corporation will be presenting.

News and Noteworthy

PAYROLL AUDIT INDEPENDENT DETERMINATION (PAID) PROGRAM

Jeff Kelsey forwarded the press release from DOL regarding its new Payroll Audit Independent Determination (PAID) program, which is designed to facilitate faster and easier resolution of wage claims. You can see the news release at https://www.dol.gov/whd/paid/. If you use the program and/or have insights regarding it, please report by to the section. Jeff believes that this could be of interest to corporate counsel, so please let us know.

For more information on the program, see Helen Holden's article below.

SCOTUS REJECTS SEC'S EXPANDED DEFINITION OF WHISTLEBLOWER

MILLER LAW GROUP
California

In *Digital Realty Trust Inc. v. Somers*, the U.S. Supreme Court has unanimously overruled a Ninth Circuit decision that had relied on the Securities and Exchange Commission's (SEC) broad interpretation of the definition of a whistleblower under the Dodd-Franks Act.

Dodd-Franks defines whistleblowers as employees who provide "information relating to a violation of the securities laws to the [Securities and Exchange] Commission." The SEC had passed a regulation expanding the definition to include whistleblowers who report either internally to their employers or to the SEC. Digital Realty Trust involved an employee who reported to management that a vice president had eliminated some internal corporate controls in violation of the Sarbanes-Oxley Act. The employee did not report the violation to the SEC.

In upholding the SEC's expansive definition of whistleblower to include employees who report internally, the Ninth Circuit relied on the Supreme Court's decades-old Chevron doctrine, which gives regulatory agencies much leeway for interpreting federal law. But the Supreme Court's decision to overrule the Ninth

Circuit appears to roll back the ability of federal agencies to interpret their own statutes. As Justice Kagan stated during oral argument, "You have this definitional provision, and it says what it says."

The Supreme Court's *Digital Realty Trust* ruling means that federal agencies cannot ignore unambiguous language in statutes in order to make a decision that suits the agency's purpose. With respect to Dodd-Frank whistleblower protections in particular, while the outcome in Digital Realty Trust is good news for employers because individuals who only report securities violations internally will no longer qualify for Dodd-Frank protection, the decision should not be seen as a green light for employers to ignore internal complaints or become lax with regard to enforcing anti-retaliation policies. More employees may be incentivized now to go directly to the SEC to gain Dodd-Frank protection, and there may be other whistleblower protections that apply to an employee who reports a violation internally.

COURT RULES GRUBHUB DRIVER WAS INDEPENDENT CONTRACTOR; WHAT'S THE IMPACT FOR THE GIG ECONOMY?

MILLER LAW GROUP
California

In a long-awaited decision, a federal district court in California has ruled that a driver for food delivery app Grubhub was an independent contractor and not an employee under California law. While the ruling in *Lawson v. Grubhub, Inc.* is expected to have an impact on other "gig economy" companies that offer customers an opportunity to connect with goods or services through smartphone apps, the case is not the last word on worker classification.

Plaintiff Raef Lawson was an aspiring actor who worked as a food delivery driver for several months. Lawson filed an individual and PAGA action alleging that Grubhub violated California labor laws, including failing to pay minimum wage and overtime and not reimbursing expenses, by misclassifying drivers as independent contractors.

The court focused primarily on the degree of control that Grubhub exercised over the drivers' work. It concluded that Grubhub lacked sufficient control to classify Lawson as an employee. Among other factors, Grubhub exercised little control over how drivers performed deliveries and for how long they worked or how often they worked. It also did not require drivers to wear uniforms, to meet any particular appearance standards, or to drive any particular types of vehicles. Nor did the company provide any orientation, training, or performance evaluations.

The judge also noted several "secondary" factors, which could be indicative of an employer-employee relationship, including that drivers were paid by the hour and performed work that did not require special skills, and Lawson was not engaged in a distinct occupation or business. In addition, the drivers' work – delivering food – is a core service of Grubhub's business. However, the judge found that on the whole the evidence weighed in favor of establishing that Lawson was an independent contractor and not an employee.

Impact of Ruling

While this decision is generally regarded as a big win for gig-economy companies that rely on independent contractors, the issue is far from settled. To begin, it is only a federal district court ruling. Thus, while it may have persuasive value, it is not controlling on state or federal courts. In addition, Lawson could appeal the decision to the Ninth Circuit. Even then, the court may not be able to draw clear lines.

What's more, whether a worker is determined to be an employee or independent contractor depends on the facts of the particular case – and often on the court or agency that is reviewing the matter. For example, on the heels of the Grubhub ruling, the National Labor Relations Board released a 2016 advice memorandum determining that Postmates couriers are employees rather than independent contractors.

Ultimately, as the court acknowledged, the legislature may need to reconcile the existing legal guidelines with our modern economy: “Under California law whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. . . . With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy.”

CALIFORNIA’S “IMMIGRANT WORKER PROTECTION ACT” IN EFFECT; DLSE ISSUES NOTICE TEMPLATE AND GUIDANCE

MILLER LAW GROUP
California

California’s A.B. 450, the “Immigrant Worker Protection Act,” took effect on Jan. 1, 2018, imposing strict new obligations on all California employers during immigration enforcement actions and when receiving a Notice of Inspection (NOI) from U.S. Immigration and Customs Enforcement (ICE) regarding I-9 forms and other employment records. Employers should pay close attention to their new obligations under A.B. 450, particularly as ICE has signaled that it will be responding to this new law with increased raids and inspections at California workplaces. Joint guidance on A.B. 450 recently issued by the California Division of Labor Standards Enforcement (DLSE) and the California attorney general, as well as a notice template from the DLSE, should assist employers with their compliance efforts.

No Voluntary Consent to Worksite Access and Records

A.B. 450 prohibits all employers, and all persons acting on behalf of employers, from voluntarily consenting to allow an immigration enforcement agent to enter nonpublic areas of the workplace without a judicial warrant. Additionally, employers may not voluntarily consent to allow an immigration enforcement agent to access, review, or obtain employee records without a subpoena or judicial warrant. Importantly, this latter prohibition does not apply where the employer has received an NOI for I-9 Forms and other records.

The new joint guidance on A.B. 450 issued by the DLSE and the California attorney general defines a nonpublic area as one that “the general public is not normally free to enter or access,” such as an office where personnel or payroll records are kept. Furthermore, the guidance states that “for consent to be voluntary, it should not be the result of duress or coercion, either express or implied,” and that the law does not require physically blocking an immigration enforcement agent in order to show that voluntary consent was not provided. The guidance also provides a sample judicial warrant and subpoena, for employers’ reference.

Pre-Inspection Notice; New Template

Under A.B. 450, an employer that receives an NOI has new notice obligations. First, within 72 hours of receiving the NOI (whether it is mailed to the employer or delivered by ICE agents), the employer must provide written notice to each current employee by posting the following information in the language the employer typically uses to communicate employment-related information to its employees:

- The name of the immigration agency that will be conducting the inspection;
- The date the employer received the NOI;
- The “nature of the inspection” to the extent known; and
- A copy of the NOI.

Employers must also provide the written notice within the same timeframe to any collective bargaining representative. Furthermore, the employer must provide an affected employee a copy of the NOI upon the employee’s request.

The DLSE, as directed by the new statute, has published a template that employers may use to satisfy the initial notice requirement. The template is available on the DLSE website. Employers are not required to use the template – and should ensure that it otherwise fits the notice requirements of their particular situation and business before relying on it – but may find it convenient.

Post-Inspection Notice

A.B. 450 also requires employers to provide notice of the results of the inspection to any "affected employees" and their representatives within 72 hours after the employer receives the inspection results. An "affected employee" is an employee who may lack work authorization or an employee whose work authorization documents have been identified as deficient. Any such notice must relate solely to the affected employee, and must be hand-delivered to the employee at the workplace, if possible. If hand delivery is not possible, the employer should deliver the notice by mail and email (if the email is known). The post-inspection notice must contain:

- A description of all deficiencies or other items identified in the written immigration inspection results related to the affected employee;
- The time period for correcting identified deficiencies;
- The time and date of any meeting with the employer to correct any identified deficiencies; and
- Notice that the employee has the right to representation during any such meeting.

No template exists for this post-inspection notice, and A.B. 450 does not require the DLSE to develop one. Employers should work with experienced Human Resources professionals or legal counsel to develop a compliant notice should the need arise.

I-9 Reverification

In addition to the worksite enforcement and notice provisions of A.B. 450, the law also prohibits an employer from reverifying a current employee's employment eligibility at a time or in a manner that is not required by the work authorization provisions of the federal Immigration Reform and Control Act (IRCA). Violation of this prohibition alone subjects the employer to a civil penalty up to $10,000.

Takeaways

Civil penalties for violations of the Immigrant Worker Protection Act are steep, ranging from $2,000 to $5,000 for a first violation of the entry and notice requirements and $5,000 to $10,000 for subsequent violations. And with ICE's recent announcement of plans to increase worksite enforcement operations by 400%, it is critical for businesses to ensure that their HR and management teams understand the new obligations imposed by A.B. 450 so they are legally equipped to handle a visit from ICE or a Notice of Inspection. For more information, employers can refer to the new A.B. 450 joint guidance issued by the DLSE and the California attorney general's office.

DOL ANNOUNCES "PAID" PROGRAM

HELEN HOLDEN
SPENCER FANE
Originally appearing at https://www.spencerfane.com/publication/

On March 6, 2018, the Wage and Hour Division of the U.S. Department of Labor (DOL) announced that it will soon launch a nationwide pilot program for employers to self-report potential overtime and minimum wage violations. The pilot program is called the Payroll Audit Independent Determination (PAID) program. The primary objective of PAID, according to the agency, is to "improve employers' compliance with

overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster." Many details are not yet available, but the DOL has announced the broad outlines of the program, which are available here: https://www.dol.gov/whd/paid/#1

All employers covered by the Fair Labor Standards Act (FLSA) are eligible to participate to resolve potential issues, but the program may not be utilized to resolve issues subject to current investigations by DOL, active litigation, or claims where there is a known threat of litigation. Employers who are interested in participating would begin the process by reviewing DOL's compliance assistance materials, and then conducting a self-audit of payroll practices. After conducting the self-audit, employers would have the option of submitting the audit results to the agency to request participation in the program, and, if the application to participate is approved, DOL will require the employer to provide additional information and certifications to DOL, including an agreement to correct the pay practices at issue moving forward and pay affected employees back wages. In return, Employers who participate would not be required to pay liquidated damages or civil monetary penalties, and, if payment is accepted by the affected employees, employers will also receive a limited waiver of claims. The waiver of claims appears to be very narrow, and would not result in a waiver of state law claims or a waiver of claims under statutes other than the FLSA. The PAID program is slated to begin in April, 2018, and DOL has stated that it will evaluate the program after six months.

Many details of the program remain unknown, including how far back employers must look to determine whether violations occurred, what criteria DOL will use for approving participation in the program, and the form of the limited waiver of claims. Because program participation requires employers to provide information to the agency, employers should proceed with this program cautiously, and only with the advice of counsel. Even with these questions, PAID appears to be structured in a way that may provide a viable option for employers who are concerned about resolving potential violations of the FLSA.

FDCC E-Newsletter

Every month on the 10th, we are asked to submit articles or items of interest to the Federation for publication in the FDCC E-newsletter. Please send your materials to me so that we can get you published! You can reach me at pmfinamore@nilesbarton.com.

Section Connections

If you are a blogger or have a LinkedIn group that you would like to invite section members to join, please send the information to me so that members know how to access it. I would be happy to highlight your blogs or sites, so please send them along to me.

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