Fenwick Employment Brief

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FOR THE FIRST TIME, CALIFORNIA SUPREME COURT CLARIFIES ADMINISTRATIVE EXEMPTION TEST – REJECTS MECHANICAL APPLICATION OF ADMINISTRATIVE/ PRODUCTION DICHOTOMY

In a major wage/hour ruling, the California Supreme Court clarified the test used to analyze whether the administrative exemption to overtime applies to employees. Historically, courts have applied the administrative/production worker dichotomy test. This dichotomy distinguishes between administrative employees who are primarily engaged in administering the business affairs of the enterprise (exempt employees) and production-level employees whose primary duty is producing the commodities that the business exists to produce and market (non-exempt employees). However, in *Harris v. Superior Court*, the Supreme Court held that the administrative/production worker dichotomy is not a dispositive test and should only be applied in limited circumstances. Instead, courts should first analyze whether the work performed by the employee is (1) directly related to management policies or general business operations of the employer or its customers and (2) both qualitatively and quantitatively administrative.

In *Harris*, plaintiff claims adjusters filed class action lawsuits asserting that the defendant insurance companies misclassified them as exempt from overtime. The insurance companies raised an "affirmative defense" that plaintiffs were exempt from overtime under the administrative exemption. Plaintiffs sought to have that defense dismissed on the grounds that, as a matter of law, the claims adjusters were not exempt under the administrative/production worker dichotomy test. The trial court denied the dismissal request. On initial appeal, the court reversed and determined that plaintiffs were not exempt, applying the administrative/production worker dichotomy.

Upon further appeal, the Supreme Court considered the administrative exemption test for the first time. It focused on whether the work performed by the employee was "administrative." The Court noted that the current, operative wage order, unlike an earlier wage order used to analyze prior cases, describes in detail the administrative exemption: "A person employed in an administrative capacity means any employee … [w]hose duties and responsibilities involve either … [t]he performance of office or non-manual work *directly related* to management policies or general business operations of his/her employer or his/her employer's customers."

Interpreting the language of the wage order and related federal regulations, the Court determined that the phrase "directly related" means that the work must be both (1) qualitatively administrative (*i.e.,* administrative in nature) and (2) quantitatively administrative (*i.e.,* of substantial importance to the management or operations of the business). Plaintiffs argued that defendants could not establish the qualitative element of this test, specifically citing the administrative/ production worker dichotomy to support their argument that they were non-exempt production employees.

The Supreme Court reversed the appellate court's decision, stating that the lower court failed to properly apply the operative wage order. It held that (1) the correct test for the administrative exemption is whether the work performed by the employee is "directly related to management policies or general business operations of his/her employer or his/her employer's customers"; (2) in analyzing whether the work is directly related, courts must find that the work is both qualitatively and quantitatively administrative; and (3) courts should only apply the dichotomy if the applicable statutes and wage orders "fail to provide adequate guidance."

This ruling is significant because the Supreme Court rejected the analytical framework of the administrative/ production worker dichotomy as dispositive. It noted that the mechanical application of the dichotomy is improper and that courts must instead conduct a fact-

intensive analysis guided by statutory and regulatory language. It also recognized that the dichotomy can be outdated when applied to today's workforce: '"courts often strain to fit the operations of modern-day post-industrial service-oriented businesses into the analytical framework formulated in the industrial climate of the late 1940's."' Significantly, the Court disregarded Department of Labor Standards Enforcement ("DLSE") opinion letters relied upon by the appellate court, stating "it is ultimately the judiciary's role to construe the language."

Most importantly, this decision opens the possibility that a greater range of positions may be properly classified as administrative exempt under the new test. Employers should consider the test outlined by the Court when deciding, or perhaps reconsidering, more difficult classifications (*e.g.,* administrative assistants to an executive may now be exempt under the new standard).

NEWS BITES

NLRB Holds That Mandatory Arbitration Agreements With Class Action Waivers Violate The NLRA

As if the National Labor Relations Board ("NLRB") does not have enough problems with a full-scale congressional attack against its procedures and a refusal to confirm new members nominated by President Obama, on January 3 it issued a controversial decision (with only three members) that invalidates most class action waivers in arbitration agreements. In *D.R. Horton, Inc. and Michael Cuda*, the Board ruled that arbitration agreements (signed as a condition of employment) which require employees to forego filing joint, class, or collective claims regarding their wages and hours or working conditions, violate the "concerted activity" protections under Section 7 of the National Labor Relations Act ("NLRA"). Although the Board recognized that the Federal Arbitration Act ("FAA") traditionally permits such agreements, it nonetheless held that there is no conflict between federal labor law and the FAA. This sweeping decision, affecting both union and non-union companies, will certainly be challenged in the courts. [More to follow on this ruling in our next FEB issue].

NLRB General Counsel Issues Pro-Employer Social Media Decisions

In the last few months, the NLRB General Counsel has issued various advice memos recommending dismissal of cases wherein he determined that employees' Facebook posts did not constitute protected, concerted activity affording them protection from discipline under the NLRA. Most of these cases involved employees posting disparaging comments about their supervisors or coworkers on Facebook. In those cases, the conduct did not constitute "concerted activity" because no other employees joined in the discussion or the intention of the post was not seen as attempting to initiate group action.

For example, in one case (*TAW, Inc.*), an employee complained to her employer that a company accounting practice could constitute fraud, and then posted her belief on her Facebook page. The employer met with the employee and external auditors, who assured her that the employer was not engaged in fraud. A few days after the meeting, the employer asked her to remove the post. She refused and was terminated. The post did not constitute protected activity because when she was asked to remove the post, she knew that the employer was not engaged in fraud. Thus, the post was false and her refusal to remove it was not protected under the NLRA.

These advice memos continue to indicate a more careful, nuanced approach by the NLRB regarding protected, concerted activity in social media and perhaps a shift towards a stricter interpretation of NLRA protection for such conduct.

Ninth Circuit Holds That Obscene, Degrading, And Insubordinate Comments – Absent Threat Of Physical Harm – May Result In Loss Of Protection Under The NLRA

In *Plaza Auto Center, Inc. v. NLRB*, the Ninth Circuit (in San Francisco) held that the NLRB erred in its finding that an employee's obscene, insubordinate conduct was nevertheless protected activity under the NLRA. In this case, salesman Nick Aguirre regularly complained regarding the terms and conditions of his employment, including meal breaks and payment of wages.

In response to his complaints, his managers told him to work elsewhere if he did not like the employer's policies. Eventually, the sales managers held a meeting with Aguirre and business owner Tony Plaza. Plaza told Aguirre that he was asking too many questions, "talking a lot of negative stuff" that would negatively affect the sales force, that he should not be complaining about pay, and that he could work elsewhere if he did not trust the company. Aguirre became very angry and called Plaza a "f*cking crook" and an "a**hole." He also told Plaza that he was stupid, nobody liked him, and everyone talked about him behind his back. While making these comments, Aguirre stood up, pushed his chair aside, and told Plaza that if he fired him he would regret it. Plaza fired Aguirre.

The Court upheld the NLRB's finding that the employer violated the NLRA by inviting Aguirre to quit in response to his complaints regarding his employment conditions. However, the Court ordered the Board to reconsider its prior decision that Aguirre retained protection despite his conduct during the meeting with Plaza. The Court stated that the nature of the actual outburst could weigh in favor of lost protection under the NLRA (even absent a threat of physical harm) if the conduct is obscene, degrading, and insubordinate, suggesting that Aguirre's conduct could be all three.

Ninth Circuit Confirms In *Sullivan v. Oracle Corp*. That California Law Can Apply To Work Performed In California By Nonresident Employees

After review of the issues by the California Supreme Court, and return of the *Sullivan v. Oracle Corp.* case to the Ninth Circuit (San Francisco), the federal court confirmed that nonresident employees who occasionally performed work in California could pursue claims for overtime under the California Labor Code. This decision puts California employers on notice that if they employ workers located in other states who occasionally perform work in California for periods of a day or more, they are likely to be required to pay them according to California wage and hour laws. For more details on this case, and the prevailing standards, please refer to our July special bulletin.

Federal Court Finds Insufficient Evidence To Establish WARN Act Liability Against Parent Company

A New York district court recently held in *Guippone v. BH S&B Holdings* that a parent company that merely approved the decision of its subsidiary to lay off employees was not subject to WARN Act liability. While plaintiff employees easily established common ownership under the Act since the parent was the sole owner of the subsidiary, they could not establish liability of the parent company as a single employer because (1) the parent did not exercise control by merely consenting to the subsidiary's decision to implement mass layoffs; (2) it did not have a unity of personnel policies simply because its representatives discussed operations with management of the subsidiary; and (3) plaintiffs could not demonstrate an interrelation of operations. This somewhat unusual case underscores the required fact-intensive analysis to determine if there is single employer liability under WARN.

At-Home Call Center Misclassification Class Action Lawsuit Filed Against Apple

A class of individuals performing at-home call center services sued Apple in early December claiming they were misclassified as independent contractors. The class alleges that Apple forced each of them, as a condition of employment, to form a separate Virtual Services Corporation to act as a shell corporation to enable Apple to avoid employee-related costs such as payroll taxes. The complaint refers to these agreements as "Yellow Dog Contracts," which were historically agreements between employers and employees wherein employees agreed not to join or remain a member of a labor organization. Such contracts are illegal and violate public policy. Here, the class members argue that conditioning employment on the formation of a shell corporation is akin to a Yellow Dog Contract. The case, *Hilton v. Apple*, is pending in Santa Clara County Superior Court, and may be instructive regarding proper classification of at-home workers.

Although The California Wage Theft Prevention Act Is Now In Effect, DLSE Guidance Remains Sparse

On January 1, 2012, the California Wage Theft Prevention Act of 2011 ("WTPA") became effective. Most significantly, the WTPA adds section 2810.5 to the California Labor Code, which requires employers to provide non-exempt employees at the time of hire with a notice specifying various employment details such as rate of pay and the employer's regular paydays (among others). The DLSE recently issued a template notice and Frequently Asked Questions. Employers must also adhere to written notice requirements for changes in the rate or basis of pay. For more details on the Act and this notice, please refer to our November FEB issue.

NLRB Further Delays Deadline For Posting Notice Of Employee Rights

The NLRB has again postponed the deadline by which employers must post a notice of employee rights under the NLRA. The Board previously postponed the original deadline of November 14, 2011 to January 31, 2012. The current deadline is now April 30, 2012. For more details on this notice, please refer to our September and October FEB issues.

Brinker Decision On Meal Periods Likely In April 2012

Employers will likely have to wait until April for a decision from the California Supreme Court in the long-awaited *Brinker* case involving whether employers must ensure that employees take meal periods or simply provide them. The Court permitted additional briefing to address whether certain of its ultimate holdings should apply prospectively or retroactively, which will extend the deadline for a decision until April 2012. For more details on this decision, please refer to our October, November, and December FEB issues.

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