Schulte Roth&Zabel

Employment & Employee Benefits Luncheon for Investment Managers

Thursday, June 2, 2016

Schulte Roth&Zabel

Alert

Update on the New Federal Overtime Regulations and the New York Minimum Wage

May 27, 2016

On May 18, 2016, the U.S. Department of Labor ("DOL") announced the DOL's final rule extending coverage of overtime pay under the federal Fair Labor Standards Act ("FLSA").[1] Along with the announcement, the DOL released guidance on the final rule and the FLSA's requirements after the rule becomes effective on Dec. 1, 2016.[2]

As we advised in a previous *Alert*, the FLSA generally requires employers to pay employees the minimum wage and overtime pay for each hour they work in excess of 40 hours per week. However, the FLSA includes many exemptions, including one for employees who are paid on a salary basis and earn a certain minimum amount per week. To be exempt, these employees also must meet the "duties test," which determines whether the employee falls under one of the "white collar" exemptions, which include, among others, executive, administrative and professional employees.[3] The final rule does not change the duties tests for the white collar exemptions, or that, to be exempt as a "highly compensated employee," an employee must satisfy a minimal duties test.[4]

The key provisions of the final rule are as follows:

1. Increase the minimum salary level for the white collar exemptions from $455 per week to $913 per week (from $23,660 to $47,476 per year);
2. Increase the minimum salary level for the exemption for "highly compensated employees" from $100,000 to $134,004 per year; and
3. Automatically update the salary thresholds every three years. Automatic updates to the thresholds will begin Jan. 1, 2020.

The new rule will allow employers to include nondiscretionary bonuses and incentive payments, such as commissions, to satisfy up to 10 percent of the salary requirement.

[1] The full text of the final rule is available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf.

[2] Available at https://www.dol.gov/whd/overtime/final2016/.

[3] For a more detailed analysis of the white collar exemptions and the exemption for "highly compensated employees," please visit https://www.dol.gov/whd/overtime/final2016/.

[4] The rule also does not change the special provisions that apply to employees of educational institutions, such as the specified salary level rules for academic administrative personnel. For a more comprehensive discussion of the final rule's effect on the FLSA requirements for educational institutions, please visit https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf.

Maintaining Compliance
Although there are efforts in Congress and threats of litigation to stop the implementation of the final rule, employers should begin reviewing the classifications they use for employees.

To qualify as exempt under a white collar exemption after the new rule takes effect, an employee generally must meet three tests:

- He or she must be paid a salary, rather than an hourly wage;
- His or her salary must be at least $913 per week; and
- His or her primary duty must consist of the type of work normally associated with exempt executive, administrative, or professional employees.

In the guidance released with the announcement of the final rule, the DOL outlined several options for employers affected by the change in the salary requirements: (a) raise salaries to keep the exemption; (b) keep current salaries and pay overtime when employees work overtime; (c) redistribute work responsibilities or hours, or adjust schedules, so that employees are not working more than 40 hours per week; and (d) adjust wages, reallocating employees' earnings between regular pay and anticipated overtime so that the total compensation stays about the same.

New York State's Minimum Wage and Overtime
New York historically raised its salary requirement for employees to be considered exempt with each increase in New York's minimum wage. The most recent increase to the minimum wage occurred on Dec. 31, 2015, and the current New York salary requirement for exemption increased to $675 per week on that date. Until the federal increases set forth in the final rule go into effect on Dec. 1, 2016, New York employers need to ensure they are meeting the current New York requirement.

New York State's Minimum Wage Increases
New York State's minimum wage will increase over the next several years. The minimum wage will vary based on location and on the number of employees, eventually reaching $15.00 per hour for employers in New York City and Nassau, Suffolk and Westchester counties.

For New York City employers with more than 10 employees, the minimum wage will increase to $11.00 per hour effective Dec. 31, 2016, to $13.00 per hour effective Dec. 31, 2017, and to $15.00 per hour effective Dec. 31, 2018. For New York City employers with 10 or fewer employees, the minimum wage will increase to $10.50 per hour effective December 31, 2016, to $12.00 per hour effective Dec. 31, 2017, to $13.50 per hour effective Dec. 31, 2018, and to $15.00 per hour effective Dec. 31, 2019.

Employers in Nassau, Suffolk and Westchester counties will see slower increases. The minimum wage will increase to $10.00 per hour effective Dec. 31, 2016. The minimum wage will then increase by $1.00 per hour each December 31 thereafter, eventually reaching $15.00 per hour effective December 31, 2021.

Employers in all other counties will see minimum wage increased to $9.70 per hour effective Dec. 31, 2016. The minimum wage will then increase by $0.70 per hour each Dec. 31 thereafter, eventually reaching $12.50 per hour effective Dec. 31, 2020. Thereafter, the minimum wage will increase to $15.00 per hour through annual increases determined by the State Director of the Division of Budget in consultation with the State Department of Labor.

Beginning Jan. 1, 2019, the Director of the Division of Budget will conduct an annual analysis of the state of the economy in each region, as well as the effect of the minimum wage increases, to determine whether to temporarily suspend or delay any scheduled minimum wage increases.

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It is expected that the State Department of Labor will publish schedules for the salary levels necessary for an exemption from overtime pay in conjunction with the new wage law, although these New York thresholds likely will be less than the federal thresholds effective Dec. 1, 2016.

Employers should review their payroll each December and ensure that it reflects the correct minimum wage rate for the following calendar year. Employers with employees performing work at the minimum wage level in multiple regions for a single employer should make sure the employees are being paid the correct wage for all hours worked in each location.

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Congress Passes the Defend Trade Secrets Act of 2016

May 2, 2016

On April 27, 2016, the U.S. House of Representatives passed the Defend Trade Secrets Act of 2016, S. 1890 (the "DTSA"). The U.S. Senate had already passed the DTSA on April 4, 2016. The White House has expressed its support of the DTSA, and President Obama is expected to sign it into law within the next few weeks.

The DTSA, among other things, provides owners of trade secrets with a federal private cause of action for the misappropriation of trade secrets. Currently, a patchwork of state laws, not federal law, allows individuals and entities to commence civil actions to protect their trade secrets and seek damages for misappropriation. Historically, federal law governing the protection of trade secrets has been limited to criminal statutes such as the Economic Espionage Act of 1996.

In a previous *Alert*, we discussed an earlier version of this legislation (the Trade Secrets Protection Act of 2014, H.R. 5233) that was designed to provide trade secret owners with a federal private right of action to combat trade secret misappropriation. The legislation has since been modified in various ways and employers and other owners of trade secrets should become familiar with the key provisions.

Key Provisions of the DTSA

- Private Right of Action: The owner of a trade secret "related to a product or service used in, or intended for use in, interstate or foreign commerce" has the right to commence a civil action in federal court if such trade secret is misappropriated or if misappropriation is threatened.
- *Ex Parte* Seizures: In "extraordinary circumstances," a court may, upon *ex parte* application, "issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action." Before issuing such a seizure order, an applicant must demonstrate to the court that the applicant otherwise would suffer irreparable and immediate injury, and that "the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and substantially outweighs the harm to any third parties who may be harmed by such seizure." The applicant also must demonstrate that the party subject to such an order "would evade, avoid, or otherwise not comply with" a preliminary injunction or temporary restraining order, and that, if the person subject to the order had prior notice of it, that person (or persons acting in concert with that person) "would destroy, move, hide, or otherwise make such matter inaccessible to the court." An applicant for an *ex parte* seizure order must post an adequate security (as determined by the court). A court issuing an *ex parte* seizure order must hold a hearing no later than the seventh day following the issuance of such order to determine whether the order should be modified or dissolved.
- Injunctions: A plaintiff may seek an injunction to prevent actual or threatened misappropriation. The DTSA places certain limitations on such injunctions. Most importantly,

they may not "prevent a person from entering into an employment relationship." Further, any conditions on employment cannot be based on a person's mere knowledge of trade secrets (unlike employment conditions imposed under state law based on the inevitable disclosure doctrine). Rather, employment restrictions must be based on "evidence of threatened misappropriation." The DTSA does not define what constitutes a "threatened misappropriation," which may result in significant litigation. Injunctions under the DTSA may not conflict with applicable state law prohibitions on "restraints on the practice of a lawful profession, trade, or business." These limitations were added to the DTSA after certain senators expressed concern that it would interfere with state laws designed to protect employee mobility. These limitations do not, however, limit the injunctions currently available under state law.

- Damages: A plaintiff may seek damages for actual loss, plus any unjust enrichment in excess of actual loss, caused by the misappropriation of a trade secret. Alternatively, the plaintiff may collect a reasonable royalty for an unauthorized disclosure or use of a trade secret. A plaintiff also may collect exemplary damages up to twice the amount of damages otherwise awarded in the event of willful and malicious misappropriation of the trade secret.
- Statute of Limitations: A civil action must be commenced within three years following the date on which the misappropriation was discovered or should have been discovered with reasonable diligence.
- Preemption: The private cause of action set forth in the DTSA does *not* preempt or displace state law governing the protection of trade secrets.
- Immunity: The DTSA provides immunity from civil and criminal liability under federal or state trade secret law for individuals who disclose trade secrets in confidence to federal, state or local government officials, or to attorneys, in each case "solely for the purpose of reporting or investigating a suspected violation of law," or in court filings made under seal. In certain circumstances, an individual who sues his or her employer for whistleblower retaliation may disclose that employer's trade secrets to an attorney. Under the DTSA, employers must notify their employees, in any employment contract or agreement governing the use of trade secrets or confidential information that is entered into or modified after the DTSA is enacted, of their immunity in such circumstances.

Considerations for Employers

The DTSA provides employers with greater resources to protect trade secrets. Because the private cause of action under the DTSA will not preempt state law, employers will be able to pursue claims under both federal and state law. They also will have access to federal courts to pursue those claims. At the same time, the DTSA imposes additional burdens on employers. Employers will need to make sure that their employment contracts contain the proper notifications as required by the DTSA.

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Alert

Federal Court Finds Private Equity Funds Liable for Pension Liabilities of Portfolio Company

April 8, 2016

In a much-anticipated decision addressing the reach of multiemployer pension plans in imposing withdrawal liability, a U.S. District Court ruled on March 28, 2016 that three private equity funds were engaged in a "trade or business" and their investment in a portfolio company was made through a "partnership-in-fact," thereby subjecting the funds to withdrawal liability. The ruling in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund* by the U.S. District Court for the District of Massachusetts comes almost three years after the high-profile decision of the U.S. Court of Appeals for the First Circuit that one of the funds managed by Sun Capital Advisors ("Sun Capital") was engaged in a "trade or business," setting the stage for the district court's recent decision.

First Circuit's 2013 Decision

As described in a previous SRZ *Alert*, *Sun Capital* involves the 2007 investment in Scott Brass Inc. ("SBI") by three private equity funds ("SCP Funds") established and managed by Sun Capital. Sun Capital Partners IV, LP ("SCP IV Fund") owned 70 percent of SBI and two "parallel funds" — Sun Capital Partners III, LP and Sun Capital Partners III QP, LP ("SCP III Funds") — owned the remaining 30 percent of SBI. In October 2008, SBI stopped contributing to the New England Teamsters and Trucking Industry Pension Fund, a multiemployer pension plan, which triggered withdrawal liability. The Teamsters Plan assessed withdrawal liability on SBI and the SCP Funds. The Teamsters Plan's position was that the SCP Funds were members of SBI's ERISA-controlled group. Under ERISA, to be liable as a member of a contributing employer's controlled group, the entity must be: (1) a "trade or business"; and (2) under "common control" with the obligated entity through ownership of at least 80 percent.

On appeal, the First Circuit set forth an "investment plus" standard to evaluate whether a private equity fund was engaged in a "trade or business," which includes analysis of the profit-making purpose, the involvement in portfolio company management and operations, governance control, and any direct economic benefit received by the fund. Based on "the sum of all of these factors," the First Circuit held that the SCP IV Fund satisfied "the 'plus' in the 'investment plus' test." The First Circuit remanded the case to the district court to determine whether the SCP III Funds also constituted trades or businesses and, if so, whether SBI was under the "common control" of the SCP Funds.

District Court Decision

Using the First Circuit's "investment plus" test, the district court found that the SCP IV Fund and the SCP III Funds were trades or businesses based on the economic benefits they received from their management activities with respect to SBI. The SCP III Funds' economic benefit was offsets from the management fees that each owed to Sun Capital by certain fees (such as management fees, directors' fees, corporate services fees, investment banking fees and any net fees) that Sun Capital and its affiliates received from SBI. The SCP IV

Fund argued that the First Circuit's holding that the fund was a trade or business was based on an erroneous factual determination. The SCP IV Fund asserted there was no economic benefit because it never utilized any offset due to SBI's bankruptcy and Sun Capital's waiver of fees. The district court rejected the argument, holding the economic benefit was a potential offset that could be carried forward to reduce the fund's future management fees.

As to "common control," the district court determined that the three SCP Funds should be deemed to have formed a de facto partnership — a "partnership-in-fact" — in connection with their investment in Sun Scott Brass LLC ("TopCo LLC"), which, in turn, owned SBI. The district court rejected the SCP Funds' argument that the choice of organizational form under state law should be determinative of treatment under federal law. In reaching its conclusion, the district court found that:

- An intent to form a partnership was evident from the SCP Funds' decision to split SBI's ownership to address the SCP Funds' different investment life cycles, income diversification preferences and desire to avoid common control under ERISA. The decision showed a "coordination" and "joint action" that "stem from top-down decisions to allocate responsibilities jointly" and was not the action of "independent funds choosing, each for its own reasons, to invest at a certain level."
- The SCP Funds engaged in a "period of joint investigation and action prior to the formation of an LLC" to identify potential investments.
- The SCP Funds are closely affiliated entities and "part of the larger ecosystem" of Sun Capital entities created and directed by general partners, each of which is controlled by the co-CEOs of Sun Capital.
- The SCP Funds were not passive investors in SBI that invested "by happenstance, or coincidence," but the SCP Funds created the TopCo LLC to invest in SBI — a form of investment structure that the SCP Funds used to invest in five other companies between 2005 and 2008.
- There was no record of any actual independence of the SCP Funds with respect to their co-investments, such as co-investments with outside entities or evidence of disagreement between the SCP III Funds and SCP IV Fund over how to operate the TopCo LLC, as might be expected from independent members. "The smooth coordination is indicative of a partnership-in-fact sitting atop the [TopCo] LLC: a site of joining together and forming a community of interest."

The district court also determined that the partnership-in-fact created by the SCP Funds was engaged in a trade or business. The SCP Funds already have appealed the district court's decision.

Conclusion

The decision marks the first time that a court has held that private equity funds, each owning less than 80 percent of a portfolio company, were liable for the pension obligations of the portfolio company. As a result of the decision, we expect that multiemployer pension plans and the Pension Benefit Guaranty Corporation will become more aggressive in pursuing private equity funds for a portfolio company's withdrawal liability. We also expect that private equity funds will undertake additional precautions in structuring and managing portfolio company investments to prevent being held liable for a portfolio company's withdrawal liability.

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Employment Law Update: 2015 Year-End Review

January 2016

Employment Law Update: 2015 Year-End Review

In the past year, many significant statutory, regulatory and case law developments affected employers' approaches to a variety of important workplace issues. From changing the ways they handle background checks and whistleblowers to classifying workers as unpaid interns and making religious accommodations in the workplace, employers faced a range of challenges that we summarize in this *Employment Law Update: 2015 Year-End Review*.

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New York City Fair Chance Act

On Oct. 27, 2015, the Fair Chance Act ("FCA") took effect in New York City. The FCA prohibits employers from looking into applicants' criminal records before making a "conditional offer of employment." The law also prohibits employers from stating in any job advertisement or application that the position requires a criminal background check. The New York City Commission on Human Rights (the "Commission") later clarified this prohibition, explaining that such phrases as "no felonies," "background check required" and "must have clean record" would violate the FCA.

If the employer discovers a criminal conviction, the employer must conduct the analysis required under Article 23-A of the New York State Correction Law ("Article 23-A") before revoking the conditional job offer. To revoke a conditional offer, employers must follow the steps below, which the Commission collectively calls the "Fair Chance Process":

- Provide the applicant with a written copy of the criminal history check the employer conducted;
- Provide the applicant with a written copy of the employer's Article 23-A analysis; and
- Give the applicant at least three business days after receipt of the above documents to respond.

The FCA provides an exemption for employers that act pursuant to "state, federal, or local law that requires criminal background checks for employment purposes or bars employment based on criminal history." Additionally, the Commission has stated that the FCA exempts actions taken by employers to comply with rules and regulations made and enforced by a self-regulatory organization within a particular industry. These exemptions apply only when the law, rule or regulation *mandates* that individuals with certain convictions be barred from a particular job.

The Commission released an Interpretive Enforcement Guide on its website,[1] clarifying that employers who intend to use an exemption must inform applicants and create an exemption log, which must be maintained for five years. The Commission may require an employer to provide its exemption log.

More information on the FCA can be found in these recent SRZ *Alerts*:

- "New York City to Ban Employer Pre-Offer Inquiries About Applicant Criminal Records"[2]
- "New York City Commission on Human Rights Issues Enforcement Guidance on Fair Chance Act and Clarifies Credit Check Law Exemption"[3]

New York City Stop Credit Discrimination in Employment Act

The Stop Credit Discrimination in Employment Act ("SCDEA") took effect in New York City on Sept. 3, 2015. Under the SCDEA, employers in New York City are prohibited from asking for and/or using an individual's consumer credit history when making decisions regarding that individual's employment. One day before the SCDEA took effect, the Commission issued enforcement guidance that made clear that the Commission will interpret the SCDEA's restrictions broadly and its exemptions narrowly.

The SCDEA provides exemptions for certain positions, including those that involve the control of funds or assets worth $10,000 or more, non-clerical positions with regular access to trade secrets, positions involving control over digital security systems, and positions for which credit checks are required by law or a self-regulatory organization. Exemptions will be construed narrowly, and employers will bear the burden of showing that an exemption applies. An employer that believes a position is exempt should inform the affected applicants or employees. Additionally, the employer should keep an "exemption log" that details each use of an exemption to perform a credit check.

Employers in New York City are prohibited from asking for and/or using an individual's consumer credit history when making decisions regarding that individual's employment

As with other violations of the New York City Human Rights Law, employers found in violation of the SCDEA may be liable for compensatory damages (including front pay and back pay), punitive damages, and attorney's fees and costs, as well as a civil penalty of up to $250,000 for violations that "are the result of willful, wanton or malicious conduct."

We addressed developments with the SCDEA in several SRZ *Alerts*:

- "New York City to Restrict Employers' Use of Credit History in Employment Decisions"[4]
- "New York City Commission on Human Rights Issues Enforcement Guidance on Credit History Law"[5]
- "Update: New York City Commission on Human Rights Revises Enforcement Guidance on FINRA Member Exemption to Credit History Law"[6]
- "New York City Commission on Human Rights Issues Enforcement Guidance on Fair Chance Act and Clarifies Credit Check Law Exemption"[7]

Second Circuit Ruling on Dodd-Frank Protection for Internal Whistleblowers

On Sept. 10, 2015, the U.S. Court of Appeals for the Second Circuit held in *Berman v. Neo@Ogilvy LLC*, No. 14-4626, that the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") protects employees who report violations of securities laws even if they only do so internally. This decision directly is contrary to the U.S. Court of Appeals for the Fifth Circuit's decision in *Asadi v. G.E. Energy (USA), L.L.C.,* 720 F.3d 620 (2013), in which the court held that Dodd-Frank's anti-retaliation provision only protects employees who report violations to the Securities and Exchange Commission (SEC).

Because of this decision, there will likely be an increase in Dodd-Frank whistleblower retaliation claims — at least in the Second Circuit — and the question of which whistleblowers are protected is now poised for review by the U.S. Supreme Court.

We analyzed *Berman v. Neo@Ogilvy* in a recent SRZ *Alert*, "Second Circuit Rules That Internal Whistleblowers Are Protected Under Dodd-Frank."[8]

The question of which whistleblowers are protected is now poised for review by the U.S. Supreme Court

Department of Labor Action Regarding FLSA Overtime Exemption and Independent Contractor Misclassification

On June 30, 2015, the U.S. Department of Labor ("DOL") issued a proposed regulation that would amend the exemptions for "white collar" employees under the Fair Labor Standards Act ("FLSA"). Less than a month later, on July 15, the DOL issued Administrator's Interpretation No. 2015-1 (the "Interpretation"), which addresses the misclassification of employees as independent contractors under the wage and hour requirements of the FLSA.

Proposed FLSA Salary Requirement

Under the FLSA, employers must pay employees at least minimum wage, as well as overtime pay for time worked in excess of 40 hours per week. The FLSA provides exemptions to this requirement. Several of these exemptions, together called the "white collar" exemptions, apply to certain types of employees, including administrative, executive and professional employees, who are paid salaries of more than a specified amount per week. To determine whether an employee meets one of these exemptions, the employee's primary duties are evaluated using a "duties test."

The DOL's proposed regulation would raise the minimum weekly salary for this exemption from $455 to $970. The DOL also suggested that a mechanism be established to automatically update the minimum salaries annually and that the minimum salary for the "highly compensated employee" exemption be raised from $100,000 per year to the 90th percentile of earnings for full-time salaried employees (currently $122,148 per year).

Additionally, the DOL requested comments on the "duties test," suggesting amendments to that part of the exemption may be forthcoming. The DOL did note, however, that a change to the "duties test" may not be necessary if its proposed salary change is effected.

A change to the 'duties test' may not be necessary if [the DOL's] proposed salary change is effected

Misclassification of Employees as Independent Contractors

In its Interpretation, the DOL emphasizes the broadness of the FLSA's definition of employee and notes that most workers should be classified as employees, not independent contractors. Under the FLSA, the existence of an employment relationship is determined through the "economic realities" test, which requires the consideration of multiple factors:

1. Whether the work performed is an integral part of the employer's business;
2. Whether the worker's managerial skill affects the worker's opportunity for profit or loss;
3. Whether the worker is retained on a permanent or indefinite basis;
4. Whether the worker's investment is relatively minor as compared to the employer's investment;
5. Whether the worker exercises business skills, judgment and initiative in the work performed; and
6. Whether the worker has control over meaningful aspects of the work performed.

In the Interpretation, the DOL emphasizes the first factor and seemingly deemphasizes the sixth. At the end of the Interpretation, the DOL states that "most workers are employees under the FLSA's broad definitions," and adds that the "factors should be used as guides to answer that ultimate question of economic dependence."

In contrast with the Interpretation is a June 2015 ruling by the U.S. Court of Appeals for the Second Circuit affirming a lower court decision that struck down an FLSA class action suit. Meyer v. U.S. Tennis Ass'n, No. 14-3891-CV (2d Cir. June 29, 2015). The court focused primarily on the sixth factor ("control") in reaching its decision.

The courts and the DOL are not evaluating the factors in the same way. Thus, because courts are not bound by DOL interpretations, employers should take into account both approaches and pay close attention to all six factors.

Our *Alert* "Recent Department of Labor Actions Seek to Limit Independent Contractor Misclassification and Raise the Salary Requirements for Overtime Exemption"[9] provides more details about the white collar exemptions and the test for classifying workers as employees or independent contractors.

Unpaid Interns

On July 2, 2015, the Second Circuit held in *Glatt v. Fox Searchlight Pictures, Inc.,* 791 F.3d 376 (2d. Cir. 2015), that a new test called the "primary beneficiary test" should be used to determine whether an intern is really an employee who must be paid. In that case, three unpaid interns sued Fox Searchlight Pictures and Fox Entertainment Group Inc., claiming that they were employees and were therefore entitled to compensation and overtime pay under the FLSA and the New York Labor Law ("NYLL"). One of the plaintiffs also sought to certify a nationwide class of unpaid interns.

Employment Status

In *Glatt*, the court adopted a "primary beneficiary test," the goal of which is to determine whether the primary beneficiary of the relationship is the employer or the intern. The court provided a non-exhaustive list of factors:

1. The extent to which the intern and employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and if there's not a promise of compensation, the worker is more likely an intern.

2. The extent to which the internship provides training that would be similar to that which would be given in an education environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The court noted that the factors do not all need to align for a court to find that an intern is not an employee, and no individual factor is dispositive. The key is to look to the totality of the circumstances, with an emphasis on the educational aspects of the internship.

A new test called the 'primary beneficiary test' should be used to determine whether an intern is really an employee

Class Action Certification

The court held that the primary beneficiary test is a "highly individualized inquiry" and therefore is not likely to be suitable for a class action. Although this holding does not completely preclude the certification of class actions brought by unpaid interns, it does make such certification unlikely.

We provide a more detailed analysis of the Glatt case and the primary beneficiary test in our *Alert* "Second Circuit Adopts New 'Primary Beneficiary Test' for Determining Whether Unpaid Interns Are Employees."[10]

Religious Accommodations in the Workplace

On June 1, 2015, the U.S. Supreme Court held in *EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028 (2015), that Abercrombie & Fitch's ("Abercrombie") refusal to hire a Muslim applicant because she wore a headscarf violated Title VII of the U.S. Civil Rights Act ("Title VII"). Under Title VII, a business cannot refuse to hire an applicant because it does not want to accommodate a religious practice that it could accommodate without undue hardship. The question in this case was whether the Title VII prohibition still applies when the applicant has not informed the employer of the need for an accommodation.

The EEOC filed the original complaint on behalf of a woman who was denied a position at an Abercrombie clothing store because she wore a headscarf. Abercrombie claimed, however, that at the time of the employment decision the managers were not sure if she wore the headscarf for religious reasons. Abercrombie argued that a plaintiff must show that the defendant had "actual knowledge" of the need for an accommodation to prove that the defendant violated Title VII. The Court disagreed with this, holding that plaintiffs in such cases only need to show that the defendant's decision was motivated by the plaintiff's need for an accommodation. It is not necessary for the applicant to explicitly ask for a religious accommodation.

Endnotes

[1] Available at www.nyc.gov/html/cchr/html/coverage/fair-chance-legalguidance.shtml.

[2] Available at www.srz.com/New_York_City_to_Ban_Employer_Pre_Offer_Inquiries_About_Applicant_Criminal_Records.

[3] Available at www.srz.com/New_York_City_Commission_on_Human_Rights_Issues_Enforcement_Guidance_on_Fair_Chance_Act_and_Clarifies_Credit_Check_Law_Exemption.

[4] Available at www.srz.com/New_York_City_to_Restrict_Employers_Use_of_Credit_History_in_Employment_Decisions.

[5] Available at www.srz.com/New_York_City_Commission_on_Human_Rights_Issues_Enforcement_Guidance_on_Credit_History_Law.

[6] Available at www.srz.com/Update_New_York_City_Commission_on_Human_Rights_Revises_Enforcement_Guidance_on_FINRA_Member_Exemption_to_Credit_History_Law.

[7] Available at www.srz.com/New_York_City_Commission_on_Human_Rights_Issues_Enforcement_Guidance_on_Fair_Chance_Act_and_Clarifies_Credit_Check_Law_Exemption.

[8] Available at www.srz.com/Second_Circuit_Rules_That_Internal_Whistleblowers_Are_Protected_Under_Dodd_Frank.

[9] Available at www.srz.com/Recent_Department_of_Labor_Actions_Seek_to_Limit_Independent_Contractor_Misclassification_and_Raise_the_Salary_Requirements_for_Overtime_Exemption.

[10] Available at www.srz.com/Second_Circuit_Adopts_New_Primary_Beneficiary_Test_for_Determining_Whether_Unpaid_Interns_Are_Employees.

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