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Employment Law Update: 2015 Year-End Review

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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, 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"
- "New York City Commission on Human Rights Issues Enforcement Guidance on Fair Chance Act and Clarifies Credit Check Law Exemption"

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"
- "New York City Commission on Human Rights Issues Enforcement Guidance on Credit History Law"
- "Update: New York City Commission on Human Rights Revises Enforcement Guidance on FINRA Member Exemption to Credit History Law"
- "New York City Commission on Human Rights Issues Enforcement Guidance on Fair Chance Act and Clarifies Credit Check Law Exemption"

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."

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" 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."

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.

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