WORKING WISE - VOLUME 6

Date: 30 January 2020

Labor, Employment and Workplace Safety Alert

By: David J. Garraux

1. PHILADELPHIA DELAYS ENACTMENT OF FAIR WORKWEEK ORDINANCE

Philadelphia employers received an early holiday gift in December: The effective date of the municipality's new Fair Workweek Ordinance has been postponed from January 1, 2020 to April 1, 2020. Further, the city is providing employers through July 1, 2020, to begin providing "good faith estimates" of average work schedules. The Ordinance imposes new and very specific predicable scheduling obligations and hiring restrictions on large retail, hospitality and food service employers, and franchisees operating in the City of Philadelphia. These include:

- Advance notice of work schedules for both new hires and existing employees;
- Prompt notice of changes to work schedules;
- Payment of predicable pay in certain circumstances when an employer changes an employee's schedule after the required advance notice period;
- The right to rest between shifts;
- Priority rights for existing employees for additional shifts; and
- Heightened recordkeeping and posting requirements.

Why It's Important: While covered Philadelphia employers can breathe a collective sigh of relief, the respite is only temporary; they should use the additional months to ensure compliance come April 1. The law's requirements are strict and specific; employers should use the extra time to evaluate applicability and ensure compliance.

2. CALIFORNIA'S ANTI-ARBITRATION LAW UNDER ATTACK

In our November 2019 installment of Working Wise found here, we reported on AB 51, a new California law precluding the use of mandatory arbitration agreements in employment settings. The law is now being challenged by a coalition of national and state trade associations filing suit to prevent the law from taking effect, with a California federal court issuing a temporary restraining order on December 30, 2019 — two days before the law was set to take effect.[1] The coalition argues that AB 51 is preempted by the Federal Arbitration Act and is unconstitutional.

Why It's Important: Due to the importance and frequent use of mandatory arbitration agreements in the employment context, we'll continue to follow this story closely. Briefing is continuing throughout January, and the court has already acknowledged the case may end up at the U.S. Supreme Court. Stay tuned.

3. OSHA RELEASES ITS TOP 10 MOST FREQUENTLY CITED VIOLATIONS FOR FY 2019

The 2019 list is in. In December, the Occupational Safety and Health Administration ("OSHA") released its annual list of the top 10 most frequently cited violations. The list is as follows, and remains largely unchanged from the 2018 list:

1. Fall Protection – General Requirements (Sec. 1926.501): 6,010 violations
2. Hazard Communication (Sec. 1910.1200): 3,671 violations
3. Scaffolding (Sec. 1926.451): 2,813 violations
4. Lockout/Tagout (Sec. 1910.147): 2,606 violations
5. Respiratory Protection (Sec. 1910.134): 2,450 violations
6. Ladders (Sec. 1926.1043): 2,345 violations
7. Powered Industrial Trucks (Sec. 1910.178): 2,093 violations
8. Fall Protection – Training Requirements (Sec. 1926.503): 1,773 violations
9. Machine Guarding (Sec. 1910.212): 1,743 violations
10. Personal Protective and Lifesaving Equipment – Eye and Face Protection (Sec. 1926.102): 1,411 violations

Why It's Important: OSHA violations can be extremely costly for employers, exposing them to penalties of varying amounts depending on the nature of the violation (i.e., $132,598 per violation for willful or repeated violations; $13,260 per violation for serious, other-than-serious and posting requirement violations; and $13,260 per day for failure to abate violations). These penalties are in addition to potential lawsuits by injured employees and contractors. Employers should review workplace and safety policies and protocols to ensure that they are in compliance with OSHA requirements.

4. NEW JERSEY SUPREME COURT TO EVALUATE THE SCOPE AND APPLICABILITY OF THE "GOOD FAITH" DEFENSE BARRING WAGE AND HOUR CLAIMS

On December 5, 2019, the New Jersey Supreme Court agreed to review the question of what constitutes an "administrative practice or enforcement policy" of the Department of Labor & Workforce Development ("DOL") sufficient to support that state's "good faith" defense to certain wage and hour claims. The good faith defense insulates employers from wage and hour liability if they can prove that they acted in reliance on certain determinations made by the DOL.[2] The Appellate Division held that discrete determinations or communications regarding complaints by individual employees, which could have been subject to administrative appeal, did not qualify. A DOL opinion letter did, but it did not help that particular employer because the court found that it had not proven the facts necessary to show that it fell within its scope.[3]

We do not have a timeline for the New Jersey Supreme Court's decision.

Why It's Important: Wage and hour violations are a significant source of liability for employers and can result in substantial fines and penalties sought in both individual and putative class litigation. Often, employers seek and rely upon guidance from the Department of Labor for clarification as to how the law fits within specific circumstances. The New Jersey Supreme Court's decision will clarify whether employers can rely upon some of the more common forms of advice and guidance when asserting the good faith defense to defend against wage and hour claims. In the interim, employers should be cognizant of the uncertain legal posture associated with good faith reliance.

5. SECOND CIRCUIT: JUDICIAL APPROVAL NOT REQUIRED FOR OFFERS OF JUDGMENT FOR FLSA CLAIMS

In early December, the Court of Appeals for the Second Circuit determined that settlements of Fair Labor Standards Act ("FLSA") claims pursuant to offers of judgment do not require judicial review or approval to be enforceable.[4] Federal Rule of Civil Procedure 68 allows a defendant to make an offer of judgment — essentially a settlement offer — at any time up to 14 days before trial. If the offer is rejected, the plaintiff may be required to pay the defendant's costs incurred after the offer was made if they ultimately recover less than the amount of the offer after trial. If the offer is accepted, either party may file a notice of acceptance with the court, after which the clerk will enter judgment and dismiss the case.

The U.S. Department of Labor has taken the position that FLSA settlements require judicial or DOL approval to determine whether they are fair and reasonable. According to the Court of Appeals, however, the requirement for judicial review and approval does not apply to offers of judgment. In doing so, the court distinguished "private, secret settlement agreements and waivers of an employee's FLSA rights" along with "private, back-room compromises that could easily result in exploitation of the worker and the release of his or her rights" from accepted offers of judgment, which must be filed with the court and are made during the course on ongoing litigation.

Why It's Important: District courts in the Second Circuit were split regarding whether accepted offers of judgment require judicial review and approval. The Second Circuit's decision resolves this split and provides employers clarity and comfort that accepted offers of judgment will be enforceable absent judicial review and approval.

Notes:

[1] *See* Chamber of Commerce of U.S., et al. v. Xavier Becerra, et al., Case No. 2:19-cv-02456 (E.D. Cal. Dec. 30, 2019).

[2] The defense provides that "no employer shall be subject to any liability or punishment for or on account of the failure to pay minimum wages or overtime compensation under this act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the [DOL] or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged."

[3] Branch v. Cream-O-Land Dairy, 459 N.J. Super. 529 (App. Div. 2019).

[4] *See* Yu v. Hasaki Restaurant, Inc., Case No. 17-3388 (2d Cir. 2019).

KEY CONTACTS

DAVID J. GARRAUX
PARTNER

PITTSBURGH
+1.412.355.6580
DAVID.GARRAUX@KLGATES.COM

