Strategic Perspectives

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Top labor and employment developments for July 2019

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In case you missed the in-depth coverage of *Employment Law Daily* for July, here's a recap of some key developments in the L&E community.

In the federal appeals courts

Third Circuit

States likely to succeed in challenge to contraceptive exemption regs. Affirming an order preliminarily enjoining the rules' enforcement nationwide, the Third Circuit found that Pennsylvania and New Jersey are likely to succeed in proving that several federal agencies did not follow the Administrative Procedure Act and that regulations expanding the religious exemptions authorizing employers with religious objections to limit employees' access to health insurance coverage for contraception are not authorized under the ACA. The appeals court also found the states will suffer a concrete and imminent financial injury from the increased use of state-funded services were the regulations to go into effect and that an injunction would redress that injury (*Commonwealth of Pennsylvania v. Trump*, July 12, 2019, Shwartz, P.).

Fifth Circuit

Texas federal court had no authority to sanction Chipotle plaintiff suing in NJ under enjoined OT rule. A federal court in Texas improperly held a plaintiff and her attorneys in contempt for filing an FLSA overtime suit in New Jersey against her employer, Chipotle Mexican Grill, based on the revised overtime rule that the DOL had been enjoined from enforcing. The plaintiff (and her attorneys) did not act in privity with the DOL, and she was not adequately represented by the agency in the injunction case. There was no basis for the lower court's conclusion that "the DOL represents every worker's legal interests through its enforcement of the FLSA so as to bind every worker in the United States to an injunction where the DOL is the only bound party." Consequently, the Texas court lacked personal jurisdiction over the employee, the Fifth Circuit held, reversing the judgment and an award of attorneys' fees to Chipotle (*State of Texas vs. U.S. Department of Labor*, July 1, 2019, Dennis, J.).

Courts, not arbitrators, must determine availability of class arbitration. Agreeing with its sister circuits, the Fifth Circuit held in a matter of first impression that class arbitration is a gateway issue that must be decided by the courts, not by an arbitrator, unless the arbitration agreement contains "clear and unmistakable" language to the contrary. Finding no such language here, the court reversed and remanded one lower court decision, and vacated and remanded another, in a ruling on consolidated appeals (*20/20 Communications, Inc. v. Crawford*, July 22, 2019, Ho, J.).

Seventh Circuit

Employee fired without notice or pre-discharge hearing may pursue due process claims. A city police chief who was fired without notice or a pre-discharge hearing was entitled to pursue his federal due process claims, a divided Seventh Circuit held, reversing a district court's order disposing of his Section 1983 cause of action on the pleadings. The appellate court grappled with how relevant Supreme Court and circuit precedent applies and disputed which outcome here would properly stay the course in a long thread of cases that Judge Easterbrook had once likened, in part, to "'a line of precedent already resembling the path of a drunken sailor.'" *Monell v. New York City Dep't of Social Services* was the proper framework for this municipal liability case, the majority held, and the *Parratt v. Taylor* defense had no bearing here (*Bradley v. Village of University Park*, July 16, 2019, Hamilton, D.).

Eighth Circuit

Locomotive engineer's request to 'lay off as necessary,' rest between shifts was unreasonable. Job attendance, declared the Eighth Circuit, is an essential job function of a Union Pacific locomotive engineer, and thus an engineer's newly requested accommodation for his chronic back pain of "laying off as necessary" and receiving 24 hours of rest between shifts was unreasonable as it essentially amounted to an unlimited absentee policy.

> *"We have 'consistently stated that regular and reliable job attendance is a necessary element of most jobs,'" said the Eighth Circuit, finding that to be the case here as well.*

Nor did the fact that Union Pacific had previously allowed him to miss a large percentage of his shifts create a material fact question regarding the reasonableness of his requested accommodation, said the court, affirming summary judgment against his ADA failure-to-accommodate claim (*Higgins v. Union Pacific Railroad Co.*, July 24, 2019, Melloy, M.).

Employee fired after calling supervisor evil. A hospital medical assistant could not show she was fired in retaliation for taking FMLA leave. Rather, she was discharged months after her return from leave because, after refusing to discuss her performance issues, she told her supervisor to "get away from me" and called her "evil," the Eighth Circuit held. Neither could she establish a race discrimination claim based on her contention she was being labeled a racist.

The Caucasian employee was angry because she had been questioned about a comment she made that her black coworker "didn't like working with white people." The appeals court affirmed summary judgment in favor of the employer, noting that the employee "misunderstands what qualifies as racial discrimination by equating accusations of racist behavior with racist behavior itself" (*Lovelace v. Washington University School of Medicine*, July 25, 2019, Smith, L.).

Ninth Circuit

Ordinances targeting 'bikini barista' businesses not unconstitutionally vague. Neither a city's Dress Code Ordinance nor its Lewd Conduct Amendments, each of which were designed to curtail sexual victimization, prostitution, and lewd conduct by some individuals at "bikini barista" stands, was impermissibly vague or susceptible to arbitrary enforcement by law enforcement, the Ninth Circuit ruled, vacating a preliminary injunction against enforcement of the ordinances. The First Amendment challenge to the Dress Code Ordinance also failed based on the appeals court's reasoning that the baristas' (and the business owners') choice to wear provocative attire, which the court described as pasties and g-strings, was not sufficiently expressive conduct to warrant First Amendment protection. Importantly, the plaintiffs denied that they had engaged in either nude dancing or erotic performances, disavowing the First Amendment protections available for that conduct; if they had not, the city's preexisting ordinances regulating adult entertainment, requiring licenses, and imposing zoning restrictions, could have come into play (*Edge v. City of Everett*, July 3, 2019, Christen, M.).

***Vasquez* withdrawn**. In *Dynamex Operations West, Inc. v. Superior Court*, an April 30, 2018, decision, the California Supreme Court adopted the ABC test for determining whether workers are independent contractors or employees under California wage orders. Just a few months ago, the Ninth Circuit found that the *Dynamex* test was applicable to a class claim filed by workers for a "three-tier franchising" model. It has retreated from that decision in a one-page order granting a petition for panel rehearing, withdrawing its May 2 opinion in *Vazquez v. Jan-Pro Franchising International, Inc.*, and noting that a revised disposition and an order certifying to the California Supreme Court the question of whether *Dynamex* applies retroactively "will be filed in due course" (*Vazquez v. Jan-Pro Franchising International, Inc.*, July 22, 2019, *per curiam*).

District of Columbia Circuit

Union challenges to EOs must be pursued through statutory scheme. The D.C. Circuit found it had no power to address the merits of three executive orders issued by President Trump that were alleged to have effectively reduced the scope of the right to bargain collectively for federal employees as crafted by Congress. The unions' claims fell within the exclusive statutory scheme of the Federal Service Labor-Management Relations Statute, which the unions could not bypass by filing suit in the district court. The appeals court found that the statute provided the unions with several "administrative options" for challenging the executive orders, that the challenges in this case were of the type that are regularly adjudicated through the FSLMRS scheme, and that the unions' claims were not "beyond the expertise" of the FLRA (*American Federation of Government Employees v. Trump*, July 16, 2019, Griffith, T.).

Other cases of interest

Obesity always an impairment under WLAD. Obesity, ruled the Washington Supreme Court in response to a question certified by the Ninth Circuit, "always qualifies as an impairment" under the plain language of the WLAD "because it is recognized by the medical community as a 'physiological disorder, or condition'" that affects multiple body systems listed in the statute. Therefore, the court continued, if an employer refuses to hire someone because it perceives the applicant to have obesity, and the applicant can properly perform the job in question, the employer violates the state's disability discrimination law. Judge Yu, dissenting, argued that the majority's holding "ignores the need for an individualized inquiry" (*Taylor v. Burlington Northern Railroad Holdings, Inc.*, July 11, 2019, Fairhurst, M.).

Anti-SLAPP law applies to threshold screening of some discrimination, retaliation claims against CNN. Giving CNN a partial victory in its fight against the discrimination and retaliation claims of a three-time Emmy award-winning African-American writer and producer whom it fired because it said he had plagiarized a story, the California Supreme Court ruled that the state's anti-SLAPP law may apply to employment discrimination and retaliation claims in certain circumstances. Specifically, an employer's allegedly discriminatory actions may qualify as protected speech or petitioning activity under the anti-SLAPP law: CNN's actions qualified here as to the fired producer's termination claim, because CNN's choice of how to staff its newsroom in light of what it said was plagiarism qualified as protected speech or petitioning activity. But as to claims of discrimination and retaliation prior to his termination, including promotion denials and menial assignments, those claims did not rest on protected activity by CNN and would survive. So would the employee's claims that CNN defamed him by privately discussing the alleged reasons for his termination with potential employers and others because these privately communicated remarks were not made in connection with any issue of public significance, as the statute requires (*Wilson v. Cable News Network, Inc.*, July 22, 2019, Kruger, L.).

At the agencies:

DOL

Acosta resigns . . . On July 12, Secretary of Labor Alexander Acosta submitted his resignation to President Trump, effective Friday, July 19, 2019. Although he made only a veiled reference in his resignation letter to the firestorm prompted by the indictment of Jeffrey Epstein on federal charges of sex trafficking, Trump confirmed that Acosta saw it as a distraction. "Your agenda, putting the American people first, must avoid any distractions," Acosta wrote in his resignation letter. "

. . . Scalia named as replacement. And on July 18, President Trump announced via Twitter his intent to nominate Gene Scalia, the son of deceased Supreme Court Justice Antonin Scalia, to replace Acosta. "Gene has led a life of great success in the legal and labor field and is highly

respected not only as a lawyer, but as a lawyer with great experience working with labor and everyone else," Trump said on Twitter. "He will be a great member of an Administration that has done more in the first 2 1/2 years than perhaps any Administration in history!"

New opinion letters released. On July 1, new Wage and Hour Administrator Cheryl M. Stanton issued three opinion letters addressing FLSA compliance issues:

- **Overtime pay, nondiscretionary bonuses.** This opinion letter addresses the calculation of overtime pay for nondiscretionary bonuses paid on a quarterly and annual basis (FLSA2019-7).
- **Highly qualified employee exemption.** The second opinion letter discusses the application of the highly compensated employee exemption to paralegals employed by a global trade organization (FLSA2019-8).
- **Rounding practices.** The final July 1 opinion letter addresses permissible rounding practices for calculating an employee's hours worked (FLSA2019-9).

Final Rule expands multiple-employer plan access to small businesses, PEOs. The DOL released a final rule, "Definition of 'Employer' Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans," that the agency says will expand access to affordable quality retirement saving options by "clarifying the circumstances" under which an employer group or association, or a professional employer organization (PEO), may sponsor a multiple employer workplace retirement plan under Title I of ERISA. Under the rule, employer groups or associations and PEOs can, when satisfying certain criteria, be "employers" within the meaning of ERISA for purposes of establishing or maintaining an individual account "employee pension benefit plan."

NLRB

"Last in time" rule unworkable to determine continued union support; new framework adopted. In a 4-1 decision, the NLRB created a new mechanism to settle questions concerning employees' preference in the anticipatory withdrawal context through a Board-conducted, secret-ballot election. In so doing, it overruled precedent established in *Levitz Furniture Co. of the Pacific* and its progeny to the extent it permits an incumbent union to defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal. In this dispute, which involved a disaffection petition showing a union had lost majority support, the Board found that at the time an employer withdrew recognition the union had lost majority support, so the union's complaint was dismissed. The Board will apply its new holding retroactively in this case and in other pending cases. Member McFerran dissented (*Johnson Controls, Inc.*, July 3, 2019).

"Ride for Respect" by Walmart employees was unprotected intermittent strike. A "Ride for Respect," in which 100 to 130 Walmart employees went on strike for five or six days to travel to Walmart's annual shareholders' meeting in order to demonstrate, was an intermittent strike unprotected by the NLRA, ruled a divided three-member Board panel. The Ride for Respect was part of a plan to strike, return to work, and strike again, repeatedly, pursuant to a strategy in support of the goal of broadly improving Walmart employees' wages, hours, benefits, and other working conditions. Accordingly, it was an intermittent strike, and Walmart did not violate the

NLRA by disciplining and discharging employees who participated in the work stoppage. Member McFerran dissented in part (*Walmart Stores, Inc.*, July 25, 2019).

On the legislative front

House approves controversial $15 minimum wage boost. On July 18, the Democratic-controlled House passed the Raise the Wage Act, which as modified would boost the federal minimum wage to $15 an hour by 2025. The 231 to 199 vote fell largely along party lines, with three Republicans joining Democrats to vote in favor the bill, and six Democrats joining Republicans to vote against it. The voting followed a sweetener adopted by the House Rules Committee on July 16, which made H.R. 582 more palatable by extending the phase-in period by a year, moving the $15 an hour minimum wage effective date from October 1, 2024, to October 1, 2025. That move was accomplished by an 8-4 vote**.**

Settlements of note

Court signs off on $7.4M deal to end class claims that Dave & Buster's cut hours to dodge ACA mandates. In what looks to be the first case of its kind suing an employer for cutting employee work hours in an attempt to skirt Affordable Care Act coverage requirements, a federal court in New York gave final approval to a $7.425 million settlement resolving a nationwide ERISA class action against Dave & Busters, Inc. The suit alleged that the restaurant chain drastically cut employees' work hours, reducing them to part-time status to avoid providing them with health insurance under the looming ACA employer mandate. (The ACA requires employers with 50 or more full-time employees, defined as those who regularly work at least 30 hours per week, to offer health coverage to full-time employee or face monetary penalties).

> *"Although the practice of reducing employee hours to less than thirty hours per week to deprive employees of existing health insurance coverage or eligibility under the Affordable Care Act may not be uncommon, this was one of the first, if not the first, case in the nation challenging the practice under ERISA," the plaintiffs noted in their memorandum in support of their motion for final settlement approval. "As such, the case was novel, risky, and likely to effect change in the way companies make employment decisions going forward."*

The lead plaintiff worked in one of the chain's New York restaurants, where the full-time workforce was reduced from 100 to 40 employees. Notably, in addition to monetary recovery, the settlement includes injunctive relief barring management from reducing employees' hours or discharging them for the purpose of denying health coverage. Class counsel will receive $2.2275 million from the settlement fund (*Marin v. Dave & Buster's, Inc.*, July 19, 2019, Hellerstein, A.).

$65M settlement approved in au pair wage-fixing suit. Ending a lawsuit brought on behalf of more than 100,000 au pairs alleging that sponsoring agencies kept wages artificially low and failed to pay minimum wage or overtime, a federal court in Colorado approved a $65 million settlement between the au pairs and sponsoring agencies. The settlement also included a requirement the sponsoring companies inform host families and au pairs that their weekly stipend was a minimum and that they were free to agree to higher compensation. The court also approved $22.9 million in attorneys' fees and $3.3 million for litigation expenses, to come from the settlement fund (*Beltran v. Interexchange, Inc.*, July 18. 2019, Arguello, C.).

Merck to pay $6.2 million to female sales representatives in court-approved settlement. A class of 671 current and former female sales representatives of Merck will share a $6.2 million settlement after a federal district court in New Jersey approved a deal to resolve their Title VII, EPA, FMLA, and ERISA claims. Merck denied all liability in the matter. The settlement amount includes attorneys' fees and service awards (*Smith v. Merck & Co ., Inc.*, July 19, 2019, Shipp, J., unpublished).

Google to pay $11M to end systemic age bias collective action. Under an agreement submitted to the court for final approval, Google would put up $11 million to resolve allegations it violated the ADEA by engaging in systemic age discrimination against a class of applicants age 40 and older for jobs as site reliability engineers, software engineers, and systems engineers. If accepted by the court, the deal would end litigation that began in April 2015. As the joint motion for final approval of the settlement notes, the court is not required to conduct a fairness hearing to approve this settlement of an ADEA collective action. However, following circuit precedent, the court may approve the settlement after determining that the litigation resolves a bona fide dispute, the settlement is fair and equitable to all parties, and the settlement contains a reasonable amount of attorneys' fees. The parties have asked the court to forego a fairness hearing, but they have reserved a time and date to hold one, should the court find it necessary.