SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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Supreme Court Takes on Highly Compensated Employee Overtime

The Fair Labor and Standards Act (FLSA) has a specific exemption for employees that are considered highly compensated, which dramatically lowers the standards for exempting an employee from the overtime and minimum wage requirements of the FLSA if an employee is paid more than $107,432 a year on a salaried basis. Recently, in the case of *Hewitt v. Helix Energy Solutions Group, Inc.*, the Supreme Court granted an employer's petition to review whether overtime compensation was necessary for an employee paid a daily rate of $962 per day, more than $200,000 per year in annual compensation. The employee admits that this rate was not subject to salary reduction, and that he otherwise qualified for an exemption, except that he was paid on a daily as opposed to salaried rate. Because he was paid a daily rate, his pay on a week-to-week basis fluctuated based on the number of days he worked, though he was paid his full rate for each day worked.

At trial, the US District Court for the Southern District of Texas sided with the employer, finding that the employee was a highly compensated employee, and that the daily rate of pay qualified as a salary exemption under the FLSA. In a contentious *en banc* appeal, the Fifth Circuit reversed this ruling in a 12-6 decision, finding that the daily rate of pay failed to meet the salary test articulated in the FLSA. The Supreme Court has accepted certiorari of this case, and it is expected to be heard during the 2022-2023 term. We will continue to monitor this case as it progresses.

To read the Fifth Circuits Opinion, please refer here.

Immigration Update – India's New Priority Date, Remote I-9 Document Confirmation, and an Extended Extension for Employment Authorizations

This month, U.S. Citizenship and Immigration Services (USCIS) advanced the priority date for India EB-2 green card applications by a full year, meaning that permanent immigrants from India with priority dates prior to September 1, 2014, will now be eligible to complete the process to get their visas, including sending in their Form I-485. India remains the country with the longest wait period for EB-2 visas, followed by China with a priority date of March 1, 2019. To read more, please refer here.

USCIS has also extended the period for remote review of Form I-9s, meaning that employers will be able to remotely confirm the eligibility of entirely remote workers until October 31, 2022. Employers must still follow the directives that USCIS issued in March of 2022 to take advantage of this policy. To read more please refer here.

Finally, employees who have pending Form I-765s have been granted an extension to their employment authorization. Prior to May 3, 2022, employees would be granted an automatic 180-

day extension upon sending in their Form I-765, a form used for a variety of visas to acquire an employment authorization document. This has been extended to 540 days, in light of the amount of time USCIS takes to process the Form I-765. This extension will only be valid through October 26, 2023. This extension is intended as a stop-gap measure to prevent the loss of workers due to the lag in processing these forms. To read more please refer here.

Supreme Court Holds that Emotional Distress Damages Are Not Available Under Certain Anti-Discrimination Statutes

In a ground-breaking decision in *Cummings v. Premier Rehab Keller*, the United States Supreme Court recently held that damages for emotional distress are not recoverable in a private action for discrimination brought pursuant to the Rehabilitation Act of 1973 (the "Rehab Act") or the Patient Protection and Affordable Care Act (the "ACA"). Federal courts had previously been split on the issue, but the Supreme Court has now definitively barred plaintiffs from recovering for emotional injuries under the Rehab Act or the ACA.

The plaintiff in *Cummings*, who is deaf and legally blind, sued her physical therapy provider for disability discrimination under the Rehab Act and the ACA for failing to provide an American Sign Language interpreter during her physical therapy sessions. Her only damages were for emotional distress. However, in a 6-3 decision authored by Chief Justice John Roberts, the Supreme Court dismissed the plaintiff's claims, holding that emotional distress damages are not available under either statute.

The Supreme Court's ruling was based on long-standing precedent that holds that statutes governing recipients of federal funding pursuant to the Spending Clause of the United States Constitution (such as the Rehab Act and the ACA) are contractual in nature and typically do not allow for the recovery of punitive damages (absent specific language in the statute). The Supreme Court in *Cummings* extended this reasoning, and held that emotional distress damages, like punitive damages, are not traditionally available in suits for breach of contract. The Court also note that the Rehab Act and ACA are silent as to such special damages, and as a result, held that damages for emotional distress are no longer available to plaintiffs under the Rehab Act or the ACA.

Click here to read more.

EEOC Speaks on Use of Artificial Intelligence in Hiring Process

On May 12, 2022, the Equal Employment Opportunity Commission ("EEOC") released guidance on employers using algorithms and other artificial intelligence ("AI") to assist in the hiring process. The EEOC recently launched its "AI Initiative" with the goal of educating employers and applicants on using AI properly, and not perpetuating discriminatory hiring practices. While the new guidance focuses mainly on the Americans with Disabilities Act ("ADA"), it is expected that the EEOC will apply some of these new definitions and guidance to other protected classes in the future.

The EEOC discussed three areas where the use of AI could violate the ADA. These included: (1) Using AI that intentionally or unintentionally "screens out" applicants or employees on the basis

of disability; (2) Not providing a reasonable accommodation for the applicant to be rated fairly and accurately by the AI; and (3) Using AI that violates ADA restrictions on disability related inquiries and medical examinations.

In addition to listing how AI could violate the ADA, the EEOC recommended practices to reduce the chances of unlawful discrimination. Some of these recommendations included: consistently evaluating the AI software to make sure it is not screening out individuals; ensuring that the AI or algorithms are accessible for persons with disabilities; and including advertisements noting the availability of reasonable accommodations in the application process.

While this guidance may be evolving as fast as AI technology itself, it is important for employers using this technology to stay up to date on EEOC standards.

Supreme Court Holds that "Prejudice" Is Not Required to Show Waiver of Right to Arbitration

The Supreme Court recently held that employers faced with claims subject to an arbitration clause may waive the right to compel arbitration if they first engage in litigation, even if the opposing party was not prejudiced by the employer's actions.

In *Morgan v. Sundance*, an hourly employee signed an agreement at the beginning of her employment to arbitrate any and all future employment disputes. Despite this agreement, the employee filed a nationwide class action suit against her employer alleging wage and hour violations. Her employer initially defended itself as if no arbitration agreement existed. The employer first filed an unsuccessful motion to dismiss, and then an answer to the lawsuit that asserted 14 affirmative defenses, none of which mentioned the arbitration agreement. The employer also participated in mediation of the suit, and only moved to compel arbitration when a settlement was not reached. The employer's motion to compel arbitration occurred *eight* months after the lawsuit began. The employee opposed the motion, arguing that the employer had waived its right to arbitration by litigating the matter for so long. The trial court agreed, but on appeal the Eighth Circuit Court of Appeals rejected the employee's argument because even though the employer had waited eight months to compel arbitration, the employee had suffered no prejudice due to the delay as no formal discovery had taken place. The Eight Circuit's ruling was consistent with the strong federal policy favoring arbitration under the Federal Arbitration Act (the "FAA").

The Supreme Court ultimately reversed the Eighth Circuit in a narrow decision, holding that the FAA's policy favoring arbitration did *not* require a party to show prejudice to demonstrate waiver of the right to arbitrate. The Court based its decision on the premise that the FAA makes it clear that courts are not to create arbitration-specific procedural rules, and instead should treat arbitration agreements like any other contract. Accordingly, because federal courts assessing contractual waiver arguments generally do not ask about prejudice, doing so in the arbitration context would be a "special arbitration-preferring procedural rule."

The takeaway from the Supreme Court's ruling for employers is that a party claiming an opponent waived its right to arbitration may not be required to show that it was prejudiced by the opponent's participation in litigation and/or delay in seeking to enforce the arbitration agreement. To avoid

potentially waiving the right to arbitrate, employers seeking to invoke arbitration should do so as early as possible, and should avoid taking actions (e.g. participate in litigation) inconsistent with that right.

Five States Seek Injunction Halting Biden Administration Minimum Wage Hike

Back in April of 2021, the Biden Administration issued an Executive Order increasing the minimum wage for federal government contractors to $15/hour. In November 2021, the Department of Labor issued its final rule implementing the new standard on new contracts or contracts being renewed after January 30, 2022. While the Biden Administration's rule applies to the majority of federal contracts within the United States and its territories, it does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government, including those that are subject to the Walsh-Healey Public Contracts Act.

In February 2022, Indiana, Idaho, Arizona, Nebraska, and South Carolina filed suit attempting to block implementation of the wage hike, and ultimately moved for a preliminary injunction on April 18. The states' argument is based on two trains of thought: (1) that President Biden has exceeded his power given to the President under the Procurement Act and directly defied the will of Congress; and (2) that the Department of Labor violated the Administrative Procedure Act (the APA) when adopting the implementing regulations by not considering and discussing alternatives.

Oral argument on the preliminary injunction is tentatively scheduled for June 27-30, or July 11-12. Until then, it is important for employers with federal contracts to abide by all existing rules and regulations regarding wages and stay up to date on the status of this lawsuit.

Firm News

Rob Sniffen co-presented "Handling Employment Actions in the Public Sector" at the Defense Research Institute's Annual employment law conference in Denver, Colorado. Mr. Sniffen's presentation included a discussion about the unique challenges faced by public sector employers in defending federal and state employment litigation.

Sniffen and Spellman is pleased to announce that its Managing Partner, Rob Sniffen, has been ranked in the 2022 Edition of Chambers USA as one of the state's leading labor and employment lawyers. In ranking Mr. Sniffen *Chambers USA* states:

Robert Sniffen of Sniffen & Spellman has a comprehensive labor and employment practice, which includes both contentious and noncontentious mandates. He is especially well regarded for his representation of local government and other public sector employers.

"Robert Sniffen is very intelligent and practical. He is a true collaborator."

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Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.