Labor & Employment Law Update

OLLC 2020

Presented by Richard F. Liebman
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ATTORNEYS

Federal Legislation & Agency Rules

New Joint Employer Rules Under the FLSA

- Published January 16, 2020, and takes effect March 16, 2020
- Four-factor test to determine joint employer status under FLSA:

(1) whether employer hires or fires the employee;

(2) whether employer supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

(3) whether employer determines the employee's rate and method of payment; and

(4) whether employer maintains the employee's employment records.

Oregon Legislation

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Employer Accommodation for Pregnancy Act

- Oregon HB 2341, effective January 1, 2020
- Creates a new cause of action for employees who suffer an adverse employment action or who are refused a reasonable accommodation based on pregnancy, childbirth, or a related condition
- Acquisition of equipment, more frequent or longer rest breaks, assistance with manual labor, and modification of work schedules are all reasonable accommodations for pregnant women or mothers recovering from childbirth
- Employers cannot require pregnant employees to use OFLA or other leave if a reasonable accommodation is available
- Employers must post notice of the new law

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Oregon Workplace Fairness Act

- Oregon SB 726 addresses issues surrounding workplace discrimination and harassment
- Extends the time for filing claims to five years—applies to events that occur on or after September 29, 2019
- Limits the use of nondisclosure, non-disparagement, and no-rehire provisions, and requires written anti-harassment and anti-discrimination policies (effective October 1, 2020)

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Washington Legislation

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Washington Paid Family & Medical Leave

- Required employers with Washington employees to start collecting premiums and reporting employee data as of January 1, 2019
- Funded by premiums totaling 0.4% of gross wages and those premiums are shared between employers, paying 36.67% of the total premium, and employees, paying the remaining 63.33%
- Employers who do not elect to cover the employee portion must withhold the employee portion from employees' paychecks, and pay the total premiums to the Employment Security Department (ESD)
- Employers with less than 50 Washington employees are not required to pay the employer portion of the premiums, but will still be required to collect, record, and remit the employees' premiums to the state

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Federal & State Case Law

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Dynamex Operations West v. Superior Court of L.A. Cty.

- California Supreme Court adopted a new legal standard—the **ABC Test**—for determining whether a worker is an independent contractor or an employee
- ABC Test – (**A**) The worker has freedom from control over how to perform the service; (**B**) The service performed is outside the business' normal variety or workplace; (**C**) The worker is engaged in an independently established role

416 P.3d 1 (2018)

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Vazquez v. Jan-Pro Franchising Int'l, Inc.

- 9th Circuit Court of Appeals sent question of whether California's new ABC Test should apply retroactively
- California Supreme Court will decide whether its ruling in the *Dynamex* case should apply retroactively, and whether it should apply to franchisers and joint-employer relationships

939 F.3d 1045 (9th Cir. 2019)

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Transgender & Sexual Orientation Discrimination

- Oral argument 10/8/2019
- 2 Cases: (1) *R.G. & G.R. Harris Funeral Homes*
  (2) *Altitude Express Inc. v. Zarda*
- Does Title VII prohibit discrimination against transgender people either based on their status as transgender or as sex stereotyping?
- Is discrimination based on sexual orientation a subset of sex discrimination under Title VII?

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (4/22/19)
Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (4/22/19)

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Richardson v. Chicago Transit Authority

- 7th Circuit joins 8th, 6th, and 2nd U.S. Circuit Courts of Appeal
- Severe obesity unaccompanied by an underlying disability is not protected under the ADA
- Weight is a physical condition (akin to eye or hair color), not a medical condition
- 9th Circuit has not ruled on this issue

926 F.3d 881 (7th Cir. 6/12/19)

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Taylor v. Burlington North Railroad Holdings

- Washington Supreme Court
- Obesity is a disability under Washington law
- No underlying physiological disorder or condition necessary to prove disability
- Employees diagnosed or perceived as obese are protected
- No Oregon ruling on this issue
- BOLI would investigate an obesity claim with or without underlying condition

193 Wash. 2d 611 (7/1/19)

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Ruiz v. Paradigmworks Group

- Affirmed that a finite period of leave *may* be a reasonable accommodation
- *But* employee must prove that extension of leave would be reasonable
- Not reasonable if likely at the end of the leave the employee will still not be able to perform the job
- Multiple requests for extensions of leave is evidence of inability to perform the job after leave

2018 U.S. Dist. LEXIS 28878 (S.D. Cal. 2/22/18)

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New York v. United States HHS

- State of NY was lead plaintiff in lawsuit challenging U.S. Department of Health and Human Services' (HHS) proposed rule allowing healthcare workers to deny care based on their religious and moral beliefs
- SDNY ruled that HHS acted outside its authority by adopting the rule, and Congress did not delegate authority to HHS to make rules regarding religious conscience protections
- The rule conflicts with Title VII of the Civil Rights Act because it would not allow for employers to raise an undue hardship if an employee's religious beliefs conflicted with providing adequate patient care

2019 U.S. Dist. LEXIS 129498 (SDNY Aug. 2, 2019)

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Danielson v. Inslee

- 9th Circuit Court of Appeals ruled that public sector unions cannot be required to refund compulsory agency (fair share) fees collected prior to Supreme Court ruling in *Janus v. AFSCME*
- Unions acted in good faith because the collection of agency fees was directly authorized under both state law and decades of Supreme Court jurisprudence prior to *Janus*
- Unions are not subject to retrospective liability
- This case is consistent with a 7th Circuit ruling on the same issue, the only other circuit to have addressed it

No. 18-36087, 2019 U.S. App. LEXIS 38552 (9th Cir. Dec. 26, 2019)

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National Labor Relations Act ("NLRA") Cases

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SuperShuttle DFW, Inc.

- Overruled *FedEx* (2014), reinstating Board's longstanding independent contractor standard, based on common law test
- Common law test considers 10 factors, including extent of control and whether the work is part of the regular business of the employer
  - No one factor is determinative
- The Board observed that entrepreneurial opportunity has "always been at the core of the common-law test," and that examining the common-law factors through that lens was consistent with its longstanding approach prior to *FedEx*

367 NLRB 75 (2019)

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Constellation Brands

- Unlawful language:
  "All non-union full-time and regular part-time employees of the Company are eligible for the incentive plan"
- Lawful language:
  "Unionized employees are eligible for the plan subject to collective bargaining"

367 NLRB 79 (2019)

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UPMC Presbyterian Shadyside

- Overrules *Ameron Automotive* (1982)
- Reinstates *NLRB v. Babcock & Wilcox* (1956)
- Employer may block non-employee union organizers from public areas of premises unless:
  1. Union has no other means of communicating, or
  2. Other non-employee groups are permitted access

368 NLRB No. 2 (2019)

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UPMC Presbyterian Shadyside

- An employer does not have a duty to allow the use of its facility by non-employees, including union organizers, for promotional or organizational activity
- Absent discrimination between non-employee union representatives and other non-employees, the employer may decide what types of activities, if any, it will allow by non-employees on its property

368 NLRB No. 2 (2019)

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Bexar County Performing Arts Center Foundation

- Contract employees are not generally entitled to the same NLRA Section 7 access rights as a property owner's own employees
- A property owner may exclude off-duty employees of a contractor from its property to engage in organizing activity unless:
  - The contractors work both regularly and exclusively on the property
  - The property owner fails to show that they have one or more reasonable non-tresspassory alternative means to communicate their message, which could include use of adjacent public property, newspapers, radio, television, billboards, and social media

368 NLRB No. 46 (2019)

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Kroger Limited Partnership / Mid-Atlantic

- NLRB held that in order for a union to establish an unlawful denial of access to a non-employee union agent, the General Counsel must prove that access was allowed to other non-employees for similar activities (e.g., protesting) as the union wanted to engage in
- Employers <u>may not</u> deny access to non-employees for protest activities while allowing access to charitable, civic, and commercial entities
- Employers <u>may</u> ban non-employee access for union organization activities if it also bans comparable organizational activities by other outside groups

368 NLRB No. 64 (2019)

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MV Transportation Co.

- Board adopted contract coverage standard for determining whether unilateral changes violate the Act
  - NLRB will now examine the plain language of the CBA and apply ordinary principles of contract law to determine if the action is within the scope of the CBA language
  - If the CBA covers the act in question, the CBA authorizes the change and there is no Section 8(a)(5) unilateral change violation
  - If employer's proposed change not covered in contract and change will substantially impact term or condition of employment, Board will still apply clear and unmistakable waiver standard
- Clear and unmistakable waiver abandoned
- Courts and arbitrators never applied clear and unmistakable waiver standard
  - D.C. Circuit:
    - "the clear and unmistakable waiver standard, is, in practice, impossible to meet"
    - "results in perpetual bargaining at the expense of contract stability and repose"

368 NLRB No. 66 (2019)

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The Boeing Company

- Clarifies the traditional community of interest standard set forth in *PCC Structurals* (2017)
- New 3-Step community of interest analysis

(1) Evaluate whether members of the petitioned-for unit share a community of interest with each other

(2) Ascertain whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweighs similarities with unit members

(3) Consider guidelines the NLRB has established for appropriate unit configurations in specific industries

368 NRLB No. 67 (2019)

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Queen of the Valley Medical Center

- Regional Director certified the union as the employees' exclusive bargaining representative after mail ballot election. Employer filed request for review of the direction of election, but started bargaining
- After RD denied request for review, employer informed the union that, unless the union agreed to certain terms, it would refuse to bargain and initiate test-of-certification procedures. The employer then ceased negotiations altogether
- Board held that employer violated Section 8(a)(5) by unlawfully withdrawing recognition from the union, refusing to bargain, and provide information

368 NLRB No. 116 (2019)

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McDonald's Settlement

- Conclusion of a three-year case between McDonald's and the Fast Food Workers Committee / SEIU over various ULPs
- On special appeal, the Board vacated the ALJ's order denying settlement agreement
- NLRB: the settlement agreements are reasonable, provide a full remedy to all affected employees, and accepting them will serve the policies underlying the Act
- Settlements do not impose joint and several liability on McDonald's USA, LLC as a joint employer

368 NLRB No. 134 (2019)

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Valley Hospital Medical Center

- NLRB held that an employer's statutory obligation to check off union dues ends upon expiration of the collective bargaining agreement containing the checkoff provision
- Majority held that there is no independent statutory obligation to check off union dues after contract expiration, even where the contract does not contain a union-security provision
- Overturns 2015 ruling in *Lincoln Lutheran* case, restoring standard in the 1962 *Bethlehem Steel* case

368 NLRB No. 139 (2019)

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Caesars Entertainment

- NLRB restored employer right to restrict employee use of its email system if it does so on a nondiscriminatory basis
- Overturned *Purple Communications* (2014), and returned to standard set forth in *Register Guard* (2007 Oregon case)
- Under the *Register Guard* standard, employees do not have a statutory right to use employer email and other IT resources to engage in non-work-related communications, unless, in rare cases, the use of employer-provided email is the only reasonable means for employees to communicate with each other

368 NLRB No. 143 (2019)

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Apogee Retail

- NLRB ruled that employers may require confidentiality during the course of workplace investigations
- Board's intent is to better align with other federal agency guidance on workplace investigations, including the EEOC's enforcement guidance
- Overturns *Banner Estrella* standard, under which employers were required to prove, on a case-by-case basis, that special circumstances justified the need for confidentiality during a workplace investigation

368 NLRB No. 144 (2019)

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Wal-Mart Stores, Inc.

- Board applied the standard on handbook policies it set forth in *The Boeing Company* (2017)
- Wal-Mart's policy on union buttons: employees may only wear "small, non-distracting" union insignia in the workplace
- Board found the rule does not violate Section 7 in "customer facing" areas of the store, but it does violate Section 7 in "employee only" areas
- Applying *Boeing*, Board found the policy facially neutral as applied to customer facing areas of the store

368 NLRB No. 146 (2019)

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King v. Construction Local 79

- Is "Scabby & the Cockroaches" lawful publicity or coercive secondary activity?
- Has been held to be "symbolic speech"
- General Counsel believes it is coercive picketing even while stationary

EDNY No. 1:19-cv-03496 (6/13/19)

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American Water

- Successor employer filed request for NLRB review of Regional Director's Order dismissing an employee-filed decertification petition one month after the successor employer voluntarily recognized the union as the exclusive representative
- Board granted the request, and signaled that it was considering overturning the successor bar doctrine set forth in *UGL-UNICCO Service* (2011), which requires a successor employer to bargain for a reasonable period before employees can decertify the union
- On November 1, 2019, the employer withdrew its request, and the Board will take no further action on this case
- The Board will likely be looking for a future case to revisit (overturn) the *UGL-UNICCO Service* successor bar

NLRB Case 14-RD-245062 (2019)

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United Parcel Service, Inc.

- Board overturned *Babcock & Wilcox* (2014) and restored the deferral standard set forth in *Spielberg Mfg. Co.* (1955)
- Board will defer to the arbitrator's decision where (1) the arbitration proceedings appeared fair and regular, (2) all parties agreed to be bound, (3) the arbitrator considered the ULP issue, and (4) the arbitrator's decision is "not clearly repugnant" to the NLRA

369 NLRB No. 1 (2019)

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NLRB Modifications to Representation Case Procedures

- December 13, 2019 announced a series of modifications to the Agency's representation case procedures (effective April 16, 2020)
- The modifications include clarifications to procedures prior to an election that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues, and also permit parties additional time to comply with pre-election requirements instituted in 2014

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NLRB Modifications to Representation Case Procedures (cont.)

- Significant rule changes:
  - **Unit scope and voter eligibility**: Provides a pre-election hearing to determine disputes regarding the appropriate scope of the bargaining unit and issues of supervisory status
  - **Ballot impoundment**: When a request for review of a direction of election is filed within 10 business days, and Board has not made a determination by election, ballots that might be affected by Board ruling on the request or decision on review will be segregated and impounded pending the ruling or decision
  - **Timeline**: Regional Director will schedule the election for the earliest date practicable, but absent waiver by the parties, will not normally schedule an election before the 20th business day after the date of the direction of election
  - **Post-hearing/election briefs**: Parties may now file a post-hearing brief after the pre-election hearing and any post-election hearing within five business days after hearing

***NOTE:** All rule changes are too numerous to include here. The above changes are the most significant, but all of them are important to know before your next election. You should review the rules in detail and consult with your labor counsel to ensure compliance.

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NLRB Rule Making on Joint Employers

- Final rule anticipated in January or February 2020
- New rule would change the standard for determining whether two employers, as defined in Section 2(2) of the National Labor Relations Act, are a joint employer of a group of employees under the Act
- An employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction

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Oregon State Cases

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Schutz v. La Costita III

- Oregon Supreme Court
- State's "social host" immunity does not protect employers from negligence
- Plaintiff sued employer for negligence in supervising, organizing, and pressuring her to attend work gathering where she was expected to drink heavily
- Plaintiff drove home drunk and was seriously injured

364 Or 536 (3/14/19)

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Maza v. Waterford Operations

- Oregon Court of Appeals applied a broad interpretation to Oregon law and concluded that employers are strictly liable for ensuring employees actually take meal breaks
- Overturned settled wisdom that employers only need to make a meal break *available* to employees
- Employers must also police employees to ensure they *take* their full meal break

300 Or App 471 (2019)

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Thank You!

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