COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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2015 Will Bring Change and New Challenges for Employers

As 2014 draws to a close, employers will want to pause to consider the labor and employment issues they may need to prepare for in 2015. Some of the developments we anticipate in the coming year include: (i) narrowing of the “white collar” exemptions to overtime eligibility when the Department of Labor amends its regulations interpreting the Fair Labor Standards Act; (ii) new mandatory paid sick leave laws and ordinances taking effect throughout the country; (iii) significant changes in federal labor law affecting both unionized and non-unionized workplaces; (iv) new limits on the use of criminal background checks during the hiring process; and (v) much-needed guidance on how employers may lawfully structure their internship programs to avoid wage-and-hour liability. Below is a brief summary of each of these issues.

Revised FLSA Regulations on Overtime Exemptions Expected in 2015

On March 13, 2014, President Obama directed the Secretary of Labor to update and modernize the Fair Labor Standards Act (“FLSA”) regulations governing employees’ entitlement to overtime compensation.

Although the FLSA generally requires employers to pay their employees overtime at a rate of 1.5 times their regular rate of pay for all hours worked in excess of 40 hours per week, the statute exempts *bona fide* executive, administrative, and professional employees, as well as certain outside sales and computer employees. An employee may be subject to one of these “white collar” exemptions if he or she earns at least $455 per week on a salary basis and performs certain types of job duties (such as

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supervising other employees; managing an enterprise, division or department; or exercising independent judgment and discretion with respect to matters of significance).

Although the President's order did not prescribe specific changes, the Department of Labor ("DOL") appears likely to increase the $455 per week salary threshold. As the White House observed in a Fact Sheet accompanying the President's Memorandum, only 12% of salaried workers earn less than the current salary threshold, which amounts to annual earnings of less than $24,000.

The DOL may also revise the "primary duty" analysis currently used to determine an employee's exempt status under the FLSA. Under the current test, employees who spend much of their time on non-exempt work can still qualify for an overtime exemption if their primary duty (i.e., the principal, main, major, or most important duty they perform) is an exempt task. Some have suggested that the DOL may revise the regulations to emphasize the percentage of an employee's time actually devoted to exempt tasks, similar to California's "primarily engaged" standard, which requires more than half of an employee's time to be spent on exempt duties for an overtime exemption to apply.

The DOL expects to publish the proposed revised regulations by the end of February 2015. Given, however, that any changes to the FLSA regulations would be subject to the federal Administrative Procedure Act's multi-step rulemaking process, the final regulations may not be in place until summer 2015. We will continue to monitor and report on any developments in this area.

<u>Paid Sick Leave Laws May Present Employers with New Challenges</u>

This past year saw much sick leave legislation at both the state and local levels. In particular, California and Massachusetts became the second and third states, after Connecticut, to require employers to provide mandatory paid sick leave to employees. Many cities across the country also have enacted laws requiring paid sick leave. Oakland, San Francisco, Portland, Eugene (Oregon), New York City, East Orange, Jersey City, Irvington (New Jersey), Montclair, Newark, Paterson,

Passaic, Trenton, Seattle, and Washington, D.C. have all passed such legislation this past year, and the trend shows no sign of abating in 2015. Among other jurisdictions, the Philadelphia City Council and the New Jersey State Legislature are currently debating such measures.

This emerging mosaic of competing statutes may present challenges to employers operating in multiple jurisdictions; each sick leave law tends to impose unique requirements, including permissible (and protected) uses for sick leave, caps on sick leave accrual, and the amount of notice due to the employer before an absence. San Francisco, for example, currently allows employees without spouses or registered domestic partners to designate one other person for whom the employee may use paid sick leave. New York City, by contrast, does not allow for this, but does allow an employee to use sick time when the employee's child's school or child care provider is closed due to a public health emergency.

Employers may therefore wish to review their sick leave policies with counsel to ensure the continuing compliance of their policies in jurisdictions where they operate.

For a further discussion on mandatory sick leave laws, please see our blog post on this topic.

Significant Labor Law Changes Affecting Employers in 2015

In 2014, the National Labor Relations Board ("NLRB" or "Board") issued several controversial and far-reaching decisions. From issuing its final rule on "quickie elections," to finding new rights for employees to avail themselves of technology in the workplace, the Board continued to overturn precedent in 2014, usually in favor of organized labor. The following discussion concerns several major NLRB developments that employers should know about in the upcoming year.

The "Quickie Election" Rule

On December 15, 2014, the Board published its final revisions to its representation case procedures (the so-called "quickie election" rule). Absent a court challenge staying its implementation, the final rule will take

effect on April 14, 2015. Employers have generally opposed the Board's new election procedures since they were first proposed in 2011, because they are expected to significantly limit employers' ability to respond to a union organizing campaign.

Highlights from the new election procedures include: (i) the pre-election hearing will occur seven days after the election petition is filed (rather than four to five weeks later as at present); (ii) employers will be required to promptly furnish a preliminary voter list including the proposed bargaining unit members' names, work locations, shifts, and job classifications; (iii) employers will be required to provide a final voter list (the *Excelsior* list) no later than two days after the election is scheduled, including employees' telephone numbers and email addresses, if available; (v) disputes about voter eligibility will be adjudicated after the election; and (vi) the Board will review certain contested issues (such as the appropriateness of bargaining units, voter eligibility, and election misconduct) on a discretionary basis, rather than entertaining appeals as of right.

Currently, most union elections occur two to three months after the election petition is filed. The final rules shorten this time frame to about three weeks, and in some cases as few as 13 days. Given the limited opportunity this affords employers to convey their message to employees after the petition is filed, employers wishing to remain union-free may wish to consider more general union-avoidance strategies. Many employees who vote in favor of unionization, for example, cite a lack of open communication with management as their greatest source of discontent, so improving communication may be a natural starting point. As the "quickie election" rules likely will go into effect in April 2015, employers should not be surprised to see a marked increase in organizing activity and election petitions being filed in the upcoming year.

Joint-Employer Standards

Although the NLRB's General Counsel's decision to charge McDonald's parent company as a joint employer in potentially hundreds of NLRB cases attracted press attention this past year, the Board's less publicized decision to invite amicus briefs in *Browning-Ferris Industries* (Case 32-

RC-109684) may have the greater and more lasting impact. In *Browning-Ferris*, the Board will consider whether to change the standards governing joint-employer relationships under the National Labor Relations Act ("NLRA" or "Act"). The NLRB is expected to relax this standard, with the effect that more business relationships may be found to give rise to joint employment under the NLRA.

Many employers are apprehensive about the effect of this expected change on franchisor/franchisee, general contractor/subcontractor, and related business arrangements. Franchisors, for example, have historically been exempt from liability under the NLRA, provided they did not exert direct and immediate control over their franchisees' businesses. If, however, franchisors became jointly liable for unfair labor practices committed by their franchisees, including cases where they have no specific knowledge or involvement in the franchisees' alleged wrongdoing, the franchise business model would likely need to be altered substantially to limit franchisors' exposure under the Act. Such changes, in turn, could impose significant economic, financial, and legal consequences on all parties involved in franchise businesses, including rank-and-file employees.

A decision is expected from the NLRB in *Browning-Ferris* in 2015. For a further discussion of the issues raised in this case, please see our blog post on this topic.

Use of Employer's Email is Now a Right for Many Employees

On December 11, 2014, the Board ruled in *Purple Communications* that employees with employer-provided email accounts have a statutory right to use those accounts to discuss their terms and conditions of employment during non-working time, absent special circumstances that justify restrictions to maintain production or discipline. In so holding, the Board overturned its decision in *Register Guard*, 351 NLRB 1110 (2007), which held that an employer could prohibit employees from using company-owned electronic communication systems (including email) for any non-business purposes.

The *Purple Communications* decision perhaps raises as many questions

as it answers. For example, the Board provided virtually no guidance to employers on what “special circumstances” would justify restricting employees’ use of company email during non-working time, despite making clear that it expected this exception to apply only in limited circumstances. The extent of *Purple Communications’* impact may vary based on how open or restrictive an employer’s current policy is with respect to employees’ use of company email for non-work purposes. In most cases, however, employers (whether unionized or not) should review their electronic communications and non-solicitation policies to ensure compliance with this newly announced employee right.

For a more detailed discussion of the *Purple Communications* decision, please see our blog post on this topic.

“Ban the Box” Movement Likely to Gain Steam in 2015

In 2014, as part of a growing national trend, Illinois, New Jersey, and Washington, D.C. joined four states and a number of localities in enacting “Ban the Box” statutes. These laws prohibit most private employers from inquiring about job applicants’ conviction histories as part of the initial employment application process, with certain exceptions. Florida, Georgia, Michigan, New Hampshire, Ohio, South Carolina, and Washington failed to pass such laws in 2014, but may try again in 2015.

The newly passed “Ban the Box” laws all have a similar scope, but each law has its own nuances. Washington, D.C.’s “Ban the Box” law, which took effect in October 2014, prohibits questions about an applicant’s conviction history before the employer extends a conditional job offer. D.C. also bars employers from inquiring about non-pending arrests or criminal accusations that did not result in a conviction. The Illinois law, which takes effect on January 1, 2015, prohibits private employers from asking about an applicant’s conviction history until the individual has been deemed qualified for the position sought and granted an interview. Where the applicant will not be interviewed as part of the hiring process, the employer cannot ask about the candidate’s prior criminal convictions until after it extends a conditional offer of employment. Similarly, the New Jersey law, which takes effect on March 1, 2015, prohibits questions about an applicant’s conviction history until

after the initial interview.

Specific jurisdictions with current or pending "Ban the Box" restrictions include Baltimore, Philadelphia, San Francisco, Seattle, Columbia (Missouri), Buffalo, Rochester, and Montgomery County (Maryland). In light of this proliferation of "Ban the Box" laws, employers may wish to review their employment application process and consult with counsel to ensure compliance with the laws in all states and localities in which they conduct hiring.

Unpaid Intern Misclassification Lawsuits on the Rise

In the past three years, at least 40 lawsuits, many styled as class and collective actions, have been filed against employers in state and federal courts by former unpaid interns claiming they should have received minimum wage and overtime compensation under the wage-and-hour laws.

In the 1947 case *Walling v. Portland Terminal Co.*, the Supreme Court established an exception under the Fair Labor Standards Act ("FLSA") for trainees. The Court held that individuals completing training with a company were not employees, and thus not entitled to the protections of the FLSA, if the individuals 1) did not displace regular employees, 2) were constantly supervised, 3) did not further the business of the company, 4) were not guaranteed a job following training, and 5) provided no immediate advantage to the company training them.

In 2010, the U.S. Department of Labor ("DOL") issued guidance on when unpaid interns at for-profit businesses satisfy the trainee exception, which required evaluation of six factors: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees, but works under close supervision of existing staff; (4) the employer derives no immediate advantage from the activities of the intern and, on occasion, its operations may actually be impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern

understand that the intern is not entitled to wages for the time spent in the internship.

The question that persists for many employers is how to determine compliance with the DOL's six-factor test. The DOL and some employees have argued that an employer must satisfy all six criteria to properly classify an individual as an unpaid intern, while some employers have argued that the DOL's factors are guidelines rather than legal requirements. Two cases pending in the U.S. Court of Appeals for the Second Circuit may resolve this dispute in 2015.

In *Glatt v. Fox Searchlight*, the U.S. District Court for the Southern District of New York relied solely on the DOL's six-factor test to find two plaintiffs had been misclassified as unpaid interns. In *Wang v. Hearst Corp.*, a different judge in the Southern District of New York ruled that, although the DOL factors should be given some deference, they could not preempt an independent consideration of all the relevant circumstances in the case. In *Wang*, the court ruled that the plaintiffs were not entitled to summary judgment on their misclassification claims. The fact that both cases were factually similar, yet reached very different outcomes, highlights the importance that the Second Circuit's rulings in these cases may have for employers with unpaid internship programs.

If the past is a guide, we should expect more lawsuits by unpaid interns in 2015. In the past five months, lawsuits have been filed over this issue against six different fashion retailers, including Kenneth Cole, Gucci, and Calvin Klein. Earlier this year, a federal court conditionally certified a collective action by current and former Viacom and MTV interns similarly claiming minimum wage and overtime violations.

Because these cases are typically brought as class and collective actions, they can be expensive to resolve. In just the last three years, at least 11 intern misclassification suits resulted in sizeable settlements.

The Firm will continue to monitor this issue and keep our clients aware of any decisions requiring changes to their unpaid internship programs in 2015.

If you have any questions or would like further information on any topic discussed in this article, please contact an attorney at the Firm at (212) 758-7600.

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