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Overview

While not unexpected, the shift in the focus and position of the Trump administration from the Obama administration, particularly in the labor and employment arena, is nothing short of dramatic. The Trump administration has reversed course in several key areas, such as wage and hour laws, EEO-1 reporting requirements, and joint employer issues. Meanwhile, allegations of sexual harassment, pay inequity, and arbitration agreements continue to dominate the news.

This paper will review recent U.S. Supreme Court issues regarding the labor and employment laws, discuss the recent rise in reports of sexual harassment and corresponding trend away from arbitration and confidentiality/non-disclosure agreements, as well as pay equity and EEO-1 issues. It will also provide an update on various federal agencies overseeing labor and employment matters; possible paid family leave legislation and paid sick leave laws; LGBT issues, new trends in discrimination suits based on social media, as well as the current state of the white collar exemptions under, and predictions changes to, the Fair Labor Standards Act ("FLSA").[1]

Recent U.S. Supreme Court Decisions in Labor and Employment

Under Dodd-Frank

In Digital Realty Trust Inc. v. Somers,[2] the Court resolved the conflict among the circuits regarding whether an individual must first complain to the Securities and Exchange Commission ("SEC") to qualify for whistleblower protection under the Sarbanes-Oxley Act of 2002 ("SOX").[3] As distinguished from the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[4] the Court held that SOX's anti-retaliation provision did not apply to an employee who had complained internally to management about certain issues, but never to the SEC before filing suit. His failure to do so, the Court ruled, precluded him from invoking SOX's anti-retaliation protection, because SOX mandates this step as a prerequisite to

[1] Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

[2] Digital Realty Trust Inc. v. Somers, 138 S.Ct. 767 (2018).

[3] Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq.

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1101 et seq.

filing suit alleging retaliation. The Court compared the language in SOX on this issue to the comparable language under Dodd-Frank, which includes no such comparable requirement to invoke its anti-retaliation protection for employees.

Under the FLSA

In Encino Motorcars, LLC v. Navarro,[5] No. 16-1362 (April 2, 2018), the Supreme Court issued its second opinion in this case, definitively ruling that automobile service advisors are exempt from overtime under section 213(b)(10)(A) of the FLSA.[6] The sole question before the Court was whether a service advisor is a salesman who is "primarily engaged in . . . servicing automobiles." In a 5-4 decision, the majority held that the best reading of the statute leads to the conclusion that service advisors are exempt from overtime because they are salesmen because they do make sales of services for vehicles and are primarily engaged in servicing automobiles.

The Court's opinion comes less than two years after it had ruled that the FLSA's overtime exemption must be construed without placing controlling weight on a 2011 U.S. Department of Labor ("DOL") rule, according to which service advisors were not exempt. This time, the Court ruled that the service advisors are "obviously" salesmen and, therefore, exempt.

With regard to "the principle that exemptions to the FLSA should be construed narrowly," which the Ninth Circuit Court of Appeals had used in arriving at its conclusion, the majority stated, "[w]e reject this principle as a useful guidepost for interpreting the FLSA." According to the Court, "[b]ecause the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." The majority noted that the principle to narrowly construe exemption is based on a "flawed premise" that the remedial purpose of the FLSA is paramount "at all costs."

Under the NLRA

As of the writing of this paper, the Court has yet to rule on the issue of the enforceability of class action waivers in arbitration agreements in the consolidated appeal of NLRB v. Murphy

[5] Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117 (2016).

[6] 29 U.S.C. §§ 201-219.

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