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EMPLOYMENT LAW UPDATE

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June 5, 2019

AGENDA

I. Judicial Decisions

- U.S. Supreme Court
- 4th Circuit
- N.C. Courts

II. Selected Hot Topics

III. Legislative and Regulatory Update

SUPREME COURT DECISIONS

ARBITRATION

Henry Schein, Inc. v. Archer & White Sales, Inc.

(Decided January 8, 2019)

- "Wholly groundless exception": Fifth Circuit and two others had previously held that even if the parties delegate arbitrability to an arbitrator, a court can refuse arbitration if the argument for arbitration is "wholly groundless."

ARBITRATION

Henry Schein, Inc. v. Archer & White Sales, Inc.

(Decided January 8, 2019)

- Supreme Court held that the "wholly groundless exception" is inconsistent with the FAA and Supreme Court precedent.
- When the contract delegates the question of arbitrability to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.

ARBITRATION

Henry Schein, Inc. v. Archer & White Sales, Inc.

(Decided January 8, 2019)

- If you want an arbitrator to decide disputes about arbitrability, include clear and unequivocal language making that delegation.
- Don’t rely on arbitral rules alone to authorize or forbid something that is important to you—such as who decides arbitrability.

ARBITRATION—NOT ALWAYS…

New Prime v. Oliveira

(Decided January 15, 2019)

- Issue: Whether FAA applied to an agreement between a trucking company and a driver classified as an independent contractor.
- FAA exempts "contracts of employment of seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce."

ARBITRATION—NOT ALWAYS…

New Prime v. Oliveira

(Decided January 15, 2019)

- Per 2001 SCOTUS decision in *Circuit City Stores, Inc. v. Adams* this provision is limited to employment contracts of transportation workers actually engaged in interstate commerce.
- When the FAA was adopted in 1925 "contract of employment" usually meant nothing more than an agreement to perform work.

ARBITRATION—NOT ALWAYS…

New Prime v. Oliveira

(Decided January 15, 2019)

- Held: FAA's exemption for interstate transportation workers applies to both employees and independent contractors
- Biggest impact may be for truck drivers/delivery personnel classified as independent contractors. These misclassification claims can be heard in court vs. arbitration.

ARBITRATION—NOT ALWAYS…

New Prime v. Oliveira

(Decided January 15, 2019)

- Transportation and delivery companies that use independent contractors should consider updating their arbitration agreements
  - A broad severability clause may allow a class action waiver to survive, even if transportation worker can litigate instead of arbitrate.
  - Provide for enforcement under state law, if the applicable state law does not also contain an exemption for transportation workers

CLASS ARBITRATION

Lamps Plus, Inc. v. Valera

(Decided April 24, 2019)

- An ambiguous agreement cannot provide the necessary contractual basis for concluding that parties agreed to class arbitration.
- "Foundational FAA principle that arbitration is a matter of consent."

CLASS ARBITRATION

Lamps Plus, Inc. v. Valera

(Decided April 24, 2019)

- Under the FAA, ambiguity is not construed against the drafter.
- Court made a clear distinction between individual and class arbitration.
- Class arbitration "fundamentally changes" the nature of arbitration and "undermines the most important benefits" of individual arbitration.

CLASS ARBITRATION

Lamps Plus, Inc. v. Valera

(Decided April 24, 2019)

- Employers with older or generic arbitration agreements that don't specifically exclude class arbitration may still avoid class arbitration—but possibly not class action litigation.
  - Do your agreements comply with newer state and local laws?
  - What do your agreements or arbitration rules say about who decides arbitrability?

TITLE VII'S CHARGE FILING REQUIREMENT

Fort Bend County v. Davis

(Decided June 3, 2019)

- Issue: Is Title VII's charge filing precondition to suit a "jurisdictional" requirement that can be raised at any stage of a proceeding; or is it a procedural prescription mandatory if timely raised, but subject to forfeiture if tardily asserted?

TITLE VII'S CHARGE FILING REQUIREMENT

Fort Bend County v. Davis

(Decided June 3, 2019)

- Held: Title VII's charge filing instruction is not "jurisdictional." It is a claim-processing rule that must be timely raised to come into play.
- The charge filing instruction is "`mandatory' in the sense that a court must enforce the rule if a party properly raises it."

TITLE VII'S CHARGE FILING REQUIREMENT

Fort Bend County v. Davis

(Decided June 3, 2019)

- Compare complaint to underlying EEOC charge to see if it raises new claims.
- If complaint raises Title VII claims not asserted in EEOC charge, promptly assert plaintiff's failure to exhaust administrative remedies in either a motion to dismiss or an affirmative defense.
- Failure to exhaust administrative remedies is a dispositive defense; but will be waived if not timely asserted.

CERTIORARI GRANTED

Bostock v. Clayton Co. Ga. and Altitude Express v. Zardo

- Issue: Whether Title VII's prohibition against discrimination "because of…sex" encompasses discrimination based on sexual orientation

CERTIORARI GRANTED
R.G. & G.R. Harris Funeral Homes v. EEOC

- Issue: Whether Title VII prohibits discrimination against transgender individuals based on:
  - (1) their status as transgender, or
  - (2) sex stereotyping under the 1989 *Price Waterhouse v. Hopkins* case.

FOURTH CIRCUIT DECISIONS

TANGIBLE EMPLOYMENT ACTION?

Ray v. International Paper Co.

(Decided November 28, 2018)

- Where sexual harassment by a supervisor culminates in "tangible employment action," the employer is strictly liable.
- No *Faragher/Ellerth* defense is available.

TANGIBLE EMPLOYMENT ACTION?

Ray v. International Paper Co.

(Decided November 28, 2018)

- To show tangible employment action, a plaintiff must prove:
  - Action taken against plaintiff was "tangible," such that it constituted a "significant change in employment status," and
  - "Some nexus" between the harassment and the tangible action taken

TANGIBLE EMPLOYMENT ACTION?

Ray v. International Paper Co.

(Decided November 28, 2018)

- Held: Reduction of voluntary overtime opportunities that caused a loss of a significant portion of income could be considered "tangible employment action" or "materially adverse employment action"
- Jury question as to whether the reduction in voluntary overtime was a tangible employment action and whether it was connected with the sexual harassment
- SJ for employer was vacated

TANGIBLE EMPLOYMENT ACTION?

Ray v. International Paper Co.

(Decided November 28, 2018)

- Underscores the importance of employer vigilance
  - The bar for "tangible employment action" and "materially adverse action" may be lower than most employers think.
  - Thorough investigation—take a broad look at complainant's working conditions
  - Managers and supervisors must understand that reporting harassment is mandatory—even when the employee says they don't want action taken.

ILLEGAL MEDICAL EXAMINATIONS

EEOC v. McLeod Health, Inc.

(Decided January 31, 2019)

- ADA prohibits employers from requiring employees to undergo a medical exam "unless such exam…is shown to be job-related and consistent with business necessity".

ILLEGAL MEDICAL EXAMINATIONS

EEOC v. McLeod Health, Inc.

(Decided January 31, 2019)

- Employer must reasonably believe based on objective evidence that either:
  - Employee's ability to perform an essential job function is impaired by medical conditions, or
  - Employee can perform all essential functions of the job, but because of medical condition, doing so will pose a "direct threat" to his or her own safety or the safety of others.

ILLEGAL MEDICAL EXAMINATIONS

EEOC v. McLeod Health, Inc.

(Decided January 31, 2019)

- SJ for employer reversed
  - Court could not conclude that employee's falls and performance issues objectively rose to the level of business necessity required for employer to demand the medical exam.
    - Plaintiff need only show a slight doubt as to the severity of problems to survive SJ
    - Jury question as to whether mobility was an essential function of plaintiff's job

ILLEGAL MEDICAL EXAMINATIONS

EEOC v. McLeod Health, Inc.

(Decided January 31, 2019)

- Dilemma for employers:
  - How much is enough for an employer to reasonably believe, based on objective evidence, that a medical exam is necessary?
  - But if an employer takes adverse action because of safety concerns, the employee may claim that adverse action was taken without objective medical evidence.
- Resist the urge to be paternalistic!

EMPLOYERS MAY BE LIABLE FOR WORKPLACE GOSSIP

Parker v. Reema Consulting Services, Inc.

(February 8, 2019)

- Issue: Whether a false rumor that a female employee slept with a male supervisor to get a promotion can give rise to liability for sexual harassment.
- 4th Circuit joined the 3rd and 7th circuits in finding that "sleeping your way up the ladder" rumors can constitute sexual harassment

EMPLOYERS MAY BE LIABLE FOR WORKPLACE GOSSIP

Parker v. Reema Consulting Services, Inc.

(February 8, 2019)

- Employers can be liable under Title VII for perpetuating such rumors or failing to effectively address or stop them.
- Training, training, training!
- Managers must stay above the rumor mill and not be a part of it.
- Take early, decisive and effective action.

TITLE VII—SUMMARY JUDGMENT

Haynes v. Waste Connections, Inc.

(Decided April 23, 2019)

- Issues: Whether plaintiff presented evidence sufficient to survive SJ based on a showing of:
  - A valid comparator
  - Qualified for the job and meeting the employer's legitimate expectations
  - Pretext
- SJ for employer reversed

TITLE VII—SUMMARY JUDGMENT

Haynes v. Waste Connections, Inc.

(Decided April 23, 2019)

- Valid comparator:
  - Had the same supervisor
    - Employers should use this point to narrow discovery
  - Were subject to the same standards
  - Engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment
    - Plaintiff need not show identical conduct.
    - Somewhat similar may be close enough.

TITLE VII—SUMMARY JUDGMENT

Haynes v. Waste Connections, Inc.

(Decided April 23, 2019)

- Qualified and meeting expectations
  - Plaintiff need not be a "perfect or model employee."
  - Evidence of meeting expectations on performance evaluations, receiving some level of bonus, positive comments by supervisor are enough to create issue of fact to allow plaintiff to go to the jury.

TITLE VII—SUMMARY JUDGMENT

Haynes v. Waste Connections, Inc.

(Decided April 23, 2019)

- Pretext: Inconsistencies in employer's explanation for termination are sufficient to create an issue of fact regarding pretext.
  - Stated reasons inconsistent with employer's policy
  - Stated reasons change over time
  - Asserting new reasons for the first time during litigation

TITLE VII—SUMMARY JUDGMENT

Haynes v. Waste Connections, Inc.

(Decided April 23, 2019)

- Be sure you have clear, consistent and well supported reasons for termination.
- If there are multiple reasons that factor into the termination, be sure they are "in the record" at the time of termination.
- Be sure other termination-related documentation is consistent
  - Personnel records
  - Response to unemployment claims

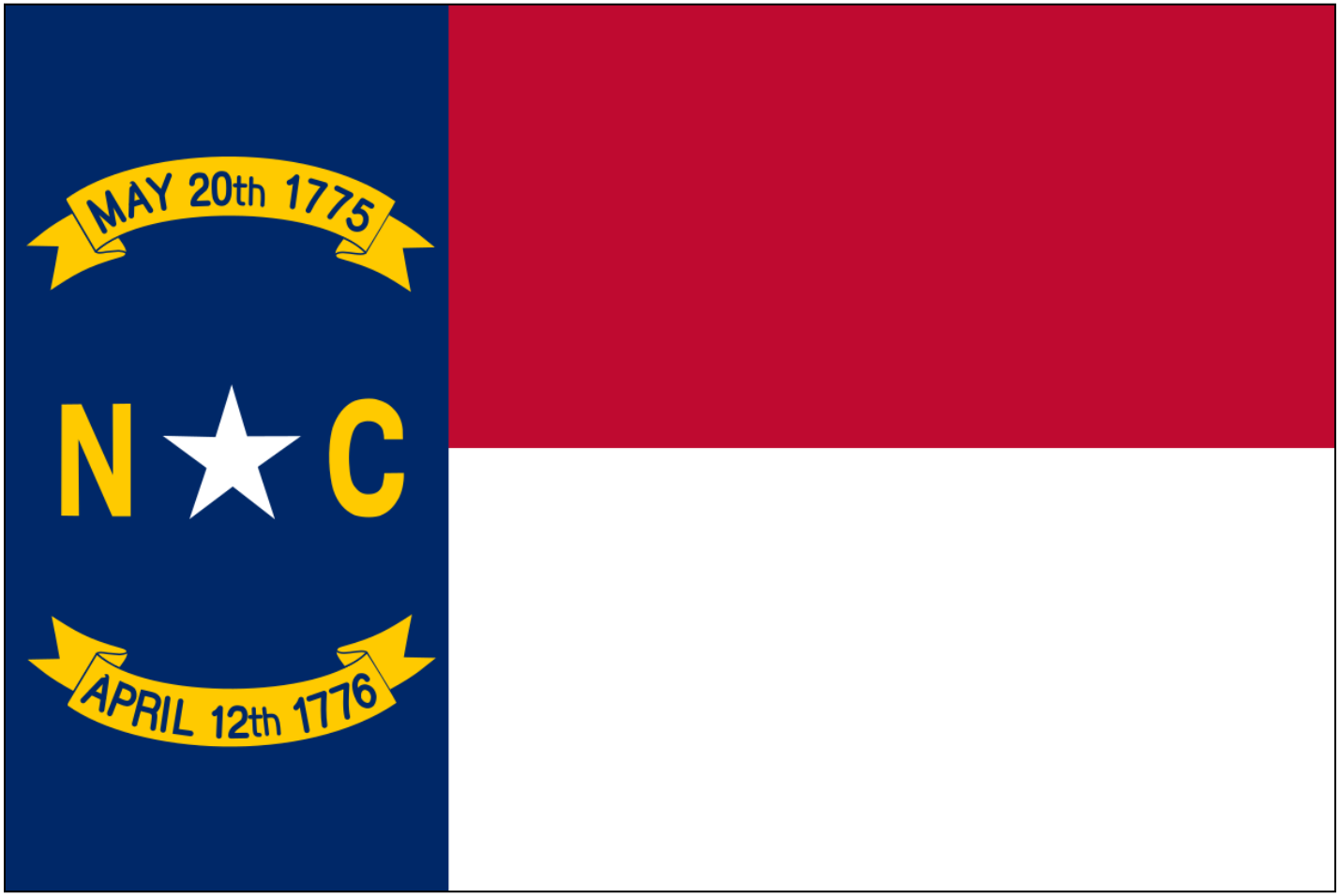
NOT YOUR FATHER'S FOURTH CIRCUIT—SUMMARY JUDGMENT

- Steady trend over the past several years of employee-friendly decisions
- 9 of 15 active judges appointed by Clinton or Obama
- Increasingly harder for employers to win summary judgment and, if obtained, to have it upheld.

NOT YOUR FATHER'S FOURTH CIRCUIT—SUMMARY JUDGMENT

- Jury trials are becoming more likely
- Plaintiff's lawyers know this and settlement values are creeping higher
- What's an employer to do?
  - Regular and robust training—risk reduction
  - Early investigation and resolution
  - Implement arbitration agreements, where permitted by state and local law

NORTH CAROLINA STATE COURT DECISIONS



LEARNED PROFESSION EXCEPTION TO N.C.'s UDTPA

Hamlet H. M. A., LLC v. Hernandez

(Decided October 16, 2018)

- Doctor who entered into a Physician Recruitment Agreement alleged Unfair and Deceptive Trade Practices Act ("UDTPA") claim based on alleged false representations that led him to enter the agreement.
- "Learned profession" exception:
  - Learned profession ≠ commerce
  - UDTPA not applicable to learned professions

LEARNED PROFESSION EXCEPTION TO N.C.'s UDTPA

Hamlet H. M. A., LLC v. Hernandez

(Decided October 16, 2018)

- NC Ct. of Appeals held that strictly business disputes unrelated to the rendering of professional services were not covered by the learned professional exception, even if one or more parties is in a learned profession.
- Court noted that if Hernandez had been an employee, the result might be different.

LEARNED PROFESSION EXCEPTION TO N.C.'s UDTPA

Hamlet H. M. A., LLC v. Hernandez

(Decided October 16, 2018)

- Stay tuned—there was a dissenting opinion, which sets up a review by NC Supreme Court.
- Medical practices, hospitals and physicians could potentially be exposed to treble damages and attorneys fees on claims about business disputes.
- The same is true for other learned professions—dentists, architects, engineers

CHANGES TO AT-WILL EMPLOYMENT

Brodkin v. Novant Health, Inc.

(Decided February 19, 2019)

- At-will status allows employer to require prospective changes to employment terms, without being subject to breach of contract claims.
- If employee refuses to accept the changed terms, employer may end the employment relationship without breaching the agreement.
- Reaffirms the broad latitude of employers in an at-will employment relationship.
- Changes must be prospective.

HOT TOPICS

- **SEXUAL HARASSMENT / #METOO**
- **PAY EQUITY**

SEXUAL HARASSMENT / #METOO

- More reports/complaints of sexual harassment
- Employers face heightened expectations to prevent harassment, investigate allegations of harassment, and to act decisively against harassers.
- Potential media attention is an ever present reality—and potentially more costly than any actual damage awards.

SEXUAL HARASSMENT / #METOO

- Increased need for training—for managers and employees.
- Just because you did it last year doesn't mean you shouldn't do it again this year.
- Real leadership from C-suite is essential.
- Training needs to be sincere and practical—real world examples and potential scenarios.

PAY EQUITY

- Equal Pay Act is getting more attention
- Salary History—Is it a legitimate factor "other than sex" or does it perpetuate prior discrimination?
  - Circuit split
- Salary history bans have been enacted in more than a dozen states and more than a dozen municipalities or counties.
  - These bans prohibit employers from asking about or considering an applicant's prior wage history

Federal Regulatory Activity

EEO-1 REPORTS

- Employers with 100 or more employees (and federal contractors with 50 or more) are required to file annual EEO-1 reports
- Includes data re: gender, race and ethnicity of employees by specified EEO-1 job categories (Component 1 data)
- In 2016, EEOC announced requirement to provide compensation data from W-2 forms and report the number of employees in each of 12 pay bands for each EEO-1 job category, by gender and ethnicity (Component 2 data)
- Litigation and stays ensued.

EEO-1 REPORTS

- Federal District Court has lifted the stay
- Current Deadlines
  - **May 31, 2019:** EEO-1 reports with Component 1 data were due.
  - **September 30, 2019:** Employers must report employees' 2017 and 2018 W-2 compensation information and hours worked.
  - EEOC portal for reporting pay data is expected to be open during July 2019.
- Current appeal does not stay deadlines.

EEO-1 REPORTS—COMPONENT 2 DATA

- Employers must collect W-2 pay data and report the number of employees in each of 12 pay bands for each EEO-1 job category by gender, race, ethnicity and establishment--and must also report hours worked during the year.
- Among other things, EEOC will use this data to identify existing pay disparities for further investigation—i.e., it's an initial sorting tool.

EEO-1 PAY DATA—SURGERY WITH A BUTTER KNIFE?

- Pay data collected on EEO-1's and the statistical tests proposed to be used by the EEOC do not include factors used in typical pay equity tests, such as:
  - Experience
  - Education
  - Performance Ratings
- EEO-1 groupings are much broader than those typically used for similarly situated employees with similar job tasks, responsibility, experience, etc.

EEO-1 PAY DATA—SURGERY WITH A BUTTER KNIFE?

- EEO-1's only identify employees by their EEO-1 grouping, rather than by other groupings of similarly situated employees.
- The only potentially explanatory variable collected is hours worked
  - Largely irrelevant for salaried employees
- Expect a "battle of the experts" over methodology and analysis of other nondiscriminatory factors to explain pay differentials

EEO-1 PAY DATA—WHAT'S AN EMPLOYER TO DO?

- Start collecting pay data for 2017 and 2018, sorting by EEO-1 pay bands
- Consider doing your own statistical analysis, preferably via a privileged review:
  - Using EEO-1 groupings
  - Using traditional pay equity analysis with multiple regressions
  - Identify disparities and explanations for them
  - Consider adjusting pay rates

DOL PROPOSED REGULATIONS
New White Collar Salary Threshold

- Impacts overtime exemptions for executive, administrative, professional, outside sales and computer employees
- To satisfy the "salary basis test," an employee must receive a minimum weekly salary of $679 ($35,308 annually), up from $455/week ($23,660)
- The exemption for "highly compensated employees" now requires minimum annual salary of $147,414, up from $100,000

DOL PROPOSED REGULATIONS
New White Collar Salary Threshold

- Employers can use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the salary level, provided they are paid at least annually.
- If employee did not earn enough bonus or commission to reach required salary level in a given 52 week period, employer can make a catchup payment.
- January 1, 2020: anticipated effective date

DOL PROPOSED REGULATIONS
Regular Rate of Pay

- "Regular rate" of pay for purposes of the "time and one-half" overtime calculation.
- Employers may exclude from "regular rate"
  - Cost of wellness programs and gym access
  - Cost of employee discounts
  - Payments for unused paid leave
  - Tuition programs—reimbursements or repayment of educational debt
- Comment period ends June 12, 2019

DOL PROPOSED REGULATIONS
Joint Employment Under FLSA

- DOL proposes a 4-factor test for determining if an entity is a joint employer.
- Whether the entity has the power to:
  - Hire or fire the employee
  - Supervise and control work schedules or conditions of employment
  - Determine employee's rate and method of payment
  - Maintain the employee's employment records

DOL PROPOSED REGULATIONS
Joint Employment Under FLSA

- Proposed rule also says what is not relevant:
  - Only actions actually taken matter—not just the right or power to act.
  - Economic dependence factors—special skill, opportunity for profit or loss, whether the individual invests in tools and equipment to do the job.
  - The entity's business model (e.g., franchise) or certain agreements (e.g., requiring an employer to have anti-harassment policy or drug testing)

Contact Us With Questions

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