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STRATEGIC PERSPECTIVES—Top labor and employment developments for November 2019

By Joy P. Waltemath, J.D.

In case you missed the in-depth coverage of Labor & Employment Law Daily for November, here’s a recap of some key developments in the L&E community.

MORE REGULATIONS ON TAP FOR YEAR-END

Expect final joint-employer rules from the DOL and the NLRB, while the EEOC intends to submit its own joint-employer proposal

On November 20, the Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions was posted, with joint employer rules at the DOL’s Wage and Hour Division, National Labor Relations Board, and the Equal Employment Opportunity Commission standing out among the many expected regulatory actions.

WHD rule list. Likely of great interest is the final rule “Joint Employer Status Under the Fair Labor Standards Act” (1235-AA26), which the WHD expects to publish by the end of 2019. The rule hasn’t been “meaningfully revised since its promulgation over 60 years ago,” according to the DOL, which says that the proposed changes are intended to provide clarity to the regulated community, enhance compliance, and help promote greater uniformity among court decisions nationwide.

At the NLRB. On tap at the NLRB is the Board’s own controversial “Joint-Employer Rulemaking” (3142-AA13), a change made for the first time via regulations instead of case determinations. The final rule, expected by the end of the year, will establish the standard for determining joint-employer status under the National Labor Relations Act.

EEOC regulatory actions. The EEOC says it too will be addressing the joint-employer issue. The Commission expects to publish a proposed rule, “Joint Employer Status Under the Federal Equal Employment Opportunity Statutes” (3046-AB16), by the end of the year, explaining the EEOC’s interpretation of when an entity qualifies as a joint employer based on the definitions of the statutory terms “employee” and/or “employer” under the federal EEO laws.
DOL’s proposed fluctuating workweek method would clarify that bonus and premium payments are compatible—and must be included in the regular rate calculation

The Department of Labor announced a proposed rule November 4, 2019, that would revise the regulation for computing overtime compensation for salaried nonexempt employees who work hours that vary each week (a “fluctuating workweek”) under the FLSA. Bonus and premium payments, in addition to the fixed salary, are compatible with the fluctuating workweek method of compensation; supplemental payments must be included in the calculation of the regular rate as appropriate.

An employer may use the fluctuating workweek method for computing overtime compensation for a nonexempt employee if the employee works fluctuating hours from week to week and receives, pursuant to an understanding with the employer, a fixed salary as straight time “compensation (apart from overtime premiums)” for whatever hours the employee is called upon to work in a workweek. The salary compensates the employee at straight time rates for whatever hours are worked in the workweek, and the employer satisfies the overtime pay requirement by compensating the employee at a rate of at least one-half the regular rate of pay for the hours worked in excess of 40 per week.

The regular rate must be determined separately each week based on the number of hours actually worked each week. The proposed rule will clarify the current regulation to allow employers who offer both productivity and hours-based bonuses and premium payments to use the fluctuating workweek method of compensation.

DACA, DISCRIMINATION PLEADING STANDARDS ARGUED AT SCOTUS

Will DACA ruling fall along the Supreme Court’s conservative/liberal split?

On November 12, the Justices heard oral argument in three consolidated cases that the Trump administration asked the High Court to review before final judgment on nationwide injunctions preventing the administration from rolling back the Obama-era Deferred Action for Childhood Arrivals (DACA) program. The DACA program offers deportation protection to children who were brought to the United States by parents who immigrated unlawfully. Just days after the petitions were filed, the Ninth Circuit weighed in on one of those cases, which will now get review after final judgment.

What’s at stake? As the respondents in one of the cases said by way of introduction: “After the President stated repeatedly that DACA participants had nothing to fear and should rest easy, the Acting Secretary of Homeland Security abruptly announced the rescission of DACA. There is no dispute that this decision has life-changing implications for nearly 700,000 DACA participants and their families. Yet the Acting Secretary provided only a single vague sentence of explanation for the decision that leaves basic questions unanswered.”

Second appeal to the top. This is the second time the Trump administration has turned to the High Court over the DACA issue. In February 2018, the Court denied the administration’s petition for certiorari in Department of Homeland Security v. Regents of the University of California (17-1003) without prejudice.

But in November 2018, the Department of Justice returned to the Supreme Court with three new petitions: DHS v. Regents of the University of California (18-587); Trump v. NAACP (18-588); and Nielsen v. Vidal (18-589). All three ask the Justices to take up the same basic questions.
posed to the Court earlier: Whether DHS’s decision to “wind down” the DACA policy is (1) judicially reviewable and (2) lawful. The court granted the petitions and consolidated the cases.

**Oral argument.** Court watchers anticipate that the Court will be split along ideological lines, with conservative Justices backing the Trump administration and the liberal wing condemning its DACA rescission. The oral argument transcript seems to bear that out.

The cases are Nos. 18-587, 18-588, and 18-589.

**Justices consider whether but-for causation is pleading standard for Section 1981**

Can pleading a motivating factor also mean pleading but-for causation, remembering that but-for causation isn’t sole-factor causation? In *Comcast Corp. v. National Association of African American-Owned Media* (NAAAOM) (18-1171) the Supreme Court agreed to review only the question of whether a claim of race discrimination under Section 1981 fails in the absence of pleading but-for causation. Section 1981 prohibits racial discrimination in contracts, including in contracts for employment.

“But-for” causation does not require a showing of sole causation; instead, to be a but-for cause, a factor need only be “the straw that broke the camel’s back” or tipped the balance.

**What is the pleading standard?** In the *Comcast* case below, which arose outside the employment context, the African-American owner of Entertainment Studios Network (ESN) sued Comcast, claiming that its decision not to carry channels produced by ESN amounted to racial discrimination in violation of Section 1981.

Comcast contends that the Ninth Circuit’s holding (reversing the district court dismissal of ESN’s complaint)—that to prevail in a Rule 12(b)(6) motion on their Section 1981 claim, the plaintiffs were required only “to plausibly allege that discriminatory intent was a factor in [the] refusal to contract, and not necessarily the but-for cause of that decision”—created a split with the Third, Sixth, Seventh, Eighth, and Eleventh Circuits, all of which have ruled that but-for causation applies.

On the other hand, the NAAAOM asserts that every circuit court of appeals “permits plaintiffs to invoke a ‘motivating factor’ causation standard for racial discrimination claims under Section 1981.” It contends Comcast is arguing that the Court should change current law under Section 1981 and impose a but-for causation standard at the pleading stage. Comcast has failed to point to any Supreme Court or circuit court decision requiring a Section 1981 plaintiff to allege but-for causation to survive a motion to dismiss, according to the NAAAOM.

**Oral argument.** The issue here is a complaint, and at oral argument the Justices seemed to stress that regardless of the ultimate burden of persuasion in the case, pleading that race was a motivating factor might be enough to survive a motion to dismiss, because as the proceedings advanced, it could also be a but-for cause. They also struggled a bit, given that it isn’t common for a case to come to the Supreme Court at the pleading stage.

By the end of the argument, Chief Justice Roberts was asking, “why have you so strenuously resisted alleging but-for causation?” The plaintiffs contended they actually did argue that but-for causation is alleged in the complaint, but “when you focus on the statutory language, when you focus on Congress's broad remedial purpose, it did not mean to impose a requirement for but-for causation at the pleading or at the prima facie case stage either.”
EEO-1 PAY DATA COLLECTION SEEMS UNLIKELY TO CONTINUE

Still trying to find its way through the mess that resulted when the Office of Management and Budget tried to find a way around the Obama administration’s controversial pay data collection by staying it—a move later declared “illegal”—the EEOC, still operating under the Washington, D.C., district court’s order reinstating the collection, has filed a status update indicating that the agency is holding open its collection of EEO-1 pay data (Component 2) for reporting years 2017 and 2018 until the collection is complete.

The agency previously told employers that it would, consistent with current practices, continue to collect data for a six-week period beyond the September 30, 2019 deadline—only until November 11.

Move to drop the collection. Operating on two fronts, the EEOC announced in a November 5 Federal Register notice that it will hold public hearings on November 20, at which a panel of experts will testify about the agency’s September 12 proposal to drop the pay data collection going forward.

Public hearing on EEO-1 pay data collection reveals sharp divides

On November 20, the invited experts offered their views on the EEOC’s proposed changes to the EEO-1 Report during a public hearing at agency headquarters. Earlier, in a September 12, 2019, Federal Register Notice, the EEOC announced that it is seeking approval under the Paperwork Reduction Act (PRA) to continue administering Component 1 of the EEO-1 survey, but it is not planning to continue using the EEO-1 Report to collect the Component 2 pay data information that the Obama administration added to the EEO-1 in 2016.

In a press release, the EEOC noted that the panelists agreed on the necessity of ensuring equal pay for equal work and combating sex-based discrimination but differed on the approach of how to do so, without further elaboration. However, the panelists submitted written testimony for the hearing that brings into focus sharp disagreement about the need for and efficacy of the Component 2 pay data collection.

Ineffective and inefficient. Michael J. Eastman, Senior Vice President, Policy and Assistant General Counsel, Center for Workplace Compliance, said, “Component 2 is not an effective and efficient enforcement tool.” He called it “irresponsible” for the Commission to seek renewal of Component 2, a “deeply flawed tool,” “before the Commission can properly assess any lessons learned from the data collection exercise.”

Data points and grouping. Lynn A. Clements, Director, Regulatory Affairs, Berkshire Associates Inc., noted that Component 2 collects two data points: Box 1 of an employee's W-2 wage statement and the employee's total hours worked in that year. During the approval process, employers repeatedly stated that the data being collected and the way that data was grouped—within broad pay bands in broad occupational categories—was not useful for identifying or remedying sex- or race-based pay disparities, Clements said. She added that the experience of preparing the Component 2 reports has only underscored these concerns about the utility and basic reliability of the collected data.

Flip flop with no analysis. Jessica Stender, Senior Counsel for Workplace, Justice, and Public Policy at Equal Rights Advocates, looked at the Commission’s decision not to renew the Component 2 data collection. Stender noted that the notice fails to provide any analysis or assessment of the utility or benefits of the pay data, “which is by definition a necessary part of
the equation, since it must, pursuant to the PRA, be balanced against any burden to employers.” She added that the agency issued the notice before the current court-ordered Component 2 pay data collection period has even concluded, which means that the Commission has “not yet had an opportunity to perform a complete analysis of the pay data itself, which is necessary to support a conclusion regarding its utility.” Nor does the notice provide sufficient information as to the methodology underlying the Commission’s new analysis and conclusion as to the burden, thereby preventing appropriate outside assessment, according to Stender.

Need for data. Betsey Stevenson, Professor of Economics and Public Policy at the University of Michigan’s Ford School of Public Policy, pointed out that “The only way to combat unintentional disparities is with intentional evaluation of decisions and outcomes such as the employment data collected on Component 1 of the EEO-1 and the pay data collected on Component 2 of the EEO-1.”

Meanwhile, OFCCP does not want any EEO-1 pay data

The Office of Federal Contract Compliance Programs has released its “Intention Not to Request, Accept, or Use Employer Information Report (EEO-1) Component 2 Data,” published in the Federal Register on November 25, 2019. The OFCCP made clear that it will not request, accept, or use Component 2 data, saying it “does not expect to find significant utility in the data given limited resources and its aggregated nature, but it will continue to receive EEO-1 Component 1 data.”

Pay data unnecessary. The OFCCP explained that it has reviewed the parameters of the Component 2 pay data collection and has determined that it does not find the data necessary “to accomplish its mission to ensure federal contractors are not engaged in unlawful pay discrimination.” The OFCCP noted that the pay data is collected in a highly aggregated format, and although it could potentially inform the OFCCP’s scheduling process for compliance evaluations, “it is too broad to provide much utility.”

The pay data is not collected at a level of detail that would permit the OFCCP to make comparisons among similarly situated employees, as required under Title VII standards that the OFCCP applies in administering and enforcing EO 11246. The OFCCP also noted that it receives up-to-date, employee-level pay data from contractors selected for compliance evaluations. This data enables the agency to identify pay disparities that may violate EO 11246 by comparing the pay of employees who are similarly situated under the contractors’ pay practices. Thus, the OFCCP does not need Component 2 pay data for that purpose.

Further, analyzing EEO-1 Component 2 pay data would put an unnecessary financial burden on the OFCCP. The agency’s limited resources do not support the enhanced scope of review of employer practices or provide the human capital and technical capacity that would be required to make use of the Component 2 data.

The OFCCP’s notice is effective immediately.

POST-JANUS SHAKEDOWN CONTINUES IN FEDERAL COURTS

7th Cir.: Employee who paid fair-share fees under protest not entitled to refund of money

Even assuming that the Supreme Court’s decision in Janus v. AFSCME, Council 31 was applied retroactively, an employee who paid fair-share fees under protest was not entitled to a refund of
some or all of that money, ruled the Seventh Circuit. The appeals court found that the state relied on the Supreme Court’s (now overruled) decision in *Abood v. Detroit Bd. of Educ.* when it adopted a labor relations scheme permitting the union to receive fair-share fees from nonmembers. The union then relied on that state law. Accordingly, the appeals court declined to grant monetary damages to the employee, on the ground that the union’s good-faith defense shielded it from such liability (*Janus v. American Federation of State, County and Municipal Employees, Council 31*, November 5, 2019, Wood, D.).

**Retroactivity.** On review, the Seventh Circuit began with the question whether the Supreme Court’s decision in *Janus* is retroactive. The employee relied on the Supreme Court’s decision in *Harper v. Virginia Dep’t of Taxation* for the proposition that “a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law.” The appeals court agreed with the union that it was not at all clear that the Supreme Court’s decision in *Janus* was to be applied retroactively. But it assumed that the right recognized in *Janus* should be applied to the full sweep of people identified in *Harper* (that is, the employee and all others whose cases were in the pipeline at the time of the Court’s decision).

**Good-faith defense.** While this was a matter of first impression in the Seventh Circuit, every federal appeals court that has decided the question has held that, while a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under § 1983. The Seventh Circuit joined its sister circuits in recognizing that, under appropriate circumstances, a private party that acts under color of law for purposes of § 1983 may defend on the ground that it proceeded in good faith.

**7th Cir.: Employee arguing for equitable remedy for fair-share fee deductions simply sought damages**

In a companion case to *Janus v. AFSCME (Janus III)*, the Seventh Circuit ruled that an employee who sought the equitable relief of restitution was also seeking damages. Because the employee’s claim was against the general assets of a union held in its treasury, it can only be characterized as legal rather than equitable. There was no reason to consider whether the good-faith defense applies where the claim is for equitable restitution. Therefore, the appeals court affirmed the judgment of the district court rejecting the employee’s claim for a refund of her fair-share fees paid prior to the Supreme Court’s landmark *Janus* decision (*Janus II*) (*Mooney v. Illinois Education Association*, November 5, 2019, Wood, D.).

**Equitable remedy sought.** In the companion case, the employee sought damages pursuant to § 1983 in the amount of fair-share fees he paid prior to the Supreme Court’s ruling in *Janus II*. By contrast, in this case the employee insists that she is not seeking damages, but instead that she is entitled to the equitable remedy of restitution under § 1983. From the union’s point of view, the two requests are identical—each one seeks a refund of fees.

The appeals court found that the employee was bringing a claim against the union’s treasury generally, not one against an identifiable fund or asset. She was unable to escape this conclusion by arguing that the entire treasury is an identifiable fund against which she can pursue an equitable lien. The court observed that every defendant will have a “fund” consisting of all of its assets. It was not enough that the employee’s fees once contributed to the union’s overall assets. Rather, she must point to an identifiable fund and show that her fees specifically are still in the union’s possession.
2d Cir.: Agency fee payors didn’t choose union; mere representation during collective bargaining not protected association

The First Amendment right to association for agency fee payors (AFPs) was not protected solely because the AFPs were represented by a union during collective bargaining, ruled the Second Circuit, vacating and remanding in part a district court’s decision. Rather, the appeals court observed, the AFPs were represented by the union not because of their choice to engage with the union, but by operation of New York law and the terms of the CBAs. Thus, the matter was remanded to determine whether the layoff of 13 AFPs was justified under rational basis review. However, the appeals court reaffirmed its decision under Rowland that strict scrutiny applied to employment decisions based on an employee’s status as a union member (Donahue v. Milan, November 18, 2019, Lohier, R., Jr.).

N.D. Illinois rejects union’s post-Janus bid to shed free riders

A federal district court in Illinois rejected a union’s First Amendment challenge to the Illinois Public Labor Relations Act (IPLRA), which requires unions to represent nonunion members, based on the Supreme Court’s Janus decision. Janus addressed only the question whether a union may charge agency fees to nonmembers; it said nothing about the union’s obligation to represent them, the district court observed, granting summary judgment in favor of the state defendants (Sweeney v. Raoul, November 12, 2019, Coleman, S.).

Union free speech rights impaired? The union filed suit against the state attorney general and Illinois Labor Relations Board, seeking to shed its “free riders,” arguing that after Janus, the duty of Illinois unions to represent nonmembers likewise runs afoul of free speech protections. As such, it alleged, the IPLRA requirement violates the unions’ First Amendment right not to associate with (i.e., represent) nonmembers who do not wish to pay agency fees.

Controlling Supreme Court precedent. Because Janus didn’t address exclusive representation, the Supreme Court’s 1984 decision in Minnesota State Board for Community Colleges v. Knight remains valid, controlling precedent. There, the Supreme Court held that Minnesota’s system of exclusive union representation did not violate First Amendment speech or associational rights of nonunion members. That holding applies here.

Plus, the district court found the union’s free rider argument unconvincing, given that the Supreme Court in Janus held that “avoiding free riders is not a compelling interest.” Therefore, the court rejected the notion that Illinois’ exclusive-bargaining-representative scheme is unconstitutional under Janus.

IN THE FEDERAL COURTS OF APPEAL

D.C. Cir.: Advocacy group has standing to challenge H-4 visa rule

The D.C. Circuit has ruled that an advocacy group created to “address the problems American workers face from foreign labor entering the United States job market through visa programs” has standing to challenge a rule permitting H-4 visa holders (the spouses of H-1B visa holders) to obtain work authorization. The court found that the organization’s membership includes people who compete with H-1B visa holders in the labor market and that the rule will subject its members to an “actual or imminent” increase in competition. The case was remanded to the district court for further proceedings (Save Jobs USA v. United States Department of Homeland Security, November 8, 2019, Tatel, D.).
Competitor standing. On appeal, Save Jobs had to prove that at least one of its members had standing to sue in his or her own right. Save Jobs argued, as it did in the district court, that the rule would harm its members by increasing competition for jobs between its members and H-1B visa holders. The court noted that the doctrine of competitor standing recognizes that “when regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests in that environment suffer legal harm under Article III.”

Increased competition. The court agreed with Save Jobs that the rule will cause an “actual and imminent” increase in competition in the labor market. Prior to the rule, some H-1B visa holders awaiting permanent residence would leave the U.S., thereby exiting the labor pool, because their spouses were unable to work. As Save Jobs argued, authorizing H-4 visa holders to seek employment would encourage more H-1B visa holders to stay and compete with Save Jobs’ members than otherwise would have.

Stated purpose supports standing. Even DHS’ stated purpose for the rule supported the court’s findings. DHS stated that the rule would incentivize H-1B nonimmigrants to wait for an immigrant visa, and DHS expected the rule to “decrease the labor disruptions” that occur when H-1B nonimmigrants abandon the permanent resident process. In support of this position, the court cited over 60 commenters who wrote that they had planned to leave the country but will now stay and wait for permanent resident status as a result of the rule.

DHS asserted that any injury to Save Jobs is caused by the H-1B visa program itself, not by the rule, which only allows their spouse to work. The appeals court disagreed, concluding that Save Jobs had shown that the rule will cause more H-1B visa holders to remain in the U.S. than would have absent the rule.

Already employed vs. looking. Nor was the court persuaded by DHS’ argument that H-1B visa holders are already employed, so they aren’t competing with Save Jobs’ members who are looking for work. The court stated that “the supply side of a labor market is made up of those individuals who are employed and those actively looking for work.”

6th Cir.: First Amendment retaliation claim of Christian firefighter who objected to coworkers’ sexual behavior revived in part

Reversing in part the dismissal of First Amendment retaliation claims of a firefighter who criticized his coworkers for conduct he considered immoral and harmful to their work, and who was ultimately fired for overreporting his hours and double dipping, a divided Sixth Circuit panel found that while a close call, his amended complaint contained enough plausible allegations to move to the discovery stage of the case. The firefighter alleged that his coworkers watched pornography in communal spaces and engaged in extra-marital affairs at the fire station, and in response to his criticisms, they responded with disrespectful comments about his religious practices and sexual orientation. But the appeals court affirmed summary judgment against the firefighter’s due process and Title VII disparate treatment and hostile work environment claims (Hudson v. City of Highland Park, Michigan, November 22, 2019, Sutton, J.).

First Amendment retaliation. On appeal, the Sixth Circuit first noted that the employee complained about the poor administration of the fire department, which was surely protected speech, and the fire department fired him, which was surely an adverse employment action. For five years, the employee alleged, he openly criticized his coworkers’ behavior, believing that it interfered with their ability to fight fires. Further, he claimed, the chief knew about his comments
and tolerated other firefighters’ dereliction of duty. In addition, he filed a complaint with OSHA alleging that the firefighters’ cavorting led to deficiencies in the station’s equipment. Ultimately, he alleged, because the chief wanted to silence him, the chief fired him for falsifying his time card even though the chief knew another firefighter had done the same thing.

**10th Cir.: Medical expert not always required to prove ADA disability**

A federal district court had granted summary judgment in favor of an employer in an ADA action because the employee did not have a medical expert witness to prove she suffered from lower back pain that substantially interfered with her ability to lift. The Tenth Circuit reversed, disagreeing that an expert always must be used to prove a disability in discrimination cases brought under the ADA. On the other hand, the appeals court affirmed the district court’s denial of the employee’s motions to enlarge the time to designate an expert witness and amend her complaint to add “perceived as” discrimination and retaliation claims (*Tesone v. Empire Marketing Strategies*, November 8, 2019, Matheson, S.).

**Expert not always required.** The lower court focused on the first element of a prima facie case—the statutory definition of “disability.” Expert medical testimony may be used to establish a plaintiff’s disability. But no language in the ADA or implementing regulations states that medical testimony is required, and there is no general rule that medical testimony is always necessary to establish disability. Rather, whether medical evidence is necessary to support a disability claim is a determination that must be made on a case-by-case basis.

Courts generally require expert evidence when “a condition would be unfamiliar to a lay jury and only an expert could diagnose that condition.” By contrast, when a plaintiff alleges an impairment “that a lay jury can fathom without expert guidance,” court generally “do not require medical evidence” to establish an ADA disability.

**UNIONS AND UNION MEMBERS**

**GM goes after Fiat Chrysler in racketeering suit over its role in union corruption**

General Motors has filed a lawsuit against FCA (FCA US LLC), Fiat Chrysler Automobiles NV, and former FCA executives who have pleaded guilty in the high-profile and ongoing federal corruption probe over union bribes. The federal racketeering lawsuit centers around what GM sees as a “multi-year pattern of corruption that FCA used to undermine the integrity of the collective bargaining process and cause GM substantial damages.” FCA clearly sponsored pervasive wrongdoing, “paying millions of dollars in bribes to obtain benefits, concessions, and advantages in the negotiation, implementation, and administration of labor agreements over time,” GM says.

The complaint states that the suit is “categorically not against the nearly 50,000 hard-working women and men employed by GM” who are members of the United Auto Workers. Nor are UAW officials named as defendants. GM says that the suit is “intended to build a stronger future for GM’s employees, the UAW, and the Company,” which depend “on a collective bargaining process and labor relations grounded in integrity, good faith, and arm’s-length negotiations, which the law requires and this lawsuit is intended to vindicate.”

**What is the suit about?** GM characterizes the Italian company, Fiat Chrysler Automobiles N.V., as having betrayed both the federal government’s and the U.S. auto industry’s trust and “embarked on a systemic and near decade-long conspiracy to bribe senior union officials to
corrupt the collective bargaining process and labor relations,” GM alleges. GM describes the core of the complaint as focused on the admissions of wrongdoing by former FCA executives during the ongoing criminal investigation conducted by the U.S. Attorney’s Office in the Eastern District of Michigan. As GM sees it, FCA clearly sponsored the pervasive wrongdoing, “paying millions of dollars in bribes to obtain benefits, concessions, and advantages in the negotiation, implementation, and administration of labor agreements over time.”

“This lawsuit is intended to hold FCA accountable for the harm its actions have caused our company and to ensure a level playing field going forward,” Craig Glidden, GM Executive Vice President and General Counsel, said in a statement.

FCA responds. For its part, FCA issued a brief statement in response to GM’s lawsuit: “We are astonished by this filing, both its content and its timing. We can only assume this was intended to disrupt our proposed merger with PSA [PSA Groupe (PSA Peugeot)] as well as our ongoing negotiations with the UAW. We intend to vigorously defend against this meritless lawsuit and pursue all legal remedies in response to it.”

UAW takes action against union officials named in criminal complaints

United Auto Workers President Gary Jones has resigned, according to a one-sentence announcement on the union’s website. The move came as the UAW formally filed charges against him under Article 30 (Charges and Trials of International Officers) of its union constitution. The union also brought Article 30 charges against UAW Region 5 Director Vance Pearson. Signed by the full International Executive Board, the union charges assert that the union president and Region 5 director directed the submission of false, misleading, and inaccurate expense records to the UAW accounting department and concealed the true information about those expenses, in violation of the UAW’s Ethical Practices Code and applicable federal labor laws.

Before his stint as union president, Jones was previously the Region 5 director.

Leaves of absence. After being named in the criminal complaint, Jones requested and was granted a paid leave of absence from his positions as president and member of the International Executive Board (IEB). He remained on leave until the UAW filed Article 30 charges against him and he subsequently resigned.

Pearson requested and was granted a leave of absence from his positions as Director of Region 5 and the IEB after the criminal charges were filed against him. He was on leave at the time the union filed Article 30 charges against him. Under his bond conditions, Pearson is barred from being involved in any financial decisions or transactions of the UAW.

“This is a somber day, but our UAW Constitution has provided the necessary tools to deal with these charges,” UAW Acting President Rory Gamble said in a release. “We are committed at the UAW to take all necessary steps including continuing to implement ethics reforms and greater financial controls to prevent these types of charges from ever happening again.”

STATE LAW INDEPENDENT CONTRACTOR NEWS

California Trucking Association claims AB-5 is preempted

The California Trucking Association and two owner-operators have amended a lawsuit they filed last year against the state of California to allege that the ABC test set forth in newly enacted AB-
and, before it, Wage Order No. 9 as construed by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, are expressly and impliedly preempted by federal law with respect to the trucking industry and are therefore unconstitutional. The plaintiffs also seek a declaration that California’s meal and rest period requirements are expressly preempted and may not be enforced with respect to drivers of property-carrying commercial motor vehicles subject to the federal Hours of Service (HOS) rules.

**Injunction; go back to Borello test.** The CTA wants a preliminary and permanent injunction prohibiting the state from enforcing the ABC test set forth in AB-5 or Wage Order No. 9, as construed by the California Supreme Court in *Dynamex*. It asks the court for a declaration that the determination of employee or independent-contractor status with respect to drivers of property-carrying commercial motor vehicles performing trucking services for motor-carrier members of the CTA is to be governed by the California Supreme Court’s earlier decision *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.

**Services, routes, and prices.** The plaintiffs contend that specifically Prong B of the ABC test under AB-5, or the preceding interpretation in *Dynamex* under Wage Order No. 9, is expressly preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA) because “the requirement that motor carriers treat all drivers as employees and the concomitant *de facto* prohibition on motor carriers contracting with independent owner-operators to perform trucking services in California directly impacts the services, routes, and prices offered by CTA’s motor-carrier members to their customers.” They also contend that Prong B is impliedly preempted “insofar as the ABC test effectively bars CTA motor-carrier members from using individual owner-operators to provide trucking services to their customers [and] is an obstacle to the achievement of ‘Congress’ overarching goal’ of ‘helping assure transportation rates, routes, and services that reflect ‘maximum reliance on competitive market forces.’” It also impermissibly burdens interstate commerce, violating the Commerce Clause.

**Motor Carrier preemption.** Finally, the plaintiffs argue that applying *Dynamex* and AB-5 to them would compel motor carriers to comply with California meal and rest period requirements, which are preempted by the federal Motor Carrier Safety Act. They seek an injunction prohibiting the state from attempting to apply or enforce such meal and rest period provisions.

**New Jersey independent contractor bill already nets significant pushback**

Introduced November 7 and sponsored by New Jersey Senate President Stephen M. Sweeney, S.4204 is modeled after California’s AB 5 and would adopt a modified “ABC” test. It would make individuals who perform services for remuneration employees and not independent contractors, unless:

a. The individual has been and will continue to be free from control or direction over the performance of the service, both under the individual’s contract of service and in fact; and

b. The individual’s service is outside the usual course of the business for which that service is performed; and

c. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the work performed.
Changes unemployment, construction industry law. Importantly, the bill would modify the similar ABC test in the state’s unemployment compensation law and New Jersey’s Construction Industry Independent Contractor Act. S.4204 modifies “b” of the ABC test in the unemployment compensation and construction industry independent contractor laws so that service is not exempt from being considered employment for that law solely because the service is performed outside of all the places of business of the enterprise for which the service is performed.

The bill further modifies “c” of the ABC test in those laws by indicating that the exemption from being considered employment because the individual is customarily engaged in an independently established trade, occupation, profession or business only applies if they are of the same nature as the trade, occupation, profession, or business involved in the work performed.

Objections lodged. The U.S. Chamber of Commerce sent a letter November 13 opposing the New Jersey bill, saying it would “severely restrict the ability of employers to utilize the legitimate services of independent contractors.” Noting that the bill was modeled after California’s AB 5, the letter notes that it “differs from AB 5 in critical ways that make this bill even more problematic and that provide ample reason to avoid rushing to pass this legislation.”

Small business concerns. The National Federation of Independent Business announced its concerns as well, saying that S.4204 “would drastically alter New Jersey’s legal definition of independent contractors—a change that would hurt free-lance business owners, small subcontractors, and the businesses that contract with those companies”—and would create turmoil within the small business community.

Amendments. Since that time, the New Jersey Senate Labor Committee reported the bill favorably, with amendments, on November 14. The amendments adopted by the committee provide that certified public accountants not be regarded as employees for the purposes of state wage and hour laws. The amendments also exempt from coverage as “employees” under state wage and hour laws, if they are exempt under the Federal Unemployment Tax Act (FUTA), the following groups: real estate salesmen or brokers compensated by commissions; securities broker agents and salesmen; and certain insurance company agents.

OTHER STATE LAW DEVELOPMENTS

New York City’s first hair discrimination settlement includes “restorative remedies”

Announcing its first settlement involving race discrimination on the basis of hair following the February 2019 release of its landmark legal enforcement guidance, the New York City Commission on Human Rights announced a settlement with two salons that requires the establishment of an internship program, trainings on styling natural hair for salon staff, and a civil penalty of $70,000. The settlement with Sally Hershberger Salon and Sharon Dorram Color concludes a Commission-initiated investigation into reports of discriminatory grooming policies enforced against Black employees. “This resolution is another step towards ensuring that racist notions of professional appearance standards are not applied in New York City,” said the Commissioner.

The Commission’s legal enforcement guidance was the first in the country to recognize discrimination on the basis of hair as race discrimination, prompting legislative change in other jurisdictions across the nation.
Learn to style natural hair. The settlement stipulates that the businesses must partner with a NYC-based styling school that specializes in the care and styling of natural hair and hairstyles closely associated with Black people in order to train current salon employees to cut and style natural hair and create a multicultural internship program which will provide professional opportunities to hair stylists from underrepresented groups.

Community service and training. In addition, the business owner and a senior stylist from Hershberger Salons will complete 35 hours of community service with a racial justice organization (to be approved by the Commission) that works to combat hair discrimination and promote Black beauty. The businesses were also mandated by the Commission to complete trainings on racial justice and equity and to identify several experts to provide such trainings.

Pennsylvania Supreme Court to decide whether post-shift security screenings are compensable under state law

In multidistrict litigation involving wage-and-hour statutes from various states, this appeal raised the question whether the U.S. Supreme Court’s security screening decision in *Integrity Staffing Solutions, Inc. v. Busk* (*Busk I*) resolves a similar claim under the Pennsylvania Minimum Wage Act. The Sixth Circuit certified to the Pennsylvania Supreme Court two questions regarding compensation for waiting time for post-shift security screenings and the validity of an employer’s *de minimis* defense for such time. Specifically, the appeals court first asked whether time spent on an employer’s premises waiting to undergo and then undergoing mandatory security screening was compensable as “hours worked” within the meaning of the Pennsylvania Minimum Wage Act (PMWA). Second, the appeals court asked whether the *de minimis* doctrine applied to bar claims brought under the PMWA (*In re Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, November 4, 2019, Griffin, R.).

In *Busk I*, the U.S. Supreme Court held that employees’ time spent waiting to undergo, and then undergoing post-shift security screening is not compensable under the FLSA. Here, the district court noted that “Pennsylvania and federal courts have used the FLSA law for interpretative guidance” where its provisions mirrored those of the PMWA, and that “the state and federal definitions of compensable time are similar to each other.” Consequently, the district court granted the employers’ motion for summary judgment. The employees appealed and moved to certify a question of law to the Pennsylvania Supreme Court, which has never squarely addressed whether the PMWA incorporated the Portal-to-Portal Act, to resolve this issue. Thus, the question raised is one of first impression.