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Top labor and employment developments for February 2020

By Wayne D. Garris Jr., J.D.

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

Supreme Court News

Employee loses bid to review religious accommodation questions

On February 24, the Supreme Court denied a Walgreen Co. training instructor’s bid for review of an Eleventh Circuit ruling that his employer had offered the Seventh Day Adventist—whose religious beliefs prohibited him from working during his Sabbath—reasonable accommodations that he either failed to take advantage of or refused to consider.

In an unpublished opinion, the appeals court had observed that Walgreens had shifted the training schedule to Sunday through Thursday and allowed the employee to swap with other employees in order to cover any shifts that conflicted with his Sabbath. But even assuming the accommodations it offered were not reasonable, allowing the employee to retain his training instructor position with a guarantee that he would never have to work on Friday nights or Saturdays, as he insisted, would have posed an undue hardship for the company’s business operations, the Eleventh Circuit determined, affirming summary judgment against the employee’s failure-to-accommodate claim.

Concurring in the certiorari denial, Justices Alito, Thomas, and Gorsuch agreed that the instant case was not the correct vehicle to explore important questions “about the meaning of Title VII’s prohibition of employment discrimination ‘because of . . . religion.’” Justice Alito agreed with the Solicitor General’s contention that the Court should reconsider the proposition, endorsed by its 1977 opinion in Trans World Airlines, Inc. v. Hardison, that Title VII does not require an employer to make any accommodation for an employee’s practice of religion if doing so would impose more than a de minimis burden. The case, Patterson v. Walgreen Co., is No. 18-349.
‘Actual knowledge’ cannot be presumed under ERISA, Section 413(2)

A unanimous Supreme Court held that a retirement plan participant does not have “actual knowledge” of information contained in plan disclosures merely by virtue of having received those disclosures. Emphasizing the significance of “actual knowledge” in the text of the statute, the U.S. Supreme Court held that a plaintiff suing a retirement plan administrator for fiduciary breach must in fact have become aware of the investment information for purposes of accelerating the complaint-filing deadline under Section 413(2) of ERISA. Rejecting a constructive knowledge standard, the Justices said that actual knowledge cannot be presumed merely because a fiduciary has disclosed information about allegedly imprudent investments. “As presently written,” Justice Alito wrote for a unanimous Court, “§1113(2) requires more than evidence of disclosure alone.” Rather, “the plaintiff must in fact have become aware of that information.” If, as Intel argues, such a reading of the statute is not sufficiently protective of ERISA fiduciaries, then that is a matter for Congress to take up (Intel Corp. Investment Policy Committee v. Sulyman, February 26, 2020, Alito, S.)

Federal regulatory developments

NLRB announces final rule governing joint-employer status under NLRA

On February 25, 2020, the NLRB announced its final rule governing joint-employer status under the NLRA, which goes into effect on March 16, 2020. Under this final rule, an entity may be considered a joint employer of a separate employer’s employees only if the two share or codetermine the employees’ essential terms and conditions of employment, which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

According to the Board, the final rule restores the joint-employer standard that applied for several decades prior to the 2015 decision in Browning-Ferris. As indicated in its original notice of proposed rulemaking (NPRM), the Board believes that the final joint-employer rule will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby enhancing labor-management stability, the promotion of which is one of the principal purposes of the NLRA. A Fact Sheet about the final rule is also available.

State AGs challenge DOL joint-employer final rule

A coalition of 18 state attorneys general filed a lawsuit challenging the Department of Labor’s joint-employer final rule. The AGs contend that the Trump Administration’s regulation would eliminate key labor protections for workers. They are asking the U.S. District Court in the Southern District of New York to vacate the rule and enjoin the DOL from implementing and enforcing it. The AGs assert in their complaint that the final rule would “unlawfully narrow the joint employment standard under the Fair Labor Standards Act, undermine critical workplace protections for the country’s low- and middle-income workers, and lead to increased wage theft and other labor law violations.”
In the federal courts of appeal

9th Cir.: Prior salary is not a valid ‘factor other than sex’ to justify pay disparity

The Ninth Circuit issued a new decision after the U.S. Supreme Court vacated its earlier opinion, which was issued 11 days after the death of its author, Judge Stephen Reinhardt. An en banc panel of the Ninth Circuit held that a female employee’s prior rate of pay is not a permissible “factor other than sex” under the Equal Pay Act (EPA) justifying an employer’s decision to pay her less than her male counterparts performing the same work. “The express purpose of the Act was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees’ prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate,” the appeals court reasoned. Thus, a county employer that relied on prior salary to set a female employee’s starting salary failed to set forth a valid affirmative defense, and the denial of its motion for summary judgment against the employee’s EPA claim was affirmed (Rizo v. Yovino, February 27, 2020, Christen, M.).

6th Cir.: Teacher not entitled to refund of agency fees paid pre-Janus

Claims by a nonunion teacher in Ohio who sought monetary relief against a public-sector union for the agency fees it collected pre-Janus were properly dismissed, ruled the Sixth Circuit. The appeals court concluded that private parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983 when they acted in good faith in following existing Ohio law and prior Supreme Court precedent, which had expressly permitted fair-share fees. Additionally, the appeals court affirmed the district court’s dismissal of the employee’s state-law conversion claim (Lee v. Ohio Education Association, February 24, 2020, Griffin, R.).

7th Cir.: Insurance sales rep discharged after on-the-job injury was fired for absenteeism and job deficiencies

Although an employee suffered an on-the-job back injury, she failed to establish that her subsequent termination was the result of discrimination and retaliation in violation of the ADA, ruled the Seventh Circuit. Even before the employee’s injury, her supervisor had consistently noted in performance reviews that she had performance and absenteeism issues. Consequently, the appeals court concluded that the termination was the direct result of the employee’s pattern of absenteeism and deficiency in product knowledge (Stelter v. Wisconsin Physicians Service Insurance Corp., February 20, 2020, Bauer, W.).

D.C. Cir.: Title VII does not apply to uniformed members of the armed forces

Addressing for the first time whether Title VII’s provision covering federal employees applies to uniformed servicemembers, the D.C. Circuit, joining “the unanimous rulings of its sister circuits,” held that it does not. The appeals court stressed that it was not holding that because military service is distinct from traditional employment, the military is free to discriminate. The appeals court affirmed the dismissal of a former marine’s Title VII claims against the Secretary
of Navy alleging that toward the end of his military career, his supervising officers discriminated against him based on his race and sex (Jackson v. Modly, February 14, 2020, Henderson, K.)

3rd Cir.: Philadelphia’s salary history ordinance survives constitutional challenges

The Chamber of Commerce has not shown a likelihood of success on the merits of its constitutional challenge to the “Reliance Provision” part of a Philadelphia ordinance that prohibits an employer from relying on an applicant’s wage history in setting an employee’s wage. Therefore, the district court correctly refused to enjoin enforcement of the provision, ruled the Third Circuit. However, the district court’s analysis of the “Inquiry Provision” applied a much higher standard than required. Although the Inquiry Provision clearly regulated speech because it prevented employers from asking potential applicants specific questions, the city enacted the provision in an attempt to address the persistent problem of the pay gap, and the record was clearly sufficient to withstand this First Amendment challenge. Accordingly, the appeals court vacated the district court’s preliminary injunction as to this provision (Greater Philadelphia Chamber of Commerce v. City of Philadelphia, February 6, 2020, McKee, T.).

At the NLRB

Refusal to bargain case remanded for retroactive application of community-of-interest standard

In a refusal to bargain case in which an employer challenged a union’s certification as bargaining representative, a three-member panel of the NLRB denied the General Counsel’s motion for summary judgment and remanded to a regional director for retroactive application of the community-of-interest standard established in PCC Structural, Inc. Because there was an intervening change in the legal standard applicable to the unit determination, it was appropriate, observed the Board, to permit the relitigation of the unit determination (Green Jobworks, LLC, February 4, 2019).

Agency news

AFSCME sues DOL over rule eliminating merit-hiring requirement for employment service workers

The American Federation of Federal, State, County, and Municipal Employees (AFSCME) filed a lawsuit in a Washington, D.C., federal district court challenging a Department of Labor final rule that, according to the union, lets states skirt requirements to use a merit-based system when hiring employment service (ES) workers. ES workers assist out-of-work Americans in finding job placements and rebuilding their lives.

Merit system requirement. The union contends that the Wagner-Peyser Act’s “merit system requirement” has been a long-standing legal precedent intended to ensure that ES workers are appointed based on merit and that they can provide access to unbiased retraining assistance, a wage subsidy, job search assistance, health insurance tax credits, relocation assistance, and other unemployment benefits.
On January 6, 2020, for the first time in the Wagner-Peyser Act’s history, the DOL, through its sub-cabinet agency the Employment Training Administration, issued a final regulation, “Wagner-Peyser Act Staffing Flexibility,” that purports to eliminate the longstanding merit system requirement, the union explained in its lawsuit. The two-count complaint seeks declaratory judgment that the final rule is invalid, as well as both a preliminary and a permanent injunction prohibiting the Department of Labor from implementing the final rule.

**Scalia tightens the reins at the DOL**

On February 21, Secretary of Labor Eugene Scalia announced actions he had taken to establish the Secretary’s authority to review, at his discretion, decisions of the Administrative Review Board (ARB); establish a similar system of discretionary secretarial review over cases pending before, and decisions issued by, the Board of Alien Labor Certification Appeals (BALCA); and reestablished the Department’s Management Review Board, among other administrative actions.

"Two constitutional principles that have guided me since my confirmation are 'fair notice' and the duty to 'take care that the laws be faithfully executed,'” Secretary Scalia said. "Establishing policy for the Department, making sure the Department is well-run, and taking responsibility for its actions are important duties of the Secretary of Labor. Today's actions enhance the ability that I and future secretaries will have to fulfill those duties."

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**DOD now has authority to nix collective bargaining rights**

In a move that quickly drew the ire of the largest federal employee union, President Trump published a delegation of authority in the Federal Register on February 21 that could strike a fatal blow to union representation at the Department of Defense. Specifically, the White House published Trump’s January 29, 2020, memorandum giving the Secretary of Defense authority (under 5 U.S.C. 7103(b)(1) and 7103(b)(2)) to issue orders excluding DOD agencies and subdivisions from coverage under the Federal Service Labor-Management Relations Statute (FSLMRS). The Defense Secretary may further delegate this authority to any DOD official appointed by the President with the advice and consent of the Senate. Any determinations made by the Secretary or other official delegated this authority also must be published in the Federal Register.

**National security.** President Trump justified this delegation of authority as being in U.S. national security interests, which require expedient and efficient decision-making. According to Trump, “Where collective bargaining is incompatible with these
organizations’ missions, the Department of Defense should not be forced to sacrifice its national security mission and, instead, seek relief through third parties and administrative fora.”

**Developments in federal legislation**

**House advances union organizing bill, the PRO Act**

On February 6, the House passed the controversial Protecting the Right to Organize (PRO) Act in a 224-194 mostly party-line vote that nonetheless saw seven Democrats join Republicans to vote against the measure, and five Republicans join Democrats to favor it.

**PRO Act would incorporate “ABC test.”** As reported by the House, [H.R. 2474](https://www.congress.gov/bill/116th-congress/house-bill/2474), would amend the NLRA and related labor laws to change the definition of “employee” and “supervisor” to prevent employers from misclassifying employees to exclude them from labor law protections. Significantly, Section 2(3) of the NLRA would be amended to provide that an individual performing any service would be considered an “employee” (except as provided in the earlier part of the subsection) and not an “independent contractor,” unless:

A. The individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
B. The service is performed outside the usual course of the business of the employer; 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 service performed.

**Other PRO Act provisions.** The PRO Act would:

- Expand unfair labor practices to include prohibitions against replacement of or discrimination against workers who participate in strikes;
- Make it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership;
- Permit workers to participate in collective or class action litigation;
- Allow injunctions against employers engaging in unfair labor practices involving discharge or serious economic harm to an employee;
- Expand penalties for labor law violations, including interference with the NLRB or causing serious economic harm to an employee; and
- Allow any person to bring a civil action for harm caused by labor law violations or unfair labor practices.

**California legislation challenged**

**E.D. Ca.: Business groups win preliminary injunction against California mandatory arbitration ban**

A federal district court in California granted the U.S. Chamber of Commerce’s request for a preliminary injunction blocking the state of California from enforcing A.B. 51, a recently enacted state law that prohibits mandatory arbitration agreements. Finding that the plaintiffs had
a high likelihood of success on the merits, the court concluded that the supporters of the bill wanted to curb the abundance of mandatory arbitration agreements within the state which placed arbitration on “unequal footing” with other contracts and interfered with employers’ rights under the FAA. Further, the plaintiffs showed that irreparable harm would result in the absence of an injunction because A.B. 51 placed employers in the position of having to risk the penalty of violating the law or absorbing the costs of rolling back existing arbitration agreements—and those costs could not be recovered in litigation. The court previously granted the Chamber’s motion for preliminary injunction in a January 31 order, but articulated its reasoning in this subsequent written order (Chamber of Commerce of the United States of America v. Becerra, February 6, 2020, Mueller, K.).

C.D. Cal.: Uber and Postmates denied preliminary injunction barring enforcement of California’s independent contractor law

Uber and Postmates, along with a pair of rideshare and delivery drivers, were denied a preliminary injunction barring the enforcement of California’s A.B. 5 against them. A federal district court in California found the drivers failed to show a likelihood of success on the merits on their Equal Protection, Due Process and Contract Clause claims because AB 5 is rationally related to a legitimate state interest, does not target gig economy companies, and does not unconstitutionally impair their contracts. In addition, the balance of equities and the public interest weighed in favor of permitting the state to enforce the legislation (Olson v. State of California, February 10, 2020, Gee, D.).

S.D. Cal.: Some of trucking association’s challenges to A.B. 5 dismissed, but injunction remains

Granting in part and denying in part the State of California’s and Teamsters’ motion to dismiss, a federal district court in California held that the California Trucking Association had previously established a likelihood of success on its claim that the Federal Aviation Administration Authorization Act (FAAAA) preempted A.B. 5 when it moved for a preliminary injunction, so that same claim would survive the defendant’s motion for dismissal. The court, however, dismissed the plaintiffs’ claims that A.B. 5 violated the dormant Commerce Clause and was preempted by a Federal Motor Carrier Safety Administration (FMCSA) order. In a separate order, the court rejected an attempt by defendant-intervenor, International Brotherhood of Teamsters, to stay enforcement of the January 16 preliminary injunction, finding that the intervenor failed to provide any evidence to meet the court’s four factor test to determine whether to stay an injunction (California Trucking Association v. Becerra, February 10, 2020, Benitez, R.).

Other developments

Restaurant groups fall short in challenge to NYC predictive scheduling law

In International Franchise Association v. City of New York, a New York state trial court granted the City of New York’s motion to dismiss a challenge to the city’s Fair Workweek Law brought by a collection of restaurant industry groups. The plaintiffs argued that the law, which imposes
various scheduling requirements on employers within New York City, was invalid because conflict preemption and field preemption. In a brief decision, the court acknowledged that the FWWL “interferes with freedom of contract of contract; distorts capitalism; and is surprisingly complex, arguably unwieldy, and only problematically enforceable.” Nevertheless, the plaintiffs’ challenge fell short because the court found the FWWL also is “narrowly tailored, regulates a few discreet facets of employer-employee relations (mainly predictive scheduling), and does not infringe on State prerogatives.”

Elaborating on its decision, the court explained that the goal of the premium payment under the FWWL is to encourage employers to provide predictive scheduling and to compensate employees for the harm caused by an employer’s failure to engage in advance scheduling, not to interfere with the state’s minimum wage law. In denying the plaintiffs’ motion, the court concluded that the FWWL is not preempted by state law because it “does not prohibit what the State allows and does not allow what the State prohibits, and employers can comply with both.”

California Supreme Court rules state’s Apple Store employees must be paid for exit inspections

Apple Store employees are entitled to compensation for the time during which they wait on the store’s premises to have their bags and personal belongings inspected, and for the time it takes to actually undergo the exit inspections, a unanimous California Supreme Court ruled. Although the U.S. Supreme Court rejected the notion that such time was compensable under the FLSA, California Industrial Welfare Commission Wage Order 7-2001, and its “control clause,” specifically, compelled a different outcome in this class action wage suit brought by Apple retail employees in the state (Frlekin v. Apple, Inc., February 13, 2020, Cantil-Sakauye, T.).