Quarterly Review

Volume 13 Issue No. 2 Spring 2019

Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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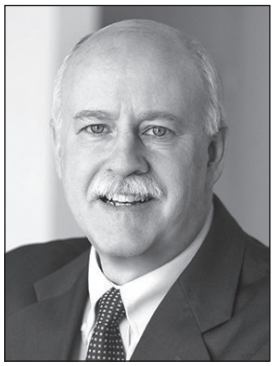
MAY 2019



OACTA is off to a great start for 2019. The last time I spoke with you, it was on the eve of the Insurance Coverage Seminar held at Grange Insurance in Columbus, Ohio on April 12. For those who were in attendance, I'm sure you will agree that the seminar was terrific! Every topic was interesting and well-presented. None of them were klunkers. There was a great mix of vendors, and I hope you had the opportunity to meet and talk with each of them. They are all great supporters of OACTA and our mission, they provide great services to our Members, and we encourage your support of them in turn. As Michael Scott might say on "The Office": Using our vendors is a "win-win-win". At the same time, the facilities were just great. While the turnout was the best we have ever had, Grange accommodated us comfortably, allowing attendees to not only enjoy the presentations, but mix and mingle during breaks, renew old friendships, and hopefully make new ones. The food and snacks also hit the spot. I want to thank Mike Neltner, Megan Foust, and Charlie Wendland of National Interstate, along with the entire Insurance Coverage Committee, for their great planning and execution of the program. You guys really set the bar.

I am also excited to let you know that OACTA made arrangements to video four of the presentations at the Insurance Coverage Seminar to make them available for CLE On Demand. This is a new benefit offered to our Members, and we hope that those of you who could not be attendance will take advantage of this online learning capability. Check out the website to take advantage of this great opportunity. Just click on "OACTA Online CLE Catalog" (it's way better than NetFlix!).

The Litigation and Trial Skills Workshop CLE is scheduled for June 21 at Capital University in Columbus, Ohio. Recognizing the changes in litigation and demands on the litigator of 2019, OACTA has sought to expand the training to not only include skills needed at trial, but also in the increasing prevalent world of alternative dispute resolution. This full day program will offer great learning opportunities for new attorneys and veterans alike. It is a great training ground, especially for newer attorneys. For those who have newer attorneys at their firms, this is a great chance to send them for top quality instruction by our exceptionally skilled members and colleagues at a great value and all for the cost of about a billable hour for our members.

And while Memorial Day is yet to arrive (along with warmer weather), it's never too early to start considering your foursome (foursomes?) for the OACTA Annual Golf Outing on September 3 to benefit our Equity and Inclusion Scholarship and our donation to the National Foundation for Judicial Excellence to train state court appellate.

Of course, we continue to plan the annual meeting in Cleveland at the Hilton Cleveland Downtown for November 21-22, 2019, where we hope to combine great learning opportunities with a little fun (lot of fun) mixed in.

Finally, I hope you enjoy this great issue of the Quarterly. The Employment Law Committee did a superb job of covering a wide array of topics that affect us whether we are practitioners, employees or employers. They addressed arbitration, FMLA, proposed changes to white collar exemptions, data misuse, and marijuana – though hopefully no one has a case including all five.

I want to thank all of you for your continued support of OACTA and the great work each of you do every day on behalf of your clients! Enjoy your Spring (if and when it gets here).

Introduction

Employment Law Committee

Brigid E. Heid, Esq., Committee Chair
Eastman & Smith Ltd.

During my tenure as Chair of the Employment Law Committee, I have been exceedingly impressed with the professional skills and accomplishments of our committee members. I am especially grateful to the members of the committee who answered my call asking them to consider contributing an article for this issue of the *Quarterly Review* which is focused on employment law. Thank you to Doug Holthus at Mazanec, Raskin & Ryder (FMLA Leave Must Run *Concurrently* With Other Forms of Paid Leave), my colleague Melissa Ebel at Eastman & Smith (The Blunt Facts: Legalized Marijuana and the Workplace), Ian Mitchell at Reminger (Recent Trends in Employment Arbitration: What Employers Need to Know in 2019), and David Oberly at Blank Rome (*Going Rogue:* Employer Liability For Employee Misuse or Theft Of Company Data) for taking time out of your busy practices to share your insights and experience with our readers on these interesting developments in employment law.

Whether your career is focused on the defense of employment law claims, advising business owners on legal compliance, or you are simply interested in broadening your knowledge and understanding of employment law, I trust you will find this issue of the *Quarterly Review* prepared by the Employment Law Committee to be both informative and insightful. If you are an attorney focused on the defense of civil claims and are interested in energizing your practice or want to enhance your trial skills to better advocate for your clients, there is no better place to be than as a member of OACTA.

Happy reading!

Recent Trends in Employment Arbitration: What Employers Need to Know in 2019

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One of the numerous ways employers have sought to minimize their risk of exposure on potential claims from current and former employees is by requiring all employees to agree in writing that those claims must be brought privately in arbitration rather than in the courts. These "mandatory arbitration" provisions are often presented to employees as either components of the company's standard employment contract or independently as stand-alone waiver agreements. Particularly in states that recognize the promise of "continued employment" as sufficient consideration for entering into a new contractual arrangement with an employee, mandatory arbitration agreements can be presented at virtually any time during the employee's tenure. For employers, forcing potential claims against the company to proceed privately in front of an arbitrator, rather than in court before a judge, is hugely advantageous for multiple reasons.

However, notwithstanding the U.S. Supreme Court's steadfast devotion to enforcing employment arbitration provisions as written, recent developments in state law and organized labor present new threats to the status quo. This article aims to educate practitioners and employers alike on those developments and highlight some of the potential risks of adopting mandatory arbitration provisions for all employees across the board.

Employment Arbitration Provisions

Mandatory arbitration has traditionally benefited employers in several critical ways. For example, and perhaps most importantly, employment arbitration provisions typically include "class waivers" that prohibit employees from banding together to bring employment claims as a group. Although critics of these waivers historically lamented that they ran afoul of the federal right to collective action under the National Labor Relations Act, the U.S. Supreme Court upheld such waivers just last year in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018). Similarly, forcing cases into arbitration means the claims are handled privately by an arbitrator, effectively keeping any high-profile allegations out of the public eye, as would be the case if the claims were brought through the courts. Furthermore, arbitration has traditionally been viewed as more cost-effective and expedient than litigation, although some have challenged that notion in recent years.

In spite of the benefits that typically inure to employers through these provisions, the leverage employers may legally exert over employees to sign such provisions, and the steady stream of criticism from employment and labor rights groups pertaining to these provisions, the U.S. Supreme Court has continued to enforce mandatory employment arbitration provisions widespread. Yet, in order to combat what critics view as an ever-increasingly business-friendly Court and its conservative majority, employee advocates have sought out new strategies in their respective industries to reclaim some of the leverage over employers. Likewise, some states have enacted statutes or issued critical decisions through their courts in an effort to chip away at the power of these provisions.

Continued

The Google Walkout & Public Push-Back Against Mandatory Arbitration of Employment Claims

Thousands of Google employees working all over the world walked out of their respective offices on November 1, 2018, to protest (among other things) Google's practice of forcing arbitration agreements on its employees, which compelled all potential discrimination and harassment claims against the company into private arbitration.[1] The massive, world-wide demonstration was terrible publicity for the internet giant and, roughly a week later, the company buckled under the pressure. Google's CEO Sundar Pichai announced that sexual harassment and assault claims brought by *full*-time employees would no longer be forced into arbitration. However, this obviously left a large swath of potential claims still subject to mandatory arbitration, including any and all discrimination claims related to race, nationality, most gender claims, sexuality, and age to name a few, as well as all claims brought by *part*-time employees.

In response to what they deemed a half-hearted measure, four of the Google employee organizers issued a public statement calling on Google, as well as the *entire* tech industry, to eradicate forced arbitration agreements once-and-for-all and eliminate class waivers. The statement further called on all employees in the tech industry to "join our fight to end forced arbitration." A group of Google employees organized the Googlers for Ending Forced Arbitration to continue the lobbying efforts.[2] In a short time, the group has already launched a massive social media campaign via Instagram and Twitter to bring even more pressure to bear on the world's largest search engine company. Commercial superpowers, such as Facebook, Microsoft, and Uber, have taken note and reluctantly made changes to their mandatory arbitration policies as well.

One of the central complaints of the Google protesters relative to forced arbitration was that sexual harassment and Title VII-type discrimination complaints were being handled in private, such that the alleged perpetrators could continue their behavior with relative impunity leaving other employees at potential risk.[3] Specifically, they've stated that "Ending forced arbitration is the gateway change needed to transparently address inequity in the workplace."[4] This is a similar criticism as was publicly launched against the Fox Corporation by Gretchen Carlson earlier in 2018 in the wake of her high-profile dispute with former Fox News Chair and CEO, Roger Ailes.[5]

State Law Attempts to Curtail Enforceability of Mandatory Arbitration Agreements

As stated in the above, the U.S. Supreme Court's conservative majority in May of last year reviewed an appeal from the Seventh Circuit involving the enforceability of class waivers in mandatory employment arbitration agreements. That case, captioned *Epic Systems v. Lewis*, addressed the central issue of whether an employer's arbitration agreements that it issued to its employees violated the National Labor Relations Act's protections for "collective action" by requiring "individualized proceedings," *i.e.*, the agreements included "class waivers." Seizing upon well-established Supreme Court precedent, including *AT&T Mobility v. Concepcion* and others, which hold that the Federal Arbitration Act requires arbitration provisions to be enforced as written, Justice Gorsuch wrote the majority opinion siding with the employer.[6] In it, he stated, "Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act."[7]

While that decision seemed to foreclose any possible in-road against class waivers and/or mandatory arbitration provisions in employment agreements, some states were not convinced. In particular, the Kentucky Supreme Court issued a published decision in a case called *Northern Kentucky Area Development District v. Danielle*

Snyder on September 27, 2018, a mere four months after the U.S. Supreme Court decided *Epic Systems*. In *NDAA v. Snyder*, the state Supreme Court held that the Kentucky state law codified in K.R.S. 336.700(2),[8] which "prohibits employers from conditioning employment on an existing employee's agreement to [arbitrate all employment claims]," was not preempted by the Federal Arbitration Act. As a consequence of that holding, the Kentucky Supreme Court justices unanimously declared that NDAA's practice[9] of requiring all its employees to sign arbitration agreements was unenforceable as a matter of state law.[10]

In its decision, the Kentucky Supreme Court seemed to be thumbing its nose a bit at the U.S. Supreme Court on the arbitration issue. Friction between the two courts on the arbitration issue appeared to mount earlier in 2018, when the U.S. Supreme Court reversed a Kentucky Supreme Court decision that invalidated a mandatory arbitration provision in a nursing home agreement on Kentucky state law grounds.[11] While many assumed that NDAA would file a petition for writ of certiorari so that the U.S. Supreme Court would revisit the arbitration issue in its case as well, it did not.

Kentucky's stated public policy to protect employees from mandatory arbitration agreements appears distinctly at odds with the U.S. Supreme Court's position to enforce such provisions according to their terms. As such, the tension creates an uncertain situation in the law and employers are placed in the precarious position of trying to determine whether their arbitration provisions will be enforced. Only time will tell whether other states elect to follow Kentucky's example and issue similar decisions. At the very least, this tension is likely to lead to "forum-shopping" where litigants rush to file their lawsuits in whatever court, either federal or state, where more favorable law will be applied.

Conclusion

Although employers have generally taken the view that it remains in their best interests to force arbitration agreements on their employees, recent events suggest taking a fresh look at that strategy. For one, the employee protests at Google and elsewhere indicate there may be growing public animosity towards mandatory arbitration agreements, which could affect a business's operations if the same type of grassroots social media lobbying phenomena takes hold amongst that company's employees. Additionally, depending upon in which state the employer is located, state law may reflect a contrasting position to prevailing Supreme Court law that generally favors both mandatory arbitration provisions and class waivers.

Employers and their counsel should cautiously consider the impact of these two parallel developments in current events and consider whether changes can be made to their policies while still providing protection against the burdens of employment litigation. For example, providing employees with the ability to "opt-out" of arbitration agreements might be a good way of protecting against state law prohibitions against conditioning employment on the execution of such an agreement. In addition, providing incentives to employees in exchange for agreements to arbitrate their employment claims and/or sign mandatory arbitration agreements might effectively immunize those agreements from collateral challenges. The best way to navigate these difficult issues, however, is to be proactive and consult an employment practices attorney to discuss all the available options.

Endnotes

1 Melanie Ehrenkranz and Bryan Menegus, *Google Walkout Organizers Demand an End to Forced Arbitration Industry-Wide*, Gizmodo.com (Dec. 10, 2018 10:00 AM), https://gizmodo.com/google-walkout-organizers-demand-an-end-to-forced-arbit-1830975799.

2 Nitasha Tiku, *Tech Workers Unite to Fight Forced Arbitration*, Wired (JAN. 14, 2019 9:00 AM), https://www.wired.com/story/tech-workers-unite-fight-forced-arbitration/.

3 Kathy Gurchiek, *Google Employees Fight Forced Arbitration Agreements*, SHRM.org (Jan. 15, 2019), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/google-employees-fight-forced-arbitration-agreements-.aspx.

4 *Id.*

Continued

[5] Hope Reese, *Gretchen Carlson on how forced arbitration allows companies to protect harassers*, Vox.com (May 21, 2018 11:44 AM), https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court.

[6] *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

[7] *Id.* at 1628.

[8] The Kentucky statute at issue reads: "Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law."

[9] The mandatory arbitration provision at issue specifically stated as follows: "As a condition of employment with the District, you will be required to sign the attached arbitration agreement. … You may revoke your acceptance of the agreement by communicating your rejection in writing to the District within five days after you sign it. However, because the agreement is a condition of employment, your employment and/or consideration for employment will end via resignation or withdrawal from the process."

[10] *Northern Kentucky Area Development District v. Snyder*, No. 2017-SC-000277, 2018 Ky. LEXIS 363, at **1-2 (Ky. 2018).

[11] *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017).

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The Blunt Facts: Legalized Marijuana and the Workplace

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Ohio's medical marijuana dispensaries began opening in January 2019. In the coming year, up to 60 dispensaries will open across the state providing Ohioans with a recommendation for medical marijuana access to a variety of products. As Ohio's Medical Marijuana Control Program becomes operational, employers are questioning the impact toking up will have on the workplace.

In passing Ohio's Medical Marijuana Control Program, the General Assembly enacted R.C. 3796.28 which includes several protections for employers. To begin, the law confirms employers:

- Do not have to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- May refuse to hire, discharge, discipline or otherwise take adverse action against someone because of his or her use, possession, or distribution of medical marijuana;
- May establish and enforce drug testing, drug-free workplace, or zero-tolerance drug policies; and
- Have just cause for the purposes of unemployment compensation to fire employees for violating drug-free workplace or zero-tolerance drug policies.

The General Assembly also confirmed Ohio's medical marijuana law does not provide employees with a private right of action. This means, employees and applicants cannot sue employers for retaliation for medical marijuana use or possession.

From an employer's perspective, Ohio's law should provide relief as nearly a third of states with legalized medical marijuana programs protect employees who use medical marijuana and nine states specifically prohibit employers from discriminating against an employee with regard to any term or condition of employment or otherwise penalizing an employee because of his or her medical marijuana use.

With regard to workers' compensation, the General Assembly confirmed medical marijuana is covered under the "rebuttable presumption" rule. This rule provides employers with a rebuttable presumption that being under the influence of alcohol or any other controlled substance, such as marijuana, as revealed by a post-accident drug test, was the proximate cause of a workplace injury. To qualify for the rebuttable presumption, an employer must (1) establish it provided employees with written notice that refusal to submit to or pass a post-accident drug test may affect workers' compensation eligibility; and (2) conduct a qualifying chemical test. To obtain a compensable workers' compensation claim, an employee is required to rebut the presumption with substantial evidence his or her marijuana use played no role in the injury.

While the General Assembly did not specifically address whether medical marijuana is reimbursable under workers' compensation claims, the Ohio Bureau of Workers' Compensation ("BWC") has stated it will not reimburse for medical marijuana. BWC drug reimbursements are limited to drugs approved by the United States Food and Drug Administration ("FDA"), and marijuana is so approved. Moreover, BWC-funded prescriptions must be dispensed by a registered pharmacist at an BWC enrolled provider. Medical marijuana is not dispensed through registered pharmacies, but rather, is dispensed through retail marijuana dispensaries. Finally, the BWC only reimburses drugs on its pharmaceutical formulary and marijuana is not on the formulary.

With regard to federal law, marijuana remains classified as a Schedule I drug under the Controlled Substances Act. Accordingly, employers are not required to accommodate an employee's medical marijuana use under the ADA nor are employers required to provide FMLA leave for employees to use medical marijuana to treat a serious health condition. Employers remain obligated under the ADA, however, to engage in the interactive process and reasonably accommodate any underlying qualified disabilities, and to provide eligible employees with FMLA leave for non-medical marijuana purposes.

With almost 25,000 patients currently registered through Ohio's Medical Marijuana Control Program, employers need to determine how they intend to handle employee and applicant medical marijuana use and review and revise existing policies to clearly address the employer's position on medical marijuana. If employers intend to prohibit medical marijuana, they need to ensure their current drug-free workplace policies are sufficiently broad to include legalize medical marijuana, not just illegal drugs. Employers should also train supervisors to identify and document employee impairment.

Conversely, employers who wish to permit employee medical marijuana use off-duty provided there is no impact to the workplace environment, could consider implementing an impairment-free workplace policy. Under such a policy, employees would be strictly prohibited from being impaired by marijuana, illegal drugs, and alcohol while at work or on Company premises, and may be subject to reasonable-suspicion drug testing.

The legalization of marijuana is an ever evolving area. Employers should stay abreast of continuing developments and act now to ensure their existing policies and procedures adequately address the Company's position on medical marijuana.

Melissa A. Ebel, Esq.'s, practice focuses on litigating and advising employers on a wide range of issues affecting the employment relationship. She is an associate with Eastman & Smith.

Ms. Ebel practices in the areas of labor, employment, workers' compensation and education law. She has experience representing employers before administrative agencies such as the EEOC, OCRC, Ohio Department of Job and Family Services and various state and federal courts. She regularly defends against claims involving the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Family and Medical Leave Act (FMLA), Title VII, Fair Labor Standards Act (FLSA) and various state discrimination laws. Additionally, she advises employers on day-to-day employment decisions, personnel policies and handbooks, Ms. Ebel also represents both self-insured and state fund employers in workers' compensation hearings before the Industrial Commission and subsequent appeals.

Ms. Ebel also practices in the area of general and special education law. She advises clients regarding a variety of school law matters including special education, student discipline, and public records and open meetings requirements.

Prior to earning her law degree, Ms. Ebel obtained bachelor degrees in French and education.

DOL Proposes New Overtime Rule for White Collar Exemptions

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On March 7, 2019, the Department of Labor ("DOL") issued a Notice of Proposed Rule Making ("NPRM") for the much-anticipated changes to the salary level requirements for the white collar exemptions[1] of the Fair Labor Standards Act ("FLSA").[2] The proposed rule replaces a 2016 final rule issued by DOL under the Obama administration which was enjoined by a federal district court in Texas[3] one week before that rule was scheduled to go into effect. Under the Trump administration, the DOL has not pursued enforcement of the 2016 rule, which would have increased the weekly salary level under the White collar exemptions to $913 per week ($47,476 per year), more than doubling the current 2004 level of $455 per week ($23,660 per year).[4] In its NPRM, the DOL officially rescinds the 2016 rule and announces its intention for the current 2004 version of white collar exemptions to remain operative.

As a refresher, employees who qualify for a white collar exemption under the FLSA are not subject to the minimum wage and overtime requirements. To qualify, employees must satisfy both the duties requirement and the salary level requirement of the applicable exemption.[5] While the new proposed rule does not modify the duties requirement of the exemptions, it does propose the following material changes to the exemptions:

1. Increase the standard salary level to $679 per week ($35,308 annually) for the Executive,[6] Administrative,[7] Professional,[8] and Computer Employee exemptions.[9]
2. Allow up to 10% of the salary level to be met with non-discretionary bonuses and incentive payments (including commissions) for the Executive, Administrative, Professional, and Computer Employees.[10] The non-discretionary payments must be paid on an annual or more frequent basis and an employer can make up a deficiency by the *next pay period* after the end of the year. If the employer does not timely pay, the employee would lose the exemption for that year and the employer would have to pay retroactively for any overtime hours worked during that year.
3. Change the Computer Employee exemption to eliminate language that allows a computer employee to be paid an hourly rate of at least $27.63 instead of a salary. Because the FLSA itself permits a Computer Employee whose primary duty satisfies section 13(a)(17) to be paid an hourly rate of at least $27.63, the hourly option would still be available for computer employees.
4. Increase the compensation level for a Highly Compensated Employee to $147, 414 per year, a 47% increase over the current level of $100,000 per year. The compensation must include a salary of at least $679 per week ($35,308 annually) with the balance being comprised of non-discretionary bonuses and commissions earned during the 52-week period. The proposed rule allows a one-time payment to meet the required compensation level so long as the payment is made within *one month* after the end of the 52-week period for which the exemption is claimed.
5. Add special salary levels at the current level of $455 per week ($23,660 per year) for Puerto Rico, the U.S. Virgin Islands, Guam and the Commonwealth of the Northern Mariana Islands and increasing to $455 per week a special salary level for American Somoa, which is currently set at $380 per week. The special salary levels apply for employers other than the Federal government.
6. Increase the special weekly "base rate" for the motion picture producing industry to $1,036 per week

($53,872 per year), a 49% increase from the current base rate of $695 per week ($36,140 per year).

As in 2016 when businesses across the country prepared for the increase to the salary levels, employers should once again prepare for an increased salary requirement under the proposed rule. If employers choose not to raise the salary for their exempt employees making less than $35,308 per year, the exemption will be lost and overtime will be owed for all hours worked in excess of forty hours in a workweek. There would be no economic impact to the employer if employees do not actually work any overtime hours. But, for those employees who do, an employer should evaluate the financial impact of raising the salary level to maintain the exemption or the impact of losing the exemption and paying overtime.

Let's take an example. Suppose an exempt employee currently earns $30,000 in annual salary ($577 per week). To maintain the exempt status under the proposed rule, the employee would have to be paid an additional $5,308 to be paid the new annual salary of $35,308. Or, the employer could choose not to increase the salary and instead pay the employee for any overtime. Assume the employee regularly works 45 hours per week and overtime would have to be paid at 1.5 times the employee's regular rate of pay. Assuming no other payments factor into the employee's regular rate of pay, the employee's regular rate of pay for a standard 40-hour workweek is the employee's weekly salary of $577 divided by 40 hours, or $14.42 per hour. The employee's overtime rate would be 1.5 X $14.42, or $21.63 per OT hour. Because the employee works 5 OT hours each week, 50 weeks per year, the employee would be owed $5,407.50 in additional overtime ($21.63 per OT hour X 250 OT hours per year). The employer in this scenario would therefore have to decide if it prefers (a) losing the exemption and paying the employee $5,407.50 in additional overtime, or (b) paying an additional $5,304 in guaranteed salary to maintain the exempt status and not have to pay overtime.

This same analysis should be applied for all exempt employees making less than $679 per week under the white collar exemptions. And it goes without saying that employers must consider the impact of applicable state law requirements on their employee exemptions. The law that provides the greater benefit to the employee is the law that will apply.

Unlike what happened with the 2016 rule, it is anticipated that this proposed rule is likely to go into effect with few changes by January 1, 2020. Absent some unforeseen development that would derail the implementation of this NPRM, employers should plan now to be ready for the increased salary levels and other changes in the white collar exemptions.

Endnotes

1 29 CFR Part 541, commonly referred to as the "EAP" or "white collar" exemptions.

2 Fair Labor Standards Act of 1938, as amended, 29 U.S.C., *et seq.*

3 *Nevada v. U.S. Dept. of Labor* (E.D. Texas, Nov. 22, 2016).

4 The current version of 29 CFR Part 541 was adopted in 2004.

5 Administrative and Professional employees may be paid either on a salaried or fee basis. Outside sales employees have no salary requirement to qualify for the exemption under 29 CFR 541.500.

6 29 CFR 541.100

7 29 CFR 541.200

8 29 CFR 541.300

9 29 CFR 541.400

10 29 CFR 541.602(a)(3)

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U.S. Department of Labor: Opinion Letter / March 18, 2019:

FMLA Leave Must Run *Concurrently* With Other Forms of Paid Leave

Douglas P. Holthus, Esq.
Mazanec, Raskin & Ryder

Ah, the halcyon days of youth:

> "I'm just a bill; yes, I'm only a bill, and if they vote for me on Capitol Hill, well then I'm off to the White House where I'll wait in a line with a lot of other bills for the president to sign; and if he signs me, then I'll be a law. How I hope and pray that he will, but today I am still just a bill."[1]

However, with the benefit of twelve years of primary education, four years of undergraduate studies (unless you were one of those fortunate few who permitted themselves a "Victory Lap"), six semesters of law school, a tedious, three day exam and so many years of practice, we realize the lyricist may have missed at least one additional stanza … unless, of course, that stanza was sacrificed as a compromise during Committee hearings:

> "I'm now a law, yes I'm finally a law, and I thought I held the power of voice. But no one cared to tell me I'd be subject to interpretation and caprice and now there's a letter from the Department Secretary; and if he decides what it is I'm really s'posed to mean then the winds of change may carry my voice away".

The FMLA entitles eligible employees of covered employers to take up to twelve (12) weeks of unpaid, job-protected leave per year for specified family and medical reasons [or, twenty-six (26) weeks for a military caregiver]. 29 U.S.C. § 2612(a).[2] When called upon to interpret this provision, the Ninth Circuit had previously determined that a qualifying employee was permitted to make an initial election to first use and even exhaust all other types of employer available leave, such as vacation time, for an FMLA-qualifying situation and defer taking FMLA allotted time for a future use. The net effect, of course, was to extend the periods of time an employee may be permitted to be away from her/his position, with or without pay, and still maintain protection for her/his employment position. See *Escriba v. Foster Poultry Farms, Inc.*, 743 F3d 1235, 1244 (9th Cir. 2014.)

That was then.

On March 18, 2019, Mr. Keith E. Sonderling, Acting Administrator of the U.S. Department of Labor (Wage & Hour Division) issued an Opinion Letter (No. FMLA2019-1-A) "disagreeing" with the 9th Circuit's interpretation in *Escriba*, specifically advising that employers are required to run periods of employee Family Medical Leave Act (FMLA) leave *concurrently* with other forms of paid leave.

The bottom-line; employees may no longer use periods of employer-paid leave benefits (*e.g.*, vacation time, sick pay, short-term disability, PTO) prior to availing themselves of any unpaid leave available under the FMLA. Under the advices of this Opinion Letter; as soon as a covered employer determines that an employee's absence qualifies for leave under the FMLA, the employer must begin allocating the twelve (12) weeks of FMLA / unpaid leave to the absence and the employee is not permitted to delay the FMLA leave by first exhausting PTO, vacation or any other type of employer-provided paid-leave benefit periods. These now, instead, can only be used after the FMLA annual allotment of time has been exhausted.

The Opinion Letter also shuts down any debate: FMLA Leave protection is limited to twelve (12) weeks annually, even if the covered employer provides some greater, more generous leave policy within its Handbook, Collective Bargaining Agreement or other employer leave policies.

It remains subject to debate; yet this same Opinion Letter suggests that workers' compensation leave time may also have to run concurrently with periods of qualified FMLA Leave.

> "I'm now a law, yes I'm finally a law, and geez, I still get kicked around the block. The courts read me one way, the bureaucracy the next and no one ever seems to get it right. How I hope and pray that the people can know the scheme … or can at least hire capable lawyers to define the theme."

Let your clients know that, consequently, their FMLA and related leave policies may need to be revisited and possibly redrafted.

Endnotes

1 *"I'm Just A Bill"*; Music & Lyrics by Dave Frishberg. Performed by Jack Sheldon. Animation by Phil Kimmelman and Associates. First aired: 1975; © 2017 School House Rock Lyrics

2 § 825.104 Covered employer. "An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. See§ 825.600.

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Prior to joining MRR, Doug was in private practice and had also served as General Counsel for Kokosing Construction Company and its multiple affiliated entities. He is past Chair of the Columbus Bar Association's Professionalism Committee (by appointment) and is a former Member of the Board of Directors of the Professional Liability Defense Federation ("PLDF"). Doug is "AV Preeminent rated" by Martindale-Hubbell, as well as named an Ohio Super Lawyer (2017-2019) and a "Best Lawyer" by Best Lawyers in America.

Going Rogue: Employer Liability For Employee Misuse or Theft Of Company Data

David J. Oberly, Esq.
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In today's highly digital and technological age, employees are commonly utilizing company networks and systems to communicate, conduct business, and access data. While productivity has increased exponentially with the advancement of technology, so too has the risk of misuse and theft of sensitive, confidential company data by employees. Importantly, the biggest threat of a data breach today comes not from malicious outsiders, but from inside the company in the form of the organization's own employees. To make matters worse, the severity of the impact felt by companies who experience data leakage has proliferated in recent years. In addition to the catastrophic financial consequences caused by a data leakage incident, the reputational hit that a company customarily takes in the wake of an incident can also have dire consequences on the long-term viability of an organization. Combined, it is imperative that companies large and small ensure that they are protected against employee misuse and theft of company data. Fortunately, there are several proactive steps that organizations can take to minimize the risk of falling victim to inappropriate data utilization by company insiders.

The Problem: Employer Liability Stemming From Misuse or Theft of Company Data

When an employee is found to have misused or misappropriated company data that results in injury or damage to third parties, two primary theories of liability are pursued against the worker's employer. First, as is common with most torts committed by employees, an injured party will seek to establish liability against the employer under a theory of respondeat superior or vicarious liability. Respondeat superior liability provides that an employer is liable for an employee's acts that were performed within the scope of and course of the individual's employment or in furtherance of the employer's interest. Liability under respondeat superior is not predicated upon fault of the employer; instead, it results from liability for acts committed by those individuals for whom the employer is responsible. Importantly, for the employer to be liable under a theory of respondeat superior liability, the employee's tort must be committed within the scope of employment. For the act to be within the scope of employment, the behavior giving rise to the tort must have been "calculated to facilitate or promote the business for which the employee was employed." Conversely, employers are not liable for independent, self-serving acts of its employees that do not facilitate or promote the company's business interests.

In addition, negligent employment theories—which are distinct from the doctrine of respondeat superior—may also impose direct liability on employers for the misconduct of their employees. Under the torts of negligent hiring, retention, and supervision, if an employer, without exercising reasonable care, employs an incompetent person in a job that brings him into contact with others, then the employer is subject to liability for any harm the employee's incompetency causes. Here, an employer is subject to direct liability for harm to a third party caused by its employee's conduct if the harm was caused by the employer's negligence in selecting, training, retaining, supervising, or otherwise controlling the employee. Foreseeability is a key issue in connection with claims of negligent hiring, retention, or supervision, and liability

often hinges on the scope of the original foreseeable risk that the employee created through his or her acts and/or omissions. It is only where the misconduct was to be anticipated, and taking the risk of it was unreasonable, then liability will be imposed.

The Solution: Employer Strategies to Minimize the Risk of Liability in Connection With Rogue Employees

There are several pivotal steps that employers can take to minimize the risk of being held responsible for the misuse or theft of company data by members of the company's workforce.

As a starting point, due to the prevalence of technology both at work and outside of the workplace today, the first layer of protection an employer should have in place is a detailed, stringent set of company policies and procedures to guard against employee data misuse. As a general matter, these policies should define expectations for employees or anyone with access to firm data regarding issues such as the use of personal email and devices, file-sharing programs, the copying of data to personal devices, and the use of company systems from remote locations. Doing so will significantly limit the risks associated with online activity by employees and limit the risks of both respondeat superior and negligent retention/supervision liability. Importantly, these policies serve dual purposes: proactively deterring employees from engaging in the improper use or dissemination of company data, and serving as a robust defense to liability in the event the employee wrongly handles or transmits sensitive company information.

Critically, however, it is not sufficient simply to have the proper policies and procedures in place; rather, employers must also expend the time and effort necessary to properly train their workers on proper data security measures—regardless of their position—as most technology-oriented data security measures are easily defeated by workers who inadvertently or carelessly open the door to data leakage events. As such, employers should train all new hires on the company's data-oriented policies, as well as proper practices and methods for the handling and transmission of company data as part of the onboarding process. Beyond that, employers should also conduct regular interim training sessions to refresh employees' knowledge on the company's data handling standards and what does—and does not— constitute proper employee use of company data.

Another important step that companies can take to further mitigate the risk of data theft is to tailor employees' access to electronic data to the worker's specific job duties. Strategically tailoring access is an effective way to prevent or limit internal employee data theft. Accordingly, companies must ensure that employees only have access to information and data that is essential to the duties and responsibilities of their position within the company. Similarly, companies should also regularly review workers' data access rights and terminate any access to accounts that are no longer in use or no longer needed for the employee to carry out his or her job responsibilities.

In addition to limiting what data is accessible, companies should also monitor what data is being accessed on the company's network. Data monitoring can not only detect leaks when they happen, but can also discourage employees from taking unnecessary risks by sharing firm data. In particular, employers should monitor electronic usage to identify any early warnings of potential vulnerabilities with an eye toward unusual activity, particularly if information is being pulled off of a company's network. In addition, it is also advisable to monitor employees' email communications, as company data is often misused or stolen by employees who use company email systems to send large chunks of company information either to their personal email addresses or to third parties over very short periods of time.

Similarly, companies should also monitor employees for potential data security threats as well. As a starting point, companies should conduct thorough background reviews of all candidates for employment before the time they are hired. Background checks are extremely useful because they can identify any prior fraudulent or dishonest activity on the part of the potential new hire,

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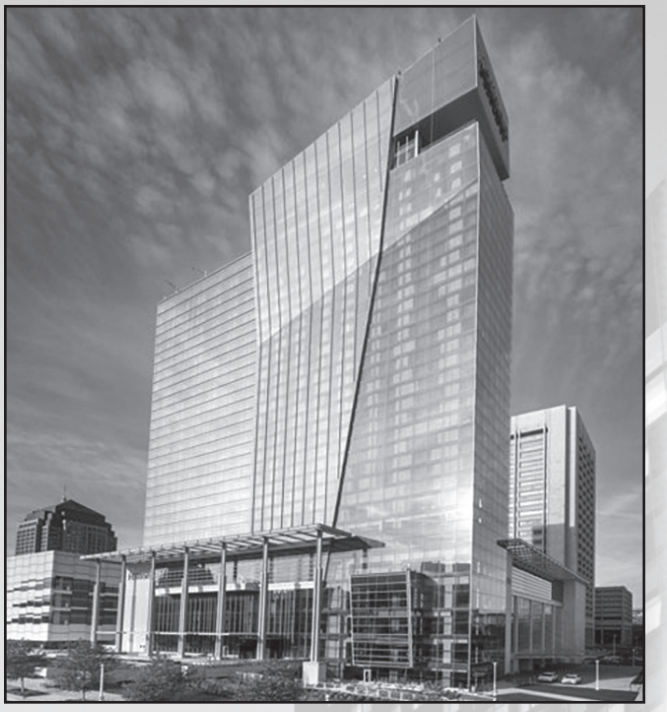
which is a clear red flag that the individual may pose a data security threat if employed by the organization and—more importantly—would serve as the basis for a cognizable negligent hiring claim. In addition, protective monitoring of current employees is also necessary to reduce opportunistic or counterproductive behavior by workers. Things such as being hostile to managers and fellow employees and severe dips in performance are tell-tale signs that an employee might pose a threat of compromising company information and data. After a high-risk employee is identified, the organization should guard against the increased threat of data leakage or theft by engaging in increased data monitoring of the employee. Importantly, however, it is imperative that all background reviews and employee monitoring activities are carried out by the company in accordance with all legal requirements and regulations.

Finally, anytime an employee leaves a company, the organization must implement proper offboarding procedures to limit the potential for data leakage. As a starting point, long before an employee ever leaves the company, employers must require all workers to sign non-disclosure agreements prohibiting them from taking any intellectual property, company data, or customer data when the worker departs the organization. In addition, the company should utilize exit interviews as an opportunity to repossess company data from all of the departing employee's electronic devices and to reaffirm and reemphasize the employee's ongoing data protection obligations which continue even after the employee severs his relationship with the organization. the company should immediately remove an employee's access to the company systems and data, and change all passwords, as soon as a worker departs the company. In the event the employer decides to terminate an employee, it is imperative that this is done prior to the time the worker is notified of his or her termination.

The Final Word

In the workplace today, the threat posed by rogue employees misusing or misappropriating company data continues to expand at break-neck speed. Combined with the ever-increasing costs of litigation, employers must be proactive in implementing strategies to minimize the risk of being on the hook for the misuse or theft of company data by members of their workforce. However, by adhering to best practices geared towards avoiding employee data leakage, employers can put themselves in the best position to proactively limit instances of data loss and set themselves up with stringent defenses to allegations of respondeat superior or negligent hiring/retention/supervision liability in the event they ever find themselves on the receiving end of an insider-triggered data breach event.

David J. Oberly, Esq., is an associate attorney in the Cincinnati office of Blank Rome LLP, where he focuses his practice in all aspects of cybersecurity and data privacy law. David has extensive expertise in counseling and advising clients on a wide range of cybersecurity and data privacy matters, including compliance management, cybersecurity risk management, data collection and utilization, consumer and employment privacy, incident response planning and mitigation strategies, vendor management, and regulatory investigations. In addition, David also has significant experience with investigations and litigation pertaining to data privacy and data breach incidents, including post-incident response and remediation, as well as the defense of regulatory enforcement matters, class action litigation, and other disputes relating to data handling and data breach events, including contractual claims and private rights of action.



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