Top 5 Employment Law Issues for 2016 and Beyond

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Last year was a legal roller-coaster for employers. There were substantial employment law changes at all levels of government. Some of these changes came from the National Labor Relations Board (NLRB) and the Department of Labor (DOL), while others came from Congress or state legislatures. This year, we expect to see the implementation of some of these new employment law changes, which will leave employers questioning what applies to them and when it will apply. If your clients desire to avoid unnecessary legal battles, they need to be aware of these five employment law issues which could affect their business practices in the upcoming year and beyond.

1. FLSA: New Overtime Regulations

In a development long anticipated, the DOL recently issued proposed amendments to the Fair Labor Standards Act's ("FLSA") "white collar" exemption tests for executive, administrative, and professional employees, dramatically expanding the number of employees who could be eligible for overtime.[2] The DOL's proposed rule is aimed at increasing the total number of employees who would qualify for overtime eligibility. The last time the overtime exemption threshold was raised was in 2004. In 2015, the DOL stated that it was proposing an update to the salary level "to ensure that the FLSA's intended overtime protections are fully implemented," and to simplify the identification of nonexempt employees, thus making the EAP [white collar] exemption easier for employers and workers to understand.[3]

The DOL substantially revised the salary test but did not amend the duties portion of the exemption tests. The most significant change more than doubles the minimum salary—from $23,660 to $50,440—for white-collar workers to be classified as exempt from the overtime requirements, thus requiring a higher exemption threshold. The proposed salary floor is currently set at the 40th percentile of weekly earnings for full-time salaried workers. Over 5 million currently exempt, salaried employees could be affected by the increased salary threshold if it is approved. Also according to the DOL, workers who are currently nonexempt because they do not satisfy the "duties test" and who earn at least $445 per week, but less than the proposed salary level, would have overtime protection strengthened because "their exemption status would be clear based on the salary test alone without the need to examine their duties."[4]

One area of the proposed regulation that has not gained as much attention is the automatic adjustment of the minimum salary requirement. This provision would allow the DOL to automatically update the salary level annually to prevent the level from becoming outdated with the passage of time between rulemakings. The agency is currently seeking input on whether the rate should be indexed based on the Consumer Price Index or fixed at the level of the 40th percentile of full-time salary workers in a given year. While such a mechanism would prevent the DOL from substantially increasing the salary threshold, like it is proposing to do now, it would leave employers with much uncertainty from year to year. Employers will need to be aware of the fact that the salary threshold could change annually and be advised on how to adjust their employee hours or salaries to effectively comply with both their business needs and the overtime regulation.

Because this is only a proposed regulation, the changes to the overtime rule are not in effect just yet. The DOL received close to 300,000 public comments regarding the proposed rule and is currently reviewing the comments before issuing its final rule, which is expected in mid-2016.

Employers need to start considering now what the proposed changes mean for their organizations and employees. For example, analysts anticipate one of the following scenarios to occur in every workplace if the proposed rule is approved:

1) Salaried employees making over $23,660 but less than the new minimum salary amount will now start receiving overtime pay when they work more than 40 hours a week.

2) If an employee makes close to the new minimum threshold, employers will raise the worker's salary above the minimum threshold of $50,440, to avoid having to pay overtime.

3) If a salaried employee regularly works more than 40 hours per week but does not receive overtime pay, the employer will begin enforcing stricter 8-hour work days to avoid overtime pay. (For example, employers could require salaried employees to now use time cards, as well as restrict employees' access to work e-mails and other work matters after normal work hours).

4) Employers will lower the base pay of an employee to offset any overtime that might be owed, creating a cost-neutral rate paid by the employer.

Accordingly, all employers should consider whether they have the resources available to pay employees overtime hours and, if not, what alternatives would best fit their work environment.

2. "Joint Employer" Definition

In the business world being considered a "joint employer" with another business may have a number of disadvantages, including greater liability and uncertainty regarding employee accountability. Recently, the definition of "joint employer," has been in flux among federal agencies and also courts, resulting in temporary and staffing agencies, and the businesses with which they contract, to question whether or not they are considered joint employers. In August 2015, the NLRB refined its joint employer standard in the decision of *Browning-Ferris Industries (BFI) of California*.[5] In the decision, the divided five-member panel applied the long standing principles articulated by the Third Circuit's 1981 decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*,[6] but fleshed out the principles resulting in a broader standard for joint-employer status. The Board noted that, since the Third Circuit's decision, it had imposed *additional* requirements for finding joint-employer status "to better effectuate the purposes of the [National Labors Relations] Act in the current economic landscape."[7] With more than 2.87 million of the nation's workers employed through temporary agencies, the Board held that its previous joint employer standard has failed to keep pace with changes in the workplace and economic circumstances.[8]

In its decision, the Board stated, as the Third Circuit did in its prior decision, that it may find two or more entities are joint employers of a single employee if (1) they are both employers within the meaning of the common law, and (2) they share or codetermine those matters governing the essential terms and conditions of employment. The Board stated that it will no longer simply require that a joint

employer possess the authority to control employees' terms and conditions of employment, but will now also examine whether an employer exercises that authority. Nor will the Board only require that a statutory employer's control be exercised directly and immediately. Thus, control exercised indirectly, such as through an intermediary, may be enough to establish joint-employer status.

In the Board's decision of *Browning-Ferris,* it found that BFI was a joint employer with the company that supplied employees to BFI to perform various work functions for BFI.[9] In finding that BFI was a joint employer with the staffing company, the Board relied on indirect and direct control that BFI possessed over essential terms and conditions of employment of the employees supplied by the staffing company as well as BFI's reserved authority to control such terms and conditions.[10]

The Board's decision will have an impact on business practices going forward. The new standard expands who will be considered a joint employer and could be particularly problematic for franchise owners; it could mean that the owners are responsible for medical care under the Affordable Care Act even if they have fewer than 50 employees, if those employees are lumped in with thousands of workers employed by other independently owned franchises under the same franchisor. Overall, this new ruling could harm business of all types by expanding unfair practices liability, making collective bargaining negotiations unworkable, creating impediments to the cancellation of commercial contracts, and decreasing responsible contractor programs. Thus, the new joint employer ruling calls into question many assumptions about the nature of employment.

Courts have also weighed in on the "joint employer" definition, with the Fourth Circuit adopting a "hybrid" test to determine joint employment in Title VII cases. The Fourth Circuit in *Butler v. Drive Automotive Industries of America,*[11] considered both the common law of agency and the economic realities of employment, reversing summary judgment on Title VII sexual harassment claims by a temporary employee. In *Casey v. Department of Health and Human Services,*[12] the First Circuit, citing the hybrid test discussed by the Fourth Circuit in *Butler*, found that a government contractor providing nursing services to civilian Air Force employees was not jointly employed by the HHS and the contractor. The First Circuit reasoned that merely setting performance criteria and overseeing the supervisor's administration of the program could not be viewed as rendering the supervisor an agent or the nurse an employee of the HHS. Thus, even using the same standard and factors, the federal circuit courts are in disagreement over how much control is needed to deem someone a joint employer.

3. Employee or Independent Contractor in Alabama?

Not only is the definition of joint employer in flux, but also in question are the definitions of who is an "employee" and who is an "independent contractor." In recent years, the employment relationship between employees and businesses has changed as businesses have contracted out or otherwise shed certain employee activities through the use of independent contractors. While the use of independent contractors may be an accepted and popular business practice, it has led to extensive litigation.

The most recent case to make national headlines regarding this issue is the FedEx driver multidistrict litigation. Drivers who worked for FedEx in Florida filed suit first in 2005, asserting a number of statutory and common law claims. Between 2003 and 2009, drivers in 40 other states filed similar actions, causing the Judicial Panel on Multidistrict Litigation to consolidate the cases.[13] In the consolidated action, the drivers alleged they were employees of FedEx, not independent contractors, and

they sought back pay for overtime, among other damages.[14] The Florida drivers sought class certification arguing that their status as employees could be demonstrated by their agreement with FedEx, as well as internal policies, practices, and procedures of FedEx.[15]

Recently, the Eleventh Circuit reversed summary judgment in *Carlson v. FedEx Ground Packing Systems, Inc.*,[16] a case that was included in the multidistrict litigation. The Eleventh Circuit held that whether FedEx drivers are employees or independent contractors is ultimately a jury question.[17] Though the agreement between the parties specified that the drivers are independent contractors, the Court said that conclusory language was not determinative, given that other contract provisions and procedures gave FedEx control over certain employment aspects.[18] Although the decision did not give an affirmative answer to the question, the Eleventh Circuit suggested that the Restatement of Agency provides a list of 10 non-exclusive "matters of fact" that courts considering Florida state law should use.[19]

Currently, Alabama courts use the common law "reserved right of control test" to determine whether a worker is an employee or an independent contractor. In the most recent Alabama Supreme Court Case, the Court stated "the test for determining whether a person is an agent or employee of another, rather than an independent contractor, is whether that other person has reserved the right of control over the means and method by which the person's work will be performed, whether or not the right of control is actually exercised."[20]

From an enforcement angle, the DOL has taken an aggressive stance on the use of independent contractors stating that the Wage and Hour Division is working with many states to "combat employee misclassification and to ensure that workers get the wages, benefits, and protections to which they are entitled."[21] In October of 2014, the U.S. DOL and the Alabama DOL executed a memorandum of understanding (MOU) to unite their enforcement efforts and ensure that all workers are properly classified as independent contractors or employees.[22] The MOU essentially allows the two agencies to coordinate investigations, make referrals to one another of complaints or potential violations of laws over which the other party has jurisdiction or expertise, accept such referrals, provide information regarding settlements or other dispositions of cases, and exchange information that may otherwise be confidential in order to effectuate the purpose of the MOU.

One case in particular that has been a product of such collaborative effort involved an Alabama trucking and logging company. According to federal investigators, the company violated the record-keeping provision of the FLSA by not maintaining accurate records of employee hours, resulting in the misclassification of 46 employees as independent contractors. As a result of the investigation, the company was fined a total of $112,735 which reflected back pay for wages plus an equal amount in liquidated damages.

Since the execution of the MOU, there has been an increase in the amount of Alabama companies that have been investigated for possible misclassification of workers, especially small businesses. Thus, employers should be advised of the importance of proper record-keeping and reminded that creating an employment agreement stating that a worker is an independent contractor does not always mean the worker will be classified as such under the FLSA.

4. Federal "Ban-the-Box" Law

Nationwide, many states, cities, and counties have adopted what are known as "ban-the-box" laws, which prohibit employers from inquiring into an applicant's criminal records on job applications. Momentum for such laws has grown substantially in recent years, leading a bi-partisan group of legislators in Congress to introduce a bill called the "Federal Fair Chance Act (FFCA)." The proposed federal legislation would prohibit federal contractors and agencies from inquiring into an applicant's criminal history prior to a conditional offer, and would allow an employer to conduct a criminal history check after the offer. The continued support for a federal "ban-the-box" law is the reason why many experts expect the FFCA to be passed in 2016. Presently, Alabama does not have a "ban-the-box" law on the books; however, the Alabama Prison Reform Task Force is currently considering such a proposal, thus such a law may find its way to Alabama soon. For employers, complying with such laws can prove time-consuming and counterproductive because just removing the box from the application is not good enough. Depending on the legislation there may be additional notice requirements, job-related screening tests, and limits on the scope or type of criminal records that can be considered.

In general, ban-the-box laws do not deviate from the guidance provided by the EEOC regarding the consideration of prior arrest and conviction records in hiring decisions. In 2012, the EEOC endorsed removing the conviction question from the job application.[23] According to the EEOC, disparate impact discrimination under Title VII can occur if an employer's criminal record screening policy disproportionately screens out a protected group from employment opportunities and the employer does not demonstrate that the policy or practice is job related and consistent with business necessity.[24] Thus, regardless of whether a jurisdiction has enacted a ban-the-box law, employers should still evaluate their criminal record screening policies to ensure compliance with Title VII.

5. ACA Update

2016 is expected to be a costly year for ACA compliance for many employers, partly due to the disclosure and notification requirements taking effect. However, 2018 expects the largest cost increase when the Cadillac Tax kicks-in. Below are a few helpful reminders of the compliance issues for which employers should be prepared in the upcoming year.

Employer Health Coverage Reporting. Effective in 2015, ACA regulations required information reporting by employers with 100 or more full-time employees. Employers with at least 50 but fewer than 100 full-time employees had an additional year, until 2016, before these rules applied. With this reporting information, the IRS will be able to enforce both the individual mandate and the employer shared responsibility mandate of the ACA. Regardless of the date that an employer becomes subject to the employer shared responsibility "Play or Pay" penalties (which is determined by the number of full-time employees), the employer must report for the entire 2015 calendar year and furnish the information to the IRS this tax year. The IRS recently announced new due dates for the tax forms in order to give employers more time to adequately comply with the reporting requirements.

For employers that must file Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, the form is due by March 31, 2016. The due date for filing a Form 1094-B, Transmittal of Health Coverage Information Returns, and Form 1095-B, Health Coverage, was extended to May 31, 2016 (if filing electronically the due date has been extended to June 30, 2016). Also, it is important to remind applicable employers that they are required to furnish a statement to each full-time employee

that includes the same information provided to the IRS. The due date to furnish those statements to employees was extended to March 31, 2016 for this year, but in the future the information will be due by January 31 of the calendar year following the year for which the information relates. [25]

An employer that fails to comply with these reporting requirements may be subject to the ACA's general reporting penalties for failure to file correct information returns and failure to furnish correct payee statements.

Employer Mandate for Medium Sized Employers Now in Effect. For employers with 50-99 full-time employees, the so-called "Play or Pay" mandate will now become effective for plan years beginning on or after January 1, 2016. To avoid compliance penalties, employers must offer "minimum essential coverage" to full-time employees and their dependents that is "affordable" and provides "minimum value."[26]

Track Employee Hours Carefully. All employers who employ 50 or more full-time employees will be subject to the employer shared responsibility mandate starting this year. The number of hours worked, also referred to as "hours of service," dictates whether an employee is a "full-time employee" within the meaning of the ACA. Therefore, it is important to track employee hours carefully in order to determine if coverage must be offered and to whom it must be offered. Disability pay, military leave, holidays, and any other paid time off must be included in the "hours of service" calculation.

"Employee status" is irrelevant when making these calculations. For example, temporary or seasonal workers can be eligible for health benefits if they work an average of 30 or more hours per week, even though by employer standards they are not considered a "full-time employee." To fully comply with the ACA, all employers need to pay close attention to tracking employee hours.

Summary of Benefits and Coverage (SBC) Disclosure Now in Effect. Employers who offer healthcare coverage are required to provide employees with a standard "Summary of Benefits and Coverage" form explaining what their plan covers and what it costs. The purpose of the SBC form is to help employees better understand and compare health insurance options that are available to them.

On June 16, 2015, final regulations for the SBC requirements were released. New key provisions include requiring all insurance issuers to include a web address where a copy of the actual policy or group certificate of coverage can be reviewed and obtained before someone signs up for coverage. For fully insured employer-sponsored plans, because the actual "certificate of coverage" is not available until after the plan sponsor has negotiated the terms of coverage with the insurer, the insurer may post a sample group certificate of coverage for each applicable product. After the actual certificate of coverage is executed, it must be posted as well. The regulations also require a qualified health plan issuer to disclose on the SBC whether non-excepted and/or excepted abortion services are covered or excluded. For disclosures with respect to plans, these regulations became applicable to health insurance issuers beginning on September 1, 2015. Noncompliance with the SBC rules is $1,000 per failure and an excise tax of $100 per person per day.

Final Rule Issued Regarding Coverage of Certain Preventive Services. Final rules have recently been released that establish an alternative way for eligible organizations that have a religious objection

to covering contraceptive services to seek an accommodation from contracting, providing, paying, or referring for such services.

The rules allow eligible organizations to notify the Department of Health and Human Services (HHS) in writing of their religious objection to providing contraception coverage, as an alternative to filling out the form provided by the Department of Labor (DOL) to provide to their issuer or third-party administrator.

The HHS and the DOL will then notify insurers and third party administrators of the organization's objection so that enrollees in plans of such organizations receive separate payments for contraceptive services, with no additional cost to the enrollee or organization, and no involvement by the organization. These final regulations are applicable beginning on the first day of the first plan year (or, for individual health insurance coverage, the first day of the first policy year) beginning on or after September 14, 2015.[27]

The Looming Cadillac Tax. Beginning January 1, 2018, the ACA will impose a 40% excise tax on high-cost group health coverage. Known as the "Cadillac Tax," it is intended to encourage companies to choose lower-cost health plans for their employees. The Cadillac Tax will tax the amount by which the monthly cost of an employee's applicable employer-sponsored health coverage exceeds the annual limitation. Employers will be responsible for calculating the Cadillac Tax owed for each employee's employer-sponsored coverage, as well as the share attributable to each coverage provider. If the employer fails to accurately calculate the excess benefit, and as a result the coverage provider pays too little tax, the employer will be subject to a tax penalty.

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[1] Ms. Nixon would like to thank Katlyn Stricklend, law clerk, for her help and assistance in drafting this article.
[2] *See Notice of Proposed Rulemaking: Overtime*, DOL.GOV (July 5, 2015) http://www.dol.gov/whd/ overtime/nprm2015/.
[3] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38515 (proposed July 5, 2015) (to be codified at 29 C.F.R. pt. 541).
[4] *Id.*
[5] 362 N.L.R.B. 186 (2015).
[6] 691 F.2d 1117, 1124–25 (3rd Cir. 1982) ("where two or more employers exert significant control over the same employees-where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment-they constitute 'joint employers' within the meaning of the NLRA.").
[7] *Browning-Ferris Industries of California*, 362 N.L.R.B. 186, (2015).
[8] Office of Public Affairs, *Board Issues Decision in Browning-Ferris Industries*, NLRB.GOV (Aug. 27, 2015), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries.
[9] 362 N.L.R.B. 186 (2015).
[10] *Id.*
[11] 793 F.3d 404, 414 (4th Cir. 2015) (the hybrid test calls for courts to analyze the following set of factors: "(1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship").
[12] 807 F.3d 395, 404 (1st Cir. 2015).
[13] *See In re* FedEx Ground Package Sys., Inc., Emp't Practices Litig., 758 F. Supp. 2d 638, 654 (N.D. Ind. 2010).
[14] *Id.*
[15] *Id.*

[16] 787 F.3d 1313, 1328–29 (11th Cir. 2015).
[17] *Id.* at 1327.
[18] *Id.* at 1323–24.
[19] *Id.* 1318–19.
[20] Smith v. Family Dollar Stores, Inc., 2015 WL 1924444, at *3 (Ala. 2015).
[21] *Misclassification of Employees as Independent Contractors*, DOL.GOV, http://www.dol.gov/whd/workers/misclassification/#stateDetails (last visited Feb. 5, 2016).
[22] To access the MOU visit: http://www.dol.gov/whd/workers/misclassification/#stateDetails.
[23] U.S. Equal Employment Opportunity Comm'n, Office of Legal Counsel, EEOC Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012).
[24] *Id.*
[25] For more information on reporting and these forms see http://www.irs.gov/instructions/i109495c /ar01.html.
[26] For more information on the mandate see https://www.sba.gov/content/employers-50-or-more-employees.
[27] The final rules can be found at: https://www.federalregister.gov/public-inspection.