Bloomberg Law®

FLSA Litigation Tracker
Litigator Q&A

December 27, 2017

Litigators Review The Year's Top Employment Law Issues, Discuss What to Expect in 2018

KATE S. GOLD, PHILIPPE A. LEBEL & IRENE M. RIZZI (INTERVIEWED BY KATHERINE P. SIMMS)

BLOOMBERG BNA: The Labor Department has appealed to the U.S. Court of Appeals for the Fifth Circuit the lower court decision striking down its 2016 rule that would have raised the salary threshold for the Fair Labor Standards Act's white-collar exemption.

How do you see this process developing in 2018?

Gold/Lebel/Rizzi: On the same day the DOL appealed the lower court's decision, it issued a press release stating it would file a motion to stay the case while it ''undertakes further rulemaking to determine what the salary level should be.'' The DOL's unopposed motion to stay the case was granted in early November 2017. The appeal is less about the lower court's decision to strike down the 2016 rule and more about affirming the DOL's authority to set a salary threshold for FLSA exemptions. Although the lower court's decision stated that it wasn't making any assessment regarding the general lawfulness of the salary basis test or the DOL's authority to implement such a test, the broad language of the opinion is hard to reconcile with the opinion's narrow holding.

In July 2017, the DOL published a Request for Information seeking comments on how it should change the 2016 rule. The comment period closed on September 25, 2017. The DOL hasn't announced when it will publish a proposal. At this point, it is a waiting game.

BLOOMBERG BNA: Do you think the DOL ultimately will increase the salary threshold and, if so, any predictions on the approximate level?

Gold/Lebel/Rizzi: Based on the DOL's press release stating that it will ''determine what the salary level should be,'' we can expect a change in the salary basis test for FLSA exemptions. In his summary judgment ruling striking down the 2016 Obama rule, Judge Amos L. Mazzant reasoned that the DOL exceeded its authority by creating a rule that effectively eliminated the duties test by setting the salary level too high. Based on this reasoning, we can conclude that the new salary level will be substantially lower. Additionally, Secretary of Labor Alexander Acosta has stated that he would be open to increasing the salary level to ''somewhere around $33,000'' which accounts for inflation from 2004, the last time the regulation was adjusted. Thus, we can predict a new salary level in and around $30,000, but this continues to be an open issue.

BLOOMBERG BNA: What should employers be doing now in this period of uncertainty when they decide how to classify their workers for FLSA overtime purposes?

Gold/Lebel/Rizzi: Although a new overtime rule for FLSA exemptions is likely, there is no deadline for the adoption of such a rule (or guarantee a new rule will be adopted). In addition, the characteristics of a new rule, including the salary level, are uncertain. However, once a new rule is issued, employers should be prepared to evaluate the exemption status of their employees and reclassify employees and/or adjust wages, as needed.

BLOOMBERG BNA: The United States Court of Appeals for the Sixth Circuit recently held in *Perry v. Randstad Gen. Partner*, No. 16-1010 that the employer failed to establish a good faith reliance defense where it relied on a 2005 DOL opinion letter when classifying employees as overtime exempt under the FLSA administrative exemption.

What impact (if any) do you think this decision might have on defense counsel's use of these letters, especially in the context of the DOL's announcement that it

 ISSN 2166-4013

plans to resume issuing opinion letters after the Obama administration abandoned the practice?

Gold/Lebel/Rizzi: The good faith reliance defense protects employers from liability if they took certain actions on the basis of an interpretation of law by a government agency, even if the agency's interpretation later turned out to be wrong. The defense requires that the employer (1) acted in conformity with the agency interpretation and (2) relied on the agency interpretation in good faith. In *Perry*, the Sixth Circuit took a hard-lined approach to each of these elements and held that the employer didn't satisfy either one.

First, the Court reasoned that conformity requires the relied upon administrative interpretation to provide a clear answer to the particular situation. As the 2005 DOL opinion letter described some duties that were inconsistent with the duties of the employees at issue, the Court concluded that the opinion letter didn't provide a clear answer and thus the conformity element wasn't satisfied. Second, the Court found that the employer didn't rely on the opinion letter in good faith because it knew its employees' duties varied significantly based on client, market, and supervisor and despite this knowledge, classified employees on a nationwide basis.

The impact of this decision is twofold. First, defense counsel and employers should narrowly construe opinion letters when relying on such administration interpretations (and others) to classify employees. Second, defense counsel and employers should ensure classification audits are conducted, at a minimum, on an office or location basis. The DOL's plan to resume issuing opinion letters is a welcome development for employers as opinion letters typically provide detailed answers to fact-specific questions. However, as the *Perry* decision shows, these opinion letters should only be relied upon if they provide a clear and comprehensive answer.

BLOOMBERG BNA: The Supreme Court heard oral argument Oct. 2 in the consolidated class action waiver cases, *Ernst & Young LLP v. Morris*, No. 16-300, *Epic Systems Corp. v. Lewis*, No. 16-285, and *National Labor Relations Board v. Murphy Oil USA Inc.*, No. 16-307.

What do you think are the takeaways from the argument for employment counsel? Did anything strike you or surprise you about how particular justices approached the issue?

Gold/Lebel/Rizzi: The employers—Ernst & Young, Murphy Oil, and Epic Systems—strategically elected to coordinate their arguments and counsel before the U.S. Supreme Court. They presented a unified position regarding the enforceability of class action waivers. By contrast, the employee plaintiffs and NLRB were represented by separate counsel and presented somewhat disparate positions, at least on some issues. In particular, NLRB General Counsel, Richard F. Griffin, Jr., essentially conceded that the NLRB wouldn't take issue with an arbitration agreement that required employees to arbitrate their claims in an arbitral forum that set limits on or outright precluded class arbitrations, so long as the employer's arbitration agreement itself didn't preclude class arbitration.

In explaining the NLRB's position, Griffin noted that section 8(a)(1) of the NLRA governs employer interference, restraint or coercion with respect to section 7 rights and, thus, doesn't address rules of the arbitral forum. When asked by Chief Justice Roberts to respond to the NLRB's argument, Daniel Ortiz, who represented the employees in the*Ernst & Young* and *Epic Systems* cases, disagreed, arguing that an employer couldn't coerce employees into a forum that precluded class actions entirely. The questions from the justices were largely as expected. Justices Ginsberg, Sotomayor, Kagan, and Breyer asked questions challenging the employers' arguments or providing support for the employees and NLRB. Justice Alito questioned Griffith about whether the NLRB's position meant that any limitation on class actions in the rules of procedure was invalid; Justice Kagan jumped in with an analogy to help explain the NLRB's argument to Justice Alito. The likely deciding voter—Justice Kennedy—asked questions that suggested he likely will rule in favor of the employers' position. Justice Kennedy questioned whether most of the benefits of class actions could be achieved by multiple employees electing to use the same attorney and sharing information. He also noted that employers might abandon efforts to compel individual arbitration when facing multiple lawsuits if the first plaintiff prevailed.

BLOOMBERG BNA: Do you have any predictions about the outcome of these cases?

Gold/Lebel/Rizzi: The Court's recent rulings regarding private arbitration agreements have been decidedly pro-arbitration. However, the Epic Systems consolidated cases are somewhat different from other recent cases before the Court insofar as they deal with employment arbitration agreements instead of consumer or business agreements. Nonetheless, this Court's deciding voter—Justice Kennedy—hasn't given any signs that his enthusiasm for arbitration would be diminished in any way in the employment context. Thus, most commentators believe the Court is likely to rule that class action waivers don't violate employees' rights to engage in protected concerted activity—especially given Justice Kennedy's questions during oral argument. Given that the Court may uphold class action waivers in employment arbitration agreements and may provide insight on the scope and language of such waivers employers may wish to defer taking any further actions relating to class action waivers until there is a final decision on the matter.

BLOOMBERG BNA: While the Supreme Court deliberates on how federal law affects class action waivers in arbitration, state courts continue to decide how state law might affect such waivers. The California Court of Appeals recently held in *Cortez v. Doty Bros.*, 15 Cal. App. 5th (2017) that an employer's arbitration provision

  ISSN 2166-4013

wasn't unambiguous and therefore it couldn't be enforced.

Does this decision affect how defense counsel will advise their clients and litigate in California, and if so, in what ways?

Gold/Lebel/Rizzi: The *Cortez* case is certainly a reminder that the scope of an arbitration provision in an employment agreement should be broad enough to encompass all claims arising out of or related to employment or the termination of employment, and, if the arbitration provision is contained in a collective bargaining agreement, it must contain a clear and unmistakable waiver of the right to enforce a statute in a judicial forum.

Separately, the Court also held that the agreement's silence regarding the availability of class-wide arbitration couldn't be interpreted, as Cortez argued, as an agreement to arbitrate claims on a class wide basis. Cortez argued that a waiver of the right to class wide arbitration violates the right to engage in collective action under sections 7 and 8 of the NLRA, and thus urged the Court to defer ruling on the claim until the U.S. Supreme Court addressed the issue in the consolidated case above. The Court didn't defer however, and, relying on the California Supreme Court's decision in Iskanian, ruled that a prohibition on class wide arbitration doesn't violate the NLRA.

Given that it appears unlikely that the U.S. Supreme Court will rule in favor of the NLRB in the consolidated Epic Systems cases, it seems premature for employers to take any actions regarding class action waivers in arbitration agreements. Of course, in the event that the U.S. Supreme Court sides with the employees and NLRB in the Epic Systems cases, employers may not be able to rely on *Iskanian* and *Cortez* to argue that class action waivers don't violate the NLRA.

Another take-away from *Cortez* for employers is, in the context of an arbitration provision in a CBA, be very specific about the scope of the arbitration agreement. In *Cortez*, the Court's ruling was focused on the waiver in a collective bargaining agreement of an employee's right to pursue statutorily protected rights in a judicial forum. The provision at issue required arbitration of disputes arising out the applicable IWC Wage Order. When Cortez sued his employer for several California Labor Code violations and unfair competition, the employer successfully argued that, because the Labor Code contained the only means to enforce certain Wage Order rules (such as meal and rest break violations, overtime pay, and record-keeping), those claims had to be arbitrated. The employer fell short, however, in attempting to compel arbitration of alleged Labor Code violations concerning final paychecks and waiting time penalties, as well as the statutory claim for unfair competition, because those provisions aren't found in the Labor Code.

The *Cortez* Court held these claims couldn't be arbitrated because these claims didn't fall within the Wage Order and the CBA didn't specifically reference these statutes. Citing U.S. Supreme Court authority, the Court held that waiver of the right to prosecute a statutory violation in a judicial form is only effective it is explicit ''clear and unmistakable.''

BLOOMBERG BNA: What does the decision mean for employers doing business in California that use arbitration agreements like the one the court refused to enforce?

Gold/Lebel/Rizzi: Again, the Court's holding about the scope of the arbitration agreement in *Cortez* was limited to the collective bargaining context and only refused to enforce arbitration of certain statutory claims that weren't specifically described. For employers with arbitration agreements in the non-union context, this decision doesn't have the same application. State and federal courts in California still enforce broadly worded (e.g., arising out of or related to) arbitration agreements. There is no requirement outside the collective bargaining agreement context to specifically enumerate statutory claims, but it certainly doesn't hurt to include an expansive list.

In the collective bargaining context, *Cortez* means that employers may have a messy procedural issue where the arbitration agreement specifies some, but not all, of the statutory claims at issue. In*Cortez*, the Court of Appeal directed the superior court to vacate its order and enter a new order compelling arbitration of certain claims and denying the petition to compel arbitration of other claims. The Court left to the lower court to determine the order to proceed on adjudicating the claims. In effect, this potentially leaves the parties with two separate actions, unless the determination of the issues in the first proceeding effectively resolves the issues in the second proceeding. This obviously can expand the cost and burden of litigating and arbitrating the claims.

BLOOMBERG BNA: What other labor and employment law developments should litigators and employers be aware of?

Gold/Lebel/Rizzi: We would be remiss in not mentioning the two recent NLRB decisions in *Hy-Brand Industrial Contractors, Ltd.*, No. 156 and *The Boeing Company*, No. 154, in which the NLRB repudiated the Obama-era joint employer test and the standard previously applied by the agency when evaluating employer rules. In Hy-Brand, the NLRB returned to its pre-Browning-Ferris test for determining whether two entities are joint employers, which focuses on ''direct and immediate'' control. In The Boeing Company, the NLRB repudiated the standard set forth in Lutheran Heritage Village-Livonia, and held that when determining whether a facially-neutral employer policy would potentially interfere with the exercise of NLRA rights, the NLRB will consider: (1) the nature and extent of the potential impact on NLRA rights; and (2) the employer's legitimate justifications associated with the policy.

Employers also should be monitoring the EEOC's ongoing efforts to expand the scope of Title VII to cover sexual orientation. Despite a circuit split, the U.S. Supreme Court recently declined to grant certiorari to an Eleventh Circuit case involving this issue. However, the EEOC had made this an enforcement priority. Thus, it is likely that future developments are on the horizon.

Kate S. Gold, a partner at Drinker Biddle, defends clients in employment and other business disputes in state and federal courts, arbitrations, and before agencies. She is co-chair of the Labor and Employment Group's Fair Pay Act Obligations Team.

Philippe A. Lebel, an associate at Drinker Biddle, represents employers in all aspects of employment litiga-

tion, including wage and hour, wrongful termination, discrimination, harassment, retaliation, whistle-blower, trade secrets, and breach of contract litigation.

Irene M. Rizzi, an associate at Drinker Biddle, counsels clients in all stages of employment and commercial litigation, including class actions. She works closely with executives and in-house counsel to develop litigation strategies in line with company objectives.

ISSN