EMPLOYMENT FLASH

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INSIDE

Expanded Protections for Sarbanes-Oxley Whistleblowers

The U.S. Department of Labor's (DOL) Administrative Review Board (ARB) recently issued several decisions that significantly expand whistleblower protections for employees under Section 806 of the Sarbanes-Oxley Act (SOX 806). In addition, in November 2011, the DOL's Occupational Safety and Health Administration (OSHA), the agency that enforces SOX 806, published an Interim Final Rule, in part to implement the amendments to SOX 806 protections that were included in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd Frank) and also to improve OSHA's handling of SOX whistleblower complaints.

Protected Activity

The ARB's decision in *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123 (May 25, 2011), broadens the scope of what constitutes protected activity under SOX 806.

Kathy Sylvester and Theresa Neuschager filed SOX whistleblower complaints with OSHA against their former employer, Parexel International, a publicly traded company that performs clinical evaluations of drugs for pharmaceutical companies. They asserted Parexel discharged them in retaliation for their complaints to management regarding instances of clinicians allegedly falsifying clinical data (that was reported as accurate by Parexel in communications through the U.S. mail and by wire communications such as the Internet). In dismissing the claims, the Administrative Law Judge (ALJ) found that complainants failed to allege they had engaged in protected SOX activity because their complaints to Parexel

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NLRB Limits Use of Class Action Waivers in Mandatory Arbitration Agreements

In a decision dated January 3, 2012, the National Labor Relations Board (NLRB or Board) held that, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements enforceable, an employer violates Section 8(a)(1) of the National Labor Relations Act (NLRA) when it requires that covered employees sign, as a condition of their employment, "an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." *D.R. Horton, Inc.*, 357 NLRB 184 (2012). The case is controversial not only for its holding, but also because it was decided by only a two-member panel of the NLRB. D.R. Horton recently filed a notice of appeal with the U.S. Court of Appeals for the Fifth Circuit, challenging the Board's decision.

The Board's holding arose out of a case in which D.R. Horton, a nationwide homebuilding company, required that all employees sign a Mutual Arbitration Agreement (MAA) as a condition of employment. The MAA required

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U.S. Supreme Court Upholds the Ministerial Exception

On January 11, 2012, the United States Supreme Court unanimously held that the First Amendment bars suits against religious organizations brought on behalf of ministers claiming termination in violation of employment discrimination laws. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). The *Hosanna-Tabor* case arose when Cheryl Perich, a grade-school teacher and commissioned "Minister of Religion" at Hosanna-Tabor Evangelical Lutheran Church and School, claimed that she was fired for pursuing a disability discrimination claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and state law.

In ruling in favor of *Hosanna-Tabor*, the Supreme Court found that a "ministerial exception," grounded in the First Amendment's establishment and free exercise clauses, precludes application of employment discrimination laws to claims concerning the employment relationship between a religious institution and its ministers. The Court reasoned that "requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

Having concluded that there is a ministerial exception to the protection of employment discrimination laws, the Court considered whether the exception applied to Perich. The Sixth Circuit Court of Appeals had found that Perich did not qualify as a "minister" because many of her duties were secular and were also performed by lay teachers. The Supreme Court disagreed in light of "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church."

In response to concerns that a ministerial exception could protect religious organizations from liability for retaliating against employees for other typically protected conduct (*i.e.,* reporting criminal misconduct or testifying in court), the Supreme Court noted that its decision was limited to employment discrimination disputes and stated that it expressed "no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."

The application of the ministerial exception to job bias cases also has been addressed recently by the California Court of Appeal. In *Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal. Rptr. 3d 15 (Ct. App. 2011), the court of appeal concluded that a preschool teacher's claim for wrongful termination in violation of public policy was barred by the ministerial exception where the employee was terminated by a Lutheran school for living with her boyfriend and raising their child together without being married. In doing so, the court confirmed that the ministerial exception extends to "church-related institutions which have a 'substantial religious character.'" It further recognized that the ministerial exception is not limited to members of the clergy but rather "encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." The plaintiff's religious duties, the court found, sufficiently qualified her as a spiritual leader covered by the exception.

California Supreme Court Clarifies the Administrative Exemption

The California Supreme Court rendered its decision on December 29, 2011, in *Harris v. Super. Ct. of Los Angeles County (Liberty Mut. Insur. Co.),* 266 P.2d 953 (Cal. 2011). Granting the insurance companies' appeal, the California Supreme Court said the appeals court had erred in holding that insurance claims adjusters working for Liberty Mutual Insurance Co. and Golden Eagle Insurance Co. in California are nonexempt employees as a matter of law, entitled to overtime pay under the Labor Code and regulations (Wage Orders) of the California Industrial Welfare Commission (IWC).

Plaintiffs filed four class action lawsuits seeking damages for unpaid overtime work and alleging the defendant insurers erroneously classified them as exempt "administrative" employees. The trial court certified a class of all nonmanagement employees in California who were employed as claims handlers and/or performed claims-handling activities and were classified as exempt by defendants. Plaintiffs moved for summary adjudication of defendants' affirmative defense that plaintiffs were exempt from overtime compensation requirements under the "administrative" exemption set forth in IWC Wage Order 4. A divided appeals court sided with the plaintiffs, relying upon the federal Fair Labor Standards Act's "administrative/production worker dichotomy," which distinguishes between administrative employees who are primarily engaged in "administering the business affairs of the enterprise" and production-level employees whose "primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." The appeals court concluded that state law incorporates this administrative/production worker dichotomy and that insurance claims adjusters could not qualify as exempt from state overtime pay requirements because they were primarily production workers.

In reversing the Court of Appeal, the California Supreme Court held that the lower court erred in failing to consider the language of the applicable Wage Order. As the California Supreme Court made clear, amendments in 2000 to the Wage Order provided guidance regarding application of the administrative exemption that the Court of Appeal ignored

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by instead applying the administrative/production worker dichotomy as a dispositive test. While the California Supreme Court rejected the analysis of the appeals court, it refrained from expressing any view as to the exempt status of the adjusters in this case. It will therefore be left to the Court of Appeal on remand to determine whether, applying the proper legal framework, the trial court's denial of summary adjudication to plaintiffs was proper.

Employee Outbursts May Forfeit Protections of the NLRA

Under NLRB precedent, an employee may forfeit the protection of the NLRA where he or she engages in "indefensible or abusive conduct" toward his or her employer. The United States Court of Appeals for the Ninth Circuit recently considered what type of employee conduct might lose the Act's protection and found that the conduct need not be accompanied by physical acts or threats to forfeit protection. *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286 (9th Cir. Dec. 19, 2011).

The underlying dispute in *Plaza* arose when an employee raised questions about his compensation and working conditions with his employer. The employee was concerned that he and his fellow employees were not being paid the minimum wage and that their commissions may have been miscalculated. In response, management called the employee into a meeting and told him that he should not be complaining about his pay and that, if he did not trust his employer, he need not work at the company. Upon receiving this message, the employee allegedly lost his temper and berated the company's owner, using profanities and other insulting language. The owner then fired the employee.

In ruling on the case, the Ninth Circuit noted that, in determining whether an employee's conduct results in a loss of protection of the NLRA, the Board considers the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB. 814, 816 (1979). The Board carefully balances these factors, permitting some leeway for impulsive behaviors while considering the employer's right to maintain order and discipline. In the *Plaza* case, the ALJ, Board and Court of Appeals all agreed that the first, second and fourth *Atlantic Steel* factors weighed in favor of preserving the employee's protection under the Act. The first factor favored protection because the discussion occurred in a private location away from the work area and other employees, where it caused no disruption to the workplace or employee discipline. The second factor favored protection because the subject matter of the meeting concerned the employee's complaints related to terms and conditions of employment, and his outburst was directly tied to his protected complaints. The fourth factor favored protection because Aguirre's outburst was provoked by the employer's unfair labor practice (*i.e.*, its censure of Aguirre's protected activities and suggestion that he could work elsewhere if he did not like the policies).

However, the ALJ and the Board disagreed as to the third factor — the nature of the employee's outburst. The ALJ found that the employee's obscene remarks and personal attacks cost him the Act's protection. The Board, on the other hand, found a lack of support in the record to conclude that the employee's conduct was physically threatening or intimidating and, therefore, concluded that all four *Atlantic Steel* factors weighed in favor of finding that the employee retained protection under the Act. The Ninth Circuit concluded that implicit in the Board's analysis was the suggestion that an employee's outburst does not factor into the loss of the Act's protection unless accompanied by physical conduct or at least a threat that is physical in nature. In disagreeing with the Board on this point, the Ninth Circuit held that, according to Board precedent, "obscene, degrading, and insubordinate comments may weigh in favor of lost protection even absent a threat of physical harm." Accordingly, the Circuit Court remanded the case back to the Board for reassessment of the nature of the employee's outburst and rebalancing of the *Atlantic Steel* factors.

H-1B Visa FY 2013 Initial Filing Date Approaches

Under current immigration law, only 65,000 new H-1B visas are issued to foreign nationals every fiscal year. Out of this number, over 6,000 visas are reserved for nationals of Chile and Singapore. Not all H-1B nonimmigrants are subject to this annual cap. Also, an additional 20,000 H-1B visas are available for individuals with U.S. graduate degrees. This supplemental H-1B visa pool is referred to as the H-1B Master's cap. Petitions for H-1B visas for fiscal year 2013 may be submitted starting on April 1, 2012, for an employment start date of October 1, 2012.

For the current fiscal year (FY2012), the statutory cap was reached as of November 22, 2011. However, during 2008 and 2009, U.S. Citizenship and Immigration Services received petitions far exceeding both the regular cap and the U.S. Master's cap during the first few days of April of each year. Though the current economic climate does not suggest that there will be a rush of H-1B visas starting in April, thereby depleting the H-1B numbers soon thereafter, there is no way to predict the precise demand for H-1B visas this year.

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management were not based on any objectively reasonable belief that Parexel had violated SOX, did not relate "definitively and specifically" to a violation of any laws enumerated in SOX 806, and did not relate to shareholder fraud or conduct otherwise adverse to shareholders.

In reversing the ALJ's decision, the ARB held that the heightened pleading standards for federal court complaints articulated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), do not apply to SOX whistleblower claims initiated with OSHA. According to the ARB, unlike the Federal Rules of Civil Procedure, the DOL's SOX whistleblower regulations make it clear that a complaint filed with OSHA need be in "no particular form" and need only give "a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations [of SOX]."

The ARB also ruled that in order to establish that a whistleblower complaint constitutes protected activity under SOX 806, the complainant does not need to show that an actual SOX 806 violation occurred, but only that the complainant had a "reasonable belief" — based on a subjective and objective analysis — that the conduct he/she complained about amounted to a violation. The reasonableness of such belief need not have been actually communicated to management or other authorities.

In addition, the ARB held that its prior ruling in *Platone v. FLYi, Inc.*, ARB No. 04-154 (Sept. 29, 2006), that a whistleblower complaint must "definitively and specifically" relate to the categories of fraud or securities violations listed in SOX 806 in order to be deemed protected activity under SOX, "has evolved into an inappropriate test and is often applied too strictly." According to the ARB in *Sylvester,* the proper standard is whether the complaint provided information that the whistleblower reasonably believed constituted a violation of one of the categories of law enumerated in SOX 806.

The decision in *Sylvester* also makes clear that protected conduct under SOX need not involve reports of shareholder fraud and can include disclosures about mail fraud, wire fraud, radio fraud, television fraud and bank fraud. Again pointing to the "reasonable belief" standard, the ARB stated that a SOX 806 complainant need not allege or prove specific elements of a fraud claim in order to demonstrate that he/she had engaged in protected whistleblowing activity.

Applying these standards, the ARB ruled that Sylvester and Neuschager had sufficiently pled that they engaged in SOX-protected activity. According to the ARB, their SOX complaints alleged that they reported fraudulent activities to managers, those activities related to one or more of the laws listed in SOX 806 (*i.e.*, mail and wire fraud), their employer had knowledge of their protected activity and they were subjected to adverse employment actions in retaliation for such protected activity.

Third-Party Misconduct

The ARB again expanded the scope of SOX-protected activity in *Funke v. Federal Express Corp.*, ARB No. 09-004 (July 8, 2011), in holding that reports of third-party misconduct may be protected.

A FedEx courier filed a SOX whistleblower complaint with OSHA alleging she had been suspended by FedEx in retaliation for reporting concerns to the local sheriff's department regarding suspected mail fraud by an individual to whom she was delivering packages. The ALJ dismissed the complaint on the grounds that complainant's report did not constitute protected activity under SOX because it was not a report of misconduct "by the employer," and it was not "related to fraud against shareholders." Upon review, the ARB reversed the ALJ's decision on the grounds that SOX protects an employee who provides information regarding any conduct the employee reasonably believes constitutes a violation of the laws identified in SOX 806. As such, whistleblower protections extended to reports of misconduct by third parties, such as in this case, one of the employer's customers.

The ARB also rejected FedEx's contention that the complainant's reports to the local sheriff's department were unprotected because they were not to "federal law enforcement" as written in SOX 806, reasoning that the statute's clear intent was to protect all reports of violations of the laws identified in SOX 806 and not to exclude reports to local officials.

Confidential Information

In *Vannoy v. Celanese Corp.*, ARB No. 09-118 (Sept. 28, 2011), the ARB further expanded the scope of whistleblower protection under SOX 806 by holding that misappropriation of confidential personal and corporate information may be protected activity depending on the circumstances surrounding the removal of the material.

Matthew Vannoy, who was hired by Celanese to help administer the company's expense reimbursement program, filed a claim with the IRS's Whistleblower Rewards Program, contending Celanese's treatment of reimbursable business expenses violated tax laws. In pursuit of this claim, Vannoy emailed confidential business documents from the company's computer system to his personal email account, including one document that contained Social Security numbers of thousands of Celanese employees. Celanese fired Vannoy for violation of its confidentiality policy and also filed a criminal complaint against him.

Following his discharge, Vannoy filed a whistleblower retaliation complaint with OSHA under SOX 806. An ALJ dismissed the complaint because, among other reasons,

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Vannoy was discharged for violating company policy and his confidentiality agreement by misappropriating confidential information.

On appeal, the ARB recognized the tension between legitimate employer confidentiality policies and employee whistleblower bounty programs, like the provisions in Dodd Frank that preclude companies from enforcing or threatening to enforce confidentiality agreements to prevent whistleblowers from cooperating with the SEC. Thus, the ARB reversed and remanded, ruling that the ALJ needed to conduct an evidentiary hearing to determine whether the information Vannoy misappropriated is the kind of "original information" Congress intended to protect and whether the method of transfer of information was protected lawful conduct within the scope of SOX.

New Regulations

On the heels of these ARB rulings, on November 3, 2011, OSHA issued an Interim Final Rule (76 Fed. Reg. 68,084) amending its SOX 806 regulations. This interim rule implements substantive changes to SOX 806 made by Dodd Frank, including extending from 90 to 180 days the statutory filing period for retaliation complaints; providing claimants with the right to a jury trial in district court if the Secretary of Labor does not act on their complaints within 180 days of filing; and providing that employees cannot waive SOX whistleblower rights, including through a pre-dispute arbitration agreement.

In addition to addressing changes under Dodd Frank, the interim final rule provides that whistleblower complaints under SOX 806 may be made orally or in writing, may be filed in any language and may be filed by any person on the employee's behalf. Moreover, the interim final rule provides that once a complainant proves by a "preponderance of the evidence" that his/her protected activity contributed to an adverse action, "the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the prohibited rationale."

The interim final rule also revises the regulations governing reinstatement. Whereas the prior regulations provided reinstatement would not be appropriate where the respondent establishes the complainant is a security risk, the determination of whether reinstatement is inappropriate under the new rule will be made "on the basis of the facts of each case and the relevant case law." In addition, where it deems appropriate, OSHA may now order "economic reinstatement," which provides the complainant with the same pay and benefits that he/she received prior to termination, or front pay, but does not require the complainant to actually return to work. Under the new rule, even if an employer ultimately prevails in the whistleblower adjudication, it does not have the right to recover the costs of economically reinstating an employee.

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that employees resolve employment-related disputes through individual arbitration and precluded them from bringing collective or class claims in any forum. In 2008, the attorney for an employee notified D.R. Horton that he represented a nationwide class of the employer's superintendents asserting that they were misclassified under the Fair Labor Standards Act. Citing language in the MAA barring arbitration of collective claims, D.R. Horton responded that the attorney failed to give effective notice of intent to arbitrate. In response, the employee filed an unfair labor practice charge.

In support of its holding, the Board found that the conduct of initiating a class or collective action constitutes "concerted activity" protected by Section 7 of the NLRA and is "central" to the NLRA's purposes. The Board therefore held that the MAA imposed by D.R. Horton violated Section 8(a)(1) of the NLRA because it unlawfully restricts employees' ability to exercise their Section 7 rights. Additionally, the Board reasoned that its holding did not create a conflict between the NLRA and the FAA, and concluded that "finding the MAA unlawful, consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes." Further, the Board's decision distinguished the United States Supreme Court's recent holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (discussed in the November 2011 *Employment Flash*) that an arbitration agreement in a consumer contract prohibiting class-wide arbitration was enforceable, noting that its decision applied only in the employment context and that *Concepcion* did not involve a waiver of NLRA-protected rights or examine a perceived conflict between two federal statutes.

As the Board also made clear, there are limitations to the reach of its decision. For example, only arbitration agreements applicable to statutorily defined employees under the NLRA — non-supervisory employees — and addressing "wages, hours or other working conditions" are implicated. Further, the decision does not preclude an employer from requiring that arbitral proceedings be conducted on an individual basis "[s]o long as the employer leaves open a judicial forum for class and collective claims." The decision also only addresses arbitration policies that are entered into as a condition of employment, not voluntary policies.

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Contacts in the Labor & Employment Law Group appear on the next page.

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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