A review of 4 key cases and new laws affecting employers

A range of legal decisions and fact sheets released by government organizations in recent months are expected to have an impact on employee benefit plans. In the wake of these cases and related guidance, advisers and employers should review their policies on topics such as cash-in-lieu of benefits, pregnancy discrimination, health questionnaires and arbitration agreements.

1) Ninth Circuit throws a wrench in "cash-in-lieu of benefits" payments

Decision: In *Flores v. City of San Gabriel*, the plaintiff filed a putative collective action under the Fair Labor Standards Act alleging that the city's police officers were underpaid for overtime hours worked because the city excluded cash payments made to employees in lieu of benefits from their regular rate of pay used to calculate overtime. Specifically, the city offered police officers a flexible benefits plan under which the city furnished employees a designated monetary amount for the purchase of medical, vision and dental benefits. Employees were required to use a portion of these funds to purchase vision and dental insurance, but could decline to use the remaining funds for health insurance upon proof that the employee had alternate medical coverage. Instead, the employee could opt to receive the unused portion of his or her benefits allotment as a cash payment added to the employee's regular paycheck. The city did not consider the value of

the cash payment when calculating the employee's regular rate of pay for overtime.

On a matter of first impression, the Ninth Circuit found that cash-in-lieu of benefits payments should be considered compensation and included in the regular rate of pay calculation. The court further noted that the simple fact that the cash-in-lieu of benefits payments were not tied to hours worked or the amount of services provided did not mean they were not considered compensation for employment. The panel further found that the city's violation of the FLSA was willful because the city has taken no affirmative steps to ensure that its initial designation of its cash-in-lieu payments as benefits complied with the act.

Impact: In the wake of the Ninth Circuit's opinion, employers who provide flexible benefits plans should review their policies to ensure that they are correctly including "cash-in-lieu of benefits" payments when they calculate the regular rate of pay for non-exempt employees. From an economic perspective, the Ninth Circuit's decision is significant because increases in an employee's regular rate of pay will increase the employee's compensation for overtime hours worked. Some employers may decide to eliminate the "cash-in-lieu of benefits" option as a financial and risk control measure.

2) EEOC issues fact sheets regarding equal pay and pregnancy discrimination

Guidance: In connection with the White House United State of Women Summit, which took place on June 14, the Equal Employment Opportunity Commission issued three new fact sheets concerning equal pay and pregnancy discrimination

issues in federal law. The first fact sheet, titled “Equal Pay and the EEOC’s Proposal to Collect Pay Data,” discusses gender-based pay discrimination, emphasizing that such discrimination is still a persistent problem 50 years after the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. The guidance summarizes employees’ rights to equal pay under federal law and describes the EEOC’s recent proposal to collect pay data from employers, which the EEOC hopes will provide insight into pay disparities across industries and occupations, thereby contributing to federal efforts to combat discrimination. The second fact sheet, titled “Legal Rights for Pregnant Workers under Federal Law,” provides guidance regarding federal legal protections for women who are pregnant or may become pregnant, including altered break or work schedules, workplace accommodations and paid or unpaid leave under the Family and Medical Leave Act. Finally, the third fact sheet, titled “Helping Patients Deal with Pregnancy-Related Conditions and Restrictions at Work,” aims to educate health providers on federal protections under the Pregnancy Discrimination Act and the Americans with Disabilities Act that are available to patients who find that their pregnancies are interfering with work.

Impact: The EEOC typically issues fact sheets when it decides to prioritize investigations or litigation on a certain topic. It is therefore wise for employers to take this opportunity to review their policies to ensure that they conform with the best practices described in the EEOC guidance.

3) Employer’s health questionnaire violates bias laws

Decision: In *Equal Employment Opportunity Commission v. Grisham Farm Products, Inc.*, the United States District Court for the Western District of Missouri entered a consent judgment finding that a farm products company violated the

Americans with Disabilities Act and Genetic Information Nondiscrimination Act. The company required job applicants to fill out a three-page health history which asked the applicants to disclose if they had any of 27 health conditions (varying from allergies to sexually transmitted diseases) and whether they had consulted a doctor, therapist or other health care provider within the past 24 months and to identify “any future diagnostic testing” recommended or discussed by their health care provider. The EEOC brought suit on behalf of a retired law enforcement officer with disabilities who was deterred from applying for a job at the company’s warehouse after refusing to complete the form. The questions regarding health conditions were deemed to violate the ADA because they were phrased in terms of disability. The questions regarding healthcare provider consultations violated GINA because they would require an applicant without a manifested disease who has previously consulted about that disease because of family history/risk factors to reveal such information (which may not be solicited under GINA). The company is to pay the applicant $10,000 and may be monitored by the EEOC for the next five years.

Impact: While employers may request information relating to an applicant’s ability to perform job-related functions, employers must be careful that those requests are not phrased in ways that may be claimed to violate the ADA or GINA. Specifically, applicant questionnaires should avoid requesting information about disabilities or non-manifested diseases or including questions that could be interpreted as requesting such information, even if not explicitly doing so.

4) Seventh Circuit Creates Circuit split by holding that class actions waivers in arbitration agreements violate the NLRA

Decision: On May 26, the Seventh Circuit held in *Lewis v. Epic-Systems Corp.*, No. 15-2997, that the company's arbitration agreement, which prohibited employees from taking part in "any class, collective or representative proceeding" violated the employees' Section 7 right to engage in concerted activity under the National Labor Relations Act. The court emphasized that the right to take part in such proceedings is a substantive, rather than procedural, right under the NLRA and that it was unlawful for the company to require its employees to forgo that right as a condition of employment. Although the court recognized that the Federal Arbitration Act makes arbitration agreements as enforceable as other contracts, it emphasized that there was no conflict between the NLRA and FAA because any agreement that violates Section 7 of the NLRA falls within the FAA's savings clause (§ 2) for non-enforcement.

As we have explained in amicus briefs filed on behalf of the Chamber of Commerce of the United States, the Seventh Circuit made at least two fundamental errors. First, in holding that illegality under Section 7 of the NLRA is a generally applicable contract defense for purposes of Section 2's savings clause, the Seventh Circuit overlooked the fact that in *AT&T Mobility LLC v. Concepcion,* the Supreme Court rejected the functionally indistinguishable argument that California's rule against exculpatory clauses is a generally applicable defense for purposes of Section 2. Second, in holding that the FAA and NLRA are reconcilable — and hence that there is no need to identify in the NLRA a clear congressional command to override the FAA — the court overlooked the Supreme Court's core holding in *Concepcion*that the purposes of the FAA will be thwarted if the enforceability of arbitration provisions is conditioned on the availability of class procedures.

Impact: This decision is important because the Seventh Circuit is the first court of appeals to agree with the National Labor Relations Board's position in *D.R. Horton* that class action waivers in arbitration agreements are unlawful. Previously, the Second, Fifth and Eighth Circuits — as well as the California Supreme Court and dozens of federal district courts — had rejected the NLRB's stance, setting the stage for a future Supreme Court review to settle a circuit split. In the meantime, employers should be aware that mandatory class and collective action waivers may no longer be enforceable in federal courts in Illinois, Indiana and Wisconsin. Accordingly, employers will need to determine whether they can seek to enforce their arbitration provisions containing class waivers in the Second, Fifth or Eighth Circuits if those provisions are challenged by the NLRB or an employee.

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