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EMPLOYER NEWSLETTER

TWO IMPORTANT RULINGS AFFECTING EMPLOYERS: (1) CONFIDENTIALITY & NON-DISPARAGEMENT CLAUSES IN SEVERANCE AGREEMENTS MAY BE VOID; AND (2) PER DIEM COMPENSATION ARRANGEMENTS MAY LEAD TO OVERTIME LIABILITY

February 2023

Two (2) important employment law decisions were announced last week. First, on February 21, 2023, the National Labor Relations Board (NLRB) ruled, in *McLaren Macomb,* that severance agreements that prevent employees from discussing the terms of the agreement or from disparaging their former employer violate the National Labor Relations Act (NLRA).[1]

Second, on February 22, 2023, the U.S. Supreme Court ruled, in *Helix Energy Solutions Group, Inc. v. Hewitt,* that employees who are paid a "day rate" are entitled to overtime because they are not paid on a "salary basis" – even if they earn more than six figures.

Each case and its implications are discussed below.

Severance Agreements (NLRB Case)

McLaren Macomb is a teaching hospital in Michigan. It laid off a group of employees during the COVID-19 pandemic. The company offered affected employees severance pay in exchange for signing a legal release. The severance agreement included confidentiality and non-disparagement provisions.[1]

The workers filed Unfair Labor Practice ("ULP") charges, and the NLRB held that the confidentiality and non-disparagement clauses were unlawful. According to the NLRB, the

[1] The following language was included in the agreement:

"Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

Non-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

clauses were too broad and might "chill" workers' rights to work together to improve the terms or conditions of their workplace. (Such rights are protected under section 7 of the National Labor Relations Act.)

The *McLaren Macomb* ruling reversed the standard set by the Republican-era NLRB, which allowed such provisions in severance agreements. It is expected that the NLRB will issue follow-up guidance and that the decision will be appealed to the federal courts.

Until the dust settles, employers will need to decide whether to (1) eliminate confidentiality and non-disparagement clauses from their severance agreements (or decline to offer severance at all); or (2) include "beefed-up" disclaimers and written safeguards. More risk-averse employers will favor option #1. Less risk-averse employers will favor option #2.

Wage & Hour/Overtime (U. S. Supreme Court case)

The plaintiff in *Helix* worked as a tool-pusher on an offshore oil rig from 2014 to 2017. He was paid between $936 and $1,341 per day, no matter how many hours he worked in a given day. His annual compensation exceeded $200,000. The plaintiff filed a lawsuit in federal district court in Texas, alleging that he was owed overtime because his employer had misclassified him as exempt. The district court disagreed. It held that because the plaintiff received at least $936 for every week that he performed work -- significantly more than the $455 per week[2] required to meet the applicable minimum requirement for the salary basis test -- he was properly classified as exempt.

The plaintiff appealed the ruling to the Fifth Circuit Court of Appeals, which reversed the decision. The Fifth Circuit reasoned that the "salary basis test" requires an employee to be paid the same amount of salary on a weekly basis regardless of the number of days that the employee works in a particular workweek. Because the plaintiff's pay varied by the number of days he worked in a workweek, the Fifth Circuit concluded it did not meet the definition of a "salary" for purposes of the white-collar exemptions under the FLSA. The employer appealed to the U.S. Supreme Court.

The Supreme Court agreed with the Fifth Circuit. It held that a worker is not compensated on a salary basis, and therefore cannot qualify for the FLSA's white-collar exemptions, when the employee's paycheck is based solely on a daily rate, meaning the employee receives a certain amount if the employee works one day in a week, twice as much for two days, three times as much for three, and so on. Employees paid on this day-rate arrangement are thus entitled to overtime pay unless they qualify for some other exemption.

In reaching its conclusion, the Supreme Court analyzed regulations issued by the U. S. Department of Labor and pointed out that nothing in the definition of "salary basis" applies to a daily rate worker, who, by definition, is paid only for the day s/he works. Simply stated, the Court concluded that a day rate is not the same as a salary.[3]

[2] The current minimum weekly salary amount is $684. During the time of the lawsuit that amount was $455.

[3] The Court stated that an employer could comply with the salary basis test in two ways. First, it could guarantee that the employee would be paid the minimum salary each week required by the Fair Labor Standards Act. Second, it could convert the employee's compensation to a straight weekly salary for the time he spent working.

In light of the *Helix* decision, employers should ensure that they pay all employees covered by the so-called "white collar exemptions" (*i.e.*, executive, administrative, and professional exemptions) exactly as defined in the salary-basis regulations. Unfortunately, "creative compensation" arrangements can come back to bite an employer. Employers who misclassify workers can be liable for substantial unpaid overtime/back wages, liquidated (or "double") damages, and attorney's fees.

We will continue to monitor developments and provide updates as appropriate. Please let us know if we can help answer your questions or help you and your business decide how to make sure you are in compliance with the law. Mr. Clark's contact information is (480) 844-0039 or etc@clarkfirm.com.