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The NLRB Proposes New Joint-Employer Standard Limiting Employers' Liability

By Jessi L. Ziska*

Recently, the National Labor Relations Board ("NLRB") published a notice of proposed rule-making on the standard for determining joint-employer status. The proposed rule makes it less likely that a company would be deemed a joint-employer liable for labor law violations involving workers the company engages at arm's length, such as subcontractors or franchisees. Under the NLRB's proposed standard, an employer may be deemed a joint-employer of another employer's employees only if it possesses and exercises "substantial, direct and immediate control" over the essential terms and conditions of the employees' employment and has done so in a manner that is not "limited and routine." The proposed rule is intended to avoid forcing companies, who have not exerted control over the terms and conditions of employment of other companies' employees, to be involved in collective bargaining negotiations or defending against unfair labor practice charges with respect to those employees.

The Current Joint-Employer Standard

In 2015, the NLRB's decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*"Browning-Ferris"*) established a new joint-employer standard to replace the decades-old standard set forth in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984), both now reversed by *Browning-Ferris*. Under the the *Browning-Ferris* standard, which currently controls, multiple entities are deemed a joint-employer of a single workforce if (1) "they are both employers within the meaning of the common law" and (2) they "share or co-determine" matters governing the essential terms and conditions of employment. Essentially, if an employer retains the right to control another employer's employees — regardless of whether it actually exercises that control — this is sufficient to establish a joint-employer relationship with respect to those employees. The *Browning-Ferris* standard potentially exposes more companies to legal liability as joint-employers than the pre-2015 standard. Prior to *Browning-Ferris*, the NLRB defined a joint-employer as one who exercised "direct and immediate" control over the workers' terms and conditions of employment. A detailed discussion of the *Browning-Ferris* decision and pre-2015 standard can be found here.

A Move to Return to the Pre-2015 Joint-Employer Standard

The NLRB's December 2017 decision in *Hy-Brand Industrial Contractors, Ltd*, 365 NLRB No. 156 (2017) (*"Hy-Brand"*) overruled the controversial *Browning-Ferris* joint-employer standard. However, the *Hy-Brand* case was vacated by the NLRB in February 2018 for an alleged conflict of interest due to NLRB Member Emanuel's participation in the case, leaving employers once again subject to the *Browning-Ferris* standard. This hiccup did not deter the NLRB from re-establishing the pre-2015 joint-employer standard. Unable to overturn the *Browning-Ferris* standard through case ruling, the NLRB is engaging in rulemaking to overturn the current standard. Further, a standard issued through rulemaking is less likely to be reversed than a standard established by case ruling, since those rulings easily can be overturned if the NLRB majority flips.

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FLSA & Car Dealer Alert: What's Fair is Fair

By Lauren M. Drabic*

The Fair Labor Standards Act ("FLSA") provides wage and overtime protections for full- and part-time workers in both the private and public sectors. In particular, it establishes the federal minimum wage and generally requires covered employers to pay their employees an overtime rate at one and one-half times their regular rate of pay for hours worked over 40 in a workweek. However, the statute exempts certain employees from these minimum wage and overtime protections depending on the nature of the employee's position, duties, and pay. The statute lists more than a dozen categories of positions that are exempt from the FLSA's minimum wage and overtime protections. Federal regulations provide further guidance on positions that qualify as exempt.

Some FLSA provisions and related federal regulations are specific and leave little room for interpretation as to whether a certain position is exempt. For example, the FLSA specifically delineates that elementary and secondary school teachers are exempt from one or more of its protections, as are criminal investigators, police officers, firefighters, computer programmers, software engineers, cab drivers, babysitters hired on a casual basis, movie theater employees, and certain employees employed in agriculture. Federal regulations further delineate, by way of example, that doctors, lawyers, architects, and engineers typically are considered exempt employees. The applicability of other exemptions under the FLSA, however, are far from clear, even in light of additional guidance.

For nearly six decades, the Supreme Court held time and again that, when ambiguous, the provisions of the FLSA – including these exemption provisions – should be narrowly construed. In essence, this meant that unless the position at issue explicitly and irrefutably fell within the plain meaning of the FLSA's exemption provisions – or as the Supreme Court once put it, "plainly and unmistakably [fell] within the terms or the spirit" of those provisions – such a position could not be considered exempt from the statute's wage and overtime provisions. In practice, this meant that whenever it was unclear whether a particular position was exempt, courts were more likely to conclude it was not. This benefitted plaintiff employees bringing wage and hour claims alleging that their employers misclassified them as exempt.

In a recent decision, *Encino Motorcars, LLC v. Navarro*, the Supreme Court turned this longstanding precedent on its head. In *Encino Motorcars*, the Court interpreted the exemption under the FLSA that exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" from its overtime provisions. The Court addressed whether car dealership service advisors – *i.e.*, employees who consulted with customers about their automobile servicing needs and sold customers servicing solutions – fell under this exemption. The U.S. Court of Appeals for the Ninth Circuit concluded they did not. In reaching this conclusion, the Ninth Circuit applied the long-standing precedent that courts should narrowly construe the FLSA's provisions.

The Supreme Court reversed the Ninth Circuit's decision. After a lengthy discussion about the construction of the FLSA's text, the Court determined that service advisors fell within the "salesman, partsman, or mechanic" exemption, despite the fact that they neither sold automobiles nor were generally responsible for servicing them. The Court reached this conclusion by determining that these employees were technically "salesmen." Also, because these employees provided advice and sold services to customers, the Court found this technically could be interpreted to mean that they "serviced automobiles."

One easily could argue that the Court did not base its holding on a narrow construction of the FLSA. Departing from the Court's decades-long precedent, the Supreme Court explicitly rejected the principle of using narrow construction "as a useful guidepost for interpreting the FLSA." Instead, the Court had "no license" to give the FLSA's exemptions "anything but a fair reading." With this simple statement, the FLSA's provisions should now be interpreted "fairly" and no longer "narrowly."

While it is too soon to say what the full impact of the Court's *Encino Motorcars* decision will be, it likely will have far-reaching consequences. For the first time since the FLSA was enacted in 1938, the Supreme Court has given lower courts – and by extension, employers – license to take broader liberties in determining whether a position is exempt from the FLSA's wage and overtime provisions.

When classifying employees, employers should still proceed with caution and err on the side of classifying positions as non-exempt, particularly when there is room for interpretation. Misclassifying an employee as exempt can result in costly litigation, including back pay for unpaid overtime wages, liquidated damages, and payment of attorneys' fees and costs. However, the Supreme Court's *Encino Motorcars* decision is a positive development for employers.

***Lauren M. Drabic** works in Z&R's Cleveland office and practices in all areas of labor and employment law. If you have questions regarding the FLSA's wage and hour exemptions or other employment-related matters, please contact Lauren at lmd@zrlaw.com or 216.696.4441.

Cuyahoga County Council Passes Law Protecting Sexual Orientation & Gender Identity

By Patrick M. Watts*

The Cuyahoga County Council recently enacted Ordinance No. O2018-0009, which specifically outlaws discrimination based upon sexual orientation and gender identity or expression. The ordinance also outlaws discrimination based upon "race, color, religion, military status, national origin, disability, age, ancestry, familial status, and sex." Finally, the ordinance creates a Commission on Human Rights.

Commission on Human Rights

The ordinance creates a new Commission on Human Rights that is charged with promoting "principles of diversity, inclusion, and harmony in the County of Cuyahoga." The commission will have three members who are appointed by the County Executive and confirmed by the County Council. The ordinance requires that these members be licensed attorneys. The commission is charged with receiving, investigating, and attempting to mediate all complaints filed under the ordinance. Of note, the commission is charged with generally encouraging complainants to file a complaint with the applicable state and federal bodies, including the Ohio Civil Rights Commission and U.S. Equal Employment Opportunity Commission. The commission is authorized to decline the exercise of jurisdiction in most circumstances. However, the ordinance requires that complaints exclusively alleging discrimination based upon "sexual orientation and/or gender identity or expression… be adjudicated by the commission… without deferral" to the related state and/or federal agency.

The ordinance affords the commission the power to "review, hear, decide, and enforce final decisions rendered under" the ordinance. The commission also has the power to issue subpoenas, require production of evidence, require attendance of witnesses, order preservation of evidence, assess civil administrative penalties, issue cease and desist orders, take certain actions in court to secure evidence, and generally exercise other powers "reasonable and necessary to fulfill [its] purpose."

Complaints regarding "unlawful employment practice[s]" must be filed within 150 days after the alleged unlawful discriminatory practices or acts occurred. A response to any complaint is due within 30 days after service of any complaint. The ordinance contemplates that a hearing occur concerning the allegations contained in the complaint. Thereafter, the commission is charged with issuing a Final Decision and Order regarding whether the allegations are substantiated. To the extent the commission finds a violation, the commission can issue a cease and desist order and may issue civil penalties. Civil penalties may not exceed $5,000. The commission also may award reasonable attorneys' fees and costs to the complainant. Any party may appeal a commission decision to the Cuyahoga County Court of Common Pleas for judicial review.

Anti-Discrimination Law and Unlawful Employment Practices under the Ordinance

In addition to existing protections for various protected classes, the ordinance specifically adds protections for sexual orientation and gender identity or expression. The ordinance defines "[g]ender identity or expression" as "an individual's actual or perceived gender-related identity, appearance, expression, mannerisms, or other gender-related characteristics, regardless of the individual's designated sex at birth."

In addition to provisions relating to fair housing and public accommodations, the ordinance specifically prohibits "any employer, because of race, color, religion, military status, national origin, disability, age, ancestry, sex, sexual orientation, or gender identity or expression," from "discharg[ing] without cause," "refus[ing] to hire a person or otherwise… discriminat[ing] against any person with respect to hire, promotion, tenure, discharge, or any terms, conditions or privileges of employment, or any matter related to employment."

The ordinance also outlaws certain other actions, such as publishing or circulating discriminatory notices, advertisements, or failing to "classify properly" any individual within a protected class. The ordinance prohibits employers from eliciting information concerning membership in any protected class, including sexual orientation and gender identity or expression on any application for employment, unless based upon a bona fide occupational qualification. The ordinance further prohibits retaliation against any person for opposing practices forbidden by the ordinance. The ordinance has certain exceptions, including for religious organizations.

Cuyahoga County employers should implement necessary changes to existing policies to ensure compliance with this new ordinance.

***Patrick M. Watts**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions about this ordinance or the Cuyahoga County Commission on Human Rights, please contact Patrick at pmw@zrlaw.com or 216.696.4441.

New Year, New Wages: Minimum Wage Increases in Several States

By Moriah L. Stutler*

At the beginning of the year, several states, including Ohio, increased their minimum wage. In Ohio, the minimum wage increased by twenty-five cents per hour to $8.55 for non-tipped employees and $4.30 for tipped employees. Ohio's law applies to employers with gross revenue of $314,000.00 or more. Ohio employers grossing less than $314,000.00 are only required to pay the federal minimum wage, which is $7.25 per hour to non-tipped employees and $2.13 per hour to tipped employees. Additionally, Ohio employers only are required to pay minors age fifteen or younger the federal minimum wage.

Some states did not wait for the New Year to increase wages. On July 1, 2018, Maryland's minimum wage increased to $10.10 per hour, while District of Columbia's minimum wage increased to $13.25 per hour. On December 31, 2018, New York fast food employees saw a minimum wage increase to $12.75 per hour, and other New York employees saw an increase to $11.10 per hour. Other states will see increases later in 2019. For example, Oregon's minimum wage will increase to $11.25 per hour on July 1, 2019.

Recently, states have been moving towards the "Living Wage" and "$15 Minimum Wage Initiative." A number of states, including Florida, Hawaii, Maryland, Massachusetts, New Jersey, and New York have proposed bills that would increase their minimum wage to approximately $15.00 per hour within the next five to seven years.

Employers also should be aware that some municipalities have local laws setting higher minimum wages than the state minimum wage.

***Moriah L. Stutler** practices in all areas of labor and employment law. For more information about minimum wage and other wage and hour questions, please contact Moriah at mls@zrlaw.com or 216.696.4441.

The following table includes all increases to state minimum wages in 2019 (unless otherwise noted, all increases were effective January 1, 2019):

STATE	NON-TIPPED	TIPPED
Alaska	$9.89	$9.89
Arizona	$11.00	$8.00
California	$12 for larger employers; $11 for smaller employers	$12 for larger employers; $11 for smaller employers
Colorado	$11.10	$8.08
District of Columbia *(Effective 7/1/2018)*	$13.25	$3.89
Florida	$8.46	$5.44
Maine	$11.00	$5.50
Maryland *(Effective 7/1/2018)*	$10.10	$3.63
Massachusetts	$12.00	$4.35
Minnesota	$9.86 for larger employers; $8.04 for smaller employers	$9.86 for larger employers; $8.04 for smaller employers
Montana	$8.50	$8.50
New Jersey	$8.85	$8.85
New York *(Effective 12/31/18)*	$12.75 for fast food employees; $11.10 for other employees	$7.50 for food service employees; $9.25 for other service employees
Ohio	$8.55	$4.30
Oregon *(Effective 7/1/19)*	$11.25	$11.25
Rhode Island	$10.50	$3.89
South Dakota	$9.10	$4.55
Vermont	$10.78	$5.39
Washington	$12.00	$12.00

Z&R SHORTS

Please join Z&R in welcoming Alison Buzzard and Moriah Stutler to its Employment and Labor Groups

Alison Buzzard represents public and private sector employers in all aspects of labor and employment law. Prior to joining Zashin & Rich in 2018 at the firm's Columbus office, Alison worked as a law clerk assisting with public and private sector labor matters while she attended The Ohio State University Moritz College of Law. At Moritz, Alison served as an Associate Editor for the Ohio State Law Journal and took part in Ohio State's moot court program, both as a member of the Governing Board and a competitor and semifinalist in the National Moot Court Competition in Child Welfare and Adoption Law.

Moriah Stutler's practice encompasses all areas of labor and employment law. Prior to joining Zashin & Rich, Moriah spent several years at a big four accounting firm in the mergers and acquisitions tax practice, where she assisted large multinational companies execute multi-million dollar acquisitions, dispositions, and other global structuring transactions. Moriah earned her law degree and MBA from The University of Akron, where she was a graduate assistant in the department of finance.

Upcoming Speaking Engagements

March 6, 2019

Drew C. Piersall presents *"Emerging Trends in Discrimination and Retaliation Law"* at the Labor and Employment Law Section meeting of the Columbus Bar Association in Columbus, Ohio.

March 7, 2019

Jonathan J. Downes presents *"FMLA, ADA & Interactive Process"* at the Jobs and Family Services Human Resource Association Conference 2019 at the Quest Conference Center in Columbus, Ohio.

April 5, 2019

David R. Vance will be presenting on civil claims under Ohio Revised Code 2307.60, including civil theft, at the CMBA Litigation Section's lunch and CLE in Cleveland, Ohio.

April 24, 2019

George S. Crisci presents *"Train Your Supervisors to Mitigate Lawsuits"* and *"Create Documentation That is a Legal Shield"* at the National Business Institute's "Why Employers Get Sued: How You Can Stop It" seminar in Maumee, Ohio.

NLRB | Continued from page 1

The proposed rule could be even better for employers than the pre-2015 standard because, in listing the criteria for whether a company exercises enough control to be considered a joint-employer, the proposed rule requires substantial "direct and immediate control." The NLRB maintains that the proposed rule fosters predictability, consistency, and stability in the determination of joint-employer status.

After releasing the proposed rule, the NLRB accepted comments from the public, which it will now consider in formulating its final rule. Regardless of the final rule's language, employers must remain cognizant of the control they exert over subcontractors, independent contractors, etc., and analyze whether it creates an employment relationship with such individuals, giving rise to related liability.

***Jessi L. Ziska** practices in all areas of labor and employment law. If you have questions regarding the NLRB's proposed joint-employer rule, please contact Jessi at jlz@zrlaw.com or 216.696.4441.