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Overtime Exemptions, Predictive Scheduling, Sex Harassment, and More: Major Developments on Some Key Issues Affecting Retail Employers

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Spring may have been slow to arrive in some parts of the country this year, but the courts, state legislatures, and government agencies have been moving full speed ahead. In April, the U.S. Supreme Court issued a potentially game-changing decision in which it rejected the principle that courts should narrowly construe exemptions under the Fair Labor Standards Act ("FLSA"). On the heels of new "predictive scheduling" laws in New York City, the New York State Department of Labor issued its own proposed—and, in some ways, more exacting—rules on the matter. The New York State Legislature has been busy as well, enacting sexual harassment laws that impose significant new burdens on employers, including an annual training requirement. In addition, with the threat of workplace violence an ever-present concern, we provide some concrete guidance on how to manage and minimize the risks to your business. Finally, as summer approaches, we assess the impact of the U.S. Department of Labor's new "primary beneficiary" test on internship programs.

For retail employers trying to keep abreast of the latest laws, regulations, rulings, and best practices, this edition of *Take 5* delves into significant recent developments and important issues impacting their businesses:

1. **Supreme Court Ruling in *Encino Motorcars* Offers Hope for Retailers Trying to Manage Federal Overtime Exemptions**

2. **New York Department of Labor Proposes New Rules on Predictive Scheduling**

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1. Court Ruling in *Encino Motorcars* Offers Hope for Retailers Trying to Manage Federal Overtime Exemptions

By Paul DeCamp

Retailers have found it increasingly challenging to classify employees as exempt from federal overtime requirements since at least the mid-1980s. Businesses with multiple stores, in particular, see the risk of private class litigation or government enforcement action regarding overtime as a constant threat. Defending exemption decisions has often been an uphill battle because courts have demanded a very compelling showing of exempt status before ruling in favor of a business. A recent decision by the U.S. Supreme Court, however, appears to have significantly altered the legal landscape for evaluating exemptions, potentially making it less daunting for retailers to demonstrate that their employees are, indeed, exempt.

The Narrow Construction Rule

In 1945, in one of the first FLSA exemption cases to reach the Supreme Court, the Court cautioned that "[a]ny exemption from such humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The Court added that "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *Id.*

By the late 1950s, the Court no longer mentioned "due regard" for the statutory language, instead reducing the framework to the rule that "[i]t is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959). This statement of the rule found itself echoed in nearly every exemption case thereafter, in both the Supreme Court and the lower courts. While some courts questioned whether the narrow construction rule was anything more than a tiebreaker, most courts treated narrow construction as creating a strong presumption of non-exempt status.

Encino Motorcars: Narrow Construction No More

On April 2, 2018, the Supreme Court issued its highly anticipated ruling in *Encino Motorcars, LLC v. Navarro*. The Court determined that the specific employees at issue—service advisors at an automobile dealership—are exempt from the FLSA's overtime requirement. (For a more detailed discussion of the Court's decision, see our blog post.) People will long remember the 5-4 ruling, however, not for the exempt status of the particular plaintiffs in that case, but rather for the Court's rejection of the principle that courts construe FLSA exemptions narrowly:

> The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. . . . ***We reject this principle as a useful guidepost for interpreting the FLSA.***

Opinion at 9 (emphasis added, citation omitted). The Court observed that "[b]ecause the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'" *Id.* (citation omitted). The Court remarked that "exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. We thus have no license to give the exemption anything but a fair reading." *Id.* (citation omitted).

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. Among other points of disagreement, the dissent criticized the Court for rejecting the narrow construction principle for FLSA exemptions "[i]n a single paragraph . . . without even acknowledging that it unsettles more than half a century of our precedent." Dissent at 9 n.7.

What *Encino Motorcars* Means for Retailers

Retailers have long been in the crosshairs for wage and hour claims concerning the exempt status of assistant managers in multi-department stores, store managers in single-department sites, loss prevention personnel, and a variety of administrative and professional roles at the corporate offices. Indeed, the 2016 efforts by the Department of Labor to more than double the minimum salary threshold for the FLSA's executive, administrative, and professional exemptions seems to have contributed to a new surge in manager and assistant manager claims, even though a federal judge in Texas issued a last-minute injunction barring the Department's proposed regulatory changes from taking effect.

After *Encino Motorcars*, private plaintiffs or government agencies seeking to challenge exempt status must do so under the "fair interpretation" standard, which seems to place the parties on a more equal legal footing. This new standard does not mean that retailers should necessarily change which employees they classify as exempt, but it does seem to suggest that employers will have a better chance of prevailing than under prior law. As always, it remains important to be mindful of state law, as it would not be surprising to see some states decline to adopt the fair interpretation standard for construing state overtime exemptions.

2. New York Department of Labor Proposes New Rules on Predictive Scheduling

By Jillian de Chavez-Lau

Just as New York City's predictive scheduling laws (also known as the "Fair Workweek" laws) took effect in November 2017, the New York State Department of Labor released a proposal that would similarly expand current state regulations regarding shift scheduling and pay—and to go even further than the New York City laws in certain respects.

New York City Predictive Scheduling Law

New York City's Fair Workweek laws, which went into effect on November 26, 2017, curtail retailers' flexibility in scheduling employees' shifts. The laws require "retail businesses" (entities with 20 or more employees who are engaged primarily in the sale

of consumer goods at stores within the city) to schedule their employees' shifts at least 72 hours in advance, while generally prohibiting employers from adding or cancelling shifts with less than 72 hours' notice. Retailers can no longer require employees to come to work with less than 72 hours' notice (unless the employee provides written consent), or require them to call within fewer than 72 hours before the start of a shift to determine if they should come to work.

New York State Department of Labor's Proposal

The proposed New York State regulations would go even further than the New York City laws—they would apply to all industries and occupations that are not exempt from the minimum wage law or covered by a separate minimum wage order. The proposed regulations would certainly impact not only retailers but also employers in numerous other industries.

Under current New York State law, employers must pay an employee for four hours of call-in pay if the employee reports to work and is sent home early. The New York State Department of Labor's amendments propose additional scenarios requiring call-in pay at the basic minimum hourly wage:

- two hours of call-in pay when a shift is scheduled less than 14 days before the start of the shift,

- four hours of call-in pay when shifts are cancelled less than 72 hours before the start of the shift,

- four hours of call-in pay when an employee is required to be in contact less than 72 hours before the shift to find out whether to report for that shift, and

- four hours of call-in pay when an employee is required to be on call.

The proposed regulations would not apply to (i) employees covered by a collective bargaining agreement that expressly provides for call-in pay, or (ii) during workweeks when an employee's weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

What Employers Should Do Now

The predictive scheduling trend is on the rise and is not limited to New York State and City. Predictive scheduling laws have already been implemented in San Francisco, San Jose, and Seattle. Oregon's predictive scheduling law will take effect on July 1, 2018. Common elements to all of these laws are (i) the requirement for covered employers to provide advance notice of employees' work schedules, and (ii) penalties and/or premium pay if employers change schedules without the requisite amount of notice.

Retailers in New York should strive to ensure compliance with New York City's regulations, including updating policies and procedures and training managers on these

issues. In preparation for the proposed regulations, employers should consider implementing scheduling practices that, among other factors, require employee shifts to be scheduled at least 14 days in advance.

3. New York State's Budget Includes New Sexual Harassment Laws

By Marc-Joseph Gansah

Several new laws enacted through the New York State Budget on April 12, 2018, now address sexual harassment in the workplace for both public and private employers.

Prohibition of Mandatory Pre-Dispute Arbitration Agreements

Employers with four or more employees are prohibited from incorporating mandatory pre-dispute arbitration clauses requiring the resolution of allegations or claims of sexual harassment in written employment contracts. This provision applies only to contracts entered into *after* July 11, 2018, the effective date of this law.

If a contract entered into after July 11, 2018, contains a prohibited mandatory pre-dispute arbitration clause, the clause will be rendered null and void without affecting the enforceability of any other provision in the contract.

Employers may continue to use mandatory pre-dispute arbitration clauses for all other claims unrelated to sexual harassment so long as the clauses are agreed to by the parties and are in accordance with federal law.

Additionally, where a conflict exists between a collective bargaining agreement and this law pertaining to mandatory pre-dispute arbitration clauses, the collective bargaining agreement will be controlling.

Ban on Some Nondisclosure Agreements

Effective as of July 11, 2018, New York State will also ban nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims, unless the condition of confidentiality is at the complainant's and/or plaintiff's preference.

If the complainant or plaintiff prefers to include a confidentiality clause in a settlement or agreement, he or she will have 21 days after receiving such settlement or agreement to consider the clause, and seven days following the execution of any such settlement or agreement to revoke it.

Mandatory Sexual Harassment Policy and Annual Sexual Harassment Prevention Training

Effective as of October 9, 2018, employers in New York State must maintain a written sexual harassment policy and provide annual training to employees. To assist employers in creating a policy and training program, the New York State Department of Labor, in consultation with the New York State Division of Human Rights, will (i) create and publish

a model sexual harassment prevention guidance document and a sexual harassment prevention policy that employers may use to satisfy their obligations under the law, and (ii) create a model sexual harassment training program addressing appropriate conduct and supervisor responsibilities.

Employers will be required to either adopt the model sexual harassment prevention policy and the model sexual harassment prevention training program or establish policies and training programs that equal or exceed the minimum standards provided by these models. A policy must be provided in writing to all employees.

Protections for "Non-Employees"

As of April 12, 2018, employers are subject to liability to non-employees, such as contractors, subcontractors, vendors, consultants, or other non-employees providing services to the employer, for sexual harassment. This liability arises when (i) the employer, its agents, or supervisors knew (or should have known) that a non-employee was subjected to sexual harassment in the workplace, and (ii) the employer failed to take immediate and appropriate corrective action.

Additional Provisions for Public Employers

1. *Requirements for Contractor's Competitive Bid Statement*

A state contractor's competitive bid statement must certify that it (i) has "implemented a written policy addressing sexual harassment prevention in the workplace," and (ii) "provides annual sexual harassment prevention training to all of its employees." When a competitive bid statement is not required, the department, agency, or official can require a bid statement to include the information noted above.

2. *Reimbursement by Public Employees Found Liable for Intentional Wrongdoing*

As of April 12, 2018, a public employee who has been found personally liable for intentional wrongdoing related to a claim of sexual harassment must reimburse any State agency or entity that makes a payment on his or her behalf within 90 days of the State agency's or entity's payment.

Conclusion

These new laws will impact private employers by (i) prohibiting mandatory pre-dispute arbitration agreements relating to sexual harassment complaints, (ii) banning nondisclosure agreements for sexual harassment claims, (iii) requiring employers to enact written sexual harassment policies and conduct annual sexual harassment trainings for all employees, and (iv) expanding liability for sexual harassment claims to certain non-employees. Employers should become familiar with the new requirements and review their agreements, policies, and programs regarding sexual harassment to ensure compliance. Employers should also be aware that similar proposed laws await Mayor Bill de Blasio's signature and will likely become effective soon in New York City.

4. Workplace Violence Prevention in the Retail Industry

By Andrea K. Douglas and Katrina J. Walasik

The nature of retail employment—including employee contact with the public, the exchange of money, the delivery of goods or services, working alone or in small numbers, and working late at night or during early morning hours—is recognized as creating a greater risk of violence than an average office workplace. Under the Occupational Safety and Health Act's ("OSHA's") General Duty Clause, the Occupational Safety and Health Administration has broad authority to issue citations and penalties to employers that fail to take appropriate steps to minimize the risk of workplace violence. It is extremely important that retail employers, which are inherently vulnerable to workplace violence risks, take the following affirmative steps to minimize their risks:

Conduct a Risk Assessment of the Workplace

A critical first step in combating workplace violence is to assess potential security threats. An effective method of threat assessment begins with examining the physical layout of the workplace to determine areas of potential risk. In conducting a threat assessment, it is recommended that employers reference the OSHA workplace typology, which classifies workplace violence incidents based on the relationship between the perpetrator and target. This will help employers tailor their risk assessment based on historical data pertaining to industry-specific vulnerabilities.

Develop a Workplace Violence Policy

Implementing a zero-tolerance workplace violence policy is one of the best protections employers can provide to their personnel. Employers may utilize the results from their specific risk assessment to create a policy that covers employees, customers, contractors, and others who interact with company personnel through the regular scope of business. A workplace violence policy should include, but not be limited to, a statement of the employer's commitment to providing a safe workplace; provide information about how to respond to a violent incident; and set forth a code of conduct that prohibits all behavior that could reasonably be interpreted as an intent to cause physical harm to others.

Use Administrative Controls to Protect Employees

Employers should also utilize the results of the risk assessment to determine areas of vulnerability where preventative measures can be taken to improve employee safety. This could include the installation of additional lighting, mirrors, or security cameras in parking structures or areas of entry and exit—if these access points create areas of potential risk for workplace violence.

Train Employees to Respond

Additionally, employers should openly communicate with their employees about what type of behavior constitutes workplace violence and the potential consequences for violating

company policies relating to workplace violence. Employees should also be trained on how to identify a potential crisis, how to avoid escalating or exacerbating an incident, and how to respond to a crisis. While training cannot guarantee that a violent incident will not occur, it may help to lower the risk and better prepare employees on how to respond if an incident occurred.

Conclusion

Employers in every industry, but particularly in the retail space, should conduct a threat assessment for potential areas of risk and work in conjunction with counsel and/or consultants to ensure that employee safety is adequately addressed both through training and other safeguards, where feasible and practical.

5. The Impact of the New DOL Test on Upcoming Summer Internship Programs

By Jeffrey M. Landes and Shira M. Blank

As the summer approaches, many retail companies, and particularly high-end retailers, are gearing up for their summer internship programs. As retailers advertise, recruit, and prepare to manage internship programs, it is imperative that they are fully aware of the legal and practical considerations and pitfalls associated with these programs in order to avoid liability under, among other things, wage and hour laws. Indeed, in the past few years, many retailer employers have fallen victim to class action lawsuits brought by former interns who asserted that companies had misclassified them and that they were, in fact, employees. If interns are deemed to be employees, they must be paid minimum wage and overtime.

On January 5, 2018, the U.S. Department of Labor formally adopted the "primary beneficiary" test that was already used by several federal appellate courts to determine whether unpaid interns at for-profit employers are employees for purposes of the FLSA. Unlike the Department's previous test (which, in practice, had the effect of only allowing interns to "shadow" employers), no one factor of this test is dispositive; thus, it allows employers increased flexibility when classifying their interns. Nevertheless, given the nature of internship programs in the retail industry, retailer employers remain particularly susceptible to intern wage and hour lawsuits.

When Are Unpaid Interns Considered Employees?

The "primary beneficiary" test adopted by the U.S. Department of Labor examines the economic reality of the relationship between the unpaid intern and the employer to determine which party is the primary beneficiary of the relationship. The following seven factors make up the "primary beneficiary" test, and, as stated, no one factor is dispositive:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

If a retail employer's interns fits within these exceptions, the internships may be unpaid.[1]

The Practical Implications for Retailers' Internship Programs

In order to satisfy the "primary beneficiary" test, employers should ensure that the internships that they develop:

- provide educational training and/or academic credit;

- contain limited, if any, clerical or manual work; and

- provide assignments that are appropriately tailored, such that the unpaid intern is the primary beneficiary of the internship.

These types of internships may be particularly helpful to an employer that merely seeks to have interns "shadow" other employees in order to learn about the industry and obtain relevant experience, and perform high-level assignments that predominantly benefit the individual.

Even when an employer meets the "primary beneficiary" test, it is not prohibited from paying its interns. In fact, paying the interns minimum wage can allay any concerns

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[1] Importantly, recent amendments to the New York City Human Rights Law extend anti-harassment and anti-discrimination protections to unpaid interns. Accordingly, even where an unpaid intern is properly classified, employers should be aware that such an intern is still covered by discrimination and harassment laws, which historically applied only to employees.

regarding what type of work the intern is doing or who the work is benefiting, and it can serve as a shield against any potential wage and hour misclassification claims. Indeed, the larger the intern class or program, the more vulnerable the employer will be to a class action lawsuit. Moreover, by paying interns minimum wage, the employer will be able to assign interns any work that it believes serves a business purpose, while also making the experience beneficial for the interns.

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For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters, or any of the authors of this *Take 5:*

Shira M. Blank
New York
212-351-4694
sblank@ebglaw.com

Jillian de Chavez-Lau
New York
212-351-4735
jdechavezlau@ebglaw.com

Paul DeCamp
Washington, DC
202-861-1819
pdecamp@ebglaw.com

Andrea K. Douglas
Los Angeles
310-557-9527
adouglas@ebglaw.com

Marc-Joseph Gansah
New York
212-351-4618
mgansah@ebglaw.com

Jeffrey M. Landes
New York
212-351- 4601
jlandes@ebglaw.com

Katrina J. Walasik
Los Angeles
310-557-9577
kwalasik@ebglaw.com

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