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Second Circuit Decisions on Current Issues

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Sills Cummis & Gross P.C.

Article By Galit Kierkut
David I. RosenCharles H. Kaplan
Jill Turner LeverSills Cummis & Gross P.C.
Client Alerts

Communications, Media & Internet
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Litigation / Trial Practice
2nd Circuit (incl. bankruptcy)

In two recent decisions, the United States Court of Appeals for the Second Circuit (covering New York, Connecticut and Vermont) addressed timely employment and labor issues, under federal laws, involving social media and independent contractors. While these decisions are not ground-breaking, the decisions provide useful guidance to employers grappling with these issues in the Second Circuit and around the nation.

NLRB v. Pier Sixty LLC

In NLRB v. Pier Sixty LLC, Nos. 15-1841-ag, 15-1962-ag (2d. Cir. April 21, 2017), one of two issues addressed by the court was the extent to which the National Labor Relations Act ("NLRA" or the "Act") protects an employee's comments on social media and the point at which an employee's conduct loses the NLRA's protection. On this point, the court affirmed the decision of the National Labor Relations Board ("NLRB") that the employer violated Sections 8(a)(1) and 8(a)(3) of the NLRA by discharging employee, Hernan Perez, because Perez's conduct was not so "opprobrious" so as to lose the Act's protection. In so doing, the court noted that its decision "rests heavily" on the deference afforded to the NLRB's factual determinations found after a 6 day bench trial. The court further observed that Perez's conduct sits at the "outer-bounds of protected, unionrelated comments."

The employee's Facebook post, made in the midst of a union organizing campaign, profanely insulted his boss's mother and family and encouraged other employees to vote for the union. The post came to the attention of the employer, which, following investigation, terminated Perez. Later that day, Perez filed a charge with the NLRB alleging that he had been terminated in retaliation for "protected concerted activity." A worker's right to engage in concerted activity regarding terms and conditions of employment activity is protected by Section 7 of the Act, Sections 8(a)(1) and 8(a)(3) of the NLRA, prohibit an employer from discharging employees for such protected conduct. The NLRB utilized a nine factor "totality of the circumstances test" developed by the NLRB's General Counsel's Office that limits the ability of employers to issue rules regarding use of social media, even where employees were posting public criticisms of their employers and workplace. The court noted that even though the employee's message was "dominated" by vulgar attacks on Perez's boss and his family, the subject matter included workplace concerns. Second, the employer consistently tolerated profanity among its workers. Third, the "location" of the comments was on an online forum, and as such, the outburst was not in the immediate presence of customers. Thus, the court ruled that the employer failed to meet its burden of showing that Perez's behavior was so egregious as to lose the protection of the NLRA.

Employer Tip

Because the NLRA covers all employers in interstate commerce, employers must carefully consider taking disciplinary action on the basis of employee social media posts, both in union and non-union settings, as the coverage of the NLRA continues to be construed broadly. Employers should take the opportunity to review and update their employment policies, including social media policies, to address these legal developments.

Saleem v. Corporate Transportation Group, Ltd.

In Saleem v. Corporate Transportation Group, Ltd., 15-88-cv (2d Cir. April 12, 2017), drivers of black cars filed a suit claiming violations of the federal Fair Labor Standards Act ("FLSA") and the New York Labor Law. The United States District Court for the Southern District of New York dismissed the case, holding that the drivers were

independent contractors of Corporate Transportation Group (“CTG”), the owner of the black-car “base license.” Specifically, the District Court found that the defendants had limited control over how much the drivers could profit or lose from their efforts, and did not require any specialized skill, and allowed the drivers to set their own hours and time off without advanced notification.

On appeal, the Second Circuit addressed the “economic reality” of the drivers’ relationship with CTG. The court concluded that the economic reality was that the drivers each operated like a small business, and decided to affiliate with CTG based on their perceived economic interests. A key factor was that the drivers in this case purchased or rented their franchises. Accordingly, the Second Circuit affirmed the District Court’s dismissal of the action.

Employer Tip

The misclassification of employees as independent contractors is a hot enforcement issue. While the trend is for agencies and courts to find in favor of “employee” status, the case at hand has unique facts by virtue of the franchise arrangement. Employers should carefully review their engagement of independent contractors, and note that, in New York City, any such arrangements must be in writing as of May 15, 2017. For additional information, please see our 2017 April Alert "Protections Continue to Grow for Individuals in the Workplace".