A Busy 2017 Sets the Stage for Further Wage-Hour Developments

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Recently, we wrote about the significant wage-hour developments of 2017. Those developments set the stage for some rather substantial issues to be addressed.

Arbitration Agreements with Class Action Waivers

With briefing and oral argument complete, it now is only a matter of time before the U.S. Supreme Court issues its ruling in three cases involving the enforceability of arbitration agreements with class action waivers. That ruling, whenever it issues, will have a significant impact on wage-hour litigation, at least in the federal courts.

The Court is likely to rule in one of three ways:

1. hold that arbitration agreements with class action waivers are unenforceable, opening the floodgates to more employee class and collective actions;
2. hold that arbitration agreements with class action waivers are enforceable, leading more employers to use them; or
3. hold that such agreements are enforceable so long as certain conditions are met, such as making entry into the agreement voluntary and assuring employees that failure to sign the agreement will not result in adverse consequences.

Will Other States Implement Statutes Like California’s Private Attorneys General Act?

Employers with operations in California are likely familiar with California’s Private Attorneys General Act (“PAGA”). Some are perhaps too familiar with it.

PAGA allows an employee to step into the shoes of the state’s Attorney General and file suit on behalf of all other “aggrieved employees” for a variety of alleged violations of California’s Labor Code. The potential exposure in these cases can be huge.

PAGA lawsuits are attractive to employees and their attorneys because they are not technically “class actions.” Instead, they are “representative actions.” The difference is more than semantic.

As PAGA actions are not class actions, they usually cannot be removed to federal court under the Class Action Fairness Act. And, as employees are filing suit on behalf of others, not themselves, courts have held that PAGA claims are not subject to arbitration agreements signed by plaintiff employees.

Having seen their counterparts in California use PAGA to avoid federal court and arbitration—and to obtain large settlements—there are rumblings that plaintiffs’ attorneys in other states will push for similar legislation. No such legislation is currently pending, but it may just be a matter of time. And that time may come in 2018—particularly
if the Supreme Court rules to uphold class action waivers in arbitration agreements. Indeed, the Center for Popular Democracy has already announced that it plans to campaign for PAGA-like statutes in several states, including New York, in the upcoming year.

**A New Proposed Salary Level for White-Collar Exemptions**

In 2017, the U.S. Department of Labor ("DOL") abandoned its 2016 “Final Rule," which would have more than doubled the minimum salary for the executive, administrative, and professional overtime exemptions from $455 per week ($23,660 per year) to $913 per week ($47,476 per year). The DOL secured a stay from the U.S. Court of Appeals for the Fifth Circuit of the lower court decision invalidating the 2016 Final Rule, to allow the DOL time to issue a new rule.

In July, the DOL issued a Request for Information ("RFI") soliciting public comment on 11 questions seeking input on what requirements and thresholds an appropriate replacement rule should contain.

We expect to see a Notice of Proposed Rulemaking in 2018. Based on Secretary of Labor Alexander Acosta’s statements to date and the RFI, we anticipate that the proposed revised regulation will raise the salary threshold to a figure in the neighborhood of $32,000 to $35,000 and may loosen the other criteria for determining when an employee may be classified as exempt.

**Further Changes in Federal Wage-Hour Enforcement Policies and Practices**

Secretary Acosta has already made a number of changes to how the DOL's Wage and Hour Division ("WHD") will approach its mission, including (i) withdrawing Administrator’s Interpretations regarding joint employment and independent contractor versus employee status, (ii) announcing that the WHD will resume the long-standing practice—suspended during the Obama administration—of issuing opinion letters to provide guidance to the public, and (iii) announcing withdrawal of a 2011 final rule regarding the standards for tip pooling.

In 2018, candidates for further changes to WHD enforcement include:

- abandoning the pursuit of liquidated damages for investigations that resolve at the administrative level;
- narrowing the range of matters for which the agency will seek civil money penalties by focusing on clearly willful scenarios and repeated violations substantially similar to prior violations;
- less burdensome initial demands for information and documentation regarding related entities and individuals, as well as vendors and other business partners; and
- greater willingness to supervise back wage payments when an employer is willing to approach the WHD to confess a violation.

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