



NLRB CLARIFIES ITS POSITION ON AT-WILL EMPLOYMENT POLICIES



Ronald G. Daves

“Employers began to worry that their most sacred management rights provision is now being claimed by the NLRB to be illegal.”

Employers have long been warned that they must include at-will employment language in their employment policies, in order to preclude an employee from claiming that the employer’s employee handbook or other personnel policies constituted an enforceable contract. These provisions are often written by lawyers and referred to as “disclaimers.” During the last year, the National Labor Relations Board (NLRB) raised serious issues about the legality of certain employer disclaimers.

In early 2012, an NLRB Administrative Law Judge ruled that a written, at-will employment policy that employees were required to sign violated the NLRA because it constituted an agreement by the employees never to act in concert with one another to change the at-will relationship. The particular language in the case at hand stated: “I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way.” *American Red Cross Arizona Blood Services Region*, Case 28-CA-23443. Because of that decision and related complaints from the NLRB, employers began to worry that their most sacred management rights provision is now being claimed by the NLRB to be illegal.

Fortunately, the NLRB General Counsel subsequently issued two Advice Memoranda (Case 32-CA-086799 and Case 28-CA-084365) explaining its position and indicating that some types of disclaimers were indeed lawful. One of the disclaimers referring to at-will employment stated as follows:

“Employment with [the Employer] is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of [the employer] has any authority to enter into an agreement of employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.”

The Advice Memos indicated that the at-will language was not written in a way that requires employees to waive their rights. The memoranda confirmed that there really is no inherent conflict between the employment at-will doctrine and an employee’s right to engage in collective bargaining.

Editor’s Note: This issue illustrates that employment disclaimers, including at-will employment policies, need to be prepared or at least reviewed by an attorney who practices in labor and employment law. In addition to at-will employment language, most disclaimers include other issues including the issue of whether the policy is a contract and the employer’s right to modify such terms in the future. Employers should keep all policies updated to comport with changes in the law.

DOL ISSUES PPACA'S MODEL NOTICE OF COVERAGE OPTIONS; EMPLOYERS MUST PROVIDE THE NOTICE TO EMPLOYEES BY OCTOBER 1, 2013



Cathy Shuck.....

"The Notice of Coverage Options is intended to inform employees about their options for obtaining health insurance through their employer and/or through their state's Health Insurance Exchange."

The Patient Protection and Affordable Care Act (PPACA) requires all employers covered by the Fair Labor Standards Act (FLSA) to provide all employees with a "Notice of Coverage Options." The due date for the Notice was originally March 1, 2013, but shortly before that date the Department of Labor (DOL) deferred the requirement until further notice. This month the DOL announced that employers must provide the Notice to current employees by October 1, 2013. Employees hired after October 1, 2013 must receive a Notice within 14 days of their start date.

The Notice of Coverage Options is intended to inform employees about their options for obtaining health insurance through their employer and/or through their state's Health Insurance Exchange (which the government now calls the "Marketplace"). The DOL has promulgated Model Notices, available at <http://www.dol.gov/ebsa/healthreform/index.html>. One Model Notice is intended for employers that do not provide health insurance; the other is intended for employers that do provide health insurance.

Employers do not have to use the Model Notices, but must provide all the information that is contained on the Model Notices to employees. This information includes basic information about the Exchange/Marketplace, contact information for the employer, and basic information about availability of insurance through the employer. The Model Notice for employers that do provide insurance includes an optional section for the employer to provide detailed, employee-specific information as to eligibility and cost. Again, providing this level of personalized information is optional under the current rules.

Interestingly, because the status of the Exchanges/Marketplaces is so uncertain in most states (including Tennessee), the model notice does not require any specific information about the state's Marketplace. Rather, employees may simply be directed to www.HealthCare.gov, which is the main website for all consumer information on PPACA.

All employers covered by the FLSA must provide a Notice to all employees, including part-time and full-time employees. The Notice must be provided to exempt employees as well as non-exempt employees. The notice must be provided in writing. It may be provided electronically, as long as the electronic delivery meets the requirements of the DOL's electronic disclosure safe harbor at 29 C.F.R. 2520.104b-1(c).

Please consult Cathy Shuck or another Wimberly Lawson attorney if you have any questions about how the Notice requirement applies to your organization.



KNOW YOUR ATTORNEY EDWARD H. TRENT

EDWARD H. TRENT is a Member of Wimberly Lawson Wright Daves & Jones, PLLC in the Knoxville, Tennessee office of the firm, which he joined in 2011. His practice includes labor and employment law matters in both state and federal court and before state and federal agencies. Ed's broad range of experience includes jury trials in employment discrimination cases, including the defense of appeals before federal and state appellate courts, day-to-day preventative counseling and advice, training for supervisor and human resources personnel on managing the workplace and complying with federal, state and local employment laws and regulations. Ed also works with churches on child protection issues and employment law

matters, including filing an amicus brief in the case of *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694 (2012), upholding the "ministerial exception" to the application of state and federal employment laws to religious organizations. Ed received his Bachelor of Science degree in Accounting from the University of Florida and his law degree from Duke University School of Law. He has been admitted to practice in the United States District Court, Eastern and Middle Districts of Tennessee, the United States Court of Appeals, Eleventh Circuit, and the United States Supreme Court. Ed is Board Certified in Labor and Employment Law by The Florida Bar.

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GOOD NEWS FOR EMPLOYERS REGARDING CLASS AND COLLECTIVE ACTIONS FROM THE SUPREME COURT



Jerome Pinn

"Given the popularity of both class and collective actions in wage and hour claims, these decisions definitely improve the outlook for employers defending against such claims."

Two recent cases from the U. S. Supreme Court are good news for employers defending against class and collective actions under State and Federal wage and hour laws. In *Genesis HealthCare Corp. v. Symczyk*, the Court ruled that when the claim of an individual who sued under the Fair Labor Standards Act (FLSA) was extinguished, the claims of others who might be "similarly situated," but who had not yet joined the case, died with the original filer's claim. The Court also let stand the lower court's holding that a claimant who is offered full relief but rejects or ignores that offer is subject to having their case dismissed. In *Comcast v. Behrend*, a consumer class action case, the Court reaffirmed what it had held in *Dukes v. WalMart*: that difference among the plaintiffs and their claims may justify denial of class action status. It also held that courts must examine requests for class status very carefully, and not just give plaintiffs a green light. Given the popularity of both class and collective actions in wage and hour claims, these decisions definitely improve the outlook for employers defending against such claims.

Symczyk was filed as a collective action under §216(b) of the FLSA. In collective actions, other plaintiffs who are "similarly situated" to the individual filing the lawsuit must "opt in," or file written consents to join the action. (In contrast, in class actions under Rule 23 like *Behrend*, everyone who has a similar claim is automatically included unless they take steps to "opt out.")

Symczyk, a registered nurse, alleged that she and others who worked for Genesis had been denied pay because Genesis automatically deducted 30 minutes from their paid time for a daily lunch break but they often worked through lunch, missed their break, and thus were denied pay for hours worked. Early in the litigation, Genesis offered *Symczyk* a sum of money that represented full relief – the maximum amount she could win if she prevailed on all her

claims – plus reasonable attorneys' fees, under Rule 68 of the Federal Rules of Civil Procedure. *Symczyk* ignored the offer, and sought to proceed with the litigation: the district court determined that because Genesis had offered her full relief, even though she did not take it, her case was moot and should be dismissed.

Symczyk appealed, saying that even if her claim was dead, the claims of others who were "similarly situated," having also been denied pay when they worked through meal breaks, should be allowed to proceed. The Court of Appeals for the Third Circuit agreed, and reinstated the case. Genesis asked for Supreme Court review. Its petition was granted, and the Supreme Court reversed the Third Circuit, holding that the claims of other potential plaintiffs who had not yet joined the lawsuit when it was dismissed due to *Symczyk's* rejection of the Rule 68 offer did not survive the dismissal.

Perhaps the most controversial aspect of *Symczyk* lies in something the Court didn't say: it let stand, without examining, the lower court's decision condoning dismissal of the plaintiff's case after she was offered, and refused (by ignoring the offer) full judgment satisfying her claims. An offer of judgment under Fed. R. Civ. P. 68 is an important tool in a defendant's arsenal to short-circuit a lawsuit and avoid expensive litigation – a problem that is particularly acute in FLSA cases where the law requires the defendant to pay attorneys' fees. If, as in *Symczyk*, an employer offers to pay the full amount of back wages, plus reasonable attorneys' fees, a plaintiff who refuses that offer and continues litigation could possibly forfeit a collective action, also preventing the plaintiffs' lawyers from collecting fees for services incurred after the date the offer is made. This is an important disincentive to lawyers eager to bring FLSA lawsuits.

Comcast was a Rule 23 "opt out" class action case. A group of customers sued the cable provider, claiming that they had been harmed because the company had created and abused a monopoly position in the market, denying them choices (and potentially lower prices) for cable service. The Supreme Court held that the case should not have been certified as a class action because individual questions regarding how different customers had been harmed predominated over class-wide questions. The Court reiterated that it had meant what it said in *Dukes v. WalMart*: that lower courts should probe beyond the pleadings, and conduct a rigorous analysis of the claims, before allowing a case to proceed as a class action.

Comcast matters to employers because shortly after publishing that opinion, the Supreme Court, citing *Comcast*, reversed and remanded to the 7th Circuit a case called *Ross v. PBS Citizens, NA*. *Ross* was a hybrid FLSA collective action/Illinois



Mary Moffatt Helms

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ADVANCE PREPARATION OF SECTION 1 BY ELECTRONIC I-9 PROGRAMS IS PROHIBITED

On April 11, 2013, the American Immigration Lawyers Association Verification and Documentation Liaison Committee held a meeting with officials from the Immigration and Customs Enforcement (ICE) HSI Worksite Enforcement Unit. One of the issues discussed was the advance preparation of Section 1 of the I-9 form by electronic I-9 programs. This is an important issue for many employers who use electronic I-9 systems. Many electronic I-9 systems are integrated with other HR systems and seek to create efficiencies in the hiring process by inserting employee information in Section 1 from data in the employer’s intake program.

In what we believe is a fairly significant change in the agency’s position on this issue, ICE stated that advance preparation of Section 1 is not permissible, regardless of whether the preparer/translator section is completed and regardless of whether the individual employee provided the original information that is used.

Based on these statements, employers should be aware that an electronic I-9 program that involves advance preparation of employee information in Section 1 carries some legal risk. The agency’s position applies to an employer’s existing and future electronic I-9s.

It is not clear why ICE has taken this position. We are monitoring this change and hope to provide more information in the near future.

“CLASS AND COLLECTIVE ACTIONS”

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law class action where a group of former employees sued, alleging that they had been denied pay for hours worked. The Court of Appeals had affirmed a District Court decision that allowed these cases to proceed as class/collective actions: the Supreme Court said that was error, that the case should not have been so certified, and sent it back.

In both *Symczyk* and *Comcast*, the Supreme Court is making it more difficult to achieve class action status. This is important for employers because class action status makes wage and hour lawsuits more expensive and difficult to settle. The Court’s tacit approval of Rule 68 offers of judgment to moot a case may also make plaintiffs’ lawyers think twice about turning down an early (and fair) settlement.



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