EMPLOYMENT LAWSCENE ALERT: RULING ON MARQUETTE PROFESSOR CONTAINS LESSONS FOR PRIVATE EMPLOYERS

On Friday, July 6, 2018, the Wisconsin Supreme Court determined that Marquette University had breached its contract with tenured professor John McAdams when it suspended him for discretionary cause after he authored a controversial blog post. McAdams claimed that the blog post fell within his rights to protected speech and academic freedom, whereas the University claimed that it was an unprofessional attack that was outside of those protections. Because the Court determined that the blog post was protected by the doctrine of academic freedom, which was guaranteed under the professor's contract and could not be used as a basis for discretionary cause, the Court held that the University had breached the contract because the blog post was a "contractually-disqualified basis for discipline."

The University argued that the Court had to defer to its internal procedures for suspending and dismissing faculty members and could not second-guess its choices unless the University had abused its discretion, infringed on the faculty member's constitutional rights, acted in bad faith, or engaged in fraud. However, the Court found that "the University's internal dispute resolution process is not a substitute for Dr. McAdams' right to sue in our courts" and that it did not have to defer to the disciplinary procedure because 1) it was fundamentally flawed due to the unacceptable bias on the Faculty Hearing Committee (the "Committee"); 2) the Committee had no authority to bind parties to its decision, because the parties had not agreed that the internal dispute process would replace or limit the adjudication of a contract dispute in court, as can be done with an arbitration agreement; and 3) there was no required procedural process to defer to because, although the Committee makes a recommendation, it is the University president that ultimately makes the disciplinary decision, and there were no rules, procedures, or standards that describe how the president was to make his ultimate decision.

This case should serve as a reminder to all private employers that, while courts generally defer to the decisions of an employer, they will not do so if those decisions or the processes underlying the decisions violate a contractual or statutory right of the employee. For example, if your disciplinary process is tainted by improper and illegal bias on the basis of protected class, the court will not disregard that simply because a disciplinary procedure was followed. Employers should make sure not only that they are following their internal disciplinary procedures but that procedures are fair and impartial and that the decisions stemming from those procedures do not violate the contractual or statutory rights of employees.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection

of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD REVIEW THEIR EMPLOYEE NON-SOLICITATION AGREEMENTS

On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Company, Inc. v. Lanning* affirming a 2016 Wisconsin Court of Appeals ruling that expanded the scope of Wis. Stat. § 103.465, which governs the enforceability of restrictive covenants, to include employee non-solicitation, or anti-raiding, provisions. We previously posted a blog about the Court of Appeals decision here.

John Lanning, a long-term employee of the Manitowoc Company, signed an agreement whereby he agreed, for a period of two years after the termination of his employment, not to solicit, induce, or encourage any employee of the Manitowoc Company to terminate his or her employment with the company or to accept employment with a competitor, supplier, or customer of the company. After he terminated his employment, he encouraged multiple employees of the Manitowoc Company to terminate their employment and join him at his new employer, which was a competitor of the Manitowoc Company.

The Wisconsin Supreme Court addressed two questions: 1) Whether employee non-solicitation agreements are "covenants not to compete" governed by Wis. Stat. § 103.465; and 2) if they are, was the provision contained in Lanning's agreement enforceable.

In answering whether non-solicitation agreements are covenants not to compete, the Court acknowledged that the statute has been applied to agreements viewed as restraints on trade, which may take many forms, and opined that the focus of the inquiry about whether a provision is a covenant not to compete should focus on the effect of the restraint, rather than its label. Therefore, the Court found that, because the non-solicitation provision restricted

Lanning's ability to compete fully with the Manitowoc Company by prohibiting him from soliciting employees and competing in the labor market, it was a restriction on his ability to engage in ordinary competition and was governed by the statute.

The Court stated that the purpose of Wis. Stat. § 103.465 is to invalidate covenants that impose unreasonable restraints on employees. The Court found the employee non-solicitation unenforceable under Wis. Stat. § 103.465 because the non-solicitation provision was unnecessarily broad because it restricted Lanning's ability to compete fully in the marketplace with the Manitowoc Company by prohibiting him from soliciting all employees wherever they might work in the world. Such a restriction does not allow for the ordinary sort of competition attendant in the free market and, as a result, was an unlawful restraint of trade.

In order to be enforceable under the statute, a covenant not to compete must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive to the employee; and 5) not be contradictory to public policy. Because the Court found that the employee non-solicitation provision that Lanning had signed was not necessary for the protection of the employer, they only addressed that portion of the test. Because words are interpreted to have their plain meaning, the Court found that the words "any employee" contained in Lanning's agreement prohibited him from soliciting every one of the Manitowoc Company's 13,000 world-wide employees with no limits as to the nature of the employee's position, Lanning's personal familiarity with or influence over the particular employee, or the geographical location in which the employee worked. The company's contention that it had a protectable interest in maintaining its entire workforce was rejected by the Court, which said that, ordinarily, the protectable interest would be limited to top-level employees, employees with special skills or knowledge important to the employer's business, or employees with a set of skills that are difficult to replace. Because the employee non-solicitation provision was not limited in any way, the Court found that it was overbroad on its face and unenforceable.

Based on this decision, employers must carefully review their restrictive covenants, particularly employee non-solicitation provisions, to ensure that they are carefully drafted to be necessary to protect their interests and no broader than needed. The focus must be on protectable, identifiable interest of the company. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

SEVENTEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State's attorneys and judges, seeking the State's top attorneys. The lists for 2017 were recently published and, once again, a large number of our attorneys are included thereon.

Dean Laing was named one of the Top 10 attorneys in Wisconsin for the third time. He was also named one of the Top 50 attorneys in Wisconsin for the twelfth straight year. In doing so, he is one of only six attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator in Wisconsin—to make the list all twelve years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named among the Top 50 attorneys in Wisconsin. This is the fifth time that Seth has made the list. Seth was also named one of the Top 25 attorneys in Milwaukee.

Doug Dehler, Jim DeJong, Pete Faust, Bob Gagan, John Gehringer, Joe Gumina, Greg Lyons, Greg Mager, Joe Newbold, Chad Richter, John Schreiber, Jason Scoby, and Steve Slawinski were also named Super Lawyers, a recognition given to the top 5% of attorneys in Wisconsin. Jim DeJong, Pete Faust, John Gehringer, and Greg Lyons have made the list for the past 10 or more years.

Erica Reib was also named Rising Stars, which is limited to 2.5% of the young attorneys in Wisconsin.

We are extremely proud of these recognitions, but even more proud of the quality of service we provide to our clients.

EMPLOYMENT LAWSCENE ALERT: MULTI-MONTH NEED FOR LEAVE DISQUALIFIES EMPLOYEE FROM ADA PROTECTIONS

Last week, the Seventh Circuit Court of Appeals issued a decision in which it stated that the Americans with Disabilities Act (ADA) does not require employers to give employees more leave after their Family Medical Leave Act (FMLA) allotment runs out. In *Severson v.*

Heartland Woodcraft Inc., the employee had a back condition for which he took twelve weeks of FMLA leave. At the end of his FMLA leave, he requested an additional two or three months of leave to recover from back surgery. The employer denied his request and terminated his employment, telling him that he could reapply once healthy. Instead, the employee filed suit, claiming that the company had violated the ADA by refusing to grant him a leave of absence and by failing to transfer him to a vacant job or a light duty position.

The ADA prohibits employers from discriminating against employees who are "qualified individuals," meaning that they can perform the essential functions of their jobs with or without accommodation. The Seventh Circuit upheld the district court's grant of summary judgment to the employer, finding that the employee was not a "qualified individual" with a disability under the ADA because he could not work, as shown by his need for long-term medical leave. Although there is no bright-line rule for what is considered a disqualifying long-term leave, the Court noted that, while a few days or even a few weeks of non-FMLA time would be acceptable, a period of multiple months is too long as leave does not permit the employee to perform the essential functions of his job. Although the EEOC argued in an amicus brief that a long-term leave of absence is a reasonable accommodation if it is definite, requested in advance, and would allow the worker to return at the end of the leave, the Court rejected this argument stating that such a policy would make the ADA into a medical leave entitlement instead of an anti-discrimination law that requires reasonable accommodations. The Court also rejected the plaintiff's other reasonable accommodation arguments, as he presented no evidence that there were any vacant positions at the time of his termination or that the company provided light duty to employees in any situation.

Although employers should carefully consider their obligations to employees under both the ADA and the Wisconsin Fair Employment Act, determine whether a requested accommodation is reasonable on a case-by-case basis, and engage in the interactive process with employees, this decision will be helpful in guiding employers that are evaluating employees' requests for extended leave.

EMPLOYMENT LAWSCENE ALERT: COURT INVALIDATES EXPANDED OVERTIME RULE

On Thursday, a federal court in Texas issued summary judgment invalidating the Obama administration's updated overtime regulations, which raised the minimum salary level for exempt employees from $455 to $913 per week. The Court determined that the "significant increase" was outside of the scope of Department of Labor's (DOL) authority, as was the provision that the minimum salary threshold would automatically update every three years.

The Court looked to Congress's intent under the Fair Labor Standards Act and found that the determining factor for whether an employee should be considered exempt is the duties the employee performs and whether those duties are executive, administrative, or professional in nature. By more than doubling the minimum salary level and excluding an estimated 4.2 million employees who were previously classified as exempt from exempt status, the Court found that the DOL had gone too far and essentially rendered the duties test meaningless. Because the emphasis should be on duties, not salary, the Court invalidated the updated overtime rules.

However, the Court did not go as far as to rule that the DOL has no authority to establish a minimum salary level. The Court found that the current minimum salary level is a permissible "floor" to screen out "obviously nonexempt" employees. Although the Fifth Circuit Court of Appeals is currently considering an appeal of the preliminary injunction the Texas federal court issued last November, the DOL under the Trump administration only continued the appeal for the purpose of establishing that it had the authority to establish a minimum salary level, which has now been done by the Texas court. The DOL is currently seeking public feedback on revisions to the overtime rule and may issue its own revised rule in the future. We will keep you updated on any further changes.

SEVENTH CIRCUIT UPHOLDS WISCONSIN RIGHT-TO-WORK

In March 2015, Wisconsin Governor Scott Walker signed Right-to-Work legislation into law, which allowed workers covered by union representation to not pay union dues if they do not wish to. Since its passage, the law has been under legal fire, including a failed bid for preliminary injunction to halt the law and a state circuit court ruling that found the law unconstitutional. However, in 2015, the federal district court sitting in the Eastern District of Wisconsin upheld the Right-to-Work law as constitutional, relying heavily on the Seventh Circuit's 2014 decision, *Sweeney v. Pence*, which upheld Indiana's right-to-work statute.

On Wednesday, the Seventh Circuit doubled down on its holding in *Sweeny* and upheld Wisconsin's Right-to-Work law as constitutional. The Court found that the plaintiff unions had failed to provide "any compelling reason" to overturn the *Sweeny* decision. The ruling stated that there have been no intervening developments in statutory, Supreme Court, or even intermediate appellate court law that would cause them to reevaluate their decision in *Sweeney* and that the strong dissent in *Sweeney* and a close vote to rehear the case en banc were not compelling reasons that would justify overturning a three-year old decision. The Court also rejected the unions' takings clause argument, whereby they claimed that

members of the union who did not pay dues but benefitted from the unions' bargaining and political activities would be taking the unions' property without compensation. The Court found that, in the event that a taking occurred, state courts could "provide an adequate route for seeking just compensation." Although the union has stated that it is considering its next steps, it appears that Wisconsin's Right-to-Work law will continue to pass judicial scrutiny and be enforceable and constitutional.

CONGRESS CONTEMPLATES "COMP TIME" BILL

In May 2017, the House of Representatives passed the Working Families Flexibility Act, which would amend the Fair Labor Standards Act to allow nonexempt employees in the private sector to choose to receive compensatory time ("comp time") in lieu of overtime pay for hours worked in excess of 40 hours per week. Under current law, employers in the public sector must pay nonexempt employees a rate of at least one and one-half of their regular wage for each overtime hour worked. However, certain government employees can receive comp time in lieu of overtime pay.

The Working Families Flexibility Act would allow private sector employees who had worked at least 1,000 hours in a 12-month period to accrue up to 160 hours of compensatory time per year, at the rate of one and one-half hours of comp time for each overtime hour worked, which could be used upon reasonable notice by the employee as long as such use does not disrupt the employer's operations. The decision of whether to receive overtime pay or comp time would be up to the individual employee or a collective bargaining agreement covering a group of employees, and any compensatory time accrued by the employee but unused by the end of the year would need to be paid to the employee. Additionally, any employee could, with 30 days' notice, choose to cash out their unused comp time and return to traditional payment of overtime. Similarly, employers could, with 30 days' notice, discontinue offering comp time as an alternative option to overtime pay. The bill states that employers may not intimidate, threaten, or coerce employees to choose to take comp time instead of overtime pay or force them to use accrued comp time. If enacted, this provision is one of the most likely to lead to litigation between employees and employers.

The bill is currently pending before the Senate, which may not have enough support to pass the bill. Proponents of the law believe that the bill would add flexibility for workers, while opponents believe that it would undermine the payment of overtime. Similar bills have been proposed in Congress previously, including as recently as 2013. However, the current bill has the support of the Trump administration. We will keep you updated on any further developments and, if passed, on techniques for implementation.

DON’T FORGET ABOUT DOL’S NEW OVERTIME RULES JUST YET

In November, a federal court in Texas issued a nationwide injunction blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. Because of the injunction, the new overtime regulations did not go into effect on December 1, 2016, as planned. However, they have also not completely gone away, and their fate is still uncertain.

The Obama administration immediately appealed the injunction to the Fifth Circuit Court of Appeals and asked for an expedited proceeding, which was granted. The DOL filed its initial brief on December 15, 2016, and the twenty-one states, which had opposed the implementation of the new overtime regulations and were granted the injunction, filed their brief on January 17, 2017. DOL’s final reply brief was originally due January 31, 2017. However, since President Trump was inaugurated on January 20, 2017, the Trump administration has asked for three extensions to file its reply brief, all of which have been granted. The first two extension were requested so that the new administration could consider its position on the new regulations and whether it would continue to defend them. Most recently, on Wednesday, April 19, 2017, the Fifth Circuit granted the DOL another two months, until June 30, 2017, to file its brief due to the fact that Alexander Acosta, the nominee for Labor Secretary, has not yet been confirmed.

It is not yet clear what stance the Trump administration will take on the overtime regulations, as there has been no official position taken by the President and nominee Acosta did not take a definitive position during his confirmation hearings. However, even if the administration decides not to pursue the appeal, others may. For example, the AFL-CIO’s Texas branch has petitioned to join the litigation as a defendant due to its concerns that the current administration will not adequately defend the prior administration’s regulations, and the national AFL-CIO has threatened to sue the DOL if it tries to scale back the regulations in any way. Additionally, the lower court, which issued the initial temporary injunction, could still issue a permanent injunction or rule on a pending motion for summary judgment, as it declined to halt proceedings while the Fifth Circuit reviewed the injunction. Therefore, these overtime regulations should still be on employers’ radar, and we will keep you updated on further developments.

EMPLOYMENT LAWSCENE ALERT: WHAT PRESIDENT TRUMP'S SUPREME COURT NOMINEE COULD MEAN FOR EMPLOYERS

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill the vacant seat on the U.S. Supreme Court left open by the death of Justice Antonin Scalia in early 2015. Many employers are wondering what impact a potential Justice Gorsuch would have on employment law decisions, and the news is generally positive. Judge Gorsuch, during his time on the Tenth Circuit, has issued decisions that have gone in favor of both employers and employees. However, he favors a straight forward application of facts to the law to reach conclusions and has been critical of administrative agencies overstepping their authority.

Judge Gorsuch, in line with holdings from the Seventh Circuit, has been critical of the *McDonnell Douglas* burden shifting framework that is frequently used in employment discrimination cases. Judge Gorsuch favors focusing on the real question – whether discrimination actually took place – instead of focusing on whether a *prima facie* case can be established. This straight-forward approach to the facts will likely be welcomed by employers who want to avoid getting bogged down in technicalities.

As we have covered multiple times, in recent years, administrative agencies such as the EEOC, OSHA, and particularly the NLRB have expanded the scope and reach of the employment laws they oversee by broadly interpreting existing laws, often to the confusion and detriment of employers. This expansion could be significantly curbed by a U.S. Supreme Court conservative majority anchored by Judge Gorsuch. In particular, Judge Gorsuch has issued opinions limiting the judicial deference that should be given to administrative agencies and stating that lawmaking should be left to Congress. For example, in his dissent in *Trans Am Trucking Inc. v. Administrative Review Board, U.S. Department of Labor,* Judge Gorsuch penned a dissent that stated that nothing in the Surface Transportation Assistance Act stated that an employee could operate a vehicle in a way the employer forbid and that the DOL did not have the authority to expand the law to say so. He also opined in a case involving the NLRB that the agency did not provide a persuasive explanation to reverse its long-standing precedent that interim earnings should be deducted from back pay awards and, therefore, should not be allowed to change its policy.

Finally, Judge Gorsuch has issued opinions favorable to arbitration agreements, which is of particular interest to employers as the Supreme Court has agreed to hear cases regarding whether the NLRB is correct in its interpretation that arbitration agreements that bar workers from pursuing class actions are illegal restraints of employees' Section 7 rights. If confirmed, Judge Gorsuch may be able to weigh-in on this important issue as the U.S. Supreme Court,

yesterday, indicated that it will not address this issue during the Court's current term, but will address it next term. Hopefully, by that time Judge Gorsuch will be confirmed by the U.S. Senate. As a result, then Justice Gorsuch could be the deciding vote on this important issue.

Although Judge Gorsuch's confirmation process is likely to be long and contentious, a Justice Gorsuch anchored U.S. Supreme Court can be something that employers can look forward to in providing common sense to employment laws.