FLSA Antitheft Security Screening Not Compensable Time Under Federal Law

In a unanimous ruling, the U.S. Supreme Court has ruled that time spent by warehouse workers in line for and undergoing antitheft security checks is not compensable time (i.e., time for which wages are owing) under the Fair Labor Standards Act (Act). (*Integrity Staffing Solutions, Inc. v. Busk,* No. 13-433).

In this case Integrity Staffing Solutions, Inc. required its hourly warehouse workers, who retrieved products from warehouse shelves and packaged them for delivery to Amazon customers, to undergo a security screening before leaving the warehouse each day. Several former employees sued the company alleging that they were entitled to pay under the Act for the roughly 25 minutes each day that they spent waiting to undergo and undergoing those screenings. They also alleged that the company could have reduced that time significantly by adding screeners or staggering shift terminations and that the screenings were conducted to prevent employee theft and, thus, for the sole benefit of the employer and its customers.

The Supreme Court reversed the Ninth Circuit appeals court and held that time spent by employees waiting to undergo and undergoing security screenings is not compensable under the Act. What remains unclear is whether similar claims brought under *state* wage and hour laws will be resolved by state courts in the same manner.

NLRB "Ambush Election" Rule Effective April 14, 2015; NLRB Issues Guidance Memo

In December, 2014 the National Labor Relations Board issued a final rule that dramatically altered the Board's longstanding union election procedures and deletes many of the options that businesses have relied on to protect employer rights and the rights of employees who do not support union representation. (79 Fed.Reg. 74307, Dec. 15, 2014). The rule goes into effect on April 14, 2015 and it significantly tilts NLRB elections in favor of unions.

The rule is still being challenged in two lawsuits – but no court action to void the rule or delay its effective date has been taken at this time.

On April 6, 2015, the general counsel for the National Labor Relations Board issued a new Memorandum No. GC 15-06 to provide agency guidance on complying with the new union election rule. The memo can be accessed at:

http://www.nlrb.gov/reports-guidance/general-counsel-memos.

Background on the Rule

According to recent data, a union election typically occurs 38 days after the union files a petition with the NLRB and more than 90 percent of elections occur within 56 days of petition filing. Under the new rule the time frame for businesses to hold union elections shrinks to as little as 14 days after the petition is filed.

According to the NLRB, the rule:

- Provides for electronic filing and transmission of election petitions and other documents;
- Ensures that employees, employers and unions receive timely information they need to understand and participate in the representation case process;
- Eliminates or reduces unnecessary litigation, duplication and delay;
- Adopts best practices and uniform procedures across regions;
- Requires that additional contact information (employees' personal telephone numbers and email addresses) be included in voter lists, to the extent that information is available to the employer, in order to enhance a fair and free exchange of ideas by permitting other parties to the election to communicate with voters about the election using modern technology; and
- Allows parties to consolidate all election-related appeals to the Board into a single appeals process.

The rule makes changes to the union election procedures that are immense in scope, complex and, in effect, will generally *reduce* the time period before an election is held—and during which employees are allowed to exercise free choice about union representation, and employers are allowed to engage in protected speech to their employees about union representation. As the Board's dissenting members stated, the rule "has become the Mount Everest of regulations: Massive in scale and unforgiving in its effect." In addition to the pending court challenges, the rule will undoubtedly be challenged in court as applied to affected employers who file court appeals to post-election questions.

Good News on the Horizon???

On January 28, 2015 Senators McConnell and Alexander introduced the NLRB Reform Act. This legislation is designed to "restore the NLRB to its proper role as an

umpire instead of an advocate." Under this bill, the number of members on the NLRB would be increased from 5 to 6 thereby forcing at least one vote from each party to take action; institute discovery rights prior to trial; and force the Board to render decisions within one year or risk losing some of its funding. While the Republicans hold majorities in both the House and Senate, they don't hold a veto proof majority and therefore may not be able to override a Presidential veto.

EEOC Loses Appeal on Challenge to Employer Use of Credit History to Screen Job Applicants

Appellate court opinions can be lengthy and often don't signal the outcome of the ruling early on. The 6th Circuit federal appeals court decision in *Equal Employment Opportunity Commission v. Kaplan Higher Education Corp.* is the exception. The first sentence in the opinion reads: "In this case the EEOC sued the defendants for using the same type of background check that the EEOC itself uses."

Further, the EEOC's personnel handbook recites that "overdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations." Because of this declared concern, the EEOC acknowledged in court that it runs credit checks for 84 of the agency's 97 positions.

In this case the EEOC alleged that Kaplan's use of credit checks for select positions causes it to screen out more minority applicants than non-minority applicants, creating a "disparate impact" in violation of Title VII of the federal Civil Rights Act. To prove disparate impact, the agency relied solely on statistical proof in the form of expert testimony by a single witness. The district court excluded this expert testimony as unreliable and dismissed the case. Federal evidence rules require expert testimony to be offered by a qualified individual in the form of an opinion based on facts and data using reliable principles and methods that are generally accepted in the scientific community.

In affirming the dismissal, the appeals court agreed that the expert's methodology did not meet any of the factors that federal courts typically consider in determining the reliability of expert testimony. Also relevant was the expert's own admission that the sample of rejected job applicants he used was not representative of Kaplan's applicant pool as a whole.

Employers are well advised to obtain legal review of any use of credit reports for employment purposes, to assure compliance with federal and state discrimination laws and the federal Fair Credit Reporting Act. In addition, a number of state laws have been passed that regulate or restrict the use by employers of credit reports and credit history information for hiring and other employment-related purposes.

Costco Challenges a Supplier's Unilateral Minimum Resale Price Policy

Under the federal and state antitrust laws, to what extent may a supplier dictate that a reseller not advertise or sell the supplier's product below a minimum resale price? Two Fortune 50 companies are squaring off in California federal court to answer this question. (*Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc., U.S. District Court, Northern District of Cal.*).

At issue is the "Unilateral Price Policy" implemented by Johnson & Johnson Vision Care for its branded contact lenses and enforced against contact lenses resellers – including Costco.

The Unilateral Price Policy ("UPP") provides in part:

> "The UPP establishes a minimum price below which no reseller can advertise or sell a particular product [branded contact lenses]. The intent of the policy is to reinvigorate the rich clinical dialogue that is so important to effective patient care, rather than focusing on cost.
>
> "Under this policy, Johnson & Johnson Vision Care, Inc. (J&J) and its authorized distributors will cease to supply UPP products to any reseller who advertises or sells UPP products to patients at a price below the UPP price listed below.
>
> "This policy is unilateral and does not represent an agreement between J&J and its authorized distributors or resellers. As such, this policy is non-negotiable and individual representatives are not authorized to alter, waive, modify or negotiate this policy. Resellers are free to advertise and sell any UPP product at a price of their own choosing, however, violations will result in loss of product supply."

In a FAQ sheet on the UPP, the supplier elaborates on the reseller's ability to advertise, or sell, below the UPP price:

> "Q. Am I permitted to sell UPP products above or below the UPP price?
>
> "A. You are free to sell product you have purchased at any price you choose. However, if you sell product below the UPP price, J&J and its authorized distributors will refuse to accept new orders from you. In addition, J&J will exercise its right to repurchase your current inventory of products subject to the UPP price. If you sell product at or above the UPP price, J&J does not consider this to be a violation of the UPP."

The key legal issue in this case is whether there is an agreement between Costco, J&J and its authorized distributors that the products will not be advertised or sold below the minimum price (Costco's theory); or whether J&J has simply announced a unilateral policy (i.e., no agreement) that it will not sell to any reseller who violates the supplier's minimum price policy (J&J's theory).

Costco argues there is an agreement with J&J that Costco will not advertise or sell the products below J&J's minimum price, and claims this agreement violates the federal antitrust laws and several state antitrust laws (California, New York and Maryland are cited in the complaint).

J&J is expected to argue there is no such agreement; that it has unilaterally announced a non-negotiable resale price policy and will enforce it by refusing to do business with any reseller who violate the policy; and that this unilateral conduct does not violate any federal or state antitrust laws.

Background

In 2007, the U.S. Supreme Court overruled its own 1911 decision and held that a manufacturer does not necessarily violate the antitrust laws by establishing minimum resale price for its products with its dealers and enforcing the policy by terminating dealer or other reseller who sells below the minimum price. (*Leegin Creative Products , Inc. v. PSKS, Inc. d/b/a Kay's Kloset…Kay's Shoes,* Docket No. 06-480).

The Court ruled that a supplier's "vertical agreements [with its resellers] establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed." Thus, these agreements should no longer be per se (or automatically) unlawful, as previously ruled in the 1911 case. Rather, courts should apply the "rule of reason" standard to decide, on a case-by-case basis, whether a particular vertical price restraint violates *federal* antitrust law. It should be noted that federal antitrust law does not preempt state antitrust laws concerning the legality of vertical minimum resale price agreements. As stated above, Costco cites California, New York and Maryland laws as holding that these agreements are illegal per se. For an archived NAW advisory on the *Leegin* case, go to: http://www.naw.org/govrelations/advisory.php?articleid=490.

The Costco case was filed on March 2, 2015 and obviously is a long way from resolution of the legality of the supplier's minimum pricing policy. This case does illustrate the continuing confusion and uncertainty that exists under antitrust laws as to whether—and to what extent—a supplier can dictate or influence a reseller's pricing decisions.

Dated: April 16, 2015