A ROUNDTABLE UPDATE WITH

MANESH RATH

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Wage and Hour, Employment, Labor, OSHA.
Manesh K. Rath

Manesh Rath is a trial and appellate attorney with experience in general commercial litigation, wage and hour and class action litigation, occupational safety and health (OSHA) law, labor law, and employment law. He has served as lead amicus counsel on several landmark cases before the U.S. Supreme Court including Staub v. Proctor Hospital and Vance v. Ball State University.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. On developing legal issues, he has been quoted or interviewed in The Wall Street Journal, Bloomberg, Smart Money magazine, Entrepreneur magazine, on “PBS's Nightly Business Report,” WAVY-TV and C-SPAN. He was listed in Smart CEO Magazine’s Readers’ Choice List of Legal Elite.

General Commercial Litigation
Mr. Rath counsels and represents businesses and associations facing business litigation disputes. In numerous cases nationwide, Mr. Rath has conducted motions and trials before state and federal courts and administrative agencies throughout the nation, including serving as lead counsel defending businesses in collective and class action matters.

Mr. Rath serves as an instructor for the National Institute for Trial Advocacy.

Wage and Hour and Class Action Litigation
For almost 20 years, Mr. Rath has successfully defended employers nationwide in wage and hour litigation.

He has served as lead counsel in class and collective action litigation in a number of jurisdictions. Mr. Rath also performs internal wage and hour audits for companies around the country.

OSHA
Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—against OSHA citations and investigations before federal and state OSHA.

Accessibility
Mr. Rath advises product manufacturers, employers, and construction firms on compliance with accessibility guidelines.

Transportation
Mr. Rath works with shippers and carriers of freight and passengers on matters involving federal motor carrier safety and hours of service compliance.

Labor Law
In the area of labor law, Mr. Rath represents employers throughout the country in union organizing campaigns, in negotiating collective bargaining agreements, and in defending against unfair labor practice (ULP) charges.

The Employment Law Aftermath
For ten years, The Employment Law Aftermath with Manesh Rath, has presented the most impactful employment law developments in the past quarter to the corporate counsel of some of the region's largest employers.

OSHA 30/30 – A Thirty Minute OSHA Update Every Thirty Days
Mr. Rath is the host of the OSHA 30/30 webinar, bringing critical developing issues in OSHA law to corporate counsel and safety and health professionals nationwide.

Service: Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. Society For Human Resources (SHRM) Special Expertise Panel, and on the Northern Virginia SHRM Board of Directors for several years. Faculty, National Institute for Trial Advocacy.

Supreme Court to Consider Scope of SOX Whistleblower Protections

Manesh K. Rath
Joe Dages

The Supreme Court recently agreed to hear for the first time a case involving the Sarbanes-Oxley Act’s (“SOX”) whistleblower provision. The Court granted a writ of certiorari to determine whether an employee of a privately-held contractor to a publicly traded company is protected from retaliation under SOX’s whistleblower provision. The case is Lawson v. FMR, LLC.

The Facts of the Case

Jonathan Zang was an analyst for FMR LLC, a subcontractor of Fidelity Investments. In early 2005, Mr. Zang raised concerns that a draft registration statement for Fidelity funds was misleading as to how executives were compensated and that several funds labeled as active were in fact veiled inactive index funds. FMR terminated Mr. Zang’s employment in June 2005.

FMR also employed Jackie Lawson. Ms. Lawson raised concerns relating to Fidelity’s cost accounting methodologies for calculating expenses. In 2007, she resigned, claiming that FMR constructively discharged her because of her previous SOX complaints.

Both employees filed retaliation claims with the Occupational Safety and Health Administration (“OSHA”), alleging adverse actions in response to the complaints that they had made.

Section 1514A of SOX prohibits a publicly held company from retaliating against an employee after the employee provides information on possible SEC fraud.

Mr. Zang and Ms. Lawson filed separate suits with OSHA and then in the U.S. District Court for the District of Massachusetts. The court consolidated the cases.

FMR filed a motion to dismiss, arguing that Mr. Zang and Ms. Lawson were not covered employees under Section 1514A because they were not employees of a public company, but rather were employed by the privately held FMR.

Mr. Zang and Ms. Lawson contended that employees of those public companies’ subcontractors should be covered under the SOX whistleblower provision.

The district court held that Section 1514A of SOX extends coverage to employees of private agents, contractors, and subcontractors of public companies. FMR asked the U.S. Court of Appeals for the First Circuit to certify an interpretation of the provision at issue. The divided First Circuit reversed applying the whistleblower provision only to publicly traded companies and their employees.

What the Court Said

In a case of statutory interpretation, the First Circuit determined that Congress did not intend the term “employee” to cover employees of privately owned companies serving as contractors to publicly held companies or mutual funds.

The First Circuit also stated that Congress had an opportunity to expand the provision’s coverage, as it did under several other statutes with whistleblower provisions but chose not to do so.

Two months after the Lawson decision, the Administrative Review Board (“ARB”) reached a conclusion opposite to the First Circuit in a similar case. In Spinner v. David Landau and Associates, the ARB held that contractors and subcontractors were protected employees under Section 1514A.

What Employers Should Do

In addition to the question of whether contractors and their employees are covered, the Supreme Court may also determine if the ARB may ignore existing federal appellate decisions when interpreting SOX.

Until the U.S. Supreme Court decides this matter, employers should consider the possibility that even privately held companies may be required to comply with the whistleblower provisions provided under SOX.

Employers should create channels for employees to register complaints, investigate complaints that merit further inquiry, and support adverse action decisions with evidence of a non-retaliatory motive.

Please contact us with questions.
April 12, 2013

Keller and Heckman LLP

DC Court of Appeals Finds NLRB Lacks Authority To Act

Manesh K. Rath

The U.S. Court of Appeals for the District of Columbia declined to enforce an order by the National Labor Relations Board on the basis that it lacked a sufficient quorum to act. The case is Noel Canning v. NLRB.

The Facts Of The Case

Noel Canning is a bottler and distributor of Pepsi-Cola products based in Yakima, Washington.

Noel Canning and the Teamsters had cooperatively entered into collective bargaining agreements for years.

The parties began renewal negotiations in June 2010. When they arrived at an agreement as to all issues except wages, they agreed to put two alternative proposals to a vote by the union’s members. Noel Canning’s president agreed to this approach.

The next day, Noel Canning sent an email to the union outlining the two proposals but materially altering one of them.

When the union’s chief negotiator called Noel Canning’s president to notify him of the discrepancy, the president responded that the negotiations were not in writing and therefore not binding. The union voted and ratified the union’s proposed alternative anyway. Noel Canning refused to execute the collective bargaining agreement arguing that the members’ ratification was a counteroffer that the company refused.

Noel Canning declared the parties at an impasse. The union brought an unfair labor practice (ULP) charge under Section 8(a)(1) of the National Labor Relations Act. The ALJ found that the parties had entered into an agreement and the Board agreed.

Noel Canning promptly appealed the Board decision to the U.S. Court of Appeals for D.C.

What The Court Said

Noel Canning argued that the Board lacked the authority to act because it lacked a quorum of at least three properly appointed Board members on the grounds that: a.) the President improperly made recess appointments when the U.S. Senate was not in recess; and b.) the vacancies filled by the President did not arise when the U.S. Senate was in recess.

The powers appointed to a president by the U.S. Constitution stated that a president shall have the power to fill all vacancies that may happen during the recess of the Senate. The Board argued that any break in Senate proceedings should suffice as a recess during which a president may make appointments.

The powers appointed to a president by the U.S. Constitution stated that a president shall have the power to fill all vacancies that may happen during the recess of the Senate. The court agreed with Noel Canning, observing that “happen” must mean “first arise” or else a president could avoid the complex confirmation process by allowing all vacancies to continue until the next recess.

On both arguments, the court noted that the primary method for appointments must be the Senate confirmation process which, though more complex, preserves the separation of powers intended by the Constitution’s framers.

What Employers Should Do

Recent administrations have made commonplace the practice of using recess appointment powers even when the Senate is in session or for vacancies that occur during a session. Other circuits have endorsed this practice on the basis that it is commonly done and that government would be rendered inefficient otherwise.

This decision is critical, not only for NLRB decisions, but for a host of agencies because it challenges and substantially limits a president’s use of recess appointment powers. Employers should challenge agency actions on this basis when appropriate, specifically seeking to bring those challenges before the D.C. Circuit when appropriate.

Please contact us with questions.

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The Sixth Circuit recently affirmed the National Labor Relations Board’s decision in Specialty Healthcare II finding that a “micro-unit” is an appropriate bargaining unit. The case is Kindred Nursing Centers East, LLC v. National Relations Board.

The Facts of the Case

Kindred Nursing Centers East LLC (“Kindred”) operates a nursing home facility in Mobile, Alabama.

The Union petitioned to represent Kindred’s 53 Certified Nursing Assistants (CNAs).

Kindred sought to include in the bargaining unit not only those 53 CNAs, but also over 86 other service employees who also served residents. All of the employees in question in this case were subject to the same personnel policies, eligible for the same benefits, and received similar pay. All of the employees in question attended the same training sessions, monthly meetings, and holiday events.

The Board’s regional director determined that the smaller group consisting of the 53 CNAs was an appropriate unit on the basis that they share a community of interest. Kindred requested review of the Board’s determination.

The Board established that the burden is on the party claiming an inappropriate bargaining unit to show that the excluded employees “share an overwhelming community of interest” with those included in the bargaining unit.

Kindred appealed. In its appeal, Kindred argued that the Board had applied a new standard without going through the required administrative rulemaking process.

What the Court Said

The Sixth Circuit granted the Board’s petition for enforcement of its decision. The court found that the National Labor Relations Act gives the Board wide discretion to determine an appropriate bargaining unit. Further, the court rejected Kindred’s argument that this decision reflects a new policy, noting that the general concept of a community of interest is not new.

The court stated that the Board is not required to select the most appropriate bargaining unit; it must merely make an appropriate unit determination.

In the instant case, the Board found the CNA-only unit to be an appropriate unit because the CNAs shared a common community of interest sufficient to justify their inclusion in a single unit.

What Employers Should Do

This decision appears to continue the Board’s recently adopted approach of supporting the creation of a micro-unit. Additional cases may continue to explore how small a unit the Board is willing to permit.

This decision could result in several micro-units at one facility, which may hinder business operations.

In light of this case, employers should try to identify the possible micro-units that may be targeted by unions and develop proactive strategies accordingly.

If an employer is faced with a challenge on the question of the appropriateness of a bargaining unit, it should examine the interchangeability of the two groups in their staffing, common supervision, a unified method for handling discipline, and centralized training.

Please contact us with questions.
Manesh Rath
Lawrence Halprin
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On September 12, 2013, the Occupational Safety and Health Administration (OSHA) issued a proposed rule to establish comprehensive, substance-specific health standards for occupational exposure to respirable crystalline silica (RCS) for General Industry, Maritime, and Construction activities.

What The Proposed Rule Says

OSHA is proposing a new permissible exposure limit (PEL) of 50 µg/m³ and action level of 25 µg/m³ in an 8 hour time weighted average for all forms of RCS in all industry sectors covered by the rule. This is essentially a reduction by 50% of the current PELs.

OSHA is also proposing many of the other traditional elements of a comprehensive health standard, including requirements for exposure assessment, preferred methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping.

The proposed standard would apply to “all occupational exposures.” Thus, the proposed rule appears to extend coverage to any instance where there is any detectable airborne RCS in a workplace, even if the exposure is mostly due to ambient environmental conditions.

Employers whose operations involve silica should conduct exposure monitoring, or use qualifying representative data from previous industry or employer monitoring, to determine what provisions of the proposed rule would apply to the activity.

If actual or reasonably expected airborne exposures were at or above the PEL, but for less than 30 days per year, all requirements of the proposed rule other than medical monitoring automatically would be triggered. The medical monitoring requirements would be added to an employer’s obligations if actual or reasonably expected airborne exposures were at or above the PEL for 30 or more days per year.

Except for the construction tasks covered by the alternative compliance methods under the proposed rule’s Table 1, the proposed rule would require employers to implement engineering and work practice controls as the primary means to reduce exposure to the PEL or to the lowest feasible level above the PEL.

This approach is based on OSHA’s position that engineering and work practice controls offer more reliable and consistent protection to a greater number of workers, and are therefore preferable to respiratory protection.

The engineering controls identified are grouped into four main categories: (1) substitution, (2) isolation, (3) ventilation, and (4) dust suppression. Depending on the sources of crystalline silica dust and the operations conducted, a combination of control methods may reduce silica exposure levels more effectively than a single method.

In situations where feasible engineering and work practice controls are not sufficient to reduce exposures to or below the PEL, employers are required to supplement these controls with respiratory protection following OSHA’s respiratory protection standard.

What Employers Should Do

The proposal includes a comment period of 90 days ending December 11, 2013, and informal hearings are scheduled to be held in Washington, D.C. beginning on March 4, 2014. Notices of Intent to appear at the hearing are due in 60 days, on November 12, 2013.

Employers should determine if the proposed standard will affect them. If affected, then employers should participate in the OSHA rulemaking and support associations that will be active in the rulemaking process.

Please contact us with any questions.
Manesh Rath

The First Circuit recently ruled that employee work performed after hours or during breaks constituted uncompensated overtime under the Fair Labor Standards Act (FLSA). The case is Manning v. Boston Medical Center Corp.

The Facts Of The Case

Elizabeth Manning worked as a registered nurse at Boston Medical Center. During her employment, Ms. Manning claims that she performed work during her breaks and before and after her scheduled shifts. Often, nurses were not relieved during their scheduled breaks. On other occasions, nurses were expected to attend training sessions or staff meetings during their unpaid lunch break or immediately following their scheduled shift.

Boston Medical utilized a practice where nurses’ timesheets were automatically populated with a nurse’s schedule, and the timekeeping system automatically deducts time from the paycheck for meals and breaks without regard to whether a nurse worked through those breaks.

Ms. Manning alleges that the timekeeping system does not allow for entry of actual hours worked before or after a shift or during a break. On the occasions where Boston Medical did permit an employee to record worked time, Ms. Manning alleges that nevertheless it did not make proper payment.

Ms. Manning brought suit under the FLSA arguing that, because the nurses performed this extra work in the presence of supervisors or attended lunchtime meetings at the supervisor’s direction and the nurses were thereafter sent back to resume their shift, Boston Medical was therefore fully aware that it had incurred an overtime duty.

Boston Medical countered that Ms. Manning’s allegations were too vague to support a claim that Boston Medical had knowledge to the unpaid work. For example, Boston Medical pointed to statements about unidentified managers with whom Ms. Manning had spoken on an unspecified number of occasions.

What The Court Said

The court acknowledged the vagueness of Ms. Manning’s claims but held that she was not required to meet a greater level of particularity than she had.

The court found that the relevant portion of Ms. Manning’s claim was stated sufficiently: Boston Medical’s employment practices required nurses to work through breaks or after hours; the work was performed in the open; and Boston Medical took no steps to adjust its automatic timekeeping system to account for those extra hours.

What Employers Should Do

This case presents a counterpoint against other FLSA cases for uncompensated time.

First, whereas other cases presented employers with an opportunity to argue that they were unaware of any extra time worked by staff, Boston Medical specifically led meetings or instructed employees to work through breaks or after hours.

Second, whereas employers in other cases, notably White v. Baptist Memorial, permitted employees to file adjustments to pre-populated timesheets, here Ms. Manning is alleging that she was barred from making adjustments to her timesheets.

In light of this case, employers should provide employees with the opportunity to review their final timesheets and make any adjustments necessary. Then employers should require employees to signify, with a signature or electronic affirmation that a timesheet has been reviewed and is accurate.

All elements of an employee’s timekeeping duties should be reflected in a written timekeeping policy.

Please contact us with any questions.
State and Local Laws Expand Employer Duty to Accommodate Family Status

Manesh Rath
Barbara Levos

San Francisco Ordinance Grants Right to Request Flexible Work Schedules

The San Francisco Family Friendly Workplace Ordinance was approved on October 9th, 2013. This ordinance requires employers of 20 or more employees to consider flexible or predictable working arrangements to assist employees who are in caregiver roles. The law prohibits employers from taking an adverse employment action against an employee with caregiver status.

Under a flexible and predictable working arrangement, a qualified employee may request scheduling changes that include the number of hours they work, telecommuting, an altered start and/or departure time and work assignments.

A “qualified” employee under this ordinance is a person who has been employed with the employer for six months or more, has worked at least eight hours per week, and is responsible for the care of a child, a family member with serious health issues or a parent over 65 years old.

The ordinance states that an employer has the right to deny a request, but it must be for a good faith business reason. The reasons may be that the identifiable costs are too great, client demands won’t be met, job sharing issues will be created among other employees, or perceived time constraints on projects.

The San Francisco Office of Labor Standards Enforcement (OLSE) will enforce the ordinance, establish rules and investigate potential violations.

Employers will be required to post a notice informing employees of their rights under the ordinance. Employers must also retain records of all requests under this ordinance for a period of three years from the date of the request.

Maryland Law Requires Light Duty Accommodation During Pregnancy

Maryland’s new law, the Reasonable Accommodations for Disabilities Due to Pregnancy Act, became effective on October 1, 2013. The act requires employers with fifteen or more employees to make reasonable accommodations for employees who request an accommodation and have a disability caused by pregnancy.

An accommodation may include changing the employee’s job duties, changing the employee’s work hours, relocating the employee’s work area, providing mechanical or electrical aids, transferring the employee to a less strenuous or less hazardous position or providing leave.

If an employee makes a request for a transfer to a less strenuous or hazardous position, the employer shall transfer the employee for a period of time up to the duration of the pregnancy if the employer has a policy or practice requiring or authorizing the transfer of a temporarily disabled employee to a less strenuous or hazardous position.

Alternatively, if the employer has no such policy or practice, it may still have to make such a transfer if a health care provider advises it and the employer can make the transfer without creating additional employment, discharging an employee, transferring a more senior employee, or promoting an unqualified employee.

Employers will be responsible for posting a notice and revising their handbooks accordingly.

What Employers Should Do

Both the San Francisco and Maryland laws impose posting responsibilities. In addition, Maryland employers must revise their written policies to reflect their compliance duties under the new law.

Please contact us with questions.
Second Circuit Rules Class Action Waiver In Arbitration Agreement is Enforceable

Manesh Rath

The Second Circuit recently issued a critical decision recognizing the enforceability of a class action waiver and arbitration agreement that was duly entered into between an employer and an employee. The case is Sutherland v. Ernst & Young LLP.

The Facts Of The Case

Stephanie Sutherland was employed with Ernst & Young for fourteen months as a Staff 2 audit employee through December 2009. Ernst & Young designated her as exempt from eligibility for overtime, yet Ms. Sutherland claimed that she performed mostly low level clerical work.

When Ernst & Young first offered Ms. Sutherland a position, she entered into an arbitration agreement. As a part of that agreement, Ms. Sutherland agreed to arbitrate any disputes rather than bring them in court. She also agreed that disputes pertaining to different employees will be heard in separate proceedings.

Despite this agreement, Ms. Sutherland brought a putative class action against Ernst & Young alleging that it failed to pay overtime wages under the Fair Labor Standards Act.

Ernst & Young filed a motion to dismiss, arguing that Ms. Sutherland had waived her right to bring a class action and to bring any action in court pursuant to her arbitration agreement.

Ms. Sutherland responded that the court should disregard the class waiver that she signed. She argued that her overtime damages were about $2,000, but seeking those damages would cost her about $200,000 in attorneys’ fees, arbitration costs, and expert testimony fees. This fact, Ms. Sutherland argued, prevented her from obtaining effective vindication since she would have no economic incentive to spend more to bring a claim than the claim was worth. Ms. Sutherland accordingly argued that a class represented the only economically sensible means for her to recover the $2,000 that she believed she was owed.

What The Court Said

The trial court agreed with Ms. Sutherland that enforcing her class waiver would effectively bar her from bringing a claim by herself since the expense of doing so would far exceed any recovery. Ernst & Young appealed. Pending its appeal, the U.S. Supreme Court, in American Express Co. v. Italian Colors Restaurant, held that a plaintiff could not walk away from a waiver of class actions or class arbitration merely because that would leave it with no economic incentive to pursue its claim individually in arbitration.

The court noted that waiver of collective actions is clearly permissible in the wake of a number of U.S. Supreme Court cases including Concepcion and Interstate Johnson Lane Corp.

What Employers Should Do

This case is of critical importance. Many employers have traditionally opted not to impose arbitration agreements or class waivers upon employees. In light of this decision, employers should revisit and give careful consideration to the merits of such agreements.

Then, if an employer elects to enter into such agreements with its workforce, it should consider with counsel any state restrictions involving conditions of employment after the commencement of the employment relationship and the National Labor Relations Board’s position on class waivers under the FLSA.

If you have any questions, please contact us.