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Courts Weaken Agreements Shortening Limitation Periods and Remind Executives of their Personal Liability for Corporate Wrongs

Three court decisions in the first nine days of August brought to light some reasons for employers to be concerned. Two of the cases bring into question the viability of agreements employers often enter into with employees to shorten the limitation period for employees to bring lawsuits against their employers. The third case reminds employers that executives may be held personally liable for an employer's failure to pay overtime under the Fair Labor Standards Act.

Limitation Period Waivers Held Inapplicable to FLSA and Some Other Claims

Employers in many parts of the country have contracts with employees which, at least in part, shorten the period employment-related claims may be brought in court. Often these shortened periods are for six months, which is much shorter than the 2 or 3 years claims under the FLSA's statute of limitations may be brought, or other claims such as those for discrimination under federal or state law or wrongful termination may be brought. Until recently, with the exception of just a few jurisdictions, these agreements have been enforced by the courts. The key to many of these decisions is that six month limitation periods are common to many laws (such as Title VII), and therefore periods of at least that duration are not inconsistent with public policy. Thus, the shortening of the period is a waiver of procedural right, and so long as the period is still reasonable, it can be waived. The employee still has recourse to vindicate his or her rights under the law. Waivers of jury trials are also commonly enforced by the courts for the same reason.

On August 6, 2013, the Sixth Circuit Court of Appeals, in a case of first impression, held that the enforceability of such provisions is much more limited than previously assumed. In *Boaz v. FedEx Customer Information Services, Inc.*, the waiver agreed to by the employee was as to limitation periods exceeding six months. The employee sued for unpaid overtime pay under the FLSA and for discrimination under the Equal Pay Act. The lawsuit was brought within the limitation periods under those laws, but after the running of the six month period under the agreement. The district court dismissed the case as being barred by the contractual limitation period.

Reversing the lower court, the Court of Appeals held that the limitation period waiver of FLSA and EPA claims amounted to waivers of the employee's statutory rights and therefore was impermissible. The Court rejected FedEx's claims that the waivers were not with respect to the substantive rights under those laws, but rather were merely procedural in nature and therefore waivable. Unlike waivers permitted in the context of discrimination claims under Title VII, the Court reasoned that waivers of pay rights could give employers a competitive advantage over employers who comply with the law. This rationale was based on the Court's application of the Supreme Court's 1945 holding that an employee cannot waive his or her right to be paid the minimum wage or overtime pay as otherwise required by the FLSA. The Court distinguished cases under Title VII allowing such waivers because employers do not gain a competitive advantage by discriminating against employees on the base of race, sex or other protected factors.

A few days earlier, on August 2nd, the United States District Court for the Southern District of Texas refused to enforce a limitation period waiver under the Americans with Disabilities Act Amendments Act and the FLSA in *Mazurkiewicz v. Clayton Homes, Inc.* The waiver in that case was quite similar to that in *Boaz*. In that case, though, the six month limitation period expired before the EEOC completed its investigation and issued a right-to-sue letter, which is a prerequisite to filing a lawsuit under the ADAAA. Thus, the employee was in a "Catch 22" since he was unable to bring a suit within the timelines of the waiver. The waiver was also invalid as to the FLSA claim because the limitation period in the waiver could negate the employees' claim for damages preceding the beginning of the period under the continuing violation theory. (The court did, however, enforce the contract's waiver of the right to bring a collective action.)

Are these cases glimpses of a new trend and legal development, or are they aberrations? It is too early to tell, and whether these cases will be appealed is unknown at this time. In any event, it is likely that both employers and employees will be litigating over these points in the years to come. The logic of these decisions is certainly vulnerable to challenges. For instance, the competitive advantage that the *Boaz* court claimed employers would gain does not really exist since all employers can, if they choose, adopt waivers with their employees. In these situations, all employers are on the same playing field in that all employers still have to comply with the FLSA and employees must bring claims as they have agreed or under the law. Other flaws appear in the Court's analysis, as well. As for the *Mazurkiewicz* decision, an argument could be made – and a waiver could be drafted to allow – for claims to still be regarded as timely after a right-to-sue letter is issued so long as the administrative charge was made in a timely manner.

Notwithstanding these flaws, at this time the *Boaz* ruling is the law at least in the Sixth Circuit (which covers Michigan, Ohio, Kentucky and Tennessee). Employers in most states – including those within the Sixth Circuit – may still have waivers, but employers must also understand that until this decision is reversed, those waivers may not work as to FLSA and EPA claims, and perhaps also ADEA and FMLA claims. Drafters should also review how these waivers are written and include provisions making them applicable to the extent permitted by law and applicable to claims after any applicable administrative process is exhausted. Waivers still have a value that should not be minimized, not only as to limitation periods, but also as to jury trials and collective and class actions.

Managers May Be Individually Liable for Company's Wrongs

On August 1, 2013, the First Circuit Court of Appeals in *Manning v. Boston Medical Center* reversed a lower court's decision to grant a motion to dismiss claims for unpaid overtime under the FLSA as well as Massachusetts' state law. The claims were brought against the hospital as well as two individuals – the hospital's former President and CEO, and the hospital's former human resources director. While claims against individual agents of employers are atypical in overtime pay cases under the FLSA, the FLSA specifically recognizes that such claims are viable to the extent the employee or agent exerts substantial authority over corporate policy relating to employee wages. Who controls corporate policies regarding wages and day-to-day operations are often key.

The Court held that the pleadings were sufficient to state a claim against the former President and CEO, but that they were not sufficient as to the human resources director. Under the precedent in the First Circuit (which covers most of the New England states), the HR Director is not normally of a high enough position to control corporate policy, as is an officer or board member, particularly if the HR director has no ownership interest in the enterprise. Further, the allegations plead in the complaint, the Court held, did not claim that the HR Director had significant control over the pay decisions and policies of the employer. Importantly, the HR Director's dismissal was upheld in part due to the peculiarity of the Circuit's precedent pertaining primarily to very senior managers, as well as to the failure of the plaintiff to plead sufficient allegations to hold the HR Director potentially personally liable for the violations asserted in the lawsuit. The lesson or reminder of this case is still significant; executives and other managers may be held personally liable for the FLSA wrongs of the employer.

Conclusion

These cases are also reminders that the law is ever evolving and it is important to review agreements and to audit pay practices to make sure that policies and practices are keeping up with new developments. Prior to these past few weeks, few would have questioned the viability of limitation period waivers and few appreciate the fact that individuals may be held individually liable for FLSA violations of a business. Now, however, that norm exists no longer.

If you have questions regarding these recent court decisions, please contact Rob Boonin or any of the other attorneys in Butzel Long's Labor and Employment Law Group.

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