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Litigator Q&A

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Michael J. Puma Guides Employers on FLSA Compliance and Claim Prevention

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BLOOMBERG BNA: The Patient Protection and Affordable Care Act (PPACA) amended several provisions of the FLSA. What new requirements are placed on employers and how would you advise them to prepare for compliance?

Puma: The PPACA added a new section, § 18A, to the FLSA requiring that, pursuant to regulations to be issued by the DOL, any employer (i) to which the FLSA applies, (ii) that offers employees enrollment in one or more health benefits plans, and (iii) that has more than 200 full-time employees, will be required to automatically enroll new full-time employees in one of the employer's health benefit plans (subject to the employee's election to opt-out) and to continue the enrollment of current employees in a health benefit plan offered through the employer. The DOL anticipates issuing regulations on this provision that would be effective in 2014, so it would be appropriate to review the DOL regulations before taking any actions. This amendment may not have much practical effect for certain employers, as many employers have used some form of automatic enrollment for some time. For example, some employers default any employee who does not make an election into a designated medical plan option with single coverage. Further, employers often carry over elections from year to year unless employees affirmatively elect to change them.

The PPACA also amended § 7 of the FLSA to require employers to provide reasonable break time for an employee to express breast milk for her nursing child for a period of one year after the child's birth each time the employee needs to express milk. Employers should provide a place, other than a bathroom, shielded from view and free from intrusion by co-workers and the public, which may be used by an employee for this purpose. Under the PPACA, employers who have fewer than 50 employees and who are able to articulate a significant reason for not providing breaks to nursing mothers may be exempt (i.e., "if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business"). The PPACA does not expressly require employers to pay for breaks associated with this requirement, but employers should consider whether such breaks are compensable under the circumstances and applicable laws. Employers also should be aware of state laws that may impose additional requirements. For example, New York Labor Law § 206(c) imposes a

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similar requirement for up to three years after birth and does not carve out an exemption for smaller employers.

BLOOMBERG BNA: [*Editor's note:* In *Christopher v. SmithKline Beecham Corp.*, the U.S. Supreme Court recently refused to grant *Auer* deference to DOL amicus briefs and held that pharmaceutical sales representatives qualify as outside salesmen under the FLSA's outside sales exemption.]

1) What kinds of employees outside the pharmaceutical sales industry have duties and responsibilities similar to pharmaceutical sales representatives and may satisfy the requirements of the outside sales exemption?

Puma: The Court's broad interpretation of the outside sales exemption, which calls for a court to consider the context of how sales occur in a particular industry, may open the door for exemption arguments in other industries. Referring to the FLSA's language on exempting those ''employed . . . in the capacity of [an] outside salesman,'' the Court stated, ''The statute's emphasis on 'capacity' counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.'' Plaintiffs may argue, however, that the Court's holding applies only to an industry like the pharmaceutical industry that is constrained by statute or regulation from direct sales and, thus, continue to challenge the classification of employees in other industries in which employers rely on a field sales force to drive sales at the local store level (although some sales may be formally consummated at a corporate level). Finally, the Court's general recognition that the FLSA allows for industry-by-industry variations may result in lower courts applying exemptions beyond the outside sales exemption in a more pragmatic manner.

BLOOMBERG BNA: 2) Where the Court rejected the DOL's claim to deference and rebuked the federal regulatory practice of regulating by amicus brief, how do you think the ruling will impact employers' reliance on agency interpretations in developing compliance plans and policies?

Puma: *Christopher* leaves untouched deference to the clear text of agency regulations that result from proper notice and comment procedures, but it raised the bar for agencies to claim ''controlling deference'' for their interpretations of ambiguous regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). The Court expressed particular concern about allowing agencies to regulate via amicus briefs, and the Seventh Circuit was equally critical of deference to amicus briefs in its recent opinion in *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 2012 BL 113137, 2012 WL 1592543 (7th Cir. May 8, 2012). Although few employers would rely on such briefs to craft policies, and they can remain comfortable relying on agency regulations, reliance on opinion letters and similar administrative interpretations are more likely subject to challenge depending on the circumstances.

On March 24, 2010, the DOL announced that the Wage and Hour Division will depart from its longstanding practice of issuing fact-specific guidance by opinion letter. Instead, the Wage and Hour Administrator will periodically publish "Administrator's Interpretations" setting forth a general interpretation of the law as it relates to a specific industry or category of employees. Regarding the amount of deference due, courts appear to treat Administrator's Interpretations as if they are ''cut from the same cloth as opinion letters.'' See *Biggs v. Quicken Loans Inc.*, Docket No. 10-11928 (E.D. Mich. Mar. 21, 2011).

Employers should be cautious when relying on opinion letters and administrator interpretations taking positions that have evolved under different administrations. In *Sandifer*, the Seventh Circuit noted that, depending on the administration in the White House, the DOL has changed its position on the definition of ''clothes'' for purposes of whether time spent changing in and out of work clothes is compensable. While accepting that ''such oscillation is a normal phenomenon of American politics,'' the court was critical of the DOL's varying pre-2010 opinion letters and its 2010 Administrative Interpretation on the issue under each administration and noted that the courts of appeals have ''come together in spurning . . . 'the gyrating agency letters on the subject.' '' The court added that ''[i]t would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat.''

BLOOMBERG BNA: What are some strategies for successfully enforcing class/collective action waivers in arbitration agreements signed by named plaintiffs in wage and hour class and collective actions in light of the U.S. Supreme Court's decision in *Concepcion* and the controversial decision issued by the National Labor Relations Board (NLRB) in *D.R. Horton*?

Puma: Although *Concepcion* provides employers substantial latitude to implement class and collective action waivers in arbitration agreements, plaintiffs continue to challenge agreements containing waivers. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 2011 BL 110648 (2011). In the Second Circuit, for instance, courts still consider whether an employee can effectively vindicate his or her federal statutory rights (under the FLSA, for instance) in individual arbitration considering the value of the individual claim as compared to the cost of litigation. However, courts have continued to enforce arbitration agreements where they make the same relief available in a civil action—particularly statutory attorneys' fees and costs that facilitate individual arbitration, even for a relatively low-value claim—equally recoverable in arbitration and also require the employer to pay the full cost of the arbitration other than at most an initial filing fee comparable to an amount due upon initiating an action in court. In

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response to arguments that expert witness expenses that are not recoverable as statutory fees/costs make it prohibitively costly to vindicate rights in individual arbitration, some employers have drafted their arbitration agreements to provide for payment of an employee's expert expenses if the employee prevails and if the arbitrator relies on the expert's opinions. To avoid additional attacks on arbitration agreements, many employers also exclude certain non-arbitrable claims, such as whistleblower claims under the Dodd-Frank Act.

As to *D.R. Horton*, it is most significant that the arbitration agreement containing the collective action waiver was ''imposed on all employees as a condition of hiring or continued employment by the [employer]'' and, therefore, the NLRB treated it as a ''unilaterally implemented workplace rule[ ].'' *D.R. Horton Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012). In contrast, permitting employees to opt-out of an arbitration agreement or conditioning participation in a new compensation/incentive plan on execution of an arbitration agreement, rather than making it a condition of employment generally, provides a strong argument that *D.R. Horton* is inapplicable. Employers may also consider including a disclaimer in the arbitration agreement that the agreement does not curtail employees' rights to collective action under the National Labor Relations Act (NLRA).

Employers also should be aware of several strong arguments they can advance in court against the application of *D.R. Horton*. First, employers have argued that *D.R. Horton* was improperly rendered because the NLRB did not have a quorum of three members when it issued the decision and did not formally delegate its authority to a three-member panel or announce in its decision that it was doing so for that particular case, as is its custom. Second, NLRB decisions are not self-enforcing, and the NLRB has not obtained an order from a Court of Appeals enforcing the *D.R. Horton* decision. Third, employers may argue that *D.R. Horton* is not entitled to deference because NLRB decisions that interpret statutes other than the NLRA, such as the Federal Arbitration Act and Norris-LaGuardia Act addressed in *D.R. Horton*, are not entitled to deference. Finally, the majority of courts to have considered *D.R. Horton* have declined to adopt its reasoning. As recently as June 4, 2012, a California appellate court declined to give deference to the *D.R. Horton* decision, noting that ''the FAA is not a statute the NLRB is charged with interpreting.'' *Iskanian v. CLS Trans. Los Angeles LLC*, 142 Cal. Rptr. 3d 372, 2012 BL 138794, 2012 WL 1979266 (Cal. Ct. App. June 4, 2012).

BLOOMBERG BNA: How would you direct corporate clients to structure employment arrangements and operating relationships with subsidiaries and contractors so as to avoid ''joint employer'' liability under the FLSA in light of different tests applied by the circuits for determining whether a corporate parent qualifies as a ''joint employer''?

Puma: It would be difficult for any company to structure its operations in a way that accounts for the often subtle differences among joint employment tests in jurisdictions across the country. Some parent companies make optional any administrative services offered to subsidiaries and eliminate or diminish day-to-day control over the operations of subsidiaries that pertain to the terms and conditions of employees' employment, such as hiring, firing, performance evaluation, discipline, and compensation. Some companies also avoid overlap with respect to the executives and Boards of Directors for parent companies and their subsidiaries in order to avoid the appearance of common control.

The Third Circuit announced a new joint employer test in its recent decision in *In re: Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation. Hickton v. Enter. Holdings Inc.*, Docket No. 11–2883, 2012 BL 162885 (3d Cir. June 28, 2012). The court considered whether a parent company had the authority to hire and fire employees; had the authority to promulgate work rules and assignments and to set conditions of employment, including compensation, benefits, hours, and work schedules, including the rate and method of payment; exercised day-to-day supervision, including control over employee discipline; and maintained control of employee records, including payroll, insurance, taxes, and the like. The decision emphasized that these factors are not an exhaustive list and should not be ''blindly applied''; rather, courts must look to the ''total employment situation'' and ''economic realities of the work relationship.''

BLOOMBERG BNA: Which industries or type of employer do you believe DOL's Wage and Hour Division has been targeting for potential FLSA violations? How would you counsel clients who may be in the crosshairs to prepare for audits and to bring their policies and procedures into compliance with federal law?

Puma: As described in the DOL's Strategic Plan for Fiscal Years 2011-2016, the Wage and Hour Division is targeting ''fissured'' industries—employers that rely on a wide variety of organizational methods that the DOL believes have redefined employment relationships, including subcontracting, third-party management, franchising, independent contracting, and other relationships that the DOL contends make the worker-employer relationship less clear. In particular, the Wage and Hour Division has directed enforcement efforts at lower-wage workers, such as those in the agricultural, construction, janitorial, and hospitality industries. In terms of regional activity, the DOL announced in April 2012 a new initiative to target the restaurant industry in Los Angeles, San Francisco, and Portland, Oregon, and in March 2012 a concerted effort directed at the hospitality industry in Texas and Louisiana. As a result of a 2010 initiative focusing on Boston, investigations of restaurants resulted in awards of almost $1.4 million in back wages to nearly 500 employees.

Companies that rely on a large number of independent contractors also are now in the DOL's spotlight, and they should carefully assess whether their independent contractor designations are appropriate. In doing so, companies should be sensitive to significant differences between tests under state and federal law in many jurisdictions used to assess contractor status.

Finally, employers working under a federal contract should pay particular attention to the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act (SCA). Specifically, the DOL has increased Davis-Bacon ''prevailing wage'' enforcement on federally funded or assisted construction projects and is establishing a compliance baseline in the construction industry from which it can measure improvements in compliance going forward. Further, in more aggressively enforcing the SCA, the DOL has used the ultimate SCA sanction—debarment—against prime contractors that were in-

volved with a SCA violation by one of their subcontractors or failed to adequately inform the subcontractor of the applicable SCA requirements.

In light of the recent class litigation relating to unpaid interns, who are now seeking overtime and minimum wage compensation, and the prevalence of unpaid interns in many industries, several more private actions are likely, and it would not be surprising to see the DOL pursue a similar claim against a high-profile employer.

To avoid run-ins with the DOL and to be well-positioned in the event of a DOL investigation, employers should conduct privileged audits (using inside or outside counsel) of their wage/hour practices. They should carefully assess the exempt status of borderline jobs, off-the-clock and meal/rest break policies, the methodology used to calculate the regular rate of pay for overtime purposes (i.e. to ensure it includes all required forms of compensation), expense reimbursement and wage deduction policies and practices, bonus and other compensation plans (for sales employees) to ensure that they do not give rise to wage deduction claims, and compliance with workplace notice requirements. The DOL has prioritized targeting repeat offenders, upping the ante significantly when an employer is labeled as a persistent problem. Employers should carefully consider whether any ''fixes'' made in response to DOL complaints or audits completely fix the problem and do so in a timely manner throughout their operations.

BLOOMBERG BNA: What are some recent federal court decisions under the FLSA related to worker misclassification or recent developments in state wage-hour law of which defense attorneys should be aware?

Puma: The Supreme Court's *Christopher* decision discussed above was the most significant misclassification decision of the year. In addition, California continues to be the focus of substantial wage/hour litigation and legislative developments with mixed results for employees in recent months with respect to closely watched misclassification cases. In *D'Este v. Bayer Corp.*, Docket No. 07-03206, 2012 BL 184083 (9th Cir. July 23, 2012), the Ninth Circuit held that pharmaceutical sales representatives are covered by the administrative exemption and, thus, are exempt from California's overtime requirements. The court held that work by front-line sales representatives ''was 'qualitatively' administrative because they were involved in representing their respective companies and promoting sales,'' and that ''it is not determinative that they did not participate in the formulation of their employers' sales and promotional policies at the company level.'' The court further held that the plaintiffs' work was ''quantitatively'' administrative because it was of substantial importance to the management or operations of the business. The court also noted that plaintiffs exercised sufficient discretion and independent judgment as part of their job, despite industry-specific regulatory constraints on their discretion.

In contrast, *Harris v. Superior Court of Los Angeles County*, 2012 BL 185460 (Cal. Ct. App. July 23, 2012), on remand from the California Supreme Court, held that claims adjusters are not exempt administrative employees, which may result in changes to compensation practices throughout the insurance industry in the state. The court observed that work qualified as ''administrative'' if it is ''directly related to management policies or general business operations,'' and that work is ''directly related'' only if it is both qualitatively and quantitatively administrative. In an apparent conflict with guidance from the California Supreme Court on the same issue, the court concluded that the ''[a]djusters' work duties do not satisfy the qualitative component of the 'directly related' requirement because they are not carried on at the level of policy or general business operations.''

Turning to legislative developments at the state level, in October 9, 2011, California Governor Jerry Brown signed into law Senate Bill 459, effective January 1, 2012, which prohibits employers from willfully misclassifying workers as independent contractors. The new law, designed to force businesses to reconsider their relationships with independent contractors, imposes civil penalties between $5,000 and $25,000 per violation. The law also requires employers who are found to have engaged in such misclassification ''to display prominently'' for one year on their Internet websites a notice to employees and the general public announcing that the employer ''has committed a serious violation of the law by engaging in the willful misclassification of employees.'' In addition, on January 1, 2012, the California Wage Theft Prevention Act of 2011 took effect, requiring employers to provide all new, non-exempt hires with written notice of specific wage information, including allowances claimed as part of the minimum wage (i.e., allowances for meals or lodging); the employee's rate or rates of pay (including overtime rates); and whether the employee is paid hourly, by the shift, by the day, by the week, by salary, by piece, by commission, or otherwise. The Act also increases the penalties for non-payment of all wages due. For example, the Labor Commissioner can now collect liquidated damages, in addition to wages and penalties, for failure to pay the minimum wage. The Act also increases employers' recordkeeping obligations, now requiring employers to keep a copy of both an employee's wage statement and a record of deductions, rather than just one or the other, for at least three years and to keep payroll records for each employee for at least three years, rather than two years.

On a more positive note for employers in California, courts overwhelmingly have recognized that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) can preempt California's meal and rest break requirements under certain circumstances. The FAAAA provides that a state ''may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.'' 49 U.S.C. § 14501(c)(1). At the end of 2011, the Ninth Circuit's interpretation of this provision ushered in a new standard for FAAAA preemption. The Ninth Circuit held that the FAAAA preempts state laws that ''indirectly[ ] 'bind[ ] the [private motor carrier or motor] carrier to a particular price, route or service and thereby interferes with competitive market forces within the . . . industry.' '' *Am. Trucking Ass'ns Inc. v. City of Los Angeles (ATA II)*, 660 F.3d 384, 397 (9th Cir. 2011).

Applying *ATA II*, district courts repeatedly and recently have concluded that the FAAAA preempts California's meal and rest break requirements potentially applicable to certain employees operating trucks, generally for the purposes of making deliveries and/or sales to customers. The courts have reasoned that enforcement of California's rigid meal and rest break require-

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ments would force drivers to take fewer or shorter routes and would result in fewer deliveries per driver. See, e.g., *Campbell v. Vitran Express Inc.*, Docket No. 11-05029, 2012 WL 2317233 (C.D. Cal. June 8, 2012); *Aguiar v. Cal. Sierra Express Inc.*, Docket No. 11-02827, 2012 BL 112486, 2012 WL 1593202 (E.D. Cal. May 4, 2012); *Esquivel v. Vistar Corp.*, Docket No. 11-07284, 2012 BL 44733, 2012 WL 516094 (C.D. Cal. Feb. 8, 2012); *Dilts v. Penske Logistics LLC*, Docket No. 08-00318, 819 F. Supp. 2d 1109 (S.D. Cal. Oct. 19, 2011). Some courts have determined that the laws also adversely affect prices because employers would be forced to hire more employees and purchase more equipment to maintain existing levels of service and would pass these costs to consumers. See *Dilts*, 2011 WL 4875520, at *9. Plaintiffs have argued that the inability to take meal or rest breaks results from their need to comply with tight scheduling requirements in order to service customers, and courts have accepted such allegations at face value as a basis for preemption. See, e.g., *Campbell*, 2012 WL 2317233, at *4. Thus, some courts have concluded that the FAAAA preempts California's meal and rest break requirements on a motion to dismiss or motion for judgment on the pleadings. See id. (''The Court finds that as a matter of law, these meal and rest break requirements, even as clarified by *Brinker*, relate to the rates, services, and routes offered by Defendant. As other courts have noted, the length and timing of meal and rest breaks affects the scheduling of transportation.''). Other courts have held that the requisite interference with regard to prices, routes, or services requires a factual record and evidentiary showing and have declined to decide FAAAA preemption on a motion to dismiss. See *Reinhardt v. Gemini Motor Transport*, Docket No. 11-01944, 2012 WL 1435008 (E.D. Cal. Apr. 25, 2012). *Dilts* is on appeal to the Ninth Circuit, so employers may soon have additional appellate guidance on the scope of FAAAA preemption.