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TOP 10 EMPLOYMENT LAW DEVELOPMENTS OF THE DECADE: PART 2

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Legal Briefings – By **Barbara Roth and Tyler Hendry**

In the final installment of our two-part article, we conclude our countdown of the top U.S. labor and employment developments of the 2010s. This part covers the key developments from 2015 to 2019, and it concludes with our selection of the most important development of the decade.

In part one, we recapped the top developments from 2010 to 2014.

2015: THE NLRB'S JOINT EMPLOYER SAGA BEGINS WITH BROWNING-FERRIS.

The so-called gig economy — the use of independent contractors, freelancers and other temporary workers to provide services — expanded significantly in the 2010s. Legislatures, administrative agencies and the courts have attempted to react to this expansion, resulting in a patchwork of laws and decisions that offer little clarity for entities operating within this sphere. These reactions account for two of the five most significant developments from 2015 to 2019.

The first is the 2015 Browning-Ferris Industries of California decision from the National Labor Relations Board and its seemingly unending aftermath. In Browning-Ferris, the NLRB significantly lowered the threshold for imposing joint employer status on entities under the National Labor Relations Act — making it much more likely that franchisors, entities utilizing temporary workers and contractors could be held responsible as joint employers under the NLRA.

Just two years later, the NLRB overturned Browning-Ferris, but the decision that overturned that decision was then vacated on the ground that one of the NLRB members should have recused himself from the decision. Thereafter, in September 2018, the NLRB issued proposed rules that would effectively overturn Browning-Ferris, but to date final rules have not been published — thus, leaving Browning-Ferris as current law.

These shifts and uncertainty are a microcosm of the issues faced by entities operating within the gig economy, and the U.S. Department of Labor's newly published joint employer standard for Fair Labor Standards Act claims — which differs from both Browning-Ferris and the NLRB's proposed rules — suggests this uncertainty and confusion will continue through the 2020s.

2016: LARGE U.S. EMPLOYERS ARE MANDATED TO DISCLOSE DETAILED PAY DATA TO THE EEOC.

In 2016, the U.S. Equal Employment Opportunity Commission announced — to significant controversy and concern from employers — that U.S. employers with 100 or more employees would be required to report detailed pay data broken down by job type, sex, race and ethnicity as part of their EEO-1 reporting requirements. Under the announcement, March 2018 was the first required compliance date.

After President Donald Trump took office, however, the Office of Management and Budget indefinitely stayed the reporting requirement while it reviewed the initiative to determine whether it imposed an unreasonable burden on employers. The OMB's stay was challenged by two pay equality advocacy groups — the National Women's Law Center and the Labor Council for Latin American Advancement — which both contended the stay exceeded the OMB's authority. A D.C. federal court agreed, lifting the stay and ordering the EEOC to collect 2017 and 2018 data by May 31, 2019.

The future of pay data collection beyond 2018 remains uncertain. The EEOC has announced that it will not require future collection, while the National Women's Law Center has vowed that it will not allow the EEOC to cease collection.

While the immediate future of pay data collection is uncertain, potential changes in presidential administrations, state laws aimed at more transparency, and legal challenges are likely to result in continued reporting and other pay transparency measures in the 2020s.

2017: THE SEVENTH CIRCUIT RULED THAT SEXUAL ORIENTATION CLAIMS ARE ACTIONABLE UNDER TITLE VII.

In a landmark decision that is our second finalist for the most important development of the decade, the U.S. Court of Appeals for the Seventh Circuit became the first circuit court to find that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

Courts — including the Seventh Circuit — have consistently held that sexual orientation discrimination is not a form of sex discrimination protected by Title VII. The Seventh Circuit in Hively v. Ivy Tech Community College of Indiana directly addressed its previous precedent, stating that "we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination."

Since Hively, the U.S. Court of Appeals for the Second Circuit has also found sexual orientation discrimination to be protected by Title VII; the U.S. Court of Appeals for the Eleventh Circuit disagreed, creating a circuit split that the U.S. Supreme Court should resolve by June 2020. The forthcoming Supreme Court decision, for which Hively served as the catalyst, is almost certain to be the most significant employment development in 2020 — particularly in those states with no statutory protection for sexual orientation discrimination.

2018: THE SUPREME COURT UPHELD ARBITRATION AGREEMENTS BARRING CLASS ACTIONS.

In Epic Systems Corp. v. Lewis, the Supreme Court held that employers can utilize mandatory arbitration agreements to bar employees from collective or class action litigation/arbitration. The court rejected the argument — embraced by a number of circuit courts — that such agreements unlawfully violate an employee's NLRA rights to engage in protected, concerted activity.

The court succinctly ruled that the Federal Arbitration Act mandates the courts to enforce arbitration agreements according to their terms, and the NLRA does not displace or override this mandate. As a result, employers can lawfully require employees to litigate employment-related claims in individual arbitrations.

The use of individual arbitration, and arbitration generally, is in conflict with advocates for the #MeToo movement who seek to end the use of mandatory arbitration for sexual harassment and discrimination claims. To date, advocacy efforts have resulted in: (1) state laws limiting or barring arbitration over #MeToo-related offenses — the legality of which are questionable due to federal preemption; and (2) many entities, including Google Inc. and Facebook Inc., voluntarily ending the use of mandatory arbitration agreements for these claims.

As state laws proliferate and advocacy efforts continue, it is inevitable that courts will be asked to resolve the potential conflict between these laws and the Federal Arbitration Act.

2019: CALIFORNIA SEEKS TO UPEND THE GIG ECONOMY.

For our second gig economy development and final event of the decade, in 2019 California enacted A.B. 5, a law aimed at disrupting the gig economy. The law, which went into effect on Jan. 1, 2020, makes it very difficult for gig economy entities to legally classify their workers as independent contractors.

The law codifies the so-called ABC test — which presumes that a worker performing services for hire is an employee unless the hiring entity can establish that the worker:

(a) Is free from the control and direction of the hiring entity in performing the work;

(b) Performs work that is outside the usual course of the hiring entity’s business; and

(c) Is customarily engaged in an independently established trade, occupation or business.

Part B of this test presents a high hurdle for entities such as Uber Technologies Inc. and other app-based ride-hailing platforms that rely heavily on independent contractors to provide services that are essential to the company's business.

In response, Uber and Postmates Inc. have filed for an injunction to block the law, and Uber, Lyft Inc. and a number of other companies have raised money to place a referendum on California's 2020 ballots to exempt ride-hailing companies from the law. In addition, freelance journalists have filed a lawsuit alleging A.B. 5 is unconstitutional.

How these battles ultimately play out is likely to influence other states as they consider legislative approaches and reactions to the gig economy.

The Most Important Labor and Employment Development of the Decade

Our selection for the most important development of the decade is the most frequently cited court decision on our list, the decision that effectively ended massive class actions, and the decision that the U.S. Chamber of Commerce appropriately labeled "the most important class action in more than a decade" — the 2011 U.S. Supreme Court decision in Wal-Mart Stores Inc. v. Dukes.

As the 2020s begin, early front-runners for the next decade's countdown include the gig economy, expanded LGBT protections and expanded paid leave protections.

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