Labor & Employment

‘No Help Wanted’: The Regulation And Elimination of Retail Positions

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BY JAMES HOLAHAN AND THERESA RUSNAK

According to *Business Insider*, more than 6,000 retail stores closed in 2017. Some of the stores, including Toys “R” Us, Payless Shoes, Gymboree and Rue 21, filed for bankruptcy. Others, such as The Limited and Radio Shack, simply shut down. Even Walmart, which seemed to convey positive news by giving its employees raises in early 2018, also eliminated thousands of jobs by shutting down hundreds of Sam’s Club stores. Overall, retail was one of the biggest job losers in 2017—nationwide, retail employment fell by more than 36,000 jobs.

What accounts for this downward trend? Although many would quickly point to the convenience and ease of online shopping, we propose that there are other factors at work. Specifically, retail sector jobs, particularly retail sector jobs in New York state, are under threat from the aggregate effect of increasing government regulations.

Perhaps the most glaring example of increasing regulations in New York is the ever-increasing minimum wage. New York has dealt a particularly serious blow to restaurant employment by accelerating minimum wage increases for fast-food employees as compared to the general minimum wage increases for other employees. Although the basic minimum wage across most of New York state is currently $10.40 per hour, the minimum wage for fast food workers is significantly greater, at $11.75, and scheduled to increase at a much faster rate such that by 2021, the fast food minimum will be $2.50 more per our than the basic minimum upstate rate. This accelerated schedule places extra pressure on the retail restaurant industry, and incentivizes employers to find ways to reduce labor costs—often by eliminating jobs. Other recent regulatory burdens, such as New York’s Paid Family Leave Act, present substantial new challenges to retail sector employers, particularly small employers, who now face losing employees for extended periods of paid leave time.

> Retail sector jobs, particularly retail sector jobs in New York state, are under threat from the **aggregate effect of increasing government regulations.**

This regulatory trend only seems to be increasing: On Nov. 22, 2017, New York published new proposed call-in and scheduling pay regulations. The regulations, which were subject to a notice and comment period, are still in their introductory, proposed state. However, given New York’s track record, retail employers should assume that the regulations will become final.

The proposed call-in regulations provide the following: (1) employees who report to work for a shift that was not scheduled at least 14 days in advance will be entitled to an additional two hours of call-in pay; (2) employees whose shifts are cancelled within 72 hours of the start of that shift will be entitled to at least four hours of call-in pay; (3) employees who are required to be on-call and available to report to work for any shift will be entitled to at least four hours of call-in pay; and (4) employees who are required to be in contact with their employer, within 72 hours of the start of a shift, to confirm whether or not to report to work for that shift will be entitled to four hours of call-in pay.

These new proposed regulations are complex, and are meant to target perceived abuses in the retail industry. In 2015, New York’s Attorney General sent an inquiry to 13 major retailers operating in New York, asking for more information regarding their on-call practices. The next year, this action was followed by a joint inquiry from New York and several other states, leading to many retailers voluntarily changing their on-call practices. The proposed regulations, which grew out of these actions, began with scrutiny of the retail industry.

The fact is that the retail industry, more than any other, relies on last minute scheduling changes and on-call shifts to meet changing customer demands. For example, clothing stores often use on-call shifts, where employees must call in before the start of shift to see if they are needed. Whether or not the employee is needed often depends on the number of customers and volume of business in the store at the time of the shift, which is difficult to predict ahead of time. Furthermore, while the proposed regulations have an exemption for employees with weekly earnings at least 40 times the state minimum wage, this exemption will rarely, if ever, apply to retail workers, who often work part-time schedules at or barely above minimum wage. It is safe to predict that when the regulations become final, they will increase labor costs and force the retail industry to find new ways to reduce staff. The result of these additional regulations will lead to a decrease in retail jobs, both directly through fewer new hires to replace departing employees, and indirectly through the further automation of the workforce.

As technology advances, retail employers are able to decrease labor costs by automating. Perhaps you have experienced this, as the authors have. At one well-known fast-food chain, human wait staff has virtually been eliminated: Customers order and pay for their meals online or by using an in-store kiosk. In fact, the only human interaction involves instructing customers how to use the new kiosks and delivering completed orders.

This customer experience is increasingly common: In late 2013, Chili’s and Applebee’s announced that they were installing more than 100,000 tableside tablets at their restaurants across the country, allowing customers to order and pay their bills, without ever talking to wait staff. Buffalo Wild Wings, Panera Bread, Olive Garden and dozens of other restaurants have followed suit. This trend is set to continue: A report by the McKinsey Global Institute predicts that by 2030, as many as 80 million jobs could be lost to automation world-wide.

None of the protections that federal, state, and local governments have implemented to protect employees will have this desired effect, if the opportunity for entry level retail work continues to shrink due to automation, online vendors, and new technology. Although » Page 13

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Non-Disparagement Agreements: Worth It?

BY PHILIP M. BERKOWITZ

Your corporate client is terminating the employment of an individual it thinks has done an awful job, with whom it shares completely differing views about how to run a business, and whom it never wants to darken its doorstep again. Whether because the employee has hired a lawyer and threatened legal action, or out of the goodness of its heart, your client is prepared to provide a severance payment in exchange for a release—but as a condition of the deal, the employee must agree never to say a bad word about the Company, its owners, shareholders, family, customers, business partners, and so forth.

And, your client insists, if she violates that agreement, she needs to repay all the money forked over in settlement, and a penalty to boot.

Opposing counsel agrees to the deal—so long as the clauses are mutual. The Company must agree that no employees will say a bad word about the employee. Also, opposing counsel wants a prevailing party’s attorney fees provision, so that when his client sues the company for violating the agreement, she can recover her fees.

You try to explain to opposing counsel that your client can’t possibly agree to the same provision—how can the company muzzle all these people? How does it know what people will say about her at some after-hours team-building drink-fest?

Well then, opposing counsel says, I will narrow the list only to those who worked with her, and to senior management, and I will give you a list of a dozen people or so who need to be included.

Do we like this deal? Are we glad that we started this conversation? Does your client really care what the former employee says? What kind of damage can she really do, and indeed what kind of damage does she want to do, when her own reputation is on the line?

Understandably, clients don’t want to read about the case they just settled when they browse their favorite social media sites. On the other hand, sometimes, non-disparagement clauses may not be worth the bother. The conversation may empower the former employee, making her feel that the Company has something to worry about, and causing her to think she has gained leverage in negotiating a settlement.

But assuming that the parties are able to reach agreement some manner of agreement—will it be enforceable? Are non-disparagement agreements worth the paper they’re written on? Are they even effective as in terrorem clauses designed to cause the parties to think twice before they badmouth the other?

President Trump certainly seems to like them. He recently threatened to sue Steve Bannon after Bannon was quoted in Michael Wolfe’s bestseller “Fire and Fury” as saying that Donald Trump Jr.’s Trump Tower meeting with a Russian lawyer and others was “treasonous” and “unpatriotic.” Within days, Trump sent a cease-and-desist letter.

The result? The publisher advanced the book’s publication date, and sales went through the roof.

The analogy may be imperfect, but courts considering these claims in the employment context have reached mixed results. In *Ohio Educ. Ass’n v. Lopez*, No. 09AP-1165 (Ohio App. Oct. 19, 2010), an employee called his former employer’s Executive Director a “slime bag.” The court found that this comment did not breach a nondisparagement agreement, characterizing the comment as a “trifling figure of speech.”

Sometimes these agreements result in damages that may not be reasonably anticipated. In *Barr v. Liddle & Robinson*, 2016 NY Slip Op 00744 (1st Dep’t 2016), the court held that an employee suing his former employer stated a claim for legal malpractice against his former lawyers when, in violation of a nondisparagement agreement, they gave an interview to the Wall Street Journal, which allegedly resulted in his losing his contractual right to certain deferred compensation.

On the other hand, courts often enforce these provisions. In one well-reasoned and often-cited case, *Smelkinson Sysco v. Harrell*, 162 Md. App. 437 (2005), the court enforced a $185,000 liquidated damages provision of a non-disparagement agreement as part of the settlement of discrimination and labor law claims. The appeals court reversed the trial court’s ruling that this constituted an unlawful » Page 13

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For Employment Law, an Ounce Of Prevention Is Worth a Pound of Cure

BY RANDI COHEN

For several months, the topic of sex and power in the workplace has been dominating our news cycle. It is undeniable that there is a relationship between these themes, and it is hard to dispute that it is a good thing to finally call attention to this long-standing, deeply rooted problem. Amid the tumult of the Weinstein scandal, #MeToo, Shi*tty Media Men, #TimesUp and the countless non-celebrities affected by these issues, what have we learned? How can we turn the corner to foster workplaces where women don’t need to create whisper networks or suffer in silence for fear of retaliation?

The truth is: This is not a novel problem. Not all that long ago it was commonplace for homosexuals or minorities, for example, to be treated poorly in the workforce. The mistreatment eased only when there was a cultural shift against the predators. There is a reason we don’t often hear overt slurs anymore—no one would tolerate that type of blatant racism or abuse. That is not to say, of course, that more veiled, insidious forms of discrimination haven’t developed, but, the hypothetical bad actor knows that such obvious treatment is unacceptable and could subject them to severe consequences. The only way that is going to happen again, in this context, is for there to be a top-down paradigm shift of prioritizing safety, equality, and respect in the workplace.

It is encouraging that the conversation is ongoing and that many companies are taking steps to investigate the issues within their own workplaces and are implementing change to build a culture of equality. For these changes to have any meaning though, leadership must care more about the quality and integrity of their workers than the value of their power players or top earners. Appealing to the concern for corporate bank accounts, from a dollars and cents standpoint, turning a blind eye to complaints about these “valued” employees runs counter to being fiscally protective. The exposure for liability in this arena is significant and growing. The new Tax Cuts and Job Act adds a provision to the Tax Code which prohibits employers from taking a deduction for amounts paid to settle sexual harassment or abuse claims if that settlement includes a nondisclosure agreement. Indeed, the tide is turning against silencing victims and from giving employers an incentive in paying for silence.

So how do we respond to the knowledge of how » Page 13

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DOL's New Internship Test: The **Rebirth** of the **Internship Program?**

BY JOHN HO

In the last several years, there have been numerous highly visible wage and hour class action lawsuits brought by interns claiming they were misclassified and thus entitled to wages for their work as employees. Some of the targets of these lawsuits included Fox Searchlight, Hearst Magazines, NBC Universal, Atlantic Records, Warner Music, designer Norma Kamil, Gawker Media, L.L.C., and Charlie Rose. Indeed, in response to these lawsuits, many companies ceased their unpaid internship programs.

In welcome news for businesses, the U.S. Department of Labor (DOL) in January 2018 implemented a significant change in its interpretation of the Fair Labor Standards Act (FLSA) with respect to the applicable test to determine internship status. As a reminder, prior to the change, DOL utilized a six factor test requiring *all* six factors to be present in order to properly classify an individual as an intern. These factors were:

• The internship is similar to training that would be given in an educational environment.

• The internship experience is for the benefit of the intern.

• The intern doesn't displace regular employees and works under close supervision of existing staff.

• The business doesn't derive an immediate advantage from the intern's activities—and on occasion the employer's operations may be impeded by the intern's activities.

• The intern isn't guaranteed a job at the end of the program.

• The business and the intern each understand that the internship is unpaid.

Often, the fourth requirement that the business derive no immediate advantage from the intern's activities was difficult to satisfy as a practical matter.

In 2015, the U.S. Court of Appeals for the Second Circuit adopted a more flexible, multi-factor "primary beneficiary" test for unpaid interns in *Glatt v. Fox Searchlight Pictures*. In 2017, the Second Circuit issued another opinion in *Wang v. Hearst Corporation* which helped to further explain and clarify this test which was essentially adopted by DOL in its new test set forth in Fact Sheet #71.

The Fact Sheet makes clear that the test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship. The current test now examines the following seven factors:

(1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

(2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

(3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

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(4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

(5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

(6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

In welcome news for businesses, the U.S. Department of Labor in January 2018 implemented **a significant change** in its interpretation of the **Fair Labor Standards Act** with respect to the applicable test to determine internship status.

(7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Unlike the prior test, not all factors need to be satisfied and no single factor is determinative. Rather, the test turns on the specific and unique facts of each case. Under such a totality of the circumstances analysis, businesses are generally better able to defend classifying an intern.

That said, businesses still need to understand the objective of the internship analysis, which is to ensure that interns are receiving a valuable educational benefit by participating in these programs as opposed to providing a source of free labor to businesses. A review of the current test shows it still contains many of the same factors as the old test, e.g., not displacing the work of paid employees and an understanding that there is no guarantee of employment at the conclusion of the internship program. These factors make sense when viewed against the purpose of a bona fide internship program. For example, DOL does not want businesses to dangle guaranteed employment to an intern in order to persuade him/her to work for free for a period of time. Similarly, a business should ask itself what if it does not use an internship program? If the answer is it would then need to hire additional employees to perform certain tasks, this would continue to be a huge red flag.

On both a legal and practical perspective, as the new test incorporates specific consideration for academic credit and accommodating an intern's academic calendar, businesses would be wise to establish internship programs in partnership with educational establishments such as colleges and universities. The educational establishment would have a vested interest in ensuring that such internship programs provide a known educational benefit to its students which would in turn help ensure such students are not being exploited as free labor. If this is done by offering academic credit and imposing certain educational standards such as program evaluations and/or periodic testing for subject matter knowledge, it would be difficult to argue the intern is not the primary beneficiary of the program.

Only time will tell if companies that ended unpaid internships or others not currently using them will revisit this decision because of DOL's more flexible analysis, but there is little question that a bona fide internship program can offer invaluable practical experience and terrific contacts for interns.

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Employers Beware! Your **Opt-Out Arrangements** Might Mean You're Not Offering **'Affordable' Health Care**

BY ROBERT G. BRODY, JOHN F. WOYKE AND LINDSAY M. RINEHART

Under the Affordable Care Act's (ACA) Employer Shared Responsibility provisions—also known as the "employer mandate" or "pay or play provisions"—applicable large employers (ALEs) with 50 or more full-time employees (working an average of 30 hours or more) risk significant penalties if they don't make affordable health coverage available to their employees. Under these provisions, employers must either offer minimum essential coverage that is "affordable" and provides "minimum value" to full-time employees, or potentially pays an employer shared responsibility payment to the IRS. These provisions penalize employers who either do not offer coverage or do not offer coverage which meets minimum value and affordability standards.

Some employers may choose to offer their employees "opt-out payments" or "cash in lieu of benefits," which are essentially cash incentives to waive employer-provided medical coverage. These opt-out arrangements are generally permissible under ACA but come with limitations. A key under ACA is to offer employees health care that is affordable, but, when an employee declines the opt-out payment, how do you calculate "affordable?"

'Affordability'

To avoid penalties under ACA, ALEs must offer affordable, minimum value health coverage to substantially all of their full-time employees. In order to be deemed "affordable," the employee cost for self-coverage cannot exceed a certain percentage of the employee's household income or of one of the three affordability "safe-harbors." This percentage is set at 9.5 percent, but is adjusted annually for the per capita growth in insurance premiums in the individual market. For 2017, it was 9.69 percent, but will decline to 9.56 percent in 2018.

The three affordability "safe-harbors" are in place because employers are not likely to know the household income of their employees, and may be unable to accurately determine what is "affordable." Under these safe harbors, employers are generally allowed to use an employee's W-2 wages, rate of pay, or the federal poverty line, instead of household income in making the affordability determination.

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Regardless of the calculation method used, the problem many employers face is they forget they might have to include the value of the cash incentive offered to the employee when making an affordability calculation. Whether an opt-out payment will need to be included when calculating affordability depends on whether the payment is made under a conditional or an unconditional opt-out arrangement.

'Conditional' Versus 'Unconditional'

In Notice 2015-87, 2015-52 I.R.B. 889, the IRS discussed the impact employer opt-out payments have on affordability calculations. The Notice discusses two distinct opt-out payments: conditional and unconditional. Conditional opt-out payments are those which require the employee to provide substantiation of other coverage, such as a spouse's family coverage, in order to receive the payment. Unconditional opt-out payments have no such requirement.

According to the Notice, ALEs are not required to include in their affordability calculations the value of unconditional opt-out arrangements adopted on or before Dec. 16, 2015, or conditional opt-out arrangements, regardless of their date of adoption. *IRS Notice 2015-87.* The IRS has been pushing for a change in this regard, however.

On July 8, 2016, the IRS issued proposed regulations which would require employers to include nearly all opt-out arrangements in their affordability calculations. Under the proposed regulations, ALEs would have to include cash offered to the employee under all unconditional opt-out arrangements, regardless of when the arrangement was adopted, and under conditional opt-out arrangements which are not deemed "eligible" (see discussion below). That's a 180-degree turn from where the IRS stood when it issued Notice 2015-87. For now, these changes are on hold. On Dec. 19, 2016, the IRS published its Final Rule, which finalized many provisions in the July 2016 proposed regulations, but not those revising the rule on opt-out arrangements.

The IRS has said it is still examining issues related to opt-out payments and their impact on affordability. It plans to finalize those proposed regulations in the future. No word yet on when the future will come.

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Eligible' Opt-Out Arrangements

If the IRS proceeds with enforcing the proposed regulations concerning opt-out arrangements, all payments offered under opt-out arrangements will count as employee contributions when calculating affordability, unless the arrangement is a conditional opt-out arrangement that meets certain eligibility criteria. To be an "eligible" opt-out arrangement under the proposed regulations:

• The employee's right to receive an opt-out payment must be conditioned on the employee providing reasonable evidence that the employee and the employee's family have or will have minimum essential coverage (other than coverage in the individual market) during the period of coverage to which the opt-out arrangement applies.

• "Reasonable evidence" may include the employee's attestation, and must be provided at least annually, but no earlier than a reasonable period of time before the commencement of the period of coverage to which the opt-out arrangement applies. The reasonable evidence may be obtained during the regular open enrollment period that occurs within a few months before the commencement of the period of coverage without being deemed too early.

• The arrangement must provide the employer will not make opt-out payments if the employer knows or has reason to know the employee or family member does not or will not have minimum essential coverage.

How to Calculate Affordability When Offering An Opt-Out Payment

ALEs should review their opt-out arrangements to confirm they meet the eligible exception from the ACA affordability calculation. At least for now, if an arrangement is conditional upon the employee providing some form of substantiation of other coverage, the value of that payment is not included as a contribution when calculating affordability. If the arrangement is unconditional, and was adopted after Dec. 16, 2015, then the value of that payment is included as a contribution by the employee.

For example, an ALE offers its employees coverage that requires employees to contribute $3,000 for self-only coverage, but offers the same employees a $1,000 incentive if they decline to enroll. An employee does not have to provide substantiation of other coverage. For purposes of calculating affordability, an employee's contribution amount would be $4,000. Since this is an unconditional arrangement and an employee who elects coverage is giving up the additional cash compensation, the $1,000 opt-out payment increases the employee's required contribution for affordability purposes regardless of whether the employee enrolls in the plan, or declines to enroll and is paid the opt-out payment. If the same arrangement was made conditional upon proof of other coverage, or if it predated Dec. 16, 2015, it would not be included.

The problem is many ALEs do not realize the importance of including their unconditional opt-out arrangements in their affordability calculations, resulting in miscalculations. For example, if an employee with a household income of $40,000 is offered the plan discussed above, this would not be affordable. To be affordable at the 2017 threshold of 9.69 percent, an employee with a household income of $40,000 would have to contribute less than $3,876. Without considering the opt-out payment of $1,000 the employer would be in compliance. However, the opt-out arrangement brings the employee past the 9.69 percent threshold.

This will become even more complicated for employers if the IRS proceeds with its plan to expand the rule in the future.

Repercussions For Employers

Applicable large employers that offer an opt-out payment to their employees should make a careful determination into what type of arrangement is being offered. If the arrangement is unconditional and adopted after Dec. 16, 2015, the ALE must include the opt-out payment as an additional contribution when calculating affordability. At least for now, if the arrangement is conditional, the opt-out arrangement will not increase the employee's required contribution.

Improperly calculating affordability can subject employers to steep penalties. Employers who offer coverage that provides minimum essential coverage but is not affordable are subject to a monthly penalty which for 2017 was the lesser of $3,390 divided by 12 per full-time employee receiving a premium tax credit, or, $2,260 divided by 12 per every full-time employee minus the first 30 employees (which is the penalty if no coverage at all is provided). These amounts are adjusted annually for inflation. The numbers for 2018 are $3,480 and $2,320, respectively.

This is an often-overlooked area of the law and easily missed. Unfortunately for large employers, miscalculating affordability under the ACA could cost tens of thousands of dollars. Employers should be mindful that this rule exists, and should keep an eye out for any new rules promulgated by the IRS. The IRS is pushing for stricter rules on opt-out arrangements, as evidenced by the July 8, 2016 proposed regulations, and we might see the very limits they are pushing for come to fruition in the near future. Of course, with a new Administration, the future may be even harder to predict.

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New Tax Law **Limits Deductibility of Harassment Settlements:** Where Will the Law of Unintended Consequences Take Us?

BY JULIA M. JORDAN

On December 20, Congress passed a comprehensive tax reform bill (the Act) that the President signed into law on December 22. There is one provision of the Act that is of interest to employment litigators and their clients. New §162(q) of the Internal Revenue Code of 1986 eliminates the deductibility of amounts paid in connection with settlement of sexual harassment and sexual abuse claims if the settlement agreement requires nondisclosure on the part of the employee.

By way of background, a taxpayer generally is allowed a deduction for ordinary and necessary expenses paid or incurred in carrying on any trade or business. I.R.C. §162(a). Settlement payments made to claimants in connection with employment-related disputes are, thus, treated as deductible business expenses by employers, including related attorney fees. Similarly, plaintiffs who sustain attorney fees in connection with settlements of employment disputes may deduct such fees. Section 162(q) eliminates those deductions in cases of settlement of sexual harassment and abuse claims that condition the settlement on non-disclosure.

The provision's language is remarkably brief. Section 162(q) reads in full:

> (q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—No deduction shall be allowed under this chapter for—
>
> (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
>
> (2) attorney's fees related to such a settlement or payment.

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The legislative history of §162(q) does not provide much guidance as to its interpretation. The provision was proposed as an amendment to the Senate bill in November by Sen. Robert Menendez, a Democrat from New Jersey. The conference report history for the Senate amendment merely restates the text of the provision: "Under the provision, no deduction is allowed for any settlement, payout, or attorney fees related to sexual harassment or sexual abuse if such payments are subject to a nondisclosure agreement."

Section 162(q) leaves several questions unanswered that will need to be resolved by the courts and the Internal Revenue Service.

First, what is a claim "related to" "sexual harassment" or "sexual abuse"? The Act does not define any of these terms. Admittedly, sexual abuse claims are subject to less ambiguity. But how broadly should employers interpret "sexual harassment" claims, let alone claims "related to" sexual harassment?

Second, assume that the claim being settled is genuinely and unambiguously a sexual harassment claim, but the claimant has raised other claims as well and the settlement agreement includes a release of any and all claims the employee may have had against the employer, including but not limited to sex-based claims. The settlement payment is consideration for the release of all claims, not just the sex-based claims. This is a common situation. Can the settlement payment be allocated between the harassment-based claim and other claims being settled? That way, at least part of the payment—if such quantification and allocation is permissible under the Act—may be deductible. This approach brings its own complications, however, including determining how much of the settlement should be allocated to the sexual harassment or abuse claims.

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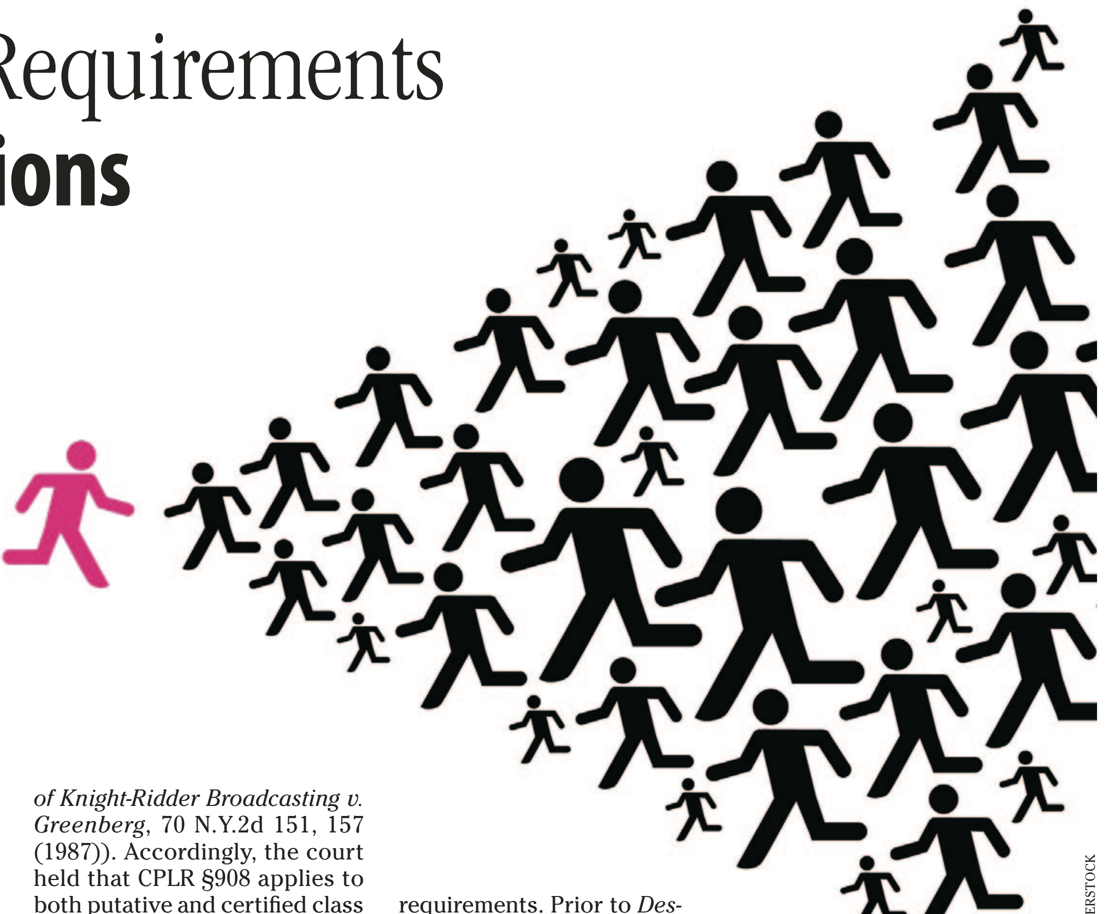
Third, what attorney fees are "related to such a settlement or payment," and, thus, non-deductible? The provision does not distinguish between the claimant's and the employer's attorney fees. Moreover, is it only the fees related to negotiating a settlement, drafting an agreement, and executing payment? May parties deduct fees incurred in investigating the underlying claims, engaging in litigation and evaluating the settlement value of a case? This could be a significant area to recoup some of the deductibility otherwise denied by §162(q) in the event a confidential settlement is preferred.

> Section 162(q) leaves several questions unanswered that will need to be resolved by the courts and the Internal Revenue Service.

The obvious intent of the provision is to provide a strong disincentive to settlements of harassment claims that include confidentiality provisions. Nevertheless, it could well have unintended consequences. Some plaintiffs welcome confidentiality provisions, because they themselves have no interest in publicity about their claims. Moreover, plaintiffs certainly would recognize that an employer may be more willing to pay a higher amount in settlement if the amounts paid are deductible. The provision may ultimately result in fewer settlements, or lower settlement amounts, for plaintiffs. It also may incentivize employee creativity in asserting claims—for example, by not asserting harassment but instead asserting other claims that could continue to be settled confidentially without adverse tax consequences. It thus may actually result in fewer sex harassment claims being brought.

A final consideration is relevant to claimants. The non-deductibility of attorney fees in confidential settlements ironically may be more significant to claimants than employers in light of the Act's reduction of the marginal tax rate for corporations from 35 percent to 21 percent; individuals' tax rates extend up to 37 percent. In 2005, the Supreme Court held that attorney fees are taxable income to plaintiffs. *Banks* v. *Comm'r*, 543 U.S. 426 (2005). But the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (Oct. 22, 2004), allowed plaintiffs to take deductions for attorneys' fee payments in discrimination cases. Thus, another unintended consequence of §162(q)—again, which was intended to remove sex harassment settlements from a shroud of secrecy—may be to incentive plaintiff-employees to characterize sex harassment claims as disparate treatment sex discrimination claims separate from harassment, in order to preserve the deductibility of their attorney fees.

Creating Complications: Notice Requirements For Resolving **Putative Class Actions**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BY GLENN S. GRINDLINGER

On Dec. 12, 2017, the New York Court of Appeals issued a seminal decision that will change the landscape of class action litigation. In *Desrosiers v. Perry Ellis Menswear*, Nos. 121 and 122, 2017 WL 6327106 (N.Y. Dec. 12, 2017,) the Court of Appeals held that under CPLR §908, upon the dismissal, discontinuance or settlement of any class or putative class action, notice must be given to class members in such manner as the court dictates. This means that even if a class is not certified, the parties must inform class or putative class members that the case has been resolved. Not only is this likely to confuse individuals who might not know about the litigation nor be bound by its results, but it also will allow unscrupulous plaintiffs' attorney to solicit potential clients and tax already precious judicial resources.

Background

Desrosiers arose from two separate cases concerning CPLR §908, which states that "[a] class action shall not be dismissed, discontinued or compromised without the approval of the court [and that] [n]otice of the proposed dismissal, discontinuance or compromise shall be given to all members of the class in such manner as the court directs." The main issue in both cases was whether CPLR §908 applies only to cases that have been certified as a class action or if it also applied to putative class actions where a court has not made the determination of whether the case is appropriate for class action status.

In the first case, *Desrosiers v. Perry Ellis Menswear*, plaintiff worked for defendant as an unpaid intern. See id. at *1. The plaintiff commenced a class action lawsuit against the defendant alleging that he and other similarly situated individuals were owed minimum wages. See id. One month after the case was filed, Perry Ellis sent an offer of compromise to plaintiff, which was accepted. See id. During the pendency of the case, plaintiff never moved to certify any proposed class. See id. A few months later, Perry Ellis moved to dismiss the complaint, which plaintiff did not oppose. Instead, plaintiff cross-moved to send notice to proposed class members about the case's resolution pursuant to CPLR 908. The Supreme Court dismissed the case and denied plaintiff's motion. See id. Plaintiff appealed to the Appellate Division.

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Following its 1982 decision in *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dep't 1982), the First Department reversed. The First Department held in *Avena* that CPLR §908 requires notice to be given to class members when a class action is settled even if the class was never certified. See id. at 151. Accordingly, in *Desrosiers,* the First Department followed its prior holding in *Avena* and noted that CPLR §908 notice to putative class members is "particularly important under the present circumstances, where the limitations period could run on putative class members' cases following discontinuance of the individual plaintiff's action." *Desrosiers v. Perry Ellis Menswear*, 139 A.D.3d, 473, 474 (1st Dep't 2016).

In the second case, *Vasquez v. National Securities*, the plaintiff alleged that he and others similarly situated were not properly paid minimum wages and overtime by defendant. See *Desrosiers*, 2017 WL 6327106, *1. Before plaintiff moved for class certification, National Securities made a settlement offer of plaintiff's individual claims, which plaintiff accepted. See id. Again, the defendant moved to dismiss the lawsuit and plaintiff cross-moved to send notice to putative class members under CPLR §908.

The Supreme Court granted both motions. See *Vasquez v. National Sec.*, 48 Misc.3d 597, 601, 9 N.Y.S.3d 836 (Sup. Ct., N.Y. Cty. 2015). National Securities appealed and the First Department, relying on its decision in *Avena*, upheld the Supreme Court's order. See *Vasquez v. National Sec.*, 139 A.D.3d 503 (1st Dep't 2016). The *Desrosiers* and *Vazquez* cases were then consolidated by the Court of Appeals for review.

The Court of Appeals' Decision

In *Desrosiers*, the Court of Appeals held that the notice provisions of CPLR §908 apply to both certified and putative class actions. See *Desrosiers*, 2017 WL 6327106, *2. In reaching this conclusion, the Court of Appeals relied on three arguments. First, the court held that the language of CPLR §908 was ambiguous as to whether it applied to putative class actions or only certified class actions. See id. However, the court noted that the language of CPLR §908 uses the term "class action" rather than "maintained as a class action," which is used elsewhere in CPLR article 9. See id. Furthermore, the legislature did not limit CPLR §908's notice provisions to only those individuals who are members of "a certified class" or "all members of the class who would be bound" by the resolution of the action. In addition, when the legislature enacted CPLR §908, various groups recommended that the notice provision of CPLR §908 apply only to certified class action, which the legislature appeared to have rejected. See id. at *2-*3. Thus, the court found that the legislature intended for CPLR §908 to apply to both certified and putative class actions.

Second, the court reviewed Federal Rule of Civil Procedure (FRCP) 23 upon which CPLR article 9 was modeled. See id. at *2-3. At the time CPLR §908 was enacted, FRCP 23(e) stated "[a] class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Former Fed. R. Civ. P. 23(e). According to the court, prior to the 2003 amendments to FRCP 23, the majority of Federal Courts of Appeals held that FRCP 23(e) applied to both putative class actions and certified class actions. See *Desrosiers*, 2017 WL 6327106, *3. Because the former FRCP 23(e) and CPLR §908 are virtually identical and a majority of courts held that the old version of FRCP 23(e) applied pre-certification, the court held that CPLR §908 also applies pre-certification. See id.

Third, the court relied on the First Department's decision in *Avena*. The court stated that *Avena* was the only appellate-level decision to address the issue of whether CPLR §908 applies pre-certification. See id. at *4. The court noted that *Avena* was issued 35 years ago and the legislature never amended CPLR §908 or otherwise expressed its disapproval of *Avena,* which "'is indicative that the legislative intent has been correctly ascertained.'" See id. (quoting *Matter of Knight-Ridder Broadcasting v. Greenberg*, 70 N.Y.2d 151, 157 (1987)). Accordingly, the court held that CPLR §908 applies to both putative and certified class actions cases.

Ramifications

Desrosiers will have far-reaching implications for New York class action litigation. Indeed, the ramifications are likely to be three-fold. First, New York is likely to see an increase in class action litigation filed in state court. *Desrosiers* provides an incentive for plaintiffs' attorneys to file their cases as class actions regardless of their merits. Upon resolution, plaintiffs' attorneys can move to send notice to the putative class, which, in effect, provides them with free advertising and court-endorsed solicitation. While ethical rules, cost of sending such notices, and the threat of sanctions may dissuade some members of the plaintiffs' bar from pursuing this route, certainly a subset of the plaintiff's bar will seek to expand their practices by filing such actions.

> It might be years before attorneys are fully aware of all of the ramifications of 'Desrosiers' and its requirement that parties send notice to putative class members whenever a putative class action is dismissed, discontinued or compromised.

Second, *Desrosiers* will require greater judicial resources to administer CPLR §908's notice requirements. Prior to *Desrosiers,* courts only got involved in reviewing, approving, and endorsing notice to class members once a class was certified or settled on a class-wide basis. Now, courts will have to get involved in reviewing and approving notices whenever a class action complaint is filed and resolved in some manner (whether through dismissal, discontinuance, settlement or otherwise). In fact, it is not difficult to anticipate that courts will have to render opinions on a multitude of CPLR §908 notice issues. For example, if a putative class action complaint is filed and the defendant successfully moves to dismiss the complaint under CPLR §3211, what would notice to the putative class under CPLR §908 look like? Defendants will likely want the notice to be short and contain limited information. On the other hand, plaintiff's counsel would want the notice to contain detailed information about the complaint's allegations in the hope that putative class members will contact counsel.

Further, there will be arguments over who is part of the putative class required to receive the notice. How does the court define a putative class member when the court has not certified a class? What information must be provided in the notice order? Who bears the costs of producing the class list, which in consumer class action may be very costly to create? The courts will have to get involved in such minutia further taxing already precious judicial resources.

Third, *Desrosiers* may make settlements of class actions more difficult. Indeed, under *Desrosiers*, notice must be sent upon the disposition of any putative class action. Therefore, defendants may want to wait until after the court rules on plaintiff's motion for class certification before engaging in settlement discussions. If the plaintiff loses the motion, the defendant knows that it can resolve the allegations without having to send notice. Further, if it settles or compromises the case before a determination of a class certification motion, the defendant will likely have to inform all putative class members about the settlement increasing the likelihood of copycat cases. Thus, there is an incentive for defendant to delay settlement negotiations until the court rules on plaintiff's class certification motion, which wastes resources of both the parties and the court.

Conclusion

Desrosiers is an important decision that will significantly impact class action litigators. Indeed, it might be years before attorneys are fully aware of all of the ramifications of *Desrosiers* and its requirement that parties send notice to putative class members whenever a putative class action is dismissed, discontinued or compromised. Nevertheless, unless the legislature amends CPLR §908 to conform to the current version of FRCP 23(e), it is almost certain that *Desrosiers* will increase the number of class actions filed in the New York State court system and will drain precious judicial resources.

Agreements

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penalty, and found the agreement enforceable.

But there have been other recent and significant challenges to non-disparagement agreements.

First, courts do not like these as part of court-approved FLSA settlements unless they are narrowly drafted to prohibit only defamatory statements by the parties, and not truthful statements about the employees' experience litigating their case. See, e.g., *Lopez v. Poko-St. Ann L.P.*, 175 F. Supp. 3d 340 (S.D.N.Y. 2016). Moreover, confidentiality provisions that would prevent employees from disclosing the underlying facts leading up to, or the existence or substance of a settlement, regardless of their truth or falsity, are "contrary to well-established public policy." *Kang Ming Sun v. Guang Jun Li*, 2015 WL 6125710, at *1 (S.D.N.Y. Sept. 15, 2015).

Prohibiting an FLSA plaintiff from speaking truthfully about his experiences, his claims, and the resolution of his lawsuit is "in strong tension with the remedial purposes of the FLSA," *Lopez v. Nights of Cabiria, LLC,* 96 F.Supp.3d 170, 177 (S.D.N.Y.2015), and undermines the public's "right to know about the terms of such judicially approved settlements." *Armenta v. Dirty Bird Grp.*, 2014 WL 3344287, at *2 (S.D.N.Y. June 27, 2014).

A related issue concerns the confidentiality of settlement agreements, which has been hotly contested in recent rulings.

As a direct result of the #MeToo movement, the recently enacted Tax Cut and Jobs Act amended the Internal Revenue Code, §162, in a way that denies a business expense deduction for income tax purposes for payments "related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or … attorney's fees related to such a settlement or payment."

Of course, a nondisclosure agreement is not necessarily synonymous with a non-disparagement agreement, and these are not prohibited; but where does disparagement cross the line into disclosure? And will an employer's effort to prevent negative statements about the employer be construed as an effort to keep the lawsuit secret, thus potentially losing the deduction?

In 2016, the SEC announced that it considers illegal any employer-imposed limitation on employees' ability to disclose confidential trade secret information to the SEC, if the employee wants to make disclosure in pursuit of whistleblower claims, and in fact that employers must affirmatively advise employees of their right to do so.

In *In re BlueLinx Holdings*, SEC File No. 3-17371 (Release No. 78528/Aug. 10, 2016), the SEC the severance agreement contained restrictions on use of "confidential information" which required in each instance that before disclosing such information outside the company, the employee needed to seek guidance and provide notice to the company's legal department.

The SEC held this violated SEC Rule SEC Rule 21F-1 (a), which provides: "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications."

The SEC required the company to notify employees of their right to provide company documents to the SEC or any other government entity without notice to the Company. The SEC also imposed a civil penalty of $265,000 and ordered BlueLinx to notify employees who signed severance agreements within last five years of their right to file whistleblower claims with the SEC and to accept SEC whistleblower awards.

OSHA and the EEOC have also gotten into the act. In 2014, the EEOC sued CVS Pharmacy, challenging as discriminatory a settlement agreement that, among other things, restricted the employee from improperly using or disclosing confidential information belonging to CVS and making "any statements that disparage the business or reputation" of CVS (but clarified that the Agreement did not prohibit the employee from "making truthful statements or disclosures that are required by applicable law, regulation or legal process" or "requesting or receiving confidential legal advice.)" *EEOC v. CVS Pharmacy*, 809 F.3d 335 (7th Cir. 2015)

The challenge was dismissed principally on technical grounds—the EEOC never sought to conciliate the matter before filing suit—but the EEOC's disdain for these agreements is plain.

In August 2016, the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) issued guidelines on settlement agreements in whistleblower cases that seek to bar "gag" provisions that prohibit, restrict or discourage participation in protected activity, e.g., broad confidentiality or non-disparagement clauses; broad liquidated damage clauses; a requirement that an employee notify the employer before filing a government complaint; and any disclaimer of knowledge that the employer violated the law. See Memorandum for Regional Administrators, "New policy guidelines for approving settlement agreements in whistleblower cases" (Aug. 23, 2016).

Non-disparagement agreements are a tempting remedy. Clients want them. They are paying to put a matter behind them. But these agreements may be perceived as an effort to unfairly muzzle employees, so they must be written with care, and in the proper context.

Prevention

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prevalent sexual harassment is the first place? One very distressing response we have seen is men refusing to be alone or work closely with female colleagues. We must put a stop to this. Excluding women from meetings, conferences, mentoring opportunities, etc., is in itself a form of discrimination. Segregation is not the answer. It was not then, and it is not now. It is common sense that employees should not be making physical contact with one another unless there is a foundation within the co-worker relationship to support that a hug or a touch on the arm, for example, would not be unwelcome. It is also common sense that morale and camaraderie are important in a workplace. Employees should be encouraged to be friendly and polite to one another, and it would be a shame for employees of any gender to feel afraid to compliment another's haircut or new shoes.

Of course, the scope of the issues are far wider than that. Complications arise when dating occurs in the workplace. This is an area ripe for company policies to develop. Perhaps there is a disclosure requirement that requires the parties to acknowledge that the relationship is consensual. Perhaps a couple who works together are prohibited from having an overlap between the relationship and reporting structure. What happens if it is the female employee who is typically reassigned? One question begets another. The solutions are not always simple and often need to be specifically tailored for individual workplaces.

What is far simpler, however, are the steps that employers can take to empower employees to speak up should they feel they are being victimized; both men and women, when they feel secure to do so, are capable of speaking up for themselves and being clear about their boundaries. The burden is on employers to create an environment in which employees feel that they can express those boundaries, and make complaints when those boundaries are not being respected, without fear of reprisal. It is in this arena it seems we still have miles to go.

We are past the point of claiming ignorance that a pat on the behind, leering, dirty pictures, or other aggressive behavior is unacceptable conduct. If a company does not have a policy explicitly prohibiting this type behavior, or fails to conduct trainings that place employees on notice that these acts, if substantiated, would lead to immediate dismissal, then the company has not joined us in the 21st century and needs to take a good hard look at their participation in the problem.

To start, companies must implement clear reporting procedures and must be genuinely committed to conducting thorough and impartial investigations. If that cannot be accomplished through an unbiased internal human resources department, outside counsel or third-party human resource teams should conduct the investigations to put more distance between the findings and "desired" business decisions. Then the hard part: Employers must be prepared to act on the findings should they substantiate allegations of impropriety. It might hurt, but that sting is the feeling of disappointment that the star performer was actually a liability. Leadership faced with that painful reality should channel that feeling into a commitment to hiring people who wouldn't put the company in that position. And, leadership should pour some of that energy into supporting the brave employee(s) who put themselves in a vulnerable position. Maybe she (or he) is the next star performer.

One thing is for sure: All employers would be wise to engage employment counsel to review their policies and develop new ones where there are gaps in addressing foreseeable scenarios. When it comes to employment law, an ounce of prevention is worth a pound of cure.

Retail

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organized labor has been in the forefront of the "Fight for $15" battleground, it has done little in the past to thwart job eliminations prompted by automation. The National Labor Relations Board has not taken a clear position on whether or not unions have a right to be involved in the employer's decision to automate. Although automation that results in the elimination of jobs would appear to be a term and condition of employment, and thus a mandatory subject of bargaining, the Board has found that the decision to use "labor saving machinery" is a management prerogative not subject to collective bargaining. See *Olean Gen. Hosp. & N.Y. State Nurses Ass'n*, 2015 NLRB LEXIS 904 (N.L.R.B. 2015). This uncertainty may be resolved in the coming years: recently, the Teamsters have announced that they plan to fight the implementation of driverless cars and drone delivery at the collective bargaining table, and other unions will likely do the same. Any of these cases could end up before the Board and provide an opportunity to clarify the automation/collective bargaining issue.

Finally, it is important to recognize that retail sector jobs are often filled by some of New York's, and the country's, most vulnerable populations. Students, immigrants, refugees, and individuals with disabilities are heavily reliant on the retail sector to provide a steady source of employment. These individuals will be disproportionately affected by the decline in retail minimum wage jobs, leaving entry-level workers unable to gain necessary workplace experience. With the trends showing a decline in retail jobs nationwide, and New York poised to promulgate additional regulations in this already-burdened area, it is unlikely that employers will be incentivized to reverse the tide, leading to unintended social and economic consequences. For the time being, we may need to get used to the concept that, for minimum wage employers, "help" in the form of employees, is not wanted.