Arbitration Update

The battle over arbitration unilaterally imposed by businesses on employees and consumers is heating up. The National Labor Relations Board has continued to hold in a series of decisions that arbitration provisions that completely bar class action in any forum violate the National Labor Relations Act because they prohibit concerted activity, a right protected by Section 7 of the statute. In *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), the Board held that even a voluntary agreement to waive the right to file a class action violates the law because it requires a prospective waiver of Section 7 rights. The Board’s view has not fared well in the courts thus far, however, either in appeals of the Board’s decisions or in cases where employees try to resist arbitration in legal actions under other statutes by arguing that the agreement is void based on NLRB precedent. There are a number of cases currently pending in Courts of Appeals that have not previously addressed the issue, including an appeal in *On Assignment Staffing*, however.

In another action related to arbitration, President Obama issued an executive order which prohibits government contractors with contracts valued at more than one million dollars from requiring arbitration of claims under Title VII of the Civil Rights Act or tort claims arising out of sexual assault or harassment. Employers argue that the order conflicts with Supreme Court decisions upholding the enforceability of arbitration agreements and, along with other provisions of the order, increases the risks of government contractors.

The New York Times recently published a three part series critical of arbitration. Several organizations, including the *Alliance for Justice* and *Public Justice* are ramping up campaigns against forced arbitration. Outside the employment arena, the Consumer Financial Protection Bureau issued a report to Congress on arbitration and is proposing to outlaw arbitration provisions in consumer contracts that prohibit class actions. In addition, the Center for Medicare and Medicaid Services is proposing to restrict arbitration in nursing home contracts.

Given the Supreme Court’s broad interpretation of the Federal Arbitration Act, their willingness to enforce arbitration agreements, and the benefits to business of arbitration, it may take Congressional action for opponents to achieve their goal of eliminating mandatory arbitration, however.

EEOC Guidance Regarding Employment of Muslims

The EEOC recently issued guidance for both employees and employers regarding employment of Muslims, Middle Easterners, and others who might be perceived to be in these groups. The guidance is
formatted as questions and answers, using specific examples. It does not provide any new law but instead reminds employers and employees of the law in light of the salience of these issues after recent attacks in Paris and the workplace attacks in San Bernadino. The EEOC reiterates that employers cannot make discriminatory employment decisions because of customer preference or employee discomfort. The religious practices of employees must be accommodated unless the employer can demonstrate that accommodation would cause undue hardship. The EEOC helpfully notes that undue hardship is not established because other employees might ask for the same accommodation. For example, if one employee asks for prayer time and that can be accommodated but ten cannot, the accommodation cannot be denied because nine others may ask. Only when they do, and it actually creates undue hardship may the employer deny the accommodation. Finally, the EEOC reminds employers about the importance of maintaining and enforcing their anti-harassment policies and advises employees to become familiar with the policies in order to understand what is permissible and what is prohibited. Current events may spill over into the workplace and require employer and employee vigilance to prevent and avoid discrimination and harassment.

For the employer guide, see here. For the employee guide, see here.

**NLRB Invalidates Rule Prohibiting Recording in the Workplace**

In December, 2015, the NLRB ruled that Whole Foods’ policy prohibiting recording conversations in the workplace without management approval violates the National Labor Relations Act. The purpose of the policy, according to Whole Foods, is to encourage open communication without fear that a conversation or meeting is being recorded. The NLRB found that employees could reasonably view the rule as prohibiting concerted activity protected by Section 7 of the Act. In fact, the company acknowledged that the rule applied to recordings of protected activity. Distinguishing the case from one which upheld a ban on recording in a hospital because of patient privacy, the Board majority found that Whole Foods’ interests weren’t sufficiently weighty to justify the impact on protected activity. Member Miscimarra dissented, arguing that the rules were actually designed to protect employee rights since some of the meetings involved town halls where criticisms of management might be voiced to regional leadership, peer review panels deciding whether to uphold terminations, and meetings about whether to award employees money from an assistance fund.

This case may have implications beyond labor law. While the Board clearly did not hold that a “no recording” policy can never be justified, the decision casts doubt on the legality of such rules where there is no special justification like patient privacy. Employees frequently want to (or do) record meetings and conversations to preserve evidence of legal claims. There are a number of state laws on recording as well, with some requiring consent of all parties to the conversation and others allowing recording where one
party (the recorder) consents. Thus, state law may prevent recording even where employer policy does not. Whole Foods has filed a petition for review in the Second Circuit Court of Appeals.

For the NLRB decision, see [here](#).
For information about state recording laws, see [here](#).

**MSHA Finally Unleashes the Pattern of Violations Notice**

On September 29th, 2015 the Federal Mine Safety and Health Review Commission released a monumental decision focused squarely on the health and safety of our nation’s 261,784 miners. The Commission deftly navigated the nuance and complexity of administrative law and legislative history to resolve whether or not the Secretary of Labor’s definition for a pattern of violations (“POV”) under its revised 2013 rule was lawful and thus enforceable. The case, a matter of first impression for the Commission, also hinged on whether the administrative law judge had jurisdiction to review the Secretary’s actions as enumerated under the Federal Mine Safety and Health Act of 1977.

When MSHA issued a POV notice and accompanying withdrawal orders (orders to temporarily cease operations) to a mine operator known as Brody Mining LLC, massive litigation followed. Brody challenged the Secretary’s definition of POV as overly broad and vague in an effort to undue MSHA’s best compliance-driven enforcement tool. Brody was successful in its initial argument before the ALJ, but the Department of Labor’s Mine Safety and Health Administration (“MSHA”) appealed to the Commission, which then overruled the ALJ in favor of the Secretary.

The heart of the case, the Mine Act, empowered mine safety inspectors to place mine operators on POV status if the inspectors found repeated violations of mandatory health and safety standards that were likely to be significant and substantial (“S&S”). During litigation, Brody compelled the Secretary to provide a definition of POV, and to show how a POV was established. The Secretary responded with a clear definition and procedure of POV notice/status that clearly aligned with the Mine Act’s legislative intent. The Commission found the definition and procedure to be adequate and upheld the issuance of POV status and the accompanying withdrawal orders. The Commission’s decision is significant because this was MSHA’s first issuance of withdrawal orders predicated on a POV notice in its administrative history. And since the Commission upheld jurisdiction and the parameters of the POV notice, it seems likely that MSHA will continue utilizing this compliance-driven enforcement tool. Mine safety advocates laud the recent decision as a step in the right direction for protecting our nation’s miners. However, opponents warn that MSHA’s newfound voice will further inhibit an already regulation-heavy industry.
Congressional Update
Protecting Older Workers Against Discrimination

In the 2009 case *Gross v. FBL Financial Services, Inc.*, the Supreme Court broke with decades of precedent when determining the test to be utilized in age discrimination claims. In *Gross*, the Supreme Court opined that absent specific legislative language, age discrimination cases must be examined using but-for causation rather than the previously incorporated mixed-motive test. Under the mixed-motive regime, plaintiffs could argue that age was among the decisions underlying adverse employment action such as termination or demotion. Once age was proven to be among the considerations, the burden then shifted to the employer to argue that it would have taken the same action regardless of age.

The mixed-motive test was an attempt to balance the scales when advancing discrimination claims, because but-for causation is a much higher evidentiary burden. However, but-for causation is the standard test under tort law, which is why the Supreme Court relied heavily upon its use absent specific language to the contrary. Proving motivation is discrimination cases, however, is different than proving causation in tort cases.

In order to return to the mixed-motive test, the United States Senate and House of Representatives have both introduced legislation called the Protecting Older Workers Against Discrimination Act (“POWADA”) that amends four laws – the ADEA, Title VII of the Civil Rights Act, the ADA, and the Rehabilitation Act. Historically, workers’ rights bills tend to fall under the Democratic umbrella. But due to the increasing number of aging Americans nationwide, and vulnerability of numerous Senators and Representatives in the upcoming elections, POWADA has seen bipartisan support. The bill has been introduced in both chambers, and is awaiting action.

Tribal Sovereignty

Although the issue of tribal sovereignty has sparked controversy for centuries, the debate over the federal government’s jurisdiction with regard to regulating labor relations reignited it once again. In 2004, the NLRB in *San Manuel Indian Bingo & Casino*, determined that it has authority over enterprises on tribal land, with some exceptions. Although the percentage of tribal cases before the Board is relatively small, the impact of San Manuel cannot be underscored: thousands of workers on tribal land (mostly in casinos) are afforded the protections of the National Labor Relations Act.

Opponents of the Board’s decision argue that the NLRB is without jurisdiction because tribes are independent nations and should accordingly be treated as sovereigns just as are states and cities (which aren’t covered under the NLRA). However, worker advocates counter that a large majority of workers on tribal lands are not members of tribes, and thus should be covered under the statute that protects millions
of similarly situated workers nationwide. Congress has taken on the issue to address the concerns raised by vocal opponents by introducing HR 511, the Tribal Sovereignty Bill of 2015. The bill passed through the House, but has stalled in the Senate; President Obama warned he would veto the bill.

Conflict of Interest

The Obama administration and the Department of Labor have ramped up their efforts to increase transparency in the pension investment arena. The DOL re-proposed a conflict of interest rule, also known as the fiduciary duty rule, for public comment earlier last year. The rule would require that those giving financial advice provide notice to investors when a higher commission would be earned on a specific investment. Simply stated, the rule encourages financial advisors to notify clients when they have a conflict of interest, i.e., when the advisor will make a higher commission on one investment versus another. The proposed rule would mandate that financial advisors act as fiduciaries when giving pension investment advice, and for those who fail to do so, it provides a private right of action for investors who’ve been misled. Opponents in Congress recently introduced legislation to preemptively nullify the rule, and also attempted unsuccessfully to strip the regulation of funding during the recent spending bill negotiations.