The Legislative Update

Jeff Devine, Legislative Chair

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HR LEGISLATIVE NEWS FROM AROUND TE WEB….

Workers' Compensation: Employee's slip and fall accident on her day off arose out of and in course of employment, and thus Worker's Compensation Act applied to accident.

An employee who slipped and fell in a puddle of water while delivering ice and checking on a broken ice machine in her employer's restaurant in Louisiana on a day that she was not scheduled to work was barred from bringing a premises liability action against her employer. The employee's acts of calling her supervisor, obtaining and delivering ice to restaurant, agreeing to look at the ice machine, and traversing the area where her accident occurred were inextricably linked to her employment at the restaurant. Given that the employee's accident occurred in the course of her employment, the Worker's Compensation Act applied to the employee's accident, and thus the Act's exclusive-remedy provision barred the employee's tort claim against her employer. The dissent maintained that the employer did not prove that the employee was required to be at the restaurant at the time of her accident or that the accident happened in an area only for employees. As a result, the dissent concluded that the employer did not prove that the employee was engaged in the performance of work duties during work hours.

Hours and Wages: Car dealership "service advisors" as salesmen exempt from FLSA overtime-pay requirements — Certiorari Granted

Granting certiorari from a Ninth Circuit case for the second time, the United States Supreme Court has agreed to address whether "service advisors" at car dealerships are exempt from the Fair Labor Standards Act's (FLSA) overtime pay requirements.

The statute exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." See 29 U.S.C.A. § 213(b)(10)(A). The employees' duties as service advisors involved greeting dealership customers, evaluating the service and/or repair needs of those customers, and then selling repair and maintenance services for the customers' cars. The employees sued the dealership under the FLSA, seeking time-and-a-half pay for working more than 40 hours per week. After determining that a service advisor is a "salesman . . . engaged in . . . servicing automobiles," the district court dismissed the action. The employees appealed. In its first decision, the Ninth Circuit, addressing a question of first impression for the circuit, reversed in part, holding that the employees were entitled to overtime compensation. Finding that Chevron deference was appropriate, the Court of Appeals relied on regulatory definitions promulgated by the Department of Labor (DOL) after a notice-and-comment period, which provided that the exemption was limited to salesmen who sold vehicles, and partsmen and mechanics who serviced vehicles. The court

acknowledged that its holding conflicted with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana, but respectfully disagreed with those decisions. The Supreme Court granted certiorari and ultimately vacated and remanded, holding in Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 195 L.Ed.2d 382 (2016), that the DOL regulation relied upon by the Court of Appeals lacked
a reasoned explanation for the Department's decision to abandon its decades-old practice of treating service advisors as exempt and so was not entitled to Chevron deference. Instead, the Court ruled, § 213(b)(10)(A) must be construed without placing controlling weight on the subject regulation. On remand, the Ninth Circuit again concluded that the employees were non-exempt. Congress did not include service advisors in the list of exempt job titles, the Court of Appeals reasoned, noting that the statutory provision exempted only three commonly understood job titles, namely, automobile salesmen, partsmen, and mechanics. Service advisors were not primarily engaged in selling or servicing cars. While the legislative history of the provision contained repeated, detailed
concerns about applying the overtime-compensation requirement to automobile salesmen, partsmen, and mechanics, it did not reveal a similar concern for applying the overtime-compensation requirement to service advisors. In its certiorari petition, the dealership argued that the Ninth Circuit's decision was "an outlier" that "badly misconstrue[d]" the relevant statutory text. "For more than 40 years, federal and state courts across the country [have] uniformly held that service advisors like Respondents were covered by » 213(b)(10)(A)'s exemption because they are salesm[e]n . . . engaged in . . . servicing automobiles,"' the petition stated.

Encino Motorcars, LLC v. Navarro
2017 WL 2021593
(U.S.)

Unions: Validity under First Amendment of law allowing union to collect "fair share" fees from non-member public employees — Certiorari Granted

The United States Supreme Court has granted certiorari from a Seventh Circuit decision affirming the dismissal of public employees' First Amendment free-speech challenge to an Illinois statute under which a union could collect "fair share" fees, that is, a proportionate share of the costs of collective bargaining and contract administration, from nonmember public employees on whose behalf the union negotiated.

The governor of Illinois filed suit in federal district court to halt unions' collection of "fair share" fees pursuant to the Illinois Public Relations Act, 5 ILCS 315/1 et seq., arguing that the statute violated the First Amendment by compelling employees who disapproved of the union to contribute money to it. Although the governor's complaint was dismissed
for lack of standing, two public employees were allowed to intervene, seeking the overruling of Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). In Abood, the Supreme Court held that an agency shop provision of public teachers' collective bargaining

agreement (CBA) was valid under the First Amendment, insofar as service charges were used to finance expenditures by the union for collective bargaining, contract administration, and grievance adjustment purposes, rather than political or ideological activities that were not approved of by teachers who
did not wish to join the union.

On appeal from the district court's dismissal of the lawsuit, the Seventh Circuit affirmed. Claim preclusion barred the claim of one employee, who, in an earlier challenge to the requirement that he pay the union "fair share" fees, had appealed to an Illinois state appellate court the Illinois Labor Relations Board's decision denying his contention, under the same provision of the Act, that the union was required to pay his non-member fees to a charity at his request. That employee had a full and fair opportunity to raise his First Amendment claim in the state-court litigation but failed to do so, the Court of Appeals found. The second employee failed to state a valid claim, because neither the district court nor the Court of Appeals could overrule Abood .

In his petition for a writ of certiorari, the second employee argued that Abood was wrongly decided because it is inconsistent with the Supreme Court's precedents requiring that instances of compelled speech and association satisfy heightened constitutional scrutiny, and for the reasons stated in Harris v. Quinn, 134 S.Ct. 2618, 189 L.Ed.2d 620
(2014), which declined to extend Abood to Medicaid-funded home care personal assistants who were regarded as public employees only for collective bargaining purposes. In Harris, the petition asserted, the Court gave no fewer than six
reasons why the Abood analysis was questionable, including that Abood : (1) "fundamentally misunderstood" earlier cases concerning laws authorizing compulsory fees in the private sector, (2) failed to appreciate the difference between
bargaining in the private and public sectors, (3) failed to appreciate the difficulty of distinguishing between collective bargaining and politics in the public sector, (4) did not foresee the difficulty in classifying union expenditures as "chargeable" or "nonchargeable," (5) did not foresee the practical problems that would face objecting non-members, and (6) wrongly assumed that forced fees are necessary to exclusive representation.

Janus v. American Federation of State, County and Municipal Employees, Council 31
2017 WL 2483128
(U.S.)

New Florida Statute Seeks to Prevent Disability Access Lawsuits

Businesses of all sizes and types throughout Florida that are open to the public face the constant threat of disability access lawsuits brought under Title III of the Americans with Disabilities Act (ADA). We've highlighted the nature of public accommodation lawsuits in previous articles and warned you of the importance of ensuring compliance with the ADA's

provisions requiring equal access to public facilities for all individuals, regardless of any disability. The Florida Civil Rights Act contains similar provisions.