Weekly Report for December 22, 2017

LABOR AND EMPLOYMENT

Department of Labor Seeks to Loosen Reins on Restaurant Industry By Rescinding Regulation of Certain Tip Pooling Practices

In 2014, the U.S. Department of Labor ("DOL") Wage and Hour Division launched an aggressive enforcement initiative aimed at ensuring companies in the restaurant and food service industry comply with the federal minimum wage, overtime, and record-keeping requirements of the Fair Labor Standards Act ("FLSA"). Plaintiff-side employment lawyers took note immediately and began advertising to their target audience. It is not surprising, therefore, that servers, bartenders, and seasonal or event staff have advanced employee complaints based on alleged improper wage- and tip-payment practices with increased frequency, exposing the restaurant industry's unique vulnerability to the complex and nuanced requirements of the statute.

Discussed above is the Department of Labor's ("DOL") 2011 Regulation related to restaurant tip distribution practices and its journey to the U.S. Supreme Court. The regulation in question announced broadly that "[t]ips are the property of the employee" and "prohibited [employers] from using an employee's tips . . . for any reason other than . . . [a]s a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool." What this means is that, under the current DOL regulation, even if a restaurant pays its employees a base hourly wage above the minimum wage (without consideration of tips), the restaurant is still required to distribute all tips among its tipped employees, i.e., servers, bartenders, and other wait staff, but it cannot distribute any tips to back-of-house employees, such as cooks, dishwashers, and janitorial staff.

In the December 5, 2017 edition of the *Federal Register*, the Wage and Hour Division of the DOL gave public notice of its proposal to rescind portions of its 2011 regulations. Under the proposed rulemaking, specifically, the DOL seeks to lift the requirement that all tips be distributed to regularly tipped employees and to consider whether it should rescind the prohibition on restaurants distributing tips to back-of-house employees, such as kitchen employees and dishwashers, so long as all employees of the restaurant receive base hourly rates of pay of at least the minimum wage.

The practical application of the DOL's proposed new rulemaking, if adopted, is that restaurants that pay all of their employees a base hourly rate above the minimum wage could reach agreement with their employees to distribute a tip pool among a larger group of employees, essentially providing a pay raise to traditionally-lower-paid—yet critical—back-of-house members of a restaurant's staff that do not customarily receive tips under the present DOL regulation. Notably, the proposed rulemaking would have no effect on restaurants that elect to take a tip credit when paying their employees, i.e., where a restaurant pays a server or bartender a base hourly rate less than the minimum wage (as low as $2.13 per hour) and makes up the difference by distributing tips among employees.

Federal Contractors under Trump Are Offshoring at a Speedy Clip

According to an article in the Federal Contracts Report, corporate contractors for the government have been "outsourcing" positions at a speedy pace. In the year since Trump's election, 93,449 jobs have been lost to outsourcing or trade competition, and the top 100 federal contractors have been certified as shipping a record 10,269 American jobs abroad. Of those, four federal contractors each had more than 1000 offshoring-related job losses: General Motors Co., Boeing Co., Pfizer Inc., and United Technologies Corp. For more information see Federal Contracts Report Vol. 108, No. 22, 571.

SMALL BUSINESS

2018 NDAA Makes Big Changes to HUBZone Program

The 2018 National Defense Authorization Act ("NDAA"), signed last week, made some significant changes to the Small Business Administration's ("SBA") Historically Underutilized Business Zone ("HUBZone") Program. Most of the changes will not take effect until January 1, 2020, but one important change is effective immediately: the current HUBZone maps will be "frozen" and will not change until at least January 1, 2020. This means that areas that currently are designated as HUBZone (or in redesignated status) will remain HUBZones until 2020. Under the 2018 NDAA, SBA is charged with creating a publicly accessible online tool to depict the HUBZones. The current HUBZone areas will remain the same until the new online tool is created – which will be no sooner than January 1, 2020 and potentially longer. The NDAA is not clear about how the new online tool will differ from the current HUBZone map available online, so time will tell what the new online tool will entail. For more information, see our recent blog article.

COFC

RECENTLY ISSUED DECISIONS

Veterans Contracting Group, Inc. v. U.S., No. 17-1188C (Dec. 20, 2017): The plaintiff was a CVE-verified SDVOSB and received a USACE contract that was set aside for SDVOSBs. A disappointed offeror filed a protest with SBA, and OHA ultimately determined that the plaintiff did not qualify as an SDVOSB under SBA's rules and was ineligible for award. The VA then notified the plaintiff that is was being removed from VA's database. The plaintiff then protested at the Court Of Federal Claims, challenging OHA's decision. The court began its analysis by walking through the VA's and SBA's SDVOSB programs and noting that an anomaly is created by the VA's regulation (38 CFR 74.2(e)), which provides that a firm in the VIP database that is found ineligible by SBA will be removed from the database, without regard to VA's eligibility requirements.

As relevant here, OHA had held that the plaintiff was not eligible to bid as an SDVOSB because, in light of the company's shareholder agreement, the veteran did not unconditionally own the company. Specifically, the shareholders agreement restricted his heirs' ability to convey or transfer the stock. The court upheld OHA's decision. In doing so, the court rejected the plaintiff's arguments, finding that the plaintiff was relying on cases interpreting VA's regulations, which have a different standard for ownership than SBA uses for SDVOSBs. (https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv1188-34-0)

Veterans Contracting Group, Inc. v. U.S., No. 17-1015C (Dec. 21, 2017): In this case, the plaintiff challenged its removal from the VA database. Specifically, after being removed from the database, it filed a protest related to two SDVOSB procurements that it had been preparing to pursue. The plaintiff argued it should not have been removed from the database. The plaintiff argued that by relying on SBA's decision, the VA removed the plaintiff without considering the VA's own regulation (38 CFR 74.22.) The plaintiff also argued that the removal was not supported by the facts. The court held that the VA was required to look beyond the fact that SBA issued an adverse determination before removing an SDVOSB – it needed to look at whether the plaintiff was eligible under the VA's regulations. The court awarded the plaintiff the bid and proposal costs for the procurement for which it was ineligible to compete (the VA extended the proposal deadline for the other). (https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv1015-62-0)