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Recent Developments in Employment and Labor Law



Employment and Labor Law Section



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Recent Developments in Employment and Labor Law

Introduction From The Section Chair

The employer employee relationship is highly personal and complex. Federal, state and local laws governing labor and employment are constantly in flux and, in many cases, dominate public policy discussions. In this Issue of *New Mexico Lawyer*, the Employment and Labor Law Section provides updates and analysis on recent case law and legal issues. We hope that the employment and labor related topics that the authors take up in this issue will be interesting and valuable for all lawyers, whether representing employers or employees, advising business clients or simply serving as employers themselves.

Sincerely,

Marshall Ray
Chair, Employment and Labor Law Section

Equal Pay is **COMP**-licated:

Equal Pay Claims in Today's Workplace

By Victor P. Montoya

Congress enacted the Equal Pay Act (EPA) in 1963 as an amendment to the Fair Labor Standards Act. *See* 29 U.S.C. § 206(d). Over the last three years, the Equal Employment Opportunity Commission (EEOC) reported an increase in EPA claims. This may be attributed to many factors, including the addition of pay discrimination to the EEOC intake form and workers' heightened awareness of equal pay issues gained from social media and other sources, as well as celebrity activism. Another government agency, the Office of Federal Contract Compliance Programs (OFCCP), also proposed rulemaking to require covered federal contractors and subcontractors with more than 100 employees to submit an annual Equal Pay Report on employee compensation to address equal pay concerns.

What is the EPA and how can employers lower the risk of EPA claims? There is no simple answer — equal pay is COMP-licated.

Equal Pay Act

The EPA prohibits discrimination on the basis of sex by paying wages at a rate less



than the rate paid to employees of the opposite sex for work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions. Exceptions are provided: “where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which

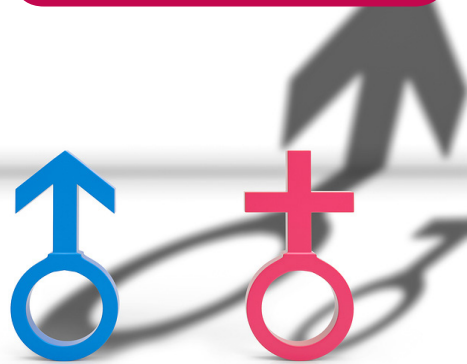
measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of [the EPA] shall not, in order to comply with the provisions of [the EPA], reduce the wage rate of any employee.” 29 U.S.C. § 206(d) (1).

Watch the Gap

The risk of EPA claims for employers of all sizes and industries is highest from employees in highly compensated or highly populated positions. The American Association of University Women (AAUW) published a report entitled “The Simple Truth About the Gender Pay Gap,” which it updated in Fall 2017. According to the AAUW report, at the rate of change between 1960 and 2016, the pay gap between women and men may not close until 2059. Given the slower rate of change seen since 2001, the anticipated date men and women may reach pay equity could extend to 2119. The report notes that, in 2016, women were paid just 80% of what men were paid. For mothers, the pay gap only grows with age - women aged 55-64 were paid only 74% of what similarly aged men earned. In 2016, women of color were paid even less, which makes it difficult to pay off their student loans and other debts. The report states that New York had the lowest pay gap for women at 89%. New Mexico, at 82%, was among the states with the lowest pay gaps in the country. The pay gap exists in almost every occupation and, although education helps increase women’s earnings, education does not close the pay gap. Among women at all education levels, white women earn more than black and Hispanic women. As a result of the pay gap, women also receive lower benefits from Social Security, pensions, and similar benefits when they retire. The AAUW report states that the pay gap is largest for Hispanic and Latina women, who earned just 54% of that earned by white men in 2015. The report also notes that the pay gap can have wide-ranging effects on children and men, since 42 percent of families’ primary or sole breadwinners are mothers with children under 18 years of age.

Hollywood celebrities (including Patricia Arquette, Jennifer Lawrence, Amy Schumer, Hugh Jackman, Emma Stone, Robin Wright, and the cast of the *Big Bang Theory*) and professional athletes also have joined the equal pay debate. In March 2016, the U.S. Women’s Hockey Team, the reigning tournament champions, announced that it would sit out the International Federation World Championship in Michigan unless the players received a living wage, and only settled the dispute shortly before the tournament began. In the same year, the U.S. Women’s soccer team filed a landmark charge with the EEOC asserting that

The EPA prohibits discrimination on the basis of sex by paying wages at a rate less than the rate paid to employees of the opposite sex for work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions



team members were paid less than members of the U.S. Men’s team. The charge alleges that despite the women’s team earning over \$20 million more in revenue than the men’s team the prior year, it still received less pay.

It is unknown how the current administration in Washington, D.C., will address equal pay issues. President Donald Trump previously stated women should get the same pay if they do the same job. However, he then signed an executive order in March 2017 revoking the 2014 Fair Pay and Safe Workplaces order created by President Barack Obama intended to ensure that federal contractors improve their compliance with federal labor and civil rights laws.

Despite this uncertainty, other branches of the federal government, states, academics, pay experts, and women’s and civil rights groups are addressing the pay gap head on. This includes state equal pay laws, enforcement priorities established by the EEOC and OFCCP, and bans on asking applicants for their salary histories.

State Law Examples

The 2016 California Fair Pay Act amended the California Labor Code to change pay groups from “similarly situated” (as used in the EPA) to “substantially similar.” Cal. Lab. Code § 1197.5. This change makes it easier for California employees to compare themselves and their wages to other employees. The California law also bars employers from prohibiting their employees from disclosing their wages, discussing the wages of others, and inquiring about another employee’s wages. This change addresses salary transparency, another barrier to equal pay. Massachusetts also enacted an Equal Pay Act in 2016, which becomes effective in 2018. Mass. Gen. Laws ch. 149, § 105A. The standard for pay groups under the Massachusetts law is “comparable work,” which is similar to the California law. The Massachusetts law, however, provides a defense to employers who self-evaluate and make progress towards eliminating the gender pay gap. An employer sued under the Massachusetts law is entitled to an affirmative defense if it can demonstrate the following: 1) it has within the previous three years completed a self-evaluation of its pay practices in good faith; and 2) reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation. This provision encourages employers to be proactive and take affirmative steps to address equal pay in their workplaces.

The New Mexico Fair Pay for Women Act also prohibits wage discrimination based upon an employee’s sex. *See* NMSA 1978, §§ 28-23-1, *et seq.* (2013). Proof of an employer’s intent to discriminate is not required. Similar to the EPA, exceptions are provided for wage differentials based upon seniority or merit systems, or systems that measure earnings by quality or quantity of production.

Many other countries, including the United Kingdom, Germany, and Sweden, also are enacting equal pay laws. Equal pay therefore is a concern for employers in the global market.

EEOC and OFCCP

Although EPA claims represented only 1.2% of the total charges received by the EEOC in Fiscal Year 2016, they resulted in \$8.1 million in monetary benefits to

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Fifty Years of the ADEA:

Proving and Defending Age Discrimination Claims in 2017 and Beyond

By Alana M. De Young

Although media outlets often focus on the millennial generation's impact upon the workforce, today's workforce is also marked by the unprecedented participation of older workers. The increased number of older workers pursuing employment long after reaching the traditional "retirement age" comes hand-in-hand with the 50th anniversary of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. When enacting the ADEA a half century ago, Congress prohibited age discrimination in employment decisions, including decisions to hire, promote, and discharge, and with regard to the compensation, terms, conditions, or privileges of employment. 29 U.S.C. § 623(a).

As age discrimination and bias in the workplace continue to trigger litigation throughout New Mexico and the country, this article considers two current ADEA-related issues. First, it considers recent court decisions regarding "substantially younger workers" and age stereotypes under the ADEA to provide guidance on making and defending against *prima facie* cases of age discrimination. Second, it discusses recent court opinions that foreshadow a potential increase of disparate impact claims under the ADEA.

The "Substantially Younger" Analysis and the Impact of Age Stereotypes in Making and Defending Against *Prima Facie* Cases of Age Discrimination

Under the ADEA, one of the elements a plaintiff must prove to establish a *prima*



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facie case of age discrimination is that he or she was replaced by a "substantially younger" employee. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-313 (1996). Notably, this does not mean that the plaintiff's replacement must be from outside the protected ADEA class (*i.e.*, under 40); instead, "[t]he fact that one person in the protected class has lost out to another person in the protected class is ... irrelevant, so long as he has lost out because of his age." *Id.* at 312. Indeed, the Eleventh Circuit Court of Appeals in *Liebman v. Metro. Life Ins. Co.* found that a 42-year-old employee who replaced the 49-year-old terminated plaintiff qualified as "substantially younger," even though the

replacement was over 40 himself. 808 F.3d 1294, 1299 (11th Cir. 2015).

Several courts have recently reviewed what is "substantial enough" of an age difference to support an inference of age discrimination under the ADEA. Historically, the majority of federal circuit courts had found an age gap of less than ten years was presumptively *insufficient*, in and of itself, to meet the substantially younger element under the ADEA *prima facie* analysis. In *France v. Johnson*, the Ninth Circuit Court of Appeals was faced with an eight-year average age difference between the 54-year-old plaintiff and four other applicants in their 40s who were selected over the plaintiff for a promotion. 795 F.3d 1170, 1172 (9th Cir. 2015), *as amended on reh'g* (Oct. 14, 2015). While the *France* court agreed with its sister circuits that an age gap of less than ten years is presumptively insufficient to make a *prima facie* showing, the Court explained that a plaintiff "can rebut the presumption by producing additional evidence to show that the employer considered his or her age to be significant." *Id.* at 1174. Thus the *France* court held the eight-year gap, coupled with additional evidence of age bias including a spoken

preference for “younger, less experienced” workers and repeated discussions about the plaintiff’s potential retirement, established a *prima facie* case of age discrimination. *Id.*

Similarly, the Eighth Circuit Court of Appeals held in *Hilde v. City of Eveleth* that an eight-year age gap between the plaintiff, who was denied a promotion, and the successful promotion candidate was substantial enough based on additional evidence that the decision makers assumed the plaintiff was not committed to the position solely because his age made him retirement-eligible. 777 F.3d 998, 1006 (8th Cir. 2015).

Ultimately, these cases emphasize that there is no magic number for what constitutes “substantially younger” under the ADEA. Instead, when analyzing age discrimination claims, the courts are carefully considering evidence relating to age and particularly focusing on evidence relating to employers’ assumptions about age. Thus, plaintiffs may be able to establish age discrimination by showing smaller age gaps between comparators, particularly where such gaps are coupled with additional evidence of age discrimination or bias. As for employers, while it may be insufficient to solely rely upon an age gap of ten years to rebut a *prima facie* showing, they, too, can use this lack of a bright-line rule to defend against age discrimination claims: these cases suggest a trend away from focusing narrowly on the age comparison and towards looking more broadly at biases of the employer *relative to* age. Accordingly, employers who root employment decisions not only on the age of older employees or job applicants but also upon their fears as to the commitment or ability of those older employees or applicants, based solely on age, may be more vulnerable to losses on these claims because they are making assumptions based on age stereotypes.

The Potential Increase of Disparate Impact Claims under the ADEA

The ADEA, in addition to prohibiting discriminatory treatment of older workers, also prohibits facially neutral employment policies and practices—such as a reduction in force—that have disparate impacts on older workers. *See* 29 U.S.C. § 623(a)(2);

The ADEA, in addition to prohibiting discriminatory treatment of older workers, also prohibits facially neutral employment policies and practices—such as a reduction in force—that have disparate impacts on older workers.

Smith v. City of Jackson, 544 U.S. 228, 240 (2005). As disparate impact claims “usually focus on statistical disparities” to make a *prima facie* disparate impact case under the ADEA, a plaintiff must proffer statistical evidence showing that the employer’s facially neutral policy or practice caused a significantly disproportionate adverse impact based on age. *See Karlo v. Pittsburgh Glass Works*, 849 F.3d 61, 69 (3d Cir. 2017).

Often times, ADEA disparate impact claims will compare a neutral policy’s impact on employees aged 40 and older versus the impact on employees under 40. At the beginning of 2017, however, the Third Circuit Court of Appeals in *Karlo* split from the Second, Sixth, and Seventh Circuit Courts and held that the plaintiffs, workers in their 50s, had stated a cognizable disparate impact claim against their employer based upon evidence that the employer’s reduction in force had a greater negative impact upon them than upon workers in their 40s. 849 F.3d 61 (3d Cir. 2017). The *Karlo* court explained that both the plain language of the ADEA and its remedial purpose of “proscrib[ing] age discrimination, not forty-and-over discrimination” permitted the use of subgroup statistics to prove a disparate impact claim under the ADEA. *Id.* at 71 (emphasis in original). This decision signals that courts may be more willing to expand ADEA disparate impact claims in light of the changing age demographic of our workforce in 2017 and beyond.

Another recent disparate impact issue addressed by the courts is whether job applicants may bring ADEA disparate impact claims. In *Villarreal v. R.J. Reynolds Tobacco Co.*, the Eleventh Circuit Court of Appeals dismissed the plaintiff’s case, holding that because a job applicant has no status as an employee under the ADEA, the plaintiff applicant could not bring a disparate impact claim. 839 F.3d

958, 963 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017). Because the *Villarreal* court found the plain language of the ADEA on this point was clear, it refused to consider legislative history or the EEOC’s interpretation to the contrary. *Id.* at 969. In contrast, in *Rabin v. PricewaterhouseCoopers LLP*, a California federal district court permitted the plaintiff job applicants to proceed with their disparate impact claims based upon Supreme Court precedent, the ADEA’s legislative history and intent, and EEOC guidance. 236 F. Supp. 3d 1126, 1128, 1133 (N.D. Cal. 2017). Although there is currently no Tenth Circuit decision on this issue, employers in New Mexico should be cognizant of this split as well as the potential increase of ADEA disparate impact claims by job applicants in this jurisdiction.

Conclusion

These opinions not only highlight the impact that the older workforce has upon age discrimination claims under the ADEA, but also reveal an emerging judicial trend with less emphasis on the age “number” in discrimination claims and increased focus on the underlying assumptions employers may make as to ability, commitment, and other employment issues related to a worker’s age. Employers are encouraged to step back and objectively consider whether their concerns about an aging staff member or job applicant are based upon actual facts relating to job performance and ability, or instead upon the employer’s age-related assumptions and biases. In addition, and in light of recent court disagreement over disparate impact claims, employers should carefully assess potentially adverse impacts of company-wide employment practices, such as reductions in force, upon older workers.

Endnotes:

¹ Drew Desilver, [More older Americans are working, and working more, than they used to](http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to/), Pew Research Center (June 20, 2016) <http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to/> (according to a Pew Research Center analysis of employment data from the federal Bureau of Labor Statistics, there are more workers (aged 65 and older) working than at any time since the turn of the century); see also Mitra

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Joining Wirth:

Potential Impacts of the Court of Appeals' decision to limit the scope of "Joint Employment" in New Mexico

By Benjamin A. Nucci

New Mexico employers owe their employees an array of duties arising under both state and federal law. In many circumstances, the existence of an employer-employee relationship, and the legal obligations that flow from that relationship, are clear. In other circumstances, though, courts may consider one entity to be a "joint employer" of another entity's employees and find it is subject to some of the same legal obligations as the primary employer. An entity may be a joint employer under New Mexico law even when the employer-employee relationship is not necessarily clear or obvious. The "joint employer" dilemma can arise in a variety of scenarios, such as when an employer uses employees from a temporary staffing agency, engages an outside entity to administer certain human resource functions, or operates as a parent to subsidiaries.

Historically, determining whether an entity was a joint employer for purposes of liability under federal law centered upon, *inter alia*, whether the putative employer possessed and exercised authority to immediately and directly control essential terms and conditions of employment of those employees alleged to be jointly employed. In 2015, the National Labor Relations Board created a new standard under which an entity could be deemed a joint employer based only on the *possibility* of an employer asserting *indirect control* over the putatively jointly employed employees. See *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (2015). The NLRB's sister federal agencies made similar overtures in moves that threatened to have widespread repercussions for entities that had previously relied upon a



An entity may be a joint employer under New Mexico law even when the employer-employee relationship is not necessarily clear or obvious.

lack of control to escape joint employer liability. For example, in January 2016, the U.S. Department of Labor established new standards for determining joint employment, stating "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA." See Dept of Labor Wage & Hour Division, Administrator's Interpretation No. 2016-01.

The developments were particularly troubling for franchisors. Unlike some corporate chains, such as Starbucks or

Chipotle, that own all of their U.S. stores and directly employ their workers, franchisees are legally distinct businesses that operate at a distance from the franchisor entity and typically follow a set of corporate operating standards. The downstream franchise, rather than the franchisor, has direct control of an employee's essential terms and conditions of employment, i.e., hiring, firing, wages and setting of schedules. The NLRB's new standard shattered the joint employer shield corporate franchisors had relied upon to protect themselves from local employment disputes. Franchisor liability in the wake of the NLRB's decision garnered support at the state level. For example, New York Attorney General

Eric Schneiderman filed a lawsuit against Domino's Pizza in 2016 seeking a finding that, under state law, Domino's is a joint employer of the employees working in 10 franchise stores named in the lawsuit. See N.Y. State Office of the Attorney General, Press Office, "A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino's And Its Franchisees Liable For Systematic Wage Theft," (May 24, 2016).

In late 2016, the New Mexico Court of Appeals bucked the trend and refused to affirm a jury verdict that found several upstream entities to be "co-employers" of the employees of a skilled nursing facility in the context of a wrongful death lawsuit. See *Wirth v. Sun Healthcare Group, Inc.*, 2017-NMCA-007, ¶ 43, 389 P.3d 295. The court's holding in *Wirth* provided some relief from state law liability for businesses operating in New Mexico and coincidentally marked the start of a general federal agency retreat of expanded "joint employer" liability.

Federal Joint Employer Liability Prelude

For several decades, the concept of “direct control” guided the federal approach toward analyzing whether or not an entity was a joint employer. The NLRB defined a “joint employer” as one who “has retained for itself sufficient control of the terms and conditions of employment of employees who are employed by the other employer[.]” *NLRB v. Browning-Ferris Industries of Pa.*, 691 F.2d 1117, 1122 (3rd Cir. 1982), but clarified that “[t]he essential element in [the joint employer] analysis is whether a putative joint employer’s control over employment matters is direct and immediate.” See *Airborne Express*, 338 NLRB 597, 597 n. 1 (2002). Similarly, for suits brought under Title VII of the Civil Rights Act of 1964, federal circuits have adopted various tests but uniformly consider whether actual control was exerted. Indeed, the U.S. District Court for the District of New Mexico concluded that New Mexico courts would likely follow the federal standard in determining joint employer liability under the New Mexico Human Rights Act. See *Tenorio v. San Miguel Cty. Det. Ctr.*, No. 1:15-CV-00349-LF-WPL, 2017 WL 1020196, at n. 2 (D.N.M. Mar. 15, 2017).

However, 2015 marked a significant departure from this standard when the NLRB expanded the scope of joint employer liability to entities that have the authority to exercise control, even if they do not exercise their authority. *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015). In *Browning-Ferris*, California waste management company Browning-Ferris Industries (“BFI”) subcontracted with employment agency Leadpoint Business Agency (“Leadpoint”) to provide staffing for tasks to be performed for BFI. *Id.* at 3. The contract between Leadpoint and BFI stated that Leadpoint was the sole employer of the workers it supplied, but their contract placed significant limitations on Leadpoint’s autonomy as an employer. *Id.* at 3, 23. When the Teamsters Local 350 petitioned BFI to represent those workers, the issue arose as to whether Leadpoint and BFI were joint employers. *Id.* at 1.

The NLRB ruled in favor of the workers and found that a joint employer relationship existed with both BFI and the subcontractor, and therefore both

While New Mexico did not pass any laws to protect upstream entities in reaction to the Browning Ferris decision, the Court of Appeals provided a hint as to how such liability might be handled in the state, in the context of a wrongful death lawsuit against a putative joint employer.

entities were liable under the National Labor Relations Act (“NLRA”). *Id.* at 22. Restating its joint employer standard, the NLRB held that one of the various ways in which joint employers “share” control over terms and conditions of employment or “codetermine” them is simply by retaining “the contractual right to set a term or condition of employment.” *Id.* at 19, f. 80. This new standard exposed a broad range of businesses to liability for workplaces over which they exercised little or no control.

Other federal agencies supported the NLRB’s ruling, or redefined the scope of joint employer liability. Franchisors, who may have clauses in their franchise agreements arguably retaining the right to set a term or condition of employment, were paying attention.

In the wake of the NLRB’s decision, Arizona, Kentucky, North Dakota, South Dakota and Wyoming enacted laws explicitly stating that franchisors are not employers of their franchisees or franchisees’ employees. While New Mexico did not pass any laws to protect upstream entities in reaction to the *Browning Ferris* decision, the Court of Appeals provided a hint as to how such liability might be handled in the state, in the context of a wrongful death lawsuit against a putative joint employer.

The Wirth Decision

The New Mexico Court of Appeals in *Wirth* rejected joint employer liability despite evidence of potential parent control over a subsidiary’s policies. In *Wirth*, a personal representative brought a wrongful death action against a skilled nursing facility operated by Peak Medical

Assisted Living, LLC (“PMAL”) and “three upstream entities in the ownership chain.” *Id.* ¶ 1. PMAL was a wholly owned subsidiary of Peak Medical, LLC, which was wholly owned by SunBridge Healthcare LLC, which was wholly owned by Sun Healthcare Group, Inc. *Id.* ¶ 33. The district court denied the defendants’ motion for directed verdict on the plaintiffs’ joint venture and co-employer theories. *Id.* ¶ 13. The jury found that all the defendants were joint venturers and co-employers of the nursing home staff and awarded \$2.5 million in compensatory damages to the wrongful death estate. *Id.*

On appeal, the defendants contended “the evidence showed nothing more than the degree of control normally incident to a chain of ownership in a legitimate corporate structure.” *Id.* ¶ 16. The court noted “[t]here was some apparent overlap in corporate officials within the group, and entities up the chain promulgated general policies and provided assistance at [the facility] for employee conduct, patient care, and regulatory compliance.” *Id.* ¶ 34. Nonetheless, the Court found that there was “nothing particularly unusual” about that corporate structure. *Id.* ¶ 35.

Ultimately, the Court found there was no co-employment liability in the context of the evidence presented at trial. *Id.* ¶ 43. The court acknowledged that while joint employment theories are recognized by some federal employment statutes, absent “extraordinary circumstances,” there is still “a strong presumption that a parent company is not the employer of its subsidiary’s employees[.]” *Id.* ¶ 42. In this instance, the court found that joint employer liability was based only upon the instruction that asked the jury to apply the “right to control” test used to distinguish employees from independent contractors, which “effectively eschewed any finding of domination or instrumentality that is normally required to find a shareholder vicariously liable for the torts of corporate employees.” *Id.* ¶ 43. As a result, the court held the district court should have granted a directed verdict. *Id.*

Wirth It?

Instead of an expanded approach to co-employment liability based on a theory of retained control over employees, which may have been the outcome based upon the corporate policies had the matter been before the NLRB, the court deferred to the purpose behind the corporate structure, which is limited liability.

While the *Wirth* decision provided some insight as to how franchisors may fare in New Mexico courts under a theory of joint employer liability, the case did not analyze joint employer liability under federal law. Since *Wirth*, the federal push toward expanded joint employer liability has lost some momentum. In June 2017, the Department of Labor announced the withdrawal of its 2015 and 2016 informal guidance on joint employment. See Jennifer Hazelton, U.S. Dep't of Labor, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (June 7, 2017) (available at <https://www.dol.gov/newsroom/releases/opa/opa20170607>).

Yet despite the D.C. Circuit recently criticizing the NLRB's approach, see *NLRB v. CNN America, Inc.* 865 F.3d 740 (D.C. Cir. 2017), and rumors that the board's standard is in the House Appropriations Committee's "crosshairs," see Anthony K. Glenn, "NLRB's Controversial Joint-Employer Standard in House Appropriations Committee's Crosshairs," *The National Law Review* (July 18, 2017) (available at <https://www.natlawreview.com/article/nlrbs-controversial-joint-employer-standard-house-appropriations-committee-s>), the NLRB has not backflipped on its *Browning-Ferris* standard.

As such, New Mexico businesses with downstream entities are well advised to actively monitor developments and potentially analyze their corporate relationships.

Endnotes

¹ See 29 C.F.R. § 791.2 (guidance under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*); see also 29 C.F.R. § 500.20 (guidance under the Migrant Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 *et seq.*); see also *TLI, Inc.*, 271 N.L.R.B. No. 798 (1984) (ruling that in order to determine whether two separate entities are joint employers under the National Labor Relations Act, the NLRB will assess whether the two "share or codetermine those matters governing the essential terms and conditions of employment.").

² See, e.g., *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 227 (5th Cir. 2015) ("The economic realities component of our test has focused on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment."); *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 702-03 (7th Cir. 2015) ("The first of the five *Knight* factors examines ... whether the employer provided direction with respect to scheduling and performance of the work."); *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1361 (11th Cir. 1994)

("The actual exercise of authority and the retained authority ... are a sufficient basis upon which to find [Defendants] to be joint employers.").

³ In the resulting D.C. Circuit appeal of the NLRB's decision, the U.S. Equal Employment Opportunity Commission ("EEOC") filed an amicus brief supporting the NLRB's new standard. See Brief of the EEC As Amicus Curiae In Support of Respondent/Cross-Petitioner And In Favor Of Enforcement, *Browning-Ferris Industries of California, Inc. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir.) (amicus filed Sept. 14, 2016). In an internal memo that was leaked, the Occupational Safety and Health Administration addressed whether "a joint employment relationship can be found between the franchisor (corporate entity) and the franchisee so that both entities are liable as employers under the OSH Act." OSHA, Internal Memorandum, Can Franchisor (Corporate Entity) and Franchisee be Considered Joint Employers, available at https://edworkforce.house.gov/uploadedfiles/osha_memo.pdf.

About the Author:

Benjamin A. Nucci is an associate with Snell and Wilmer LLP's labor and employment practice group. Nucci is licensed in New Mexico, Arizona, Colorado and the Navajo Nation

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Toosi and Elka Torpey, Older workers: Labor force trends and career options, Bureau of Labor Statistics, (May, 2017), <https://www.bls.gov/careeroutlook/2017/article/older-workers.htm> (predicting that, although older workers make up a smaller number of workers in the overall workforce, the annual labor force growth rate for older age groups is greater than any other age groups).

² The ADEA's prohibition against age discrimination is limited to individuals of at least 40 years of age or older. 29 U.S.C. § 631.

³ The courts typically apply the McDonnell Douglas burden-shifting framework age discrimination claims wherein a plaintiff must first establish a *prima facie* case of age discrimination, at which time the burden shifts to the employer to present evidence of a nondiscriminatory reason for the adverse action, which the plaintiff then must show is a mere pretext for unlawful discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

⁴ See *France v. Johnson*, 795 F.3d 1170, 1174 (9th Cir. 2015), as amended on reh'g

(Oct. 14, 2015) (citing *Grosjean v. First Energy Corp.*, 349 F.3d 332, 338-39 (6th Cir. 2003) (collecting cases from various circuits)).

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Equal Pay is COMP-licated *continued from page 4*

equal pay claimants. Having identified equal pay as an enforcement priority in its previous Strategic Enforcement Plan, the EEOC did so again in its Strategic Enforcement Plan for 2017-2021. The EEOC and OFCCP also entered into a Memorandum of Understanding in 2011 wherein they expressly agreed to refer complaints between them when a referring agency lacks jurisdiction. When complaints are referred, the original date of filing with the first agency is deemed the date of filing with the other agency in order to determine the timeliness of the complaint.

Best Practices

Best practices for mitigating the risk of equal pay claims include the following:

- 1. Do not base starting salary on prior salary:** Even if this practice remains permissible, an employer may inadvertently create pay disparities that will be difficult to defend.
- 2. Limit discretion when making pay decisions:** An employer should consider implementing pay ranges or bands for specific positions to limit discretion. Unlimited discretion may appear to give rise to discrimination.
- 3. Avoid pay based on performance-based evaluations:** Since performance evaluations can be subjective, avoid risk by limiting pay decisions based on performance.
- 4. Ensure starting salaries are based upon job-related factors:** Job-related factors may include experience, education, skills, certifications, and so on.
- 5. Document the bases for pay decisions:** Educate hiring managers

to document their pay decisions and place that documentation in the employees' personnel files. Documentation is even more important when paying outside of established pay bands or ranges.

- 6. Establish proper comparators for pay decisions:** Determine which employees are similarly situated or perform similar work for purposes of making equitable pay decisions.
- 7. Conduct a pay equity analysis:** Finally, and most importantly, employers should conduct a self-evaluation of their pay practices or a pay equity analysis with the assistance of appropriate legal counsel. Locate the pay gaps in your workforce and determine if those gaps are justifiable. Carefully consider if pay equity adjustments are required and how they should be implemented.

Equal pay is COMP-licated. But with care and attention, employers may reduce their risk through self-evaluation and proactive steps to address pay inequities before claims arise.

Endnotes:

¹ See U.S. Equal Employment Opportunity Comm'n, Charge Statistics: FY 1997 Through FY 2016, USA.gov (last visited Oct. 2, 2017), <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [Hereinafter Charge Statistics].

² See The Simple Truth About the Gender Pay Gap, AAUW (last updated Fall 2017), <http://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/>

³ "The new deal is significantly more lucrative for the players, according to a person familiar with agreement. Previously, USA Hockey didn't pay the women at

all in non-Olympic years and gave each a total of \$6,000 in the year leading up to a Winter Games. Under the new deal, players could stand to earn in the neighborhood of \$70,000 a year with the possibility of even more from performance bonuses, according to the source familiar with the contract. In addition to a \$2,000 monthly training stipend from the U.S. Olympic Committee, the national team will split an annual pool paid by USA Hockey of at least \$850,000 this year and \$950,000 in each of the final three years of the contract. USA Hockey also agreed to pay players a \$20,000 bonus for winning gold at next year's PyeongChang Olympics, or \$15,000 for silver." See Rick Maese, *Women's hockey team, USA Hockey reach agreement, settling pay dispute*, THE WASHINGTON POST, March 28, 2017, https://www.washingtonpost.com/sports/olympics/womens-hockey-team-usa-hockey-reach-agreement-settling-pay-dispute/2017/03/28/a3823b28-13cf-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.a78b48f14ce9.

⁴ See Charge Statistics, supra note i;

⁵ See U.S. Equal Employment Opportunity Comm'n: Strategic Enforcement Plan, USA.gov (last visited Oct. 2, 2017), <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

⁶ See Memorandum of Understanding between U.S. Dep't of Labor and the Equal Employment Opportunity Comm'n (Nov. 9, 2011), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm.

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