MODRALL SPERLING

LAWYERS

Employment Law Alert

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Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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What New Mexico Employers Need to Know about the U.S. Supreme Court's Recent Decision Regarding Constructive Discharge Claims

On May 23, 2016, the United States Supreme Court decided that an employee's time to file a discrimination charge for an alleged constructive discharge begins to run on the day that the employee quits his or her job (or gives notice of his or her intent to quit) rather than on the day of the last act of alleged discrimination that caused the employee to resign. The Court concluded that until an employee actually resigns, the employee does not have a "complete and present cause of action" as two key elements of a constructive discharge claim are (1) discrimination and (2) discharge. Applying ordinary principles applicable to statutes of limitation, the Court concluded that there is no viable claim for constructive discharge until the employee resigns, that it would be unfair to require an employee to make a claim prior to the date on which the claim became viable, and that the time period for filing a charge with the EEOC thus does not begin to run until the date of resignation.

This decision resolved a split in the United States Courts of Appeal. One side of the split, which included the Tenth Circuit Court of Appeals (the Circuit that encompasses the United States District Court for the District of New Mexico) had held that the deadline for contacting the EEOC should be calculated from the date of the last act of alleged discrimination. The other side of the split had held that the deadline should be calculated from the date of resignation. This decision thus lengthens the time in which an employee in New Mexico is allowed to file a charge alleging violation of federal anti-discrimination laws. An employee can now wait until he or she quits to file a charge of discrimination, even if the alleged discriminatory conduct occurred months or years prior to the employee's decision to quit.

At first blush the Supreme Court's decision seems to open the door to long stale complaints by employees who decide to quit their jobs. Some might fear that under *Green*, an employee could resign and claim that the resignation was caused by alleged discrimination that occurred months or years before the resignation. But given the elements of the constructive discharge cause of action, at least in New Mexico, many fears of stale claims should be alleviated by the fact that the employee must prove that his or her working conditions were so intolerable that a reasonable person would be compelled to resign or, stated differently, that the employee had no choice but to quit. With every day that passes between an alleged act of discrimination and an employee's decision to resign, the more difficult it will be for the employee to prove that he or she could not tolerate the discriminatory treatment. Jurors should be skeptical of a claim that an employee's working conditions were so terrible that the employee had no choice but to quit when the employee kept working for months or years after any allegedly discriminatory treatment.

For most New Mexico constructive discharge claims, *Green* should have very little practical impact. Given the elements of a constructive discharge claim—that the working conditions are so intolerable that the employee had no choice but to quit - there is often a close temporal proximity between allegedly discriminatory conduct and the employee's resignation. Thus, for the vast majority of cases, *Green* is likely inconsequential. The few employees who benefit from the additional time to initiate a constructive discharge claim will still be required to establish each of the elements of the claim and employers will still have the

opportunity to show that the employee failed to utilize reasonable avenues of reporting discrimination within the workplace.

While *Green* is only applicable to claims brought under federal anti-discrimination laws (and arguably only to claims brought by federal employees), it may also have an impact on claims brought under New Mexico law. The New Mexico Human Rights Act (NMHRA), like its federal counterpart, requires an employee to file a charge with the Human Rights Division "within three hundred days after the alleged act was committed." NMSA 1978, 28-1-10(A). While this language is slightly different than the language at issue in *Green*, the underlying policy concerns—i.e., the fact that a constructive discharge claim does not exist until an employee actually resigns—are identical. Although New Mexico Courts applying state law are not bound by *Green*, our courts frequently look to federal law when interpreting the NMHRA due to the fact that the NMHRA closely parallels Title VII. Therefore, it is foreseeable that a New Mexico Appellate Court will consider the *Green* decision when reviewing constructive discharge claims under state law. That said, a New Mexico Court applying New Mexico law is not necessarily bound by *Green* and any claims brought under the NMHRA for constructive discharge should be closely scrutinized to assess whether the argument should be made that the claim needed to be brought within 180 days of the acts that caused the employee to quit rather than the date that the employee actually quit.

For more information on this topic, please contact Jeremy K. Harrison at Jeremy.Harrison@modrall.com or by calling 505-848-1800.

EEOC Issues New Wellness Program Rules

New Mexico employers that offer or are considering offering a wellness program should be aware that on May 16th, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) published the final version of two rules that regulate employer-sponsored wellness programs. The rules provide much needed clarity on what has previously been an area filled with legal uncertainty. The rules, which will take effect in 2017, explain how employers can offer a wellness program that is in compliance with the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA). They apply to workplace wellness programs offered in conjunction with a health plan and stand-alone wellness programs.

The final ADA rule explains to what extent employers may use incentives or penalties to encourage employees to voluntarily participate in wellness programs that ask employees to respond to disability-related inquiries, such as health risk screening assessments or to undergo medical examinations. Employers may offer limited financial incentives to encourage employees to participate in a wellness program. Employers may not, however, require employee participation or take any adverse action against employees for non-participation or failure to achieve certain health outcomes.

The final GINA rule permits employers offering wellness programs to provide financial and other incentives in exchange for an employee's spouse providing health information, such as answering questions on his or her current or past health status or taking a medical examination. The rule prohibits employers from offering financial incentives in exchange for information on the

current or past health status of employees' children or in exchange for certain genetic information, such as the results of genetic tests of an employee, an employee's spouse, or an employee's children.

The rules also include confidentiality provisions to protect employees and prevent misuse of any information collected.

If you offer or are considering offering a wellness program and have questions, please contact Meghan Mead at meghan.mead@modrall.com or 505-983-6215.

The DOL's New FLSA Regulations - Millions Entitled to Overtime Wages Beginning December 1, 2016

The Department of Labor's Wage and Hour Division (the "DOL") issued its final rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees on May 17, 2016 (the "rule" or "final rule"). The rule significantly impacts who now qualifies as exempt employees under the Fair Labor Standards Act ("FLSA") by changing the threshold salary requirements for the white collar exemption under the FLSA. The DOL has not updated these salary requirements since 2004, allowing employees who made $455 per week (approximately $23,660) to qualify for the while collar exemption under the FLSA. In the final rule, this salary requirement is now doubled—entitling many employees who make less than $913/week (or $47,475) per year to be paid overtime wages. The rule also establishes new threshold requirements for employees who qualify under the highly compensated employee exemption.

It is estimated that approximately 4.2 million formerly exempt employees under the white collar exemptions will now be entitled to overtime pay under the FLSA.

Key Points of the Final Rule

- The new requirements issued in the final rule take effect December 1, 2016.
- Employees who make less than $913/week ($47,476/year) will no longer qualify under the white collar exemption and may be entitled to overtime under the FLSA.
- The rule also sets a new salary threshold for the highly compensated employees of $134,004/year.
- Every three years, the above salary threshold levels will automatically increase.
- Commission, bonus and other incentive payments may count for up to 10% of an employee's salary level, for employees who qualify under the white collar exemption.

Many employers have already begun reviewing their employee compensation structures to determine which employees will become entitled to overtime wages under the rule. Employers must now decide whether it will be more cost-effective to either increase wages in order to satisfy the new threshold salary requirements or alternatively institute overtime payments which comply with the FLSA. In addition, employees impacted by these changes may begin raising questions in the work place either about their inability to qualify as an exempt employee or alternatively their right to obtain overtime wages beginning in 2017.

If you have any questions about the new rule, handling employee questions or FLSA compliance, please contact Jennifer L. Bradfute at Jennifer.Bradfute@modrall.com or by calling 505-848-1800.