Employment Flash

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The ARPA and COBRA

The recently enacted American Rescue Plan Act of 2021 (ARPA) requires employers to pay 100% of the premiums required under the Consolidated Omnibus Budget Reconciliation Act (COBRA) for employees who are enrolled, or will enroll, in COBRA continuation coverage from April 1, 2021, through September 30, 2021. Employers can be reimbursed for the premium subsidy through a payroll tax credit, for which there is no income cap. In addition, the ARPA extends the COBRA election period and grants a second opportunity to elect COBRA continuation coverage for those qualified individuals who otherwise would be covered but either never elected COBRA coverage or previously discontinued their COBRA coverage. Accordingly, the ARPA requires the administrator of the applicable group health plan (or other entity) to send written notifications regarding the premium subsidy and extension, as applicable, by May 31, 2021, to those individuals who qualify. The Department of Labor (DOL) published a model notice that can be used by plan administrators and/or employers to comply with notice requirements under the ARPA regarding the COBRA subsidy, as well as responses to frequently asked questions regarding this topic.

Employers should contact their plan administrators to ensure that notices of the COBRA subsidy are provided to all eligible employees for the subsidy period. Employers also should review and update their separation agreement templates to account for the new obligations under the ARPA. For example, separation agreements should not include obligations for the employee to pay any portion of COBRA premiums (even if such payments will be reimbursed by the employer) during the subsidy period, given that cost-sharing is not permitted, and employers must pay the COBRA premiums directly. In addition, payment of COBRA premiums to eligible employees during the subsidy

period cannot serve as consideration for a release of claims in favor of the employer, so separate severance or other consideration should be provided in exchange for a release of claims, which may include, for example, continued COBRA coverage and reimbursement for COBRA premiums by the employer beyond the subsidy period. Employers also may consider adding language that employees shall receive separate written notification regarding the right to continue coverage under the employer's group health care benefits plan after the separation date at the employer's expense through September 30, 2021, (or such later date required by applicable law) and, thereafter, at the employee's and/or the employee's dependent(s)' own expense under COBRA.

Executive Order Set To Raise Minimum Wage to $15 for Federal Contractors

On April 27, 2021, President Joe Biden issued an "Executive Order on Increasing the Minimum Wage for Federal Contractors" (Order). The Order requires federal agencies to incorporate a $15 minimum wage in all new federal contract solicitations starting January 30, 2022. Agencies are required to implement the $15 minimum wage into new contracts by March 30, 2022, as well as upon exercise of an option to extend an existing contract. The minimum wage for federal contractors will continue to be indexed to an inflation measure and will be adjusted automatically every year after 2022 to account for cost of living increases.

Federal contractors who are tipped workers are currently subject to a lower minimum wage. The Order phases out the minimum wage distinction for tipped workers and requires they are paid at least: (i) $10.50 per hour, beginning January 30, 2022; (ii) 85% of the standard federal contractor minimum wage, rounded to the nearest multiple of $0.05, beginning January 1, 2023; and (iii) 100% of the standard federal contractor minimum wage, beginning January 1, 2024.

OFCCP Update

Federal contractors soon may be required to routinely provide copies of their affirmative action plans (AAPs) to the Office of Federal Contractor Compliance (OFCCP). Pursuant to Executive Order 11246, any federal contractor with 50 or more employees and a contract worth at least $50,000 must develop an AAP addressing issues such as recruitment, promotion and other terms of employment for women and minorities. AAPs must be updated annually. Federal contractors are subject to audits by the OFCCP to assess whether their AAPs comply with law. However, a 2016 report by the federal Government Accountability Office criticized the OFCCP's oversight process as too lax and recommended additional mechanisms for verifying compliance with AAP requirements. The OFCCP recently signaled that it intends to implement the report's recommendations by requiring contractors to provide their AAPs directly to the government. A page labeled "Affirmative Action Plan Verification Interface" on the OFCCP's website states that a "secure web based interface" to facilitate uploading AAPs to a federal database is being developed, and federal contractors soon may be required to routinely provide their AAPs directly to the government. The OFCCP has not yet provided the timeframe for any such requirement nor information about how the agency intends to secure sensitive data in AAPs. Federal contractors should prepare for new scrutiny from the OFCCP by reviewing and updating their AAPs with counsel and ensuring that they are revised annually.

DHS Extends Form I-9 Compliance Flexibility Through May 2021

In March 2020, the Department of Homeland Security (DHS) announced that it would exercise prosecutorial discretion and temporarily excuse employers and employees whose workplaces were operating remotely due to the COVID-19 pandemic from the physical presence requirements of the Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act. On March 31, 2021, the guidance was extended through May 31, 2021, and is applicable to employees hired on or after April 1, 2021. Under the new guidance, employers taking physical proximity precautions because of COVID-19 will not be required to review an employee's work authorization documentation in the employee's physical presence if such employee is working exclusively in a remote setting. The new guidance expands on the original directive by eliminating the requirement that the employer must be operating on an entirely remote basis for the exemption to apply. Employers are still required to inspect such documentation, but can do so by video, fax or email, and must retain copies of the documents provided, keep written documentation of its remote onboarding and teleworking policies applicable to each of its employees and complete in-person inspections of relevant documents upon the eventual return to the workplace. However, the guidance remains silent as to timing requirements for when in-person inspections must occur.

NLRB Changes Tone Under President Biden

On his inauguration day, President Biden fired National Labor Relations Board (NLRB) General Counsel Peter Robb and later named Peter Sung Ohr as acting general counsel pending the confirmation of President Biden's general counsel nominee, Jennifer Abruzzo. As discussed in our earlier Skadden *Insights* article, Mr. Ohr quickly established a more pro-worker stance than his predecessor. Among other things, in a March 31, 2021, memorandum, Mr. Ohr directed the NLRB regional directors to "robustly enforce[e]" Section 7 of the National Labor Relations

Act (NLRA), which protects both unionized and nonunionized workers' rights to engage in concerted activity. In an April 29, 2021, hearing before the U.S. Senate's Health, Education, Labor and Pensions Committee, Ms. Abruzzo echoed a similar tone, stating that she wants to vigorously protect the rights of workers to act collectively to improve their wages and working conditions, with or without a union. Ms. Abruzzo also commented on the importance of workers having employee status (as opposed to independent contractor status) because employees enjoy the protections of various workplace protection laws. Ms. Abruzzo stated, however, that she could apply only the language of the NLRA, which does not currently contemplate the ABC test with respect to worker classification determinations. Ms. Abruzzo also stated that she would work to strengthen labor-management partnerships with respect to health and safety issues related to the COVID-19 pandemic and that ensuring appropriate staffing in regional offices will be one of her first orders of business if she is confirmed.

New York State's HERO Act

On May 5, 2021, Gov. Andrew Cuomo signed the Health and Essential Rights Act (HERO Act) into law, which outlines the development and implementation of health and safety standards aimed at limiting exposure to airborne infectious diseases in the workplace.

The HERO Act requires the New York State Department of Labor (NYSDOL) to develop a model standard per industry for maintaining worker health and safety by June 4, 2021. The HERO Act provides that the model standard must address employee health screenings, face coverings, personal protective equipment, accessible workplace hand hygiene stations, cleaning and disinfecting, social distancing, orders of isolation or quarantine, engineering controls, designation of supervisory employees to enforce compliance, compliance with notification obligations to employees and agencies, and verbal review of employer policies and employee rights. Once the standard is issued, all New York employers will be required to implement an airborne infectious disease exposure prevention plan, either by adopting the model standard or one that is equal to or exceeds the minimum NYSDOL standard. Employers must post the plan in the workplace, incorporate the plan in employee handbooks, if applicable, and provide the plan to employees in writing in English and in the employee's primary language.

In addition, the HERO Act prohibits retaliation against employees for (i) exercising rights under the HERO Act or under the applicable plan, (ii) reporting violations of the HERO Act or the applicable plan or (iii) refusing to work where an employee reasonably believes, in good faith, that there is an unreasonable risk of exposure in light of violative working conditions of which the employer was on notice and failed to cure.

The HERO Act authorizes a penalty of at least $50 per day for failure to adopt a prevention plan and civil fines between $1,000 and $10,000 for failure to comply with the applicable plan. Further, the HERO Act provides employees with a private right of action to seek injunctive relief upon an employer's noncompliance with the NYSDOL standards. A prevailing employee is entitled to an award of up to $20,000 in liquidated damages and attorneys' fees unless the employer demonstrates a good faith basis for believing that its health and safety practices complied with applicable law.

Additionally, the HERO Act requires that employers permit employees to create a joint labor-management workplace safety committee, which must consist of at least two-thirds non-supervisory employees. The section of the HERO Act addressing workplace safety committees goes into effect on November 1, 2021. Committee members must be permitted to, at a minimum: raise health and safety concerns, review and provide feedback on health and safety policies, review the adoption of any relevant policy, participate in any government site visits, review employer health and safety reports, and regularly schedule meetings during work hours.

New York Prohibits Employment Discrimination Based on Marijuana Use

On March 31, 2021, New York State passed the Marijuana Regulation and Taxation Act (MRTA), which legalized the recreational use of marijuana by adults age 21 and older in all places where tobacco use is permitted. The MRTA also amended Labor Law Section 201-d, which protects employees' right to engage in certain recreational activities outside of work and prohibits discrimination by employers based on employees' off-duty marijuana use. As amended, Labor Law Section 201-d now prohibits employers from terminating; discriminating against, or refusing to hire, employ or license individuals in because of their "legal use of consumable products" or "legal recreational activities," including cannabis use. Employees' recreational use of marijuana is protected to the extent it occurs prior to the beginning, or after the completion, of an employee's work hours (inclusive of meal and rest periods), so long as an employee does not manifest "specific articulable symptoms while working that decrease or lessen the employee's performance" or "interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards."

The law retains several exceptions that allow employers to take action based on an employee's marijuana use, including where: (i) the employer's actions are "required" by a state or federal statute, regulation, ordinance or other mandate, (ii) an employee is "impaired by the use of cannabis" or (iii) not taking action would result in the employer's violation of federal law, or loss

of a federal contract or federal funding. Further, employers may take employment-related action based on an employee's off-duty marijuana use if the employer believes such action is permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or the employer deems the individual's actions to be illegal or to constitute habitually poor performance, incompetency or misconduct. Notably, Labor Law Section 201-d protects employees and job applicants against discrimination by employers, but does not extend to independent contractors who have a professional service contract with an employer and the nature of the services provided is such that the employer may limit the off-duty activities of such individual.

Los Angeles and San Francisco Counties Update COVID-19 Employer Screening Requirements

The Los Angeles County Department of Public Health (LACPDH) published updates to its Protocols for Office Worksites, effective April 5, 2021, which require entry screenings before employees, vendors, delivery personnel and other visitors may enter the workspace. LACPDH published entry screening guidance, which includes a temperature screening and a verbal screening inquiring as to whether the individual has experienced any COVID-19 symptoms, has had contact with any person infected with COVID-19 or is subject to a quarantine order, and whether the individual has been fully vaccinated. Though the guidance recommends that an employer take an actual temperature check at the employer's point of entry, doing so is optional as long as the verbal screening process determines whether the individual has experienced a fever. According to the protocols, these screenings can be completed upon an individual's arrival to the workplace or through alternative methods, such as online or through signage posted at the entrance of the facility, which states that individuals with these symptoms must not enter the facility. All documentation related to the entry screening and body temperature should be retained for at least three months. If entry screening is completed in-person, the screening area should permit for privacy and confidentiality of the individual being screened, masking and social distancing practices should be implemented and screeners should be properly trained about the use and cleaning of thermometers.

The City and County of San Francisco Department of Public Health (SFDPH) published an Order (Stay Safer at Home), updated April 15, 2021, which requires, among other things, completion of a screening form for all personnel before each work day. By comparison to the LACPDH, the SFDPH no longer recommends that employers conduct prescreening temperature checks. The personnel screening form includes questions regarding whether the individual has experienced any COVID-19 symptoms, has been diagnosed with COVID-19 or has had contact with any person infected with COVID-19. SFDPH has published a separate screening form for non-personnel, including guests, visitors, customers and others. Both SFDPH screening forms direct individuals being screened to the CDC recommendations for whether vaccinated persons with COVID-19 symptoms or exposure to those infected with COVID-19 are required to quarantine or be tested for COVID-19.

California Enacts Law Providing Re-Hire Rights for Employees Laid-Off During COVID-19 Pandemic

As discussed in the July 2020 edition of the *Employment Flash*, Los Angeles previously enacted COVID-19-related ordinances regarding worker recall and retention rights. On April 16, 2021, California enacted a statewide recall law, Senate Bill 93 (added as Section 2810.8 of the California Labor Code), which requires employers in certain industries, including hotels, private clubs, event centers, airport hospitality operations, airport service providers and providers of building services to office, retail or other commercial buildings, to rehire certain employees that were laid off due to a reason relating to the COVID-19 pandemic. The definition of "employer" includes entities in these industries that utilize temporary service or staffing agencies to engage employees. The law applies to covered employers regardless of whether the ownership of the employer changed after the employee was laid-off, so long as the entity is conducting the same or similar operations as conducted before the COVID-19 pandemic. Senate Bill 93 requires that covered employers offer laid-off employees information about job positions for which the employee is qualified based on a preference system. The employer must offer its laid-off employees a position, in writing, within five business days of establishing such position, and the laid-off employee has five business days to accept or decline the offer. A "laid-off employee" is defined as any employee who was separated from employment due to a non-disciplinary reason relating to the COVID-19 pandemic, such as a lack of business, government shutdown order, reduction in force, public health directive or other economic reason. The employee also must have been employed by the covered employer for at least six months in the 12-month period preceding January 1, 2020.

The law is in effect until December 31, 2024. An employee may file a complaint with the California Division of Labor Standard Enforcement for violations of the law and may be awarded any or all of the following: (i) hiring and reinstatement, (ii) front pay or back pay for each day during which the violation continues and (iii) the value of the benefits that the laid-off employee would have received under the employer's benefit plan. Additionally,

the labor commissioner may recover a civil penalty of $100 for each employee whose rights have been violated and an additional sum of $500 in liquidated damages for each day the rights of an employee under this law are violated.

Illinois Enacts New EEO-1 and Equal Pay Obligations

Illinois SB 1840, signed into law by Gov. JB Pritzker on March 23, 2021, imposes new requirements concerning EEO-1 workforce demographic data and equal pay compliance, among other things. Notably, any domestic corporation organized under Illinois law or any foreign corporation authorized to transact business in Illinois that is required to file an EEO-1 report with the Equal Employment Opportunity Commission must now include in their annual report to the state information that is substantially similar to the employment data reported under Section D of the corporation's EEO-1 report. This new requirement applies to annual reports filed on and after January 1, 2023. The requisite workforce demographic data must be provided in a format approved by the Illinois secretary of state, who plans to publish the data on the secretary's website.

In addition, any private employer with more than 100 employees in Illinois must obtain an equal pay registration certificate from the Illinois Department of Labor (IDOL) by March 23, 2024, and must recertify every two years thereafter. To obtain the certificate, an employer must:

- pay a $150 filing fee;
- submit an equal pay compliance statement to the director of the IDOL certifying that (i) the employer complies with various federal and state laws relating to pay equity and anti-discrimination; (ii) the average compensation for female and minority employees is not consistently below the average compensation for male and non-minority employees, adjusted for job category and other mitigating factors; (iii) the business does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex; (iv) wage and benefit disparities are corrected when identified; (v) wages and benefits are evaluated frequently enough to ensure compliance with the various federal and state laws relating to pay equity and anti-discrimination; and (vi) the business sets compensation and benefits in accordance with a market pricing approach, a state prevailing wage or union contract requirement, a performance pay system, an internal analysis or an alternative approach (that must be described in sufficient detail);
- provide its EEO-1 report to the IDOL; and
- provide to the IDOL a list of all employees during the past calendar year, separated by the gender and the race / ethnicity categories set forth in the EEO-1 report, and report the total "wages" (as defined by Section 2 of the Illinois Wage Payment and Collection Act) paid to each employee during the past calendar year, rounded to the nearest hundred dollar.

The IDOL is authorized to impose a penalty equal to 1% of a business's gross profits if the business does not obtain the equal pay registration certificate or if it is suspended or revoked.

International Spotlight

United Kingdom

Workers' Rights in the UK

Recent court cases about the employment status of individuals working in the gig economy have progressed the debate about their status as "workers" (which is a separate category of employment status in the U.K.). Traditionally, such individuals were classified as independent contractors, but U.K. Supreme Court and Court of Appeal decisions in recent months have called this classification into question.

The U.K. Supreme Court determined earlier this year that taxi drivers hailed through apps are workers while they are online and available for work, a decision echoed by the U.K. Court of Appeal in April. While not granting full employment rights, worker status gives individuals a variety of employment rights unavailable to those who are self-employed (such as the right to paid holiday, minimum wage and sick pay) but not all of the rights available to employees (such as the right to redundancy pay or against unfair dismissals). Following the decision, a major ride-sharing company announced it would recognize its U.K. workforce as workers and make changes to their benefits and paid holiday time and offer a flexible working model.

Similarly, in a significant departure from its previous practice, the food delivery service Just Eat announced it would offer its couriers pay by the hour, rather than per job, and will also provide additional employment benefits, such as pension contributions, holiday pay, sick pay, and maternity or paternity pay. This replicates at least some of the benefits to which "workers" are entitled. The U.K. managing director of Just Eat stated that the operating costs of the organization would rise as a result of such benefits, but that, given its success, the company felt that its actions were the right thing to do. The courts' decisions will mean that many other gig economy employers will need to consider taking similar action.

In addition, the U.K. government is currently seeking comments on a specific proposal to extend the ban on exclusivity clauses in employment agreements. In 2015, exclusivity clauses, which prohibit workers from working for anyone else under any other contract, were banned for employees and workers on "zero hour

contracts," which state that an employer is not obligated to provide any minimum number of working hours. The government is now seeking to expand that ban to (i) other workers and (ii) contracts where the worker's guaranteed weekly income is less than the statutory lower earnings limit, which is currently £120 a week. This income threshold was initially considered but not pursued alongside zero-hour contracts in 2015. The government is now revisiting that decision in response to the impact of the COVID-19 pandemic, which has meant that some employers are not in a position to offer all of their employees or workers full working hours. The intention is to allow low-income employees and workers who are not able to secure the number of hours they would like from their current employer to seek additional work elsewhere.

There is no doubt that the pandemic has sparked a movement toward increased worker rights after a year when individuals in the gig economy — couriers and food delivery drivers in particular — have been viewed as essential workers, and it is likely that the focus on worker rights will remain.

France

Consultations Regarding Veolia's Takeover Bid on Suez

On July 31, 2020, Engie — a publicly traded and partly state-owned multinational electric utility company — published a press release stating that it was examining the divestment of assets in Suez, the parent company of the Suez Group. In a press release dated August 30, 2020, Veolia Environment announced its intention to acquire 29.9% of Engie' shares of Suez "while retaining the right to make a public offer at any time before securing the necessary authorizations."

Suez's works councils filed a claim before an emergency judge on September 22, 2020, against the Suez Group, Engie and Veolia, requesting that the company be consulted as part of an emergency proceeding.

While the litigation regarding the consultation requirements was ongoing, Veolia acquired 29.9% of Engie's share capital on October 5, 2020, and announced that it intended to complete its takeover bid for Suez. However, on October 9, 2020, the Paris Court of Justice ordered the suspension of the effects of the sale.

Veolia challenged the decision and, on February 3, 2020, the judicial court ruled, on the merits, that Veolia had an overall and determined plan to take control of Suez, but since Veolia was not the employer of the works council requesting to be consulted and since Suez had no power over Veolia's decision, no consultation was required. The works councils appealed this decision.

In a ruling dated April 15, 2021, the Nanterre Court of Appeal reversed the judgment of the judicial court, arguing that it is irrelevant whether or not the project was initiated by the employer, as long as there was an impact on the employees, which there would be in this case. Therefore, the court ruled that a consultation of the works council should have taken place when the contemplated transaction was sufficiently precise in the summer of 2020. However, because Veolia had communicated documents to the works council and all relevant documents had been transmitted between November 2020 and February 2021, in a parallel consultation process, there was no need to suspend the effects of the sale of Engie's Suez shares to Veolia as ordered by the emergency courts.

On April 12, 2021, Veolia and Suez announced that they reached an agreement on the key terms and conditions of the merger. On May 14, 2021, the parties entered into a general agreement, which ended the litigation.

This decision serves as a reminder to companies looking to make acquisitions in France — or who have projects that impact employees in France — of the importance of complying with local works council consultation obligations. In this case, the courts considered that the fact that Veolia published a press release indicating that Veolia was contemplating the acquisition of 29.9% of a company with a works council, potentially followed by a public offer, triggered consultation obligations because of the impact that the overall project might have on employees of the target company. An indirect change of control, and even a lack of change of control, is not sufficient to rule out any works council consultation obligations in France. In order to determine whether consultation obligations apply — and potentially avoid litigation — companies need to consider the impact that any contemplated project may have on its employees.

Germany

Employers Offering COVID-19 Tests

The German government has implemented an obligation for employers to offer two COVID-19 self-tests per week to those employees who are not exclusively working from home. Employees can freely decide whether or not to test. An employee who tests positive is obligated to inform the employer and to quarantine. These rules are subject to the existence of a pandemic, which, for the time being, has been held to exist until June 30, 2021.

Home Office Work During COVID-19 Pandemic

Historically, there has been no legal entitlement to work from home under German law. However, with many employees work-

ing remotely in order to reduce contacts during the COVID-19 pandemic, the German government recently made it mandatory for employers to offer permanent home office work to their employees wherever possible. Further, employees are obligated to accept home office work, provided that there are no conflicting reasons for declining such work. These rules are subject to the existence of a pandemic.

Federal Labor Court Holds Crowd Worker to be Employee

According to a recent decision by the Federal Labor Court dated December 1, 2020, (Case # 9 AZR 102/20), the execution of small orders ("micro jobs") by users of an online platform ("crowd workers") on the basis of a freelance framework agreement entered into with a provider may qualify as an employment relationship between the crowd worker and the provider. Based on an overall assessment of all circumstances, crowd workers are to be regarded as employees if the they are not able to freely decide his or her time, content and place of work via the online platform. In the case referenced above, the provider created a structure that incentivized the crowd worker to accept additional micro jobs in his trade, which in turn increased the crowd worker's time efficiency and remuneration. Accordingly, the crowd worker could not freely make decisions about his time and place of work or about accepting or rejecting offers. The court's ruling indicates that the more a platform operator provides incentives to accept more orders, the more likely it is that crowd workers will be classified as employees.

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