EMPLOYMENT FLASH

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SEC Pays First Whistleblower Award to Audit and Compliance Professional

The U.S. Securities and Exchange Commission (SEC) announced its first-ever whistleblower award to a company employee who performed audit and compliance functions. The SEC's Office of the Whistleblower announced, "Individuals who perform internal audit, compliance, and legal functions for companies are on the front lines in the battle against fraud and corruption [and] may be eligible for an SEC whistleblower award if their companies fail to take appropriate, timely action on information they first reported internally." According to the announcement, after the whistleblower reported wrongdoing concerns to company personnel, including a supervisor, the company took no action within 120 days and the whistleblower reported the same information to the SEC, leading to the enforcement action. On a related note, the SEC also announced it expected to pay its largest-ever whistleblower award, totaling more than $30 million. This award will be made to a whistleblower living in a foreign country, further demonstrating the international reach of the whistleblower program.

Supreme Court Allows Affordable Care Act Contraceptives Religious Exemption

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court struck down the Affordable Care Act's contraceptive mandate where opposed by the religious beliefs of owners of closely held corporations. 134 S.Ct. 2751 (2014). The contraceptive mandate generally requires that nonexempt employers (*i.e.*, organizations other than religious employers and certain religious nonprofits) provide coverage at no cost to employees for 20 contraceptive methods, including four that are effective after fertilization. In exempting methods of contraception opposed to the sincerely held religious beliefs of the corporate owners, the Court found that regulations promulgated by the U.S. Department of Health and Human Services under the Affordable Care Act violated the Religious Freedom Restoration Act of 1993 because the Religious Freedom Act applies to regulations governing the activities of closely held for-profit corporations and the contraceptive mandate substantially burdened the exercise of religion because of the severe economic consequences that the closely held corporations would face if they refused to provide contraceptive coverage. Further, the contraceptive mandate was not the least restrictive means of furthering the government's interest.

This decision has spurred further contraceptive legislation, including a failed bill (the Protect Women's Health From Corporate Interference Act of 2014) by Senate Democrats seeking to reverse the *Hobby Lobby* decision and require for-profit corporations to provide and pay for

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contraceptive coverage. Republicans have also introduced a bill (the Preserving Religious Freedom and a Woman's Access to Contraception Act) to clarify that employers cannot prohibit a woman from accessing contraceptives.

EEOC Adopts New Pregnancy Discrimination Guidance

The Equal Employment Opportunity Commission (EEOC) recently adopted new enforcement guidance on pregnancy discrimination. While not law, the guidance will be applied in EEOC matters. Notably, the guidance specifically addresses the Pregnancy Discrimination Act's (PDA) applicability to light duty opportunities, the subject of a pending Supreme Court case, *Young v. United Parcel Service Inc.* In contrast to the Fourth Circuit's holding in *Young*, the EEOC guidance "rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities" under the Americans With Disabilities Act (ADA). The guidance recognizes that the ADA's 2008 amendments may allow workers with pregnancy-related impairments to qualify for ADA disability protection even though such impairments may be temporary. The guidance also addresses related best practices for employers under the Family Medical Leave Act, Executive Order 13152, and state nursing mothers laws.

Executive Order Bans Sexual Orientation and Gender Identity Discrimination

President Obama recently issued two executive orders banning sexual orientation and gender identity discrimination by federal contractors and federal government agencies. The first order amends Executive Order 11246 by prohibiting sexual orientation and gender identity discrimination by federal government contractors with 10 or more employees. Notably, this order lacks an exemption for religion-affiliated federal government contractors. The second amends Executive Order 11478, which already prohibits sexual orientation discrimination by federal government agencies, by prohibiting gender identity discrimination by such agencies. The amendment to Executive Order 11246 is expected to go into effect in early 2015. The amendment to Executive Order 11478 is effective immediately.

Second Circuit Decides Two Whistleblower Cases

The Second Circuit issued two recent decisions addressing the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Sarbanes-Oxley Act (SOX). One decision held that the whistleblower anti-retaliation provision of Dodd-Frank does not apply extraterritorially. *Liu Meng-Lin v. Siemens AG*, 2014 WL 3953672. Therefore, the court denied whistleblower protection to an employee who was a Taiwanese citizen employed in Taiwan by a subsidiary of a German corporation listed on the New York Stock Exchange. The other decision overturned a prior non-precedential order and held that a whistleblower employee's retaliation claim under SOX need not "definitively and specifically relate" to a specific fraud or securities violation category of SOX's whistleblower retaliation provision. *Nielsen v. AECOM Technology Corp.*, 2014 WL 3882488. Instead, the Second Circuit held a SOX retaliation claim must "plausibly plead that the plaintiff engaged in protected activity — that the plaintiff reasonably believed that the conduct he challenged constituted a violation of an enumerated provision."

California's Paid Sick Leave Law to Take Effect Next Year

California Gov. Jerry Brown's Healthy Workplaces, Healthy Families Act of 2014 takes effect on July 1, 2015, and will require employers to provide employees with a minimum of three days of paid sick leave per year. Employees must be entitled to use accrued sick days beginning on the 90th day of employment. The law will apply to most employees in California and employees based out of state but who work in California at least 30 days a year. The law requires employees accrue paid sick leave at the rate of at least one hour per 30 hours worked, up to at least three days per year with carryover of accrued days to a following year, subject to a six-day accrual maximum. Employees may use paid sick leave in increments as small as two hours and for reasons related to being a victim of domestic violence, sexual assault or stalking, as well as diagnosis, care or treatment of an existing health condition of, or preventative care for, an employee or an employee's family member. Employers must provide employees with written notice that sets forth the amount of paid sick leave available either in the employee's itemized wage statement or in a separate writing provided with the employee's paystub.

Third Circuit Decides FMLA 'Mailbox Rule' and Right to Return Cases

In August, the Third Circuit decided two cases with important implications under the Family and Medical Leave Act (FMLA). The first case addressed FMLA implications of the common law "mailbox" rule, which generally provides a presumption that a letter placed in the post office or delivered to a postman reaches its destination at the regular time and is received by the addressee. *Lupyan v. Corinthian Colleges*

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Third Circuit Decides FMLA 'Mailbox Rule' and Right to Return Cases *(continued from page 2)*

Inc., 2014 WL 3824309. An employee who had taken personal leave argued that her employer interfered with her FMLA rights by not informing her the leave was being designated as FMLA leave. The employer defended with affidavits from a mailroom supervisor and human resources coordinator to establish the letter had been timely placed in its outgoing mail four years earlier. The Third Circuit reversed summary judgment in favor of the employer and held the employee's denial of receipt of a letter was enough to create a genuine issue of fact. The Third Circuit reasoned that the "mailbox rule" is only an evidentiary presumption and noted, "In this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice."

The second case addressed, for the first time, what constitutes invocation of one's right to return to work under the FMLA. *Budhun v. Reading Hospital and Medical Center*, 2014 WL 4211116. It held that an employee adduced enough evidence for a reasonable jury to find she had invoked her right to return to work where her fitness-for-duty certification stated she could return to work with "no restrictions." The court noted that an employer could require a certification of an employee's ability to perform the essential job functions, but only if the employer provides a list of those functions to the employee when the employee is notified of FMLA leave eligibility. Here, the court found that the employee had sufficient evidence she had attempted to invoke her right to return to work and the employer interfered with that right.

San Francisco and New Jersey Limit Criminal Background Checks

San Francisco's Fair Chance Ordinance took effect in August to prohibit applicant criminal history questions and background checks until after an employer has conducted a live interview or made a conditional offer of employment. This law applies to San Francisco-based employees of employers with more than 20 employees anywhere in the world. In addition, the law specifies information that may not be considered at any time during the hiring process, requires employers to provide applicant notice and post a notice in the workplace, and requires a process before an employer may deny an applicant employment due to criminal history.

New Jersey's Opportunity to Compete Act was signed by Gov. Chris Christie in August and will take effect on March 1, 2015. This law will prohibit employers in New Jersey from making any inquiry or requiring an applicant to complete any employment application relating to the applicant's criminal record before the first interview is complete. The legislation applies to employers of 15 or more employees who do business, employ individuals or take employment applications in New Jersey. The act has limited exceptions, including where an applicant voluntarily discloses a criminal record and for certain security or emergency management positions. Violations carry penalties of $1,000 for the first violation, $5,000 for the second violation and $10,000 for each subsequent violation. Similar types of so-called "ban-the-box" laws and ordinances have been passed in approximately 13 other states and 70 cities across the country.

California Class Certification Developments: Lowering the Bar for Independent Contractor Misclassification and Suitable Seating Developments

California courts recently decided two significant class action certification cases. First, the California Supreme Court held that a group of Southern California newspaper delivery carriers classified as independent contractors were entitled to a rehearing on the question of whether their wage and hour suit against a local newspaper could proceed as a class action. *Ayala v. Antelope Valley Newspapers, Inc*., 148 Cal. Rptr.3d 138. The court explained that a worker's status is determined by how much control the employer is legally entitled to exercise over job performance as opposed to how much legal authority the employer actually exercises. While the employer had exercised varying levels of control over the workers, each worker signed a similar contract. *Ayala* directs California courts to focus on an employer's legal rights in deciding whether a worker is an employee or an independent contractor. Companies should carefully review contractor agreements to make sure that they do not retain contractual rights of control.

Second, in *Hall v. Rite Aid Corp.*, a California appellate court certified a statewide class of cashiers based on allegations that their work reasonably permitted the use of seats because the cashiers were covered by the same job description and had similar duties. 226 Cal.App.4th 278. Under California Wage Order 7-2001, employers are required to provide employees with suitable seats "when the nature of the work reasonably permits the use of seats." Reversing a class decertification decision, the court reasoned the trial court improperly considered the merits of the claim and instead should have focused solely on the plaintiff's theory of liability and whether the action was amenable to class treatment under such theory. The appellate court held that the plaintiff had shown that the allegedly infringing companywide policy applied uniformly to the proposed class of Rite Aid cashiers and thus class certification was proper.

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Franchisor May Be Subject to Sexual Harassment Liability to California Franchisee Employees

In *Patterson v. Domino's Pizza, LLC*, the California Supreme Court held a franchisor may be liable as an employer under California's Fair Employment and Housing Act if it retains and exercises day-to-day control over a franchisee's employees. 2014 WL 4236175. While the franchisor in this case was found not to retain such control, the case clarifies that the door is open for liability based on traditional common law principles of agency and respondeat superior. Meeting this standard requires routine authority over matters such as hiring, firing, direction, supervision and discipline of the employee. The franchisor did not meet these factors based on the terms of the franchise contract, which stated that the franchisee was "solely responsible" for recruiting and hiring employees and such employees were not the franchisor's agents or employees. Besides the lack of a right or duty to control the franchisee's personnel matters, the franchisor demonstrated it did not interfere with the franchisee's control of its employees, for instance by refraining from involvement in the hiring process and providing limited training.

President Obama Executes Fair Play and Safe Workplaces Executive Order

On July 31, 2014, President Obama executed The Fair Play and Safe Workplaces Executive Order, requiring that federal contractors limit their use of mandatory pre-dispute arbitration clauses, comply with disclosures regarding labor law violations and provide information on paychecks. The order is expected to be implemented on new contracts in stages during 2016. The order provides that companies with federal contracts in excess of $1 million may only arbitrate claims arising under Title VII of the Civil Rights Act or any tort related to sexual assault or harassment with the voluntary consent of employees or independent contractors after the dispute arises. While subcontracts in excess of $1 million are also covered, the requirement generally does not apply to contracts for the acquisition of commercial items, employees covered by collective bargaining agreements or preexisting agreements to arbitrate that do not permit amendments.

Federal contractors bidding on contracts in excess of $500,000 will be required to disclose a three-year history of arbitration and litigation judgments with respect to 14 federal labor laws and their state equivalents and will be required to update disclosures every six months during the course of a covered contract. Pursuant to the order, covered contractors will also be required to provide paystubs to employees reflecting hours worked, overtime hours, pay, and additions or deductions from pay unless covered by a substantially similar state law.

Texas Enforces New York Forfeiture for Competition Agreement

In *Exxon Mobil Corp. v. Drennen*, the Texas Supreme Court recently enforced a Texas employer's New York choice-of-law forfeiture-for-competition provision. 2013 WL 9600951. The incentive program provided for a termination of restricted shares if a participant engaged in a conflict of interest, including work for a competitor. The participant, an executive of over 31 years, went to work for a competitor after retiring and the plan administrator cancelled his shares. The court upheld the New York choice-of-law provision, finding that there was a sufficient relationship between the parties and New York despite the employer being headquartered in Texas and the employee being based in Texas for most of his career. The court found that the forfeiture provision was enforceable under New York's "employee choice" doctrine because it did not restrict the employee's right to future employment, instead allowing him to choose between competing and accepting benefits.

OSHA Announces New Rule for Reporting Injuries

On September 11, 2014, the Occupational Safety and Health Administration (OSHA) announced a new final rule establishing employer reporting requirements related to serious workplace injuries and introducing an industry classification system to determine whether employers of 11 or more employees must maintain records of injuries and illnesses. This rule requires, effective January 1, 2015, employers to report to OSHA within 24 hours any in-patient employee hospitalization and certain severe injuries. In announcing the rule, OSHA indicated that employer reports for certain serious injuries and deaths will be posted online on OSHA's public website.

Supreme Court Declines to Expand Public Employee Union Fees Holding

Under the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, public employers may require all employees, even those who are not union members, to pay union fees, as long as the fees relate to collective bargaining and the nonmembers' fees do not cover ideological activities. 431 U.S. 209. In *Harris v. Quinn*, the Supreme Court declined to extend *Abood* to home health workers reimbursed by a state-run Medicaid waiver program. 134 S.Ct. 2618. Under the Illinois program, patients who would otherwise require care in an institution may hire a personal assistant to provide homecare services paid for by Illinois and subsidized by Medicaid. While personal assistants were classified as public employees for union organizing purposes, the patient controls the assistant's work and is defined as the employer under Illinois law. As public employees, the

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Supreme Court Declines to Expand Public Employee Union Fees Holding *(continued from page 4)*

personal assistants were subject to an agency-fee, or "fair share," provision, which required those members of a bargaining unit who do not wish to join the union to still pay a fee. The Court held that its precedent authorizing agency-fee provisions does not extend to plaintiffs in this case because they were reimbursed through a state-run Medicaid program, rather than being direct government employees, finding that state reimbursement of assistant pay did not outweigh the hiring or supervision provided by the patient.

Fluctuating Workweek Overtime Method Violates Pennsylvania Law

The fluctuating workweek method of calculating overtime expressly permitted by the Federal Fair Labor Standards Act has been found to violate Pennsylvania state law. *Verderame v. RadioShack Corp.* 2014 WL 3375033. The fluctuating workweek method is an employer-favorable way of calculating overtime for employees who are paid a fixed salary for hours that fluctuate from week to week where the overtime rate diminishes with each extra hour because overtime is based on a regular rate arrived at by dividing all hours worked in an applicable week. 29 C.F.R. § 778.114(a). In *Verderame*, a federal district court followed related precedent and held that the Pennsylvania Minimum Wage Act requires that employees be paid full time and a half for all hours worked over 40 and is inconsistent with the fluctuating workweek method.

California Requires Supervisor Abusive Conduct Training

Existing California law requires sexual harassment training for supervisors for a minimum of two hours every two years. Cal. Gov't Code § 12950.1. Effective January 1, 2015, a component of this training must cover the prevention of abusive conduct not expressly tied to sexual harassment. Abusive conduct is defined as conduct of an employee or employer in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests. It includes repeated infliction of verbal abuse, conduct that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of a person's work performance.

On a related noted, California also amended its Fair Employment and Housing Act to protect those employed in unpaid internships and volunteers from discrimination and harassment.

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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