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In This Issue:

1 EEOC Proposes Collecting Equal Pay Information

1 DOL Issues Broad Interpretation of Joint Employment Under FLSA and MSPA

2 Lyft Agrees to Settle California Driver Classification Lawsuit

2 US Supreme Court Denies Review of California Supreme Court Holding in Iskanian

2 US Supreme Court Upholds Arbitration Provision Under Federal Arbitration Act

2 US Supreme Court Rules Settlement Offer Does Not Moot Class Action

3 OFCCP Adopts Pay Transparency Rule

3 California Court Dismisses Employee Bag-Checking Case

3 New York's Achieve Pay Equity Bill Takes Effect

3 New York City Limits Criminal Background Checks

4 New York City Employer Credit-Check Prohibitions Take Effect

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Four Times Square
New York, NY 10036
212.735.3000

EEOC Proposes Collecting Equal Pay Information

On February 1, 2016, the Equal Employment Opportunity Commission (EEOC) published proposed changes to its Employer Information Report (EEO-I) that would require large employers to report data on employee earnings and hours worked as a means of identifying and addressing discriminatory pay practices. Currently, the EEO-I requires certain employers and federal contractors to annually report the number of individuals they employ by job category, ethnicity, race and sex. In addition to submitting this information, the proposed changes would require private industry employers and federal contractors with 100 or more employees to submit data on the EEO-I regarding employees' W-2 earnings and hours worked. The EEOC has stated that this information will be used to "improve enforcement of federal laws prohibiting pay discrimination" and allow employers "to evaluate their own pay practices to prevent pay discrimination in their workplaces." The proposed changes would take effect in 2017. The public may submit comments on the proposed changes through April 1, 2016.

DOL Issues Broad Interpretation of Joint Employment Under FLSA and MSPA

On January 20, 2016, the U.S. Department of Labor's Wage and Hour Division (WHD) issued an Administrator's Interpretation (AI) regarding joint employment liability under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The AI purports to clarify the WHD's position that joint employment under the FLSA and MSPA "should be defined expansively" and that an entity is considered an employer if the entity "suffer[s]" or permits the individual to work. In addition, the AI discusses two types of joint employment relationships — horizontal and vertical — and provides factors for analyzing each such relationship. According to the AI, a horizontal joint employment relationship may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. On the other hand, a vertical joint employment relationship may exist when an entity has contracted or arranged with an intermediary employer to provide the entity with labor or specific work functions, such as hiring and payroll functions. Unlike the horizontal joint employment analysis,

which focuses on the relationship between the employer entities, the vertical joint employment analysis focuses on an entity's relationship with the alleged employee. If an entity is determined to be a joint employer under the FLSA or the MSPA, among other implications, an employee's hours worked for all of the joint employers are aggregated during the workweek, including for purposes of calculating overtime pay, and all of the joint employers are jointly and severally liable for any violations or noncompliance with the FLSA and the MSPA.

Lyft Agrees to Settle California Driver Classification Lawsuit

Lyft has agreed to settle a putative class action in California federal court involving an estimated 100,000 California Lyft drivers who drove for the company at least once during the settlement class period. The proposed settlement agreement includes a $12.5 million payment and nonmonetary relief in the form of "driver protections" aimed to make Lyft's relationship with its drivers "more consistent with an independent contractor relationship," according to the motion for preliminary settlement approval. Such driver protections include removing at-will termination provisions in driver agreements, implementing a pre-arbitration process, requiring Lyft to bear arbitration fees and costs in certain situations and providing drivers with additional information about prospective passengers. The court has ordered further briefing on several aspects of the proposed settlement agreement, including whether a court may approve a settlement that might be deemed contrary to the lawsuit's original goal. A second hearing on the motion for preliminary approval of the settlement agreement has been scheduled for March 10, 2016.

US Supreme Court Denies Review of California Supreme Court Holding in Iskanian

On January 20, 2015, the U.S. Supreme Court once again denied employers' petitions for review of the California Supreme Court's holding in *Iskanian v. CLS Transportation Los Angeles*, 59 Cal. 4th 348 (2014), which held arbitration provisions compelling the waiver of representative claims under PAGA to be contrary to public policy, unenforceable under California law and not preempted by the Federal Arbitration Act (FAA). After the Iskanian holding, numerous California federal district courts refused to follow the California Supreme Court's reasoning, based on the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that the FAA, which broadly favors arbitration, preempts California law. On September 28, 2015 the Ninth Circuit weighed in on this ongoing debate by holding in *Sakkab v. Luxotticca Retail North America*, 803 F.3d 425 (9th Cir. 2015), that PAGA claims cannot be waived in employment arbitration agreements, thereby following the California Supreme Court's ruling in *Iskanian*.

US Supreme Court Upholds Arbitration Provision Under Federal Arbitration Act

In *DirecTV v. Imburgia*, 136 S. Ct. 463 (2015), which was issued on December 14, 2015, the U.S. Supreme Court rejected a California court's interpretation of a classwide arbitration waiver, which the California court held invalidated the entire arbitration agreement. Writing for the six-member majority, Justice Stephen Breyer held that the California court's interpretation violated the FAA's requirement that arbitration agreements be placed on the same footing as all other contracts. At issue was a specific provision in DirecTV's customer agreement requiring that disputes between DirecTV and its customers be resolved through binding arbitration and specifically prohibiting classwide arbitration of such disputes. In addition, the arbitration provision stated that it would be unenforceable if the "law of your state" voided the class arbitration provision. DirecTV sought to compel arbitration based on the U.S. Supreme Court's decision in *AT&T Mobility LLC*, which held that the FAA preempts state laws prohibiting contracts that forbid classwide arbitration. The U.S. Supreme Court disagreed with the California court's denial of DirecTV's motion and held that, while contract interpretation is ordinarily a matter of state law, and parties are free to choose the governing law, California courts would not interpret the term "law of your state" in contracts other than arbitration contracts to include invalid state law, and therefore, such an interpretation to invalidate an arbitration clause was in violation of the FAA.

US Supreme Court Rules Settlement Offer Does Not Moot Class Action

In *Campbell-Ewald Co. v. Gomez*, No. 14-857 (2016), the U.S. Supreme Court recently held that an unaccepted offer to satisfy a named plaintiff's individual claim is insufficient to render a class action moot. The class action was brought by a nationwide class of individuals who had received, but had not consented to receipt of, a text message promoting enrollment in the U.S. Navy, in violation of the Telephone Consumer Protection Act. The text messages were sent by a federal subcontractor at the direction of a federal contractor who had been engaged by the U.S. Navy. Resolving a circuit split, the Court rejected the petitioner's attempts to moot the class action by offering to provide the named plaintiff with complete relief under the statute and filing an offer of judgment under Federal Rule of Civil Procedure 68, before class certification. The Court also held that the petitioner's status as a government contractor did not entitle it to "derivative sovereign immunity," *i.e.*, the blanket immunity enjoyed by the U.S. Navy, because the contractor had not complied with the U.S. Navy's instructions in sending the text messages.

OFCCP Adopts Pay Transparency Rule

On September 11, 2015, the Office of Federal Contract Compliance Programs (OFCCP), a division of the Department of Labor, issued a final rule prohibiting federal contractors from discriminating against employees and job applicants who inquire about, discuss or disclose their own compensation or the compensation of other employees or applicants. The final rule took effect on January 11, 2016, and applies to businesses or organizations with federal contracts or subcontracts in excess of $10,000 that were or are entered into or modified after January 11, 2016. The final rule implements Executive Order 13665, which was issued in 2014 by President Obama and amends Executive Order 11246. The final rule requires that the equal opportunity clause included in covered federal contracts and subcontracts be amended to include that federal contractors and subcontractors must refrain from discriminating against employees or applicants who inquire about, discuss or disclose their compensation. It also requires federal contractors to incorporate a prescribed nondiscrimination provision into corporate handbooks, websites and other electronic forums where other policies are disseminated to employees and job applicants. In addition, it requires federal contractors to post a new supplement to the "EEO is the law" poster, to be used alongside the current EEO poster until the OFCCP and the Equal Employment Opportunity Commission finish updating the EEO poster. Two defenses are available to employers. The first defense is available where the employee makes the disclosure based on information obtained in the course of performing his or her essential job functions. The second defense is available where the employer can show it applied a legitimate workplace rule (that does not prohibit the discussion of compensation information) in a consistent and uniform manner.

California Court Dismisses Employee Bag-Checking Case

As discussed in the October 2015 *Employment Flash*, a California federal court certified a class of approximately 12,400 California employees subject to a bag-check policy. In November 2015, that same court dismissed the employees' claim that they should be compensated for time spent undergoing such searches under California state law. Notably, the court concluded that the company's bag-check policy did not constitute "hours worked" because the searches bore no relationship to the employees' job responsibilities and the searches could be avoided if the employee chose not to bring a bag to work. The employees have appealed the dismissal.

New York's Achieve Pay Equity Bill Takes Effect

The Achieve Pay Equity bill, which took effect on January 19, 2016, amends Section 194 of the New York Labor Law (NYLL) to strengthen prohibitions on differential pay based on sex. Section 194 previously provided that an employer was exempt from the requirement to provide men and women equal pay for equal work if the employer could demonstrate the differential payment was based on "any factor other than sex." Under the amended law, any differential pay must now be based on "a *bona fide* factor other than sex, *such as* education, training, or experience" (emphasis added), which is not based on or derived from a sex-based differential in compensation, is job-related and is consistent with business necessity. Moreover, an employer cannot use this exception if an employee demonstrates the employer's practice causes a disparate impact on the basis of sex, there is an alternative employment practice that would serve the same business purpose without producing a pay differential and the employer refused to adopt the alternative practice. Further, the Achieve Pay Equity bill amends Section 198 of the NYLL to provide that employers who willfully violate Section 194 may be liable for liquidated damages equal to 300 percent of the wages found to be due. Like the California Fair Pay Act, which was signed into law on October 6, 2015, and discussed in the October 2015 *Employment Flash*, New York's Achieve Pay Equity bill places a greater burden on employers to justify differential wage payments.

New York City Limits Criminal Background Checks

The Fair Chance Act (FCA), which took effect on October 27, 2015, amends the New York City Human Rights Law (NYCHRL) to make it unlawful for an employer to inquire about, search for or consider a job applicant's criminal history before extending a conditional offer of employment. According to the FCA, an employer may ask about an applicant's criminal background after extending a conditional offer of employment but may not ask about non-convictions. If an employer wishes to withdraw its conditional offer of employment after learning about an applicant's criminal history, the employer must first perform the evaluation process mandated by New York Correction Law Article 23-A, which requires an employer to (1) draw a direct relationship between the applicant's criminal record and the prospective job or (2) show that employing the applicant "would involve an unreasonable risk ... to the safety or welfare of specific individuals or the general public." Further, an employer seeking to withdraw the conditional offer must follow the following "Fair Chance Process": (1) disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history, (2) share with the applicant a written copy of its Article 23-A analysis and (3) allow the applicant at least three business days from receipt of the inquiry and analysis to respond to the employer's concerns. Employers hiring for positions where federal, state or local law requires criminal background checks are exempt from the law's requirements.

New York City Employer Credit-Check Prohibitions Take Effect

As discussed in the July 2015 *Employment Flash*, the Stop Credit Discrimination in Employment Act recently amended the NYCHRL to prohibit employers in New York City from requesting or using a job applicant's or employee's consumer credit history for employment purposes. The law took effect on September 3, 2015, and the New York City Commission released Enforcement Guidance on this law on September 2, 2015. Certain job positions are exempt from the law, including positions for which state or federal law require the use of an employee's credit history, positions requiring security clearance, positions having signatory authority over third-party funds or assets valued at $10,000 or more, and positions with authority to enter financial agreements valued at $10,000 or more. Employers claiming an exemption from the law must inform employees and applicants of the exemption and keep a detailed log of the exemption. The law applies to New York City employers with four or more employees. Employers found in violation of the law may be liable for back and front pay, compensatory and punitive damages, and a civil penalty of up to $125,000. Willful, wanton or malicious violations of the law may result in a penalty of up to $250,000.

Contacts in the Labor and Employment Law Group

John P. Furfaro
Chair
New York
212.735.2624
john.furfaro@skadden.com

Karen L. Corman
Partner
Los Angeles
213.687.5208
karen.l.corman@skadden.com

David E. Schwartz
Partner
New York
212.735.2473
david.schwartz@skadden.com

Helena Derbyshire
Of Counsel
London
44.20.7072.7086
helena.derbyshire@skadden.com

Stéphanie Stein
Of Counsel
Paris
33.1.55.27.11.56
stephanie.stein@skadden.com

Richard W. Kidd
Counsel
New York
212.735.2874
richard.kidd@skadden.com

Risa M. Salins
Counsel
New York
212.735.3646
risa.salins@skadden.com

Ulrich Ziegler
Counsel
Frankfurt
49.69.74220.150
ulrich.ziegler@skadden.com

Anne E. Villanueva
Associate
Palo Alto
650.798.6502
anne.villanueva@skadden.com