Employment Flash

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Spotlight on Whistleblower Protections

On October 24, 2016, the Securities and Exchange Commission (SEC) issued a "risk alert" regarding SEC registrants' compliance with Rule 21 F-17, which implements Section 21F of the Securities Exchange Act of 1934 (the Exchange Act). Rule 21 F-17 states that "no person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications." The rule was passed to encourage whistleblowers to report possible violations of securities law by providing financial incentives, prohibiting employment-related retaliation and providing various confidentiality guarantees. The SEC recently brought several enforcement actions against SEC registrants for alleged violations of Rule 21 F-17, with penalties ranging from $130,000 to $6,008,291.

SEC Examinations

In its risk alert, the SEC noted that its staff in the Office of Compliance Inspections and Examinations will be inspecting compliance manuals, codes of ethics, employment agreements and severance agreements to determine whether provisions in these documents restrict or discourage employees from providing information about potential securities violations to the SEC. The SEC is keenly focused on agreements that: (a) limit the types of information an employee may convey to the SEC or other authorities; (b) require an employee to waive any right to monetary recovery in connection with providing information to the government; (c) require an employee to notify, or receive clearance from, its employer before disclosing any information to any parties (unless the government is expressly exempted from the provision); or (d) permit disclosures of confidential information only as required by law, without any exceptions for voluntary communications with the SEC concerning possible securities laws violations. Notably, on September 29, 2016, the SEC brought its first enforcement action based solely on retaliation against a whistleblower. The employer agreed to settle the matter with the SEC; pay a $500,000 penalty, without admitting or denying the SEC's findings; and

cease and desist from committing or causing any further violations of Section 21F(h) of the Exchange Act.

Employers are encouraged to review their compliance manuals, codes of ethics, and severance and employment agreements; identify any language that may violate Rule 21F-17; and clarify that any such language shall not restrict employees from filing charges or complaints with the government or receiving an award for information provided to a government agency. Provisions requiring employees to inform their employer of any legal proceedings or investigations must include an exception for any government proceedings or investigations.

Defend Trade Secrets Act

When drafting and revising language in employment-related agreements, employers also should consider the recently enacted Defend Trade Secrets Act of 2016 (DTSA). Among other things, the DTSA creates a federal private civil cause of action for trade secret misappropriation and permits whistleblowers to disclose trade secrets to government agencies without incurring liability under the law. Notably, the DTSA requires employers to provide their employees with notice of the whistleblower immunity section of the DTSA in any contract or agreement with an employee entered into after the enactment of the DTSA and that governs the use of trade secret or confidential information, if they want to be able to pursue exemplary damages or legal fees in a DTSA action. Below is sample language employers should consider including in such agreements:

> Pursuant to Section 1833(b) of the Defend Trade Secrets Act of 2016, [Employee] acknowledges that [Employee] shall not have criminal or civil liability under any federal or State trade secret law for the disclosure of a trade secret that (a) is made (i) in confidence to a federal, state or local government official, either directly or indirectly, or to an attorney and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. Nothing in this [Agreement] is intended to conflict with Section 1833(b) of the Defend Trade Secrets Act of 2016 or create liability for disclosures of trade secrets that are expressly allowed by such Section.

Equal Employment Opportunity Commission Requirements

Employers must ensure that agreements with their employees comply with the requirements of the Equal Employment Opportunity Commission (EEOC). A 2006 consent decree between the EEOC and Eastman Kodak Company contains EEOC- approved language that has been included by employers in various agreements with their employees. The language makes clear that employees remain free to file a charge with or participate in any investigation or proceeding conducted by the EEOC, but — in contrast to the SEC's position — employers may require employees to waive their rights to recover monetary damages in connection with any such charge, complaint or lawsuit. However, more recently, the EEOC has brought enforcement actions against employers who have included this language in their severance agreements. In these enforcement actions, the EEOC identified six provisions that, in the EEOC's view, may interfere with employee rights to participate in a proceeding with any government agency enforcing discrimination laws: (a) cooperation provisions requiring employees to inform an employer of any legal proceedings, including an administrative investigation; (b) non-disparagement provisions; (c) provisions prohibiting disclosure to any third party of confidential information without prior written permission of the employer's human resources officer; (d) provisions with a release of all "causes of action, lawsuits or charges including any claim of unlawful discrimination of any kind"; (e) covenants not to sue; and (f) provisions providing an employer with the right to obtain relief for any breach of an agreement. These enforcement actions were dismissed for procedural reasons (*e.g.*, failure to conciliate), but courts have expressed skepticism as to whether such language in employment agreements amounts to a violation of Title VII as the EEOC claimed. Still, employers should remain cognizant of the EEOC's recent enforcement actions with respect to such provisions and carefully consider whether and to what extent they will be including such provisions in agreements with their employees going forward.

White House Urges Congress and States to Limit Use of Non-Compete Agreements

On October 25, 2016, the White House distributed a "call to action" to states, asking them to ban many non-compete agreements in an effort to spur competition in the labor market and accelerate wage growth for workers. This follows the White House's May 5, 2016, report outlining the negative impacts that non-compete agreements can have on the economy and workers when applied to a broad section of the population. The White House estimates that nearly one-fifth of U.S. workers currently are impacted by a non-compete agreement, including 14 percent of individuals who earn less than $40,000 per year. While non-compete agreements often are cited as helping protect businesses, promoting innovation and increasing training, the report notes that "unfair" non-compete agreements can have many negative effects. The problem, the White House says, is that workers are being required to sign non-compete agreements in instances where the benefit to the employer is likely to be low (*e.g.*, employee does not possess trade secrets), but the cost

to the worker is relatively high. The White House explains that non-compete agreements can reduce job mobility, limit workers' bargaining power, depress wages, constrict labor pools, limit the number of new companies, stifle innovation and restrict consumer choice.

The White House released a set of best practices for states to reform non-compete agreements, such as banning non-compete agreements for certain categories of workers, requiring non-compete agreements be proposed before a job offer, providing additional consideration for a non-compete agreement and promoting use of the "red pencil doctrine," which renders contracts with unenforceable provisions void in their entirety. The White House also called on Congress to pass proposed federal legislation that bans non-compete agreements for workers under a certain salary threshold. In an effort to educate employees, the White House released a state-by-state guide on non-compete laws. Additionally, the White House announced its commitment to undertake the largest data collection of its kind to measure non-compete usage. In response to the call to action, state officials from Connecticut, Hawaii, Illinois, New York and Utah released statements supporting the White House's initiative.

Illinois Law Prohibits Non-Competes for 'Low-Wage Employees'

On August 19, 2016, Illinois Gov. Bruce Rauner signed the Illinois Freedom to Work Act (the FWA) into law. The FWA prohibits private sector employers from entering into non-compete covenants with low-wage employees and declares such covenants illegal and void. The FWA defines "low-wage employee" to mean an employee who earns the greater of (a) an hourly rate equal to the minimum wage required by the applicable federal, state or local minimum wage law or (b) $13.00 per hour. The FWA defines "covenant not to compete" as an agreement, entered into after the effective date of the FWA, between an employer and a low-wage employee that restricts such employees from performing, either during or after employment: (a) any work for another employer for a specified period of time, (b) any work in a specified geographical area or (c) work for another employer that is similar to such low-wage employee's work for the employer included as a party to the agreement. The FWA becomes effective on January 1, 2017.

New York Attorney General Cracks Down on Non-Compete Agreements

Last summer, the New York attorney general (AG) reached separate agreements with each of three employers in different industries concerning the use of non-compete agreements among their employees. On June 15, 2016, the AG announced that *Law360*, a legal news website, agreed to stop using non-compete agreements for all of its New York employees, with an exception of a small number of top executives. Previously, *Law360* required a majority of its employees, including some in their first job out of college, to sign mandatory non-compete agreements, restricting them from working for any other legal news media outlet for one year after leaving the company. In addition, on June 22, 2016, a nearly 18-month long investigation by the AG's Office into Jimmy John's Gourmet Sandwiches' (Jimmy John's) use of non-compete agreements concluded with Jimmy John's agreeing to stop including sample non-compete agreements in the hiring packets it sends to its New York franchisees. The investigation uncovered that some Jimmy John's franchises had required restaurant workers and delivery drivers to sign non-compete agreements, limiting them from working for another sandwich shop within a two-mile radius of any Jimmy John's location for two years after leaving the company. Also, on August 4, 2016, following a complaint received from a former employee of Examination Management Services, Inc. (EMSI), the AG announced that the company agreed to stop using non-compete agreements for most of its New York employees. EMSI, a nationwide medical information services provider, had required all New York employees to sign a non-compete agreement prohibiting them from working for any competitor within a 50-mile radius of any location in which they worked for the company for nine months after leaving the company.

In each agreement, the AG emphasized that New York law does not permit the use of non-compete agreements, except in very limited circumstances, such as where an employee has access to trade secrets or possesses a uniquely special skill. The AG said, "[r]estricting rank-and-file workers from being able to find other jobs is unjust and inappropriate" and "unscrupulous non-compete agreements not only threaten workers seeking to change jobs, they also serve as a veiled threat to employers who may be reluctant to hire candidates due to the mere existence of a non-compete agreement."

On October 25, 2016, in response to the White House's call to action, the AG announced that he would introduce state legislation in 2017 that would prohibit non-compete agreements for employees earning less than $900 per week, require employers to provide non-compete agreements before an offer is made, offer additional compensation to employees who sign non-compete agreements and create a private cause of action that would include liquidated damages for employees subject to unlawful non-compete agreements.

DC Circuit Criticizes NLRB for Misusing Non-Acquiescence Policy

On September 30, 2016, the U.S. Court of Appeals for the D.C. Circuit held that the National Labor Relations Board (NLRB) misused its policy of non-acquiescence and ordered the NLRB to

pay attorney's fees totaling $17,649 to Heartland Health Center, a Michigan health care system. In *Heartland Plymouth Court MI v. NLRB*, No. 15-1034 (D.C. Cir. Sept 30, 2016), the D.C. Circuit overturned the NLRB's order that Heartland violated its collective bargaining agreement by failing to bargain over the effects of reducing employees' work hours and stated that the NLRB forced Heartland Health Center to litigate a case that precedent guaranteed the NLRB would lose. The D.C. Circuit acknowledged the NLRB can oppose contrary circuit court decisions to bring national labor law questions to the U.S. Supreme Court, but the D.C. Circuit stated that the non-acquiescence policy was misused here. First, where an appeal implicates a statute's multi-venue provision, the NLRB may assert its non-acquiescence when it has good reason to be uncertain about the venue; but here, the NLRB had no reason to be uncertain and made no effort to transfer the case. Moreover, the non-acquiescence policy requires the agency to assert its non-acquiescence honestly and clearly, but the NLRB did not do so until Heartland made its motion for attorney's fees. Also, the non-acquiescence policy requires the agency to specify its arguments against adverse precedent to preserve them for the U.S. Supreme Court's review, but the NLRB failed to mention any intention of preserving this case for review. The D.C. Circuit found that the NLRB made its order with the goal of forcing Heartland to expend resources litigating an order it knew would be found erroneous. The D.C. Circuit also criticized the NLRB's "extreme and unbounded" view of non-acquiescence when the NLRB argued that it could rely on its non-acquiescence policy even in cases where there is no circuit split. This case represents the first time in recent history that the NLRB has been ordered to pay an opponent's attorney's fees for bad faith litigation.

Paid Sick Days for Government Contractors

On September 7, 2015, President Obama signed Executive Order (EO) 13706, titled "Establishing Paid Sick Leave for Federal Contractors." The EO requires certain government contractors and subcontractors to provide employees performing work on or in connection with a covered government contract with up to seven days of paid sick leave annually. On September 30, 2016, the Wage and Hour Division of the Department of Labor issued a final rule implementing EO 13706 that applies to four categories of contracts and subcontracts: (a) procurement contracts for construction covered by the Davis-Bacon Act (DBA), (b) service contracts covered by the McNamara-O'Hara Service Contract Act (SCA), (c) concessions contracts and (d) contracts in connection with federal property or lands. The final rule also contains certain exclusions from coverage: (a) grants (as such term is used in the Federal Grant and Cooperative Agreement); (b) contracts and agreements with and grants to American Indian tribes under Public Law 93-638, as amended; (c) any procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under $2,000); and (d) any contracts for services, except for those otherwise expressly covered by the final rule, that are exempted from coverage under the SCA. In addition, the final rule does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles or equipment to the federal government. The final rule will apply to new government contracts entered into on or after January 1, 2017.

Writ of *Certiorari* Denied in Student-Athlete Compensation Case

On October 3, 2016, the U.S. Supreme Court denied a petition for a writ of *certiorari* requesting the Court to review the 9th Circuit's decision in *O'Bannon v. National College Athletic Ass'n.*, 802 F.3d 1049 (2015). In *O'Bannon*, two former student-athletes each filed and subsequently settled separate suits against the NCAA, Electronic Arts Inc. and Collegiate Licensing Co. regarding the use of their names, images and likenesses (NILs) in video games. Following the settlement and after granting a class certification of all student-athletes regarding their antitrust claims, the 9th Circuit upheld the district court's decision that the NCAA's rules banning compensation for the use of student-athletes NILs were anticompetitive and affirmed the injunction requiring the NCAA to allow member schools to grant full scholarships to compensate student-athletes for the use of their NILs. However, the 9th Circuit rejected the district court's holding requiring the NCAA to permit member schools to use a deferred compensation scheme that would have allowed colleges to pay players up to $5,000 per year in deferred licensing payments to be held in trust for the student-athlete until he or she leaves college.

Ninth Circuit Rules on Concerted Action Waivers in Arbitration Agreements

On August 22, 2016, the U.S. Court of Appeals for the 9th Circuit held that an arbitration agreement that prevents employees from bringing class and collective actions violates employees' substantive rights to engage in concerted activity under the National Labor Relations Act (NLRA). In *Morris v. Ernst & Young, LLP*, No. 13-16599, a class and collective action involving wage and hour claims brought on behalf of employees of Ernst & Young, the 9th Circuit agreed with the NLRB that employers cannot impose, as a condition of employment, an arbitration agreement with a "concerted action waiver" requiring employees to bring claims in separate proceedings, effectively barring employees from joining legal claims in a collective arbitration. The 9th Circuit held that employees have the right to pursue work-related legal claims as a group and, therefore, a concerted action waiver violates the NLRA and is unenforceable. However, an arbitration agreement with a collective action waiver from which an employee has the right to opt out does

not violate the NLRA. Notably, *Morris* has no controlling precedential effect on California state courts, including the California Supreme Court, which previously has rejected the NLRB's position.

Ninth Circuit Rules Ex-Uber Drivers' Claims Subject to Arbitration, PAGA Waiver Severable

On September 7, 2016, in *Mohamed v. Uber Techs., Inc.*, Nos. 15-16178, 15-16181, 15-16250, the 9th Circuit affirmed in part and reversed in part orders from the United States District Court for the Northern District of California denying a motion to compel arbitration brought by Uber Technologies, Inc. (Uber) in actions filed by two former Uber drivers. The drivers had entered into agreements in 2013 and/or 2014 with Uber containing arbitration provisions and provisions requiring the drivers to waive their right to bring class, collective and representation actions (including Private Attorneys General Act (PAGA) claims) either in court or in arbitration. The agreements also largely delegated the question of arbitrability to the arbitrator. The 2014 agreements stated that *all* disputes as to arbitrability would be resolved by the arbitrator. Unlike the 2014 agreements, the 2013 agreements excepted the question of the arbitrability of class, collective and representative claims (including PAGA claims) from its otherwise broad delegation of arbitrability questions to the arbitrator. The 9th Circuit explained that whether the court or the arbitrator decides arbitrability is an issue of judicial determination unless the parties unambiguously provide otherwise. The 9th Circuit held that the delegation clauses were unambiguous and further held that the arbitration provisions were not unconscionable because both drivers had an opportunity to opt out, though neither did. With regards to the PAGA waivers, the 9th Circuit held that the enforceability of the 2014 PAGA waiver was appropriately delegated to the arbitrator, however regarding the 2013 PAGA waiver, the question of enforceability was delegated to the courts and held that the waiver itself was invalid under California law. Nonetheless, the 9th Circuit found that it was severable from the remainder of the 2013 agreements and, therefore, did not render the rest of the 2013 agreements unenforceable.

New Amendments to California's Fair Pay Act

On September 30, 2016, California Gov. Jerry Brown signed into law two amendments to Section 1197.5 of the Labor Code — California's Fair Pay Act — to strengthen protections against wage differentials based on sex, race and ethnicity. The first amendment prohibits employers from using prior salary, by itself, to justify a disparity in compensation between employees of the opposite sex performing substantially similar work. The Fair Pay Act continues to allow businesses to justify wage differentials based on: (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production and (d) a bonafide factor other than gender. The bonafide factor may include education, training or experience, provided that the factor is not based on gender, is related to the position in question and is consistent with business necessity. Business necessity means "an overriding legitimate business purpose." The second amendment extends the Fair Pay Act by prohibiting employers from paying their employees less than other employees of a different race or ethnicity for substantially similar work. Employers may justify wage differentials based on the same four factors that justify wage differentials between genders. Both amendments require employers to keep for three years records of employees' wage rates, job classifications and other terms of employment. The amendments do not prohibit employers from asking employees for pay history. Employers who violate the Fair Pay Act can be liable to an affected employee for the wages denied because of the wage disparity, an additional equal amount as liquidated damages and attorney's fees. Retaliation against employees who report violations of the Fair Pay Act also is prohibited.

Employment Contracts Cannot Require California Employees to Adjudicate Disputes Out of State

On September 25, 2016, Gov. Brown signed into law a bill prohibiting employers from requiring that an employee who resides and works in California sign contracts that either: (a) require an employee to adjudicate outside of California a claim arising in the state or (b) deprive an employee of the substantive law of California regarding a controversy arising in the state. The new law makes any provision that violates these terms voidable upon an employee's request and subject to adjudication in California under California law. Adjudication includes both litigation and arbitration. Notably, the new law does not apply to contracts with an employee who is individually represented by legal counsel in negotiating the terms of an agreement designating the venue or forum where a claim arising from the employment contract is to be adjudicated or the choice of law to be applied. The new law applies to employment contracts entered into, modified or extended on or after January 1, 2017, and will be added as Section 925 of the California Labor Code.

California Adds Employment Protections for Victims of Domestic Violence, Sexual Assault and Stalking

On September 14, 2016, Section 230.1 of the California Labor Code was amended to strengthen protections for victims of domestic violence, sexual assault and stalking. Before it was amended, Section 230.1 prohibited employers from discharging, discriminating or retaliating against victims of domestic violence, sexual assault or stalking because they took leave for specified reasons related to addressing these violations, such as

obtaining services from a domestic violence shelter or seeking medical attention. The new amendment requires employers to inform each employee in writing of his or her right to take time off under Section 230.1, upon hire for new employees and upon request for other employees. The new amendment also directs the California labor commissioner to develop a form that employers can use as guidance for complying with the new notice requirements. Employers may either use the form as developed by the labor commissioner or develop their own form, provided it is substantially similar in content and clarity to the labor commissioner's form. The form will be made available on the labor commissioner's website on or before July 1, 2017. Employers must comply with the new amendment once the labor commissioner's form is made available. The original provisions of Section 230.1 and the new amendment apply to employers with 25 or more employees.

California Gender-Neutral Bathroom Bill Signed Into Law

Effective March 2017, all single-user restrooms in any California business or government agency must be branded as all gender and cannot be designated as male or female only. A "single-user restroom" is a "toilet facility with no more than one water closet and one urinal with a locking mechanism controlled by the user." The law further allows public inspectors or building officials to check such bathrooms for compliance during any inspection. The bill's author contends that single-sex, single-user bathrooms disproportionately burden members of the LGBT community, women and caretakers of dependents of the opposite sex, and that the new law will increase safe and convenient access for all. This law follows another recently enacted California law prohibiting state agencies from making its employees travel to any state that allows discrimination on the basis of gender identity.

International Spotlight

Below is a discussion of recent noteworthy employment law decisions and legal developments emanating from the United Kingdom (U.K.) and the European Union (EU).

Brexit and Employment Law in the United Kingdom

Organizations with operations in the U.K. are considering the effects of the U.K.'s vote to leave the EU. Many U.K. employment laws, and workers' rights laws in particular, are framed by EU legislation, and the referendum's impact upon such laws has been a major area of speculation before the June 2016 referendum and during its aftermath. There will be some uncertainty as to the impact of the referendum until negotiations have been concluded with the EU and other trade partners regarding their respective relationships with the U.K. However, Prime Minister Theresa May's new U.K. government has confirmed that all EU law will remain on the U.K. statute book immediately following the U.K.'s departure from the EU, and most commentators agree that employment law is unlikely to change immediately, particularly given other pressing political and economic concerns on the U.K. government's agenda. While the consensus was that the U.K. would dismantle many EU-derived employment regulations it had long opposed, the U.K. government unequivocally stated that this will not be the case. David Davis, the U.K.'s secretary of state for exiting the European Union, has stated, "[t]o those who are trying to frighten British workers, saying, '[w]hen we leave, employment rights will be eroded,' I say firmly and unequivocally, 'no they won't.'" Rather than dismantling U.K. employment law, the U.K. government has indicated that perhaps the opposite may be true, with new rules to place workers on company boards as one of the government's showpiece policies.

Still, many businesses are concerned about possible changes and the uncertainty that lies ahead. EU law underpins much of the U.K.'s existing legislative framework, including working time protections, discrimination laws and data protection legislation. Long-term changes are likely to occur in those areas of EU-derived employment law that have never received universal support from successive U.K. governments. The Working Time Regulations, the Agency Workers Regulations and the TUPE Regulations are areas that could see some loosening of the current rules, and U.K. courts will be less constrained by rulings of the European Court of Justice that have caused controversy in the U.K., most notably those relating to holiday pay and remedies for infringement of employment legislation. In addition, given the importance of immigration to the referendum debate, the current rules on U.K. companies employing foreign workers are expected to be tightened. Although transitional arrangements are likely to be part of any negotiation, and EU nationals already working in the U.K. are expected to be permitted to stay in return for similar arrangements for U.K. citizens working in EU countries, the U.K. government already has announced proposals to monitor the number of overseas workers employed by U.K. companies. Moreover, the government has reiterated its determination to reduce net migration into the U.K. to under 100,000 people per year, which could significantly impact mobility of workers in international organizations.

France Passes Employment Reform Law

A wide-ranging labor reform in France was passed into law on August 8, 2016, and goes into effect in December 2016. The Law on Labor, the Modernisation of Employee Dialogue and the Securing of Career Paths (*Loi relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*) covers multiple areas, including economic dismissal, the validity of collective agreements, transfer of employee rights

and use of electronic communication devices. Different provisions of the new law will come into force in stages between now and 2019, and there may be amendments to the law if there is a change of government following next year's presidential elections. The new law also establishes a commission to prepare a further comprehensive overhaul of the French Labor Code.

The new law provides a new definition of "economic difficulties" justifying employment terminations. Such difficulties may be characterized by significant changes in one or more economic indicators, such as a fall in customer orders or turnover, operating losses and reduction in cash flow or gross operating profit. A "significant fall" in orders or turnover is considered based on the size of the company and the length of time it is impacted. The new law also introduces more stringent validity conditions for company-level collective agreements, which must be signed by unions representing more than 50 percent of votes in the most recent employee elections (rather than the previous figure of 30 percent or more). The new law provides the possibility of a direct ballot of all employees to approve collective agreements. These provisions will take effect in 2017 and 2019, depending on the subject areas covered by the collective agreements in question. Other provisions of the new law include: (a) changes to the rules on collective agreements where employees transfer automatically to a buyer in an asset transfer (under the new regime, collective agreements remain in force within the new employer for 15 months following the transfer, and are then extinguished, whereas previously such advantages were agreed to contractually after that period); (b) preserving employees' "disconnection right" to disconnect from electronic communications devices when not at work; (c) adopting various measures to prevent unlawful secondments France from workers outside national borders; and (d) changes to working time provisions for managers.

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