Employment Flash

Skadden

April 2017

1 Supreme Court Adopts Deferential Standard of Review for EEOC Cases

1 Congress Nullifies Two Obama-Era Regulations

2 Title VII Prohibits Sexual Orientation Discrimination

2 USCIS Issues New H-1B Visa Policies

3 New York to Provide Comprehensive Family Leave Benefits

3 New York City Council Passes Salary Ban Legislation

3 Salary Data Disclosure Required for New York State Contractors

4 California Supreme Court Limits Arbitration Waivers

4 State Court Ruling Does Not Preclude Dodd-Frank Whistleblower Suit

4 Appeals Court Examines At-Will Employment, Continuation of Nonsolicit in Pennsylvania

International Spotlight

4 UK Courts and Tribunals Tackle the Gig Economy

5 French Law Protects Employees' Disconnection Right

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

Supreme Court Adopts Deferential Standard of Review for EEOC Cases

On April 3, 2017, in *McLane v. EEOC*, 137 S.Ct. 30 (2016), the U.S. Supreme Court ruled that appellate courts should review lower court decisions to enforce or quash the Equal Employment Opportunity Commission (EEOC) subpoenas using a deferential standard (*i.e.*, abuse of discretion) rather than a *de novo* standard of review. The lower court had ruled that the employer did not have to provide "pedigree information" comprised of names, Social Security numbers and phone numbers because the information was irrelevant to the case at hand. The U.S. Court of Appeals for the Ninth Circuit disagreed, reversed the lower court and held that the employer must provide the information. The Supreme Court found that the Ninth Circuit erred by declining to accord the lower court's decision deference and remanded the case to the Ninth Circuit. The Supreme Court explained that there is a long-standing practice of reviewing district court decisions regarding the enforcement of subpoenas for abuse of discretion and noted that district court judges are often in the best position to decide whether subpoena requests are pertinent.

Congress Nullifies Two Obama-Era Regulations

The Congressional Review Act (CRA) permits Congress to enact a resolution of disapproval nullifying any rule promulgated by an administrative agency if passed by both chambers and signed by the president. The CRA's "fast track" additions to the Senate procedure — including the filibuster restriction and debate-time limitations — provide a simple mechanism to nullify an agency rule when issued within the last 60 legislative days. President Donald Trump and Congress used the CRA to nullify two Obama-era labor regulations — the Federal Acquisition Regulatory Council's "Fair Pay and Safe Workplaces" rule (the FARC rule) and the Occupational Safety and Health Administra-

tion's (OSHA's) "Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness" rule (the Volks rule). Prior to President Trump taking office, the CRA had been used successfully only once since its enactment in 1994.

On January 30, 2017, a joint resolution disapproving the FARC rule was introduced in the House. The FARC rule required prospective federal contractors and subcontractors to disclose labor and employment violations during the previous three years and provide wage statements with pay and hours to employees and independent contractors. It also prohibited mandatory arbitration agreements concerning Title VII and sexual assault claims. The resolution passed in the House in early February 2017 and narrowly passed in the Senate the following month. On March 27, 2017, President Trump signed the resolution nullifying the FARC rule and issued Executive Order 13782, officially revoking President Barack Obama's executive orders that authorized the rule.

In late February 2017, a joint resolution disapproving the Volks rule was introduced and quickly passed in the House. The Volks rule gave OSHA the power to issue citations and levy fines on employers who did not maintain proper records of work-related injuries and illnesses for five years. On March 22, 2017, the Senate narrowly passed the resolution. On April 3, 2017, President Trump signed the resolution nullifying the Volks rule.

Because these two rules have been nullified pursuant to the CRA, no rule substantially similar to either of them may be promulgated in the future by any agency without Congress' approval.

Title VII Prohibits Sexual Orientation Discrimination

On April 4, 2017, the U.S. Court of Appeals for the Seventh Circuit held that employment discrimination based on sexual orientation is a case of sex discrimination for purposes of Title VII of the Civil Rights Act of 1964 (Title VII). In *Hively v. Ivy Tech Community College*, No. 15-1720 (2017), the former employee alleged that she was denied full-time employment based on her sexual orientation. While sexual orientation is not an enumerated protected class under Title VII, the 1989 U.S. Supreme Court ruling in *Price Waterhouse v. Hopkins* held that Title VII prohibits discrimination against workers who fail to conform to sex-based stereotypes. Relying on the decision in *Hopkins*, the *Hively* court reasoned that because she was not heterosexual, the former employee did not conform to the female stereotype. The *Hively* court used the comparative method, which isolates the significance of an employee's sex in the employer's decision — *i.e.*, if the employee had been a man married to a woman, she would not have been fired. The *Hively* court also applied the associational theory and considered whether the college discriminated against the employee because of the sex of the individual with whom she associated. The *Hively* court concluded that sexual orientation discrimination is in fact sex discrimination, especially in light of recent Supreme Court decisions involving same-sex marriage and the "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

The EEOC and other circuit courts have addressed the issue of discrimination on the basis of sexual orientation and gender stereotyping. In 2015, the EEOC issued a ruling in *Baldwin v. Foxx*, Appeal No. 0120133080 (July 16, 2015) that sex discrimination under Title VII includes sexual orientation discrimination. On March 27, 2017, the U.S. Court of Appeals for the Second Circuit held in *Christiansen v. Omnicom Group, Inc.*, No. 16-748, that an employee adequately alleged a Title VII claim of discrimination on the basis of gender stereotyping but not sexual orientation. The *Christiansen* court found that sex discrimination encompasses gender stereotyping discrimination but not sexual orientation discrimination, and the employee, who had alleged that he had been harassed on the basis of his "stereotypically feminine traits," successfully alleged gender stereotyping discrimination. On March 10, 2017, the U.S. Court of Appeals for the Eleventh Circuit held in *Evans v. Georgia Regional Hospital*, No. 15-15234, that sexual orientation discrimination is not actionable under Title VII. The *Evans* court stated that it was bound by a prior decision, *Blum v. Gulf Oil Corp.*, which had found that Title VII does not prohibit sexual orientation discrimination.

USCIS Issues New H-1B Visa Policies

H-1B visas enable companies to temporarily employ foreign workers in specialty occupations. Each year, 65,000 of the visas are allotted by lottery, with another 20,000 allotted to foreign nationals with an advanced degree from an American university. On April 3, 2017, the U.S. Citizenship and Immigration Services (USCIS) announced that it is implementing multiple measures to deter and detect H-1B visa fraud and abuse. In particular, USCIS will focus on:

- Cases where it cannot validate the employer's basic business information through commercially available data;
- H-1B-dependent employers; and
- Employers petitioning for H-1B workers who work off-site at another company or organization's location.

According to USCIS, targeted site visits will help the agency focus resources where fraud and abuse may be more likely to occur and determine whether H-1B dependent employers are

paying their H-1B employees the required wage to render them exempt from recruitment attestation requirements. USCIS also announced that it has established an email address, ReportH-1BAbuse@uscis.dhs.gov, to allow individuals to submit information about potential H-1B fraud or abuse. Further, on March 31, 2017, USCIS issued a rescission memorandum that is effective immediately and rescinds a prior USCIS policy memorandum that directed its adjudicators to consider the computer programmer position as a specialty occupation for H-1B purposes. In addition, the rescission memorandum reminds USCIS adjudicators to review companies' Labor Condition applications to ensure that wage levels correspond to the proffered position. The memorandum also explains that a Level I, entry-level position designation may contradict a claim that the proffered position is particularly complex, specialized or unique.

New York to Provide Comprehensive Family Leave Benefits

In April 2016, New York Gov. Andrew Cuomo signed legislation that, beginning in January 2018, will provide comprehensive family leave benefits to eligible employees. The New York Paid Family Leave Benefits Law (PFLL) will be fully funded through a payroll deduction and, once completely phased in, provide eligible employees with 12 weeks of paid leave in any 52-week period to care for a new child or close relative with a serious health condition, or attend to obligations when a family member is called to active military service. To be eligible for paid family leave, at the time the employee applies for benefits, the employee must have been employed by a covered employer on a full-time basis for 26 weeks or on a part-time basis for 175 days. Also, employees are entitled to job reinstatement when their leave ends and continuation of their health insurance while on PFLL. For purposes of the PFLL, covered employers include all private employers in New York with at least one employee on each of at least 30 days in a calendar year. The PFLL will be phased in over four years, beginning January 1, 2018, with eligible employees able to take eight weeks of paid leave at 50 percent of the employee's average weekly wage (not to exceed 50 percent of the state's average weekly wage). The number of weeks of leave and the wage rate will increase each year until January 1, 2021, when eligible employees may take up to 12 weeks of paid leave at 67 percent of the employee's average weekly wage (not to exceed 67 percent of the state's average weekly wage).

On February 22, 2017, the state filed proposed regulations implementing the PFLL. The notice and comment period ended on April 8, 2017. The proposed regulations clarify that employers are permitted, but not required, to begin collecting the weekly payroll deduction on July 1, 2017, for PFLL coverage beginning on January 1, 2018. The employer is exempt from the PFLL when employees of a covered employer are entitled to family leave benefits under a collective bargaining agreement, but the employer must provide benefits that are at least as favorable as those provided under the PFLL.

New York City Council Passes Salary Ban Legislation

On April 5, 2017, the New York City Council voted to pass Introduction 1253-A, which, once signed into law by New York City Mayor Bill de Blasio, will ban New York City employers from asking job applicants for their previous salary information. Known as the Letitia James bill, the text amends the New York City Human Rights law and forbids employers and employment agencies from inquiring about the salary history of an applicant or relying on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of an employment contract. For purposes of the law, "inquiring" includes asking an applicant questions and searching public records. Further, the definition of "salary history" includes base compensation as well as benefits and other compensation (*e.g.*, bonuses and commission). Employers are legally permitted to verify salary information if, without prompting, the employee discloses such information and to discuss salary "expectations" with applicants. The law will become effective 180 days after Mayor de Blasio signs the bill. Massachusetts and Philadelphia recently passed similar laws forbidding inquiries into salary and wage history. In addition, California's salary ban amendment to its fair pay law took effect in January 2017.

Salary Data Disclosure Required for New York State Contractors

On January 9, 2017, New York Gov. Andrew Cuomo issued Executive Order 162 (EO 162), which aims to increase wage transparency and equity by requiring all state contractors to disclose the gender, race, ethnicity, job title and salary data of all employees performing work under state contracts, agreements or procurements issued and executed on or after June 1, 2017. EO 162 requires state agencies to include a provision that every contractor or bidder disclose the pertinent data of each employee working on that contract or of each employee in the contractor's entire workforce if the contractor cannot identify the individuals working directly on a state contract. EO 162 requires contractors to obtain the same information from subcontractors.

For purposes of EO 162, a covered contract includes a contract: (1) for the expenditure of public funds in excess of $25,000 for labor, services (including, but not limited to, financial, legal and other professional services), supplies, equipment or materials; or (2) in excess of $100,000 for the acquisition, construction, demolition, replacement, major repair or renovation of real

property and improvements thereon. EO 162 requires contractors with prime contracts valued in excess of $25,000 and $100,000 to provide quarterly and monthly reports, respectively. The New York state economic development department will dictate the form and manner in which the required disclosures are to be reported.

California Supreme Court Limits Arbitration Waivers

On April 6, 2017, the California Supreme Court held in *McGill v. Citibank NA*, No. S224086 (2017), that an arbitration agreement that waives the right to public injunctive relief is contrary to California's public policy and is unenforceable under California law. This decision reverses a California appellate court decision, which found that the U.S. Supreme Court ruling in *AT&T Mobility LLC v. Concepcion* pre-empts state law arbitration rules, including California's Broughton-Cruz rule prohibiting arbitration of injunctive relief claims brought for the public's benefit. In *Concepcion*, the U.S. Supreme Court found that the Federal Arbitration Act pre-empts state law rules that amount to an outright ban on arbitration. However, in *McGill*, the California Supreme Court found that public injunctive relief remains a remedy available to private plaintiffs under the state's Unfair Competition and False Advertising Law and the Consumer Legal Remedies Act. The California Supreme Court further held that the Federal Arbitration Act does not pre-empt the right to seek public injunctive relief or require enforcement of a provision in an arbitration agreement that waives any rights to such relief.

State Court Ruling Does Not Preclude Dodd-Frank Whistleblower Suit

On April 12, 2017, the U.S. Court of Appeals for the Third Circuit held in *Danon v. Vanguard Group, Inc.*, No. 16-2881, that an in-house lawyer's failure to sufficiently plead, in state court, that his former employer had knowledge of his protected activity did not preclude his retaliation claim in federal court. The lawyer allegedly told many senior employees that he believed their employer was violating certain tax and corporate laws. He filed a state court action in the Supreme Court of the State of New York, claiming that his former employer violated the New York False Claims Act when it terminated his employment in retaliation for his attempt to stop illegal activities. The state court dismissed the action and held that the lawyer's complaint failed to contain any allegations that the former employer knew he was involved in protected conduct. While appealing the state court's decision, the lawyer filed suit in the U.S. District Court for the Eastern District of Pennsylvania, claiming that the termination of his employment constituted retaliation under the whistleblower protections of the Sarbanes-Oxley Act, the Dodd-Frank Act and the Pennsylvania Whistleblower Law. On appeal, the Third Circuit held that preclusion was inapplicable with respect to the Dodd-Frank claim because the state court decided only that the lawyer had not sufficiently pleaded the former's employer's knowledge of the protected activity, not that the former employer actually lacked knowledge of the activity. The Third Circuit affirmed the dismissal of the remaining claims.

Appeals Court Examines At-Will Employment, Continuation of Nonsolicit in Pennsylvania

On April 18, 2017, a Pennsylvania appeals court ruled in *Metalico Pittsburgh Inc. v. Newman et al.*, 2017 PA Super 109 (Pa. Super. Ct. 2017), that converting employees to at-will employment after their employment contracts terminate does not eviscerate the contracts' nonsolicitation provisions. The case arose in 2015 when an employer sought to enforce the nonsolicitation provisions in its contracts with two former employees after they left to work for a competitor and began soliciting the former employer's clients. In 2011, the two former employees had signed three-year employment contracts with nonsolicitation provisions that applied for one or two years after their employment terminated. When the employment contracts expired in 2014, the employees continued to work as at-will employees until they began working for a competitor in 2015. The appeals court found that the consideration offered in exchange for the nonsolicitation provisions did not fail because the employees had already received the consideration promised in the employment contracts. The appeals court further found that the language of the two employment contracts specified that the nonsolicitation provisions were to extend after the contract term ended and after the employees' departure from the former employer. Because the employees had already received the consideration promised, they were bound by the restrictive covenants for the full period during which they agreed to be bound, *i.e.*, after the expiration of their three-year terms and after their at-will employment terminated.

International Spotlight

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

UK Courts and Tribunals Tackle the Gig Economy

The categorization of staff and their employment rights has been an increasingly high-profile issue in the U.K., especially given the rise in self-employment, "casual work" and "zero-hour contracts." Under English law, there are three categories of employment status:

- **Employees** are entitled to various employment rights and protections, including unfair dismissal protections, certain redundancy payments and parental leave rights. Employees work under a contract and are subject to a high degree of employer control.

- **Self-employed contractors** are primarily autonomous and bear business risks, and are not entitled to employment rights other than protection from discrimination.
- **Workers** perform services personally for a third party who is not a client or customer, are neither employees nor self-employed contractors and are entitled to some employment protections, such as minimum wage and paid annual leave benefits.

Recent employment Tribunal and Court of Appeal decisions in 2016 and 2017 have focused on the distinction between self-employed contractors and workers. The courts in *Pimlico Plumbers and Mullins v. Smith* [2017] EWCA Civ 51, *Aslam & Farrar v. Uber BV & Others* [2016] (ET/2202550/2015) and *Dewhurst v. CitySprint U.K. Ltd* (ET2202512/2016) held that the individuals in those cases should be categorized as workers, despite the contractual provisions specifying that they were self-employed contractors. Certain themes emerged in these cases:

- **Carefully drafted legal documentation stating that individuals are self-employed is not determinative.** Courts and tribunals will look to multiple factors, including the work performed, the employer's level of control and the level of business risk borne by the individual. For example, the *Pimlico Plumbers* and *CitySprint* courts found that the individuals in those cases should be classified as workers because, in practice, they almost never used the assignment and subcontracting provisions in their contracts.
- **Courts and tribunals will look closely at the level and degree of autonomy an individual exercises.** The *Uber* court found that the drivers were not required to make any commitment to work when signed into the Uber application, but they lacked autonomy because their access to the application could be suspended or blocked if they failed to accept bookings, thus preventing them from performing work.
- **A high level of integration within the wider organization may suggest worker status.** In the *CitySprint* case, when logged on to the company's tracking system, the bicycle courier was required to wear a uniform, was directed via phone or radio by a controller, and was given guidance about providing a professional service. The tribunal held that the *CitySprint* courier was an integrated part of the wider business and was therefore a worker even though her contract stated that she was self-employed.

Companies could incur significant increases in staff operating costs, including costs related to holiday pay and the U.K. national minimum wage, if they incorrectly categorized staff as self-employed contractors rather than as employees or workers. Given the increased use of self-employed and casual labor in the U.K., the government there has ordered a review of modern working practices called the Taylor Review, which is likely to draw on the themes explored in the *Uber*, *Pimlico Plumbers* and *CitySprint* cases and make suggestions for changes to U.K. employment law and the current rules governing staff categorization.

French Law Protects Employees' Disconnection Right

Effective January 2017, a new French law recognizes workers' legal right to disconnect from work-related electronic devices. The so-called "disconnection right" ("droit à la déconnexion") obliges employers with more than 50 employees to enact measures protecting employees' rest periods and personal and family life.

The legislation does not specify the content and application of the disconnection right. Instead, employers are expected to define and apply it through a collective agreement with unions or a charter established after consultation with employee representatives. The document should describe the application of the disconnection right within the company and provide employee information and training regarding the use of electronic devices. It is unclear whether this obligation applies in companies without employee representatives. However, employers must establish a disconnection right regime for employees whose working time is measured in days per year, as is typically the case for autonomous, management-level workers.

The idea of a disconnection right has been a subject of discussion for some years in European and other jurisdictions. The genesis of the disconnection right is the proliferation of devices allowing remote access to work emails and the resulting impact upon employee health and safety. In many cases, individual employers rather than lawmakers have taken the lead on this issue. For example, in Germany, employers such as VW and Daimler have implemented automatic restrictions on out-of-hours access to messages for certain employees. In France, Société Générale, Areva, Total and Air France had already taken steps to regulate device usage prior to the new law. Concrete measures include limitations and agreements about the hours and circumstances when an employee can be contacted by his or her employer.

Contacts in the Labor and Employment Law Group

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

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
650.470.4596
anne.villanueva@skadden.com