Employment Flash

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House of Representatives Passes American Health Care Act; Senate Unveils Its Better Care Reconciliation Act

On May 4, 2017, the U.S. House of Representatives narrowly passed the American Health Care Act (AHCA), which partially repeals and replaces the Affordable Care Act (ACA). The AHCA would significantly change many features of the ACA, including insurance coverage requirements and protections, and taxes imposed on high-income individuals, insurers and drug companies. Unlike the ACA, the AHCA would not require individuals to purchase health insurance or employers to provide health insurance. The AHCA would also curtail the ACA's Medicaid expansion, which would reduce spending by an estimated $900 billion dollars. Furthermore, the AHCA would provide states with federal money for Medicaid or a block grant with fewer federal requirements. The AHCA would permit states to apply for a waiver exempting them from compliance with the ACA's prohibition against insurers charging higher premiums to individuals with pre-existing health conditions and to those above age 50. Further, the AHCA is expected to increase limits for health savings accounts, reduce tax penalties for non-eligible expenses and increase limits on flexible spending accounts.

On June 22, 2017, the Senate unveiled the Better Care Reconciliation Act (BCRA). Like the AHCA, the BCRA would curb the ACA's Medicaid expansion and eliminate many of the ACA's taxes and penalties associated with the employer and individual health insurance mandates. Under the BCRA, states would be legally permitted to opt out of the ACA's marketplaces and the ACA's "essential health benefits" (*e.g.*, maternity care and mental health care). Further, as with the AHCA, insurance companies would be permitted to charge older Americans premium costs that are up to five times more than those charged to younger Americans. If the BCRA passes in the Senate with a majority vote, both chambers will have to vote on a version that reconciles any differences between the two measures.

DOL Withdraws Administrative Interpretations Regarding Proper Worker Classification and Joint Employer Liability

On June 7, 2017, the U.S. Department of Labor (DOL) withdrew two Obama-era interpretations addressing independent contractor misclassification and joint employer liability. Both interpretations had the effect of broadening the employment relationship as it related to compliance with the Fair Labor Standards Act (FLSA) and other federal employment laws. Under the now-withdrawn worker classification interpretation, the DOL had instructed employers to evaluate "economic realities" when classifying workers by focusing on whether the worker is economically dependent on the employer and de-emphasizing the degree to which a business controls an individual's
work. The DOL had pronounced that "most workers" should be classified as employees, who are entitled to receive certain employment benefits and protections such as minimum wage, overtime compensation, unemployment insurance coverage and workers' compensation benefits. That interpretation was viewed by some as the agency's reaffirmation of an effort to investigate and contest worker classification. In a separate administrative interpretation, the DOL had taken a similarly broad view of joint employer liability with respect to wage violations committed by franchisees, subcontractors and employment agencies. A broad interpretation of the term employer meant that certain companies could be held jointly and severally liable for any noncompliance with the law by the direct employer.

These interpretations were not and are not legally binding, but their withdrawal signals the DOL's intention to take a narrower view regarding the scope of the employment relationship. That said, the withdrawal of the joint employer interpretation does not affect the National Labor Relations Board's 2015 *Browning-Ferris* decision, in which the board held that businesses can be classified as joint employers even if they only indirectly control workers. That decision is currently under review by the U.S. Court of Appeals for the District of Columbia.

Supreme Court Issues Another Arbitration Decision

The U.S. Supreme Court recently issued a decision reinforcing its prior holding that the Federal Arbitration Act prevents states from creating special standards to govern the enforceability of arbitration agreements. In *Kindred Nursing Centers v. Clark*, the Kentucky Supreme Court had held that the state's constitution barred individuals holding a power of attorney from binding another person to an arbitration agreement unless the power of attorney specifically included the power to waive access to the courts and trial by jury. The Supreme Court reversed, holding that Kentucky law could not maintain this specific authorization requirement with respect to only arbitration agreements. The ruling follows the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*, which held that courts may invalidate arbitration agreements based on "generally applicable contract defenses" but not on legal rules that "apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue."

House Approves Bill Allowing Employers to Pay Comp Time in Lieu of Overtime

On May 2, 2017, the U.S. House of Representatives passed the Working Families Flexibility Act. The bill would amend the FLSA to allow private, non-unionized employers to credit certain employees with paid time off in lieu of paying the employees monetary compensation for overtime. The bill requires an employee to make a written election between receiving compensatory paid time off or monetary overtime and allows an employee to change his or her election in the future. The bill states that employees may accrue up to 160 hours of compensatory paid time off, and, in the event that an employee does not use all of his or her accrued compensatory paid time off in a given 12-month period, the employer is obligated to pay the employee a monetary amount equivalent to such accrued compensatory paid time off not later than 31 days after the end of such 12-month period.

New York Court of Appeals Extends Liability for Employment Discrimination Based on Criminal Conviction

On May 31, 2017, the U.S. Court of Appeals for the Second Circuit ordered a remand of a wrongful termination suit back to the U.S. District Court for the Eastern District of New York. The order was made pursuant to a May 4, 2017, judgment by the New York Court of Appeals in *Griffin v. Sirva Inc.*, No. 15-1307 (2017), which held that Section 296(6) of the New York State Human Rights Law extends liability to out-of-state non-employers that aid or abet in employment discrimination based on a criminal conviction. The district court had ruled that New York state law prohibiting employment discrimination on the basis of prior criminal convictions applied only to employers and that aiding and abetting liability could not be imposed on the defendants because neither defendant was the plaintiffs' direct employer. The New York Court of Appeals affirmed the district court's ruling that liability for employment discrimination based on a criminal conviction is limited to an aggrieved party's employer but extended liability for aiding and abetting for this type of employment discrimination to out-of-state non-employers. The New York Court of Appeals explained that the aiding

and abetting provision specifically applies to any "person," not just an employer, and the New York State Human Rights Law contains an extraterritoriality provision extending liability to out-of-state non-employer defendants.

New York City Signs Fair Workweek Bills to Enforce Predictable Schedules in Fast Food and Retail Industries

On May 30, 2017, New York City Mayor Bill de Blasio signed into law the Fair Workweek package of bills, which ensures predictable schedules and paychecks for fast food and retail workers in New York City. With respect to the retail industry, the laws ban the practice of "on-call scheduling," or changing work shifts within 72 hours of the start of the shift, and requires retailers to post their employees' work schedules at least three days before the beginning of their respective scheduled work hours. With respect to the fast food industry, the laws ban the practice of requiring an employee to work back-to-back shifts involving the closing and opening of a fast food restaurant without an extra $100 compensation. The new laws also require fast food employers to regularly provide employees with their respective work schedules 14 days in advance, and if any changes are made with less than 14 days' notice, the employee will be compensated $10 to $75, with the highest payment paid if changes are made with less than 24 hours' notice. These laws will become effective at the end of November 2017 (*i.e.*, 180 days after signing). Seattle has already passed similar laws regarding fair work scheduling practices, which will go into effect in July 2017. San Francisco's Retail Workers Bill of Rights took effect in March 2017.

New York District Court Holds That Sexual Orientation Discrimination Claims Are Cognizable Under Title VII

On May 3, 2017, in *Philpott v. State of New York, et al.*, No. 16-cv-6778, the U.S. District Court for the Southern District of New York (S.D.N.Y.) ruled that discrimination based on sexual orientation is covered under Title VII of the Civil Rights Act of 1964 (Title VII). This ruling follows on the heels of a similar U.S. Court of Appeals for the Seventh Circuit ruling in *Hively v. Ivy Tech Community College*, No. 15-1720 (2017), that employment discrimination based on sexual orientation qualifies as sex discrimination for purposes of Title VII (as discussed in the April 2017 edition of the *Employment Flash*). The *Philpott* court declined to embrace the distinction between gender stereotyping and sexual orientation discrimination recently made by the U.S. Court of Appeals for the Second Circuit in *Christiansen v. Omnicom Group, Inc.*, 852 F. 3d 195 (2d Cir. 2017) .

About two weeks after the *Philpott* decision, on May 25, 2017, the Second Circuit agreed to hold an en banc hearing in *Melissa Zarda et al. v. Altitude Express d/b/a Skydive Long Island et al.*, No.15-3775 (2017), instructing the parties to brief only the following question: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of ... sex'?" On May 31, the Second Circuit issued an order inviting the Equal Employment Opportunity Commission (EEOC) to brief and argue the case as *amicus curiae*. As the *Philpott* court stated, "The law with respect to this legal question is clearly in a state of flux, and the Second Circuit, or perhaps the Supreme Court, may return to this question soon."

SDNY Denies Conditional Certification in FLSA Overtime Suit

On May 2, 2017, the S.D.N.Y. in *Brown v. Barnes and Noble*, Inc., No. 15-7333 denied a motion for conditional certification regarding FLSA overtime claims brought by a group of former bookstore managers, holding that the evidence they presented was "too thin to satisfy their modest burden." In *Brown*, the former managers sought to conditionally certify an FLSA collective action consisting of all individuals employed as café managers of the former employer between April 2016 and September 2016, arguing that as café managers they each primarily performed duties that were not "managerial" in nature. Prior to September 2016, the former employer classified all café managers as exempt from the overtime provisions of the FLSA, but in September 2016, the former employer reclassified them as non-exempt. The former managers argued that conditional certification was warranted based on: (1) their common exempt classification and non-exempt reclassification, (2) their common job description and (3) the former employer's uniform corporate policies and procedures. The *Brown* court reasoned that the mere classification (or reclassification) of a group and a common job description is insufficient to satisfy the low threshold for conditional certification. Further, the court took issue with the former managers' declarations, as they used "self-serving legal terms of art," described their day-to-day responsibilities in "the vaguest of ways" and may have omitted certain job functions that were managerial in nature that were referenced in their performance evaluations. The court denied the former managers' motion for conditional certification without prejudice, allowing them to renew their motion if discovery reveals additional evidentiary support.

California Supreme Court Clarifies Rest Days at 9th Circuit's Request

On May 8, 2017, the California Supreme Court clarified Sections 551, 552 and 556 of the state's labor code and found that California employers cannot require their employees to work more than six days in a week, but that the clock restarts every Sunday, meaning that employees may work as many as 12 days in a row.

The clarification was in response to a February 2015 request from the Court of Appeals for the Ninth Circuit asking the California Supreme Court to clarify aspects of the state labor code that address workers' day of rest. The Ninth Circuit requested the clarification in connection with a case, *Christopher Mendoza et al v. Nordstrom Inc. et al.*, No. 12-57130 (9th Cir. 2015), where former employees claimed that they were forced to work more than six consecutive days and, on some of those days, more than six hours per shift, which they claimed violated the California labor code. In seeking to determine whether under California law an employee can waive his or her right to take a day off or shift a rest day from week to week, the Ninth Circuit asked the California Supreme Court to clarify the following: (1) the meaning of "cause" in Section 552, which prohibits an employer from "caus[ing] his employees to work more than six days in seven," (2) whether Section 551, which requires employees to have one day of rest every seven days, could "restart" each workweek or applies to any consecutive seven-day period and (3) whether Section 556, which carves out an exemption to the day of rest rule when an employee works less than 30 hours in a week or six hours in any one day during the week, applies when an employee works less than six hours in any one day of the applicable week or less than six hours in each day of the week.

With respect to the first issue regarding "cause," the California Supreme Court determined that an employee may choose to skip a rest day, but the employer must inform the worker of such worker's right to a rest day and cannot induce the worker to skip it. With respect to the second issue regarding Section 551, the Supreme Court found that Section 551 applies on a set weekly basis, rather than a rolling basis from week to week, and restarts each workweek. With respect to the third issue regarding Section 556, the Supreme Court ruled against the employer and determined that workers are entitled to a day of rest unless they work fewer than six hours every day for a workweek, rather than once on any day of a workweek. Consequently, only employees asked to work no more than six hours on any one day and no more than 30 hours in a workweek may be scheduled to work for seven days without a rest day.

Ninth Circuit Rules That Pay Differential Due to Prior Salary Is an Affirmative Defense to Equal Pay Act Claims

On April 27, 2017, the Ninth Circuit overturned a district court ruling involving the Equal Pay Act (EPA). In *Rizo v. Yovino*, 854 F.3d 1161, the court held that the EPA permitted the Fresno County, California, superintendent of schools to pay a female public school employee less than her male counterparts based on the prior respective salaries of the employees.

One of the affirmative defenses under the EPA allows an employer to establish that the difference in pay is "based on any other factor other than sex." The Ninth Circuit held that prior salary can constitute a factor "other than sex," provided that the employer can show that the use of an employee's prior salary is reasonable in light of its stated purposes and effectuates a business policy. Accordingly, the Ninth Circuit vacated and remanded the decision of the district court. Similar to the Ninth Circuit's ruling, the Seventh and Eighth Circuits have held that reliance on an employee's prior salary does not inherently violate the EPA. The rulings of those circuits conflict with the Tenth and Eleventh Circuits' rulings that employers may not rely on prior salary alone to justify pay differentials under the EPA. Furthermore, several state and local laws prohibit or restrict the use of prior pay as a factor in employees' salary determinations. For example, an amendment to California's Equal Pay Act (California Labor Code §1197.5), effective January 1, 2017, states that "[p]rior salary shall not, by itself, justify any disparity in compensation."

The California Senate is considering bills that would prohibit all employers from seeking prior salary information from applicants and paying a lower wage rate to employees on the basis of gender, race or ethnicity.

California Senate Passes New Parental Leave Bill

On May 30, 2017, the California Senate passed the Parental Leave Act (SB-63) and ordered it to the California Assembly for consideration. The bill provides that, beginning January 1, 2018, employers must provide up to 12 workweeks of job-protected leave for employees, regardless of an employee's gender, to bond with a new child within one year of the child's birth, adoption or foster care placement. The bill specifies that employees eligible for "parental leave" are also entitled to take leave under Government Code Section 12945 (regarding pregnancy disability, childbirth and related conditions), if they otherwise qualify for such leave. However, this new law would not apply to employees covered by the California Family Rights Act and the Family Medical Leave Act.

The Parental Leave Act would require employers to guarantee employees taking such leave reinstatement to the same or a comparable job position occupied before taking the leave. In addition, the Parental Leave Act would require employers to maintain and pay for an eligible employee's medical coverage under a group health plan for the duration of the parental leave, not to exceed 12 weeks over the course of a 12-month period, commencing on the date the parental leave begins, and at the level and conditions that would have existed if the employee continued working. To qualify for leave under the Parental

Leave Act, employees would be required to have worked more than 12 months for the employer and at least 1,250 hours during the previous 12-month period. Employees would be authorized to use accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer during this parental leave. The basic minimum duration of the leave is two weeks, but employers would be permitted to grant requests for additional occasions of leave lasting less than two weeks. For the purpose of this bill, "employer" is defined as: (a) an entity employing 20 or more persons "to perform services for a wage or salary" or (b) the state of California or any of its political or civil subdivisions, except for specified school districts.

This bill mirrors last year's SB 654, which Gov. Jerry Brown vetoed, except this year's version proposes 12 weeks of leave compared to six weeks.

International Spotlight

France Reinforces Protection of Whistleblowers

In the wake of several cases involving the disclosure of unlawful conduct in the financial services sector, France enacted a new whistleblower law on December 9, 2016. The legislation covers a broad scope of offenses. It covers crimes and infractions, as well as violations of international, legal and statutory rules and, more generally, any threat to or serious harm to a general interest. Employees reporting these offenses are protected from adverse employment actions, including dismissals These protections apply to all whistleblowers as long as whistleblowers raise concerns in good faith and in a selfless manner, even if the underlying allegations have no merit.

The legislation incorporates a step-by-step procedure to ensure quick and efficient reporting and to provide a secure framework for employees. To receive the protections described above, employees first must report an issue to their respective supervisors, employers or designated references. If no action is taken within a reasonable timeframe, employees can then report their issues to the competent administrative or judicial authority, which must act within three months of the report. If such authority does not act within the three-month time frame, employees can make a public disclosure. With respect to any serious and imminent threat, an emergency procedure enables employees to go directly to the authorities and immediately make the disclosure public. In addition, the law creates an obligation, effective January 2018, for companies employing more than 50 employees to create a procedure to collect and process disclosures internally in a way that ensures efficiency, confidentiality and destruction of all documents in the case of a "false alarm."

Germany Introduces Transparency of Remuneration Act

The new Transparency of Remuneration Act (TRA), which came into effect in Germany on June 1, 2017, applies nationwide and to all industry sectors. It prohibits unequal pay based on an employee's sex with respect to employees who perform comparable work. Importantly, the TRA provides that employees working in establishments with more than 200 employees can request information about the average remuneration of a group of at least six comparable employees. An employee must show in an application to the employer that employees of his or her comparison group are in fact comparable. The information to be provided by the employer is establishment-specific information. In other words, higher wages paid by the same employer to employees in other establishments and in other regions of Germany are not required to be provided or considered. The employer is obligated to provide information within three months of an employee's request. If the employer fails to comply with these requests, a presumption of unequal treatment applies and the employee is entitled to the higher average remuneration. Furthermore, if the employer complies and the information shows that at least six comparable employees of the opposite sex are paid more on average for performing the same or equivalent work, the employee is entitled to the higher average remuneration. The TRA does not specify any sanctions for unequal pay violations.

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