Employment Flash
Special Edition

Skadden

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In This Issue:

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Recently Passed US Federal, State and Local and International Employment Laws

This November 2017 special edition of the *Employment Flash* summarizes certain noteworthy U.S. federal, state and local, as well as international, employment laws, each of which came into effect in fall 2017 or will be coming into effect on or before January 2018. We have reviewed employment developments at the U.S. federal level and in all U.S. locations where Skadden has offices (California, Delaware, Illinois, Massachusetts, New York, Texas and Washington, D.C.), as well as in certain international locations where Skadden has offices (France, Germany and the U.K.). We have summarized any applicable and noteworthy employment law developments in those locations.

This special edition is not intended to be a comprehensive summary of all employment law developments in the locations and time frame noted above. U.S. and international locations in addition to those mentioned above have passed similar laws that came into effect in fall 2017 or will be coming into effect on or before January 2018, including, for example, Arizona and Washington state, which have passed paid leave laws. A summary of all such laws is beyond the scope of this edition of the *Employment Flash*, but we will provide such information upon request.

United States

US Federal

DOL Appeals District Court Decision Invalidating Overtime Final Rule: On October 30, 2017, the U.S. Department of Labor (DOL) and the Texas AFL-CIO filed notices of appeal with the U.S. Court of Appeals for the Fifth Circuit seeking to overturn a summary judgment ruling made by Judge Mazzant of the Eastern District of Texas on August 31, 2017, invalidating the proposed overtime regulations. The proposed regulations, which were scheduled to go into effect December 1, 2016, would have increased the salary threshold required for an employee to be considered an exempt executive, administrative or professional employee from $455 per week ($23,660 per year) to $955 per week ($47,476 per year). The regulations would also have increased the minimum annual salary threshold required for an employee to be considered highly compensated from $100,000 per year to $134,000 per year.

Judge Amos Mazzant had previously issued a preliminary injunction with respect to the proposed regulations on July 26, 2017. Following the preliminary injunction and prior to his August 31, 2017, decision on the summary judgment motion, the DOL published a Request for Information seeking public comment regarding amendments to the overtime rule and requesting input with respect to the salary thresholds for the overtime exemptions. Secretary of Labor Alexander Acosta has previously stated that he believes the annual salary threshold for exempt executive, administrative and professional employees should be between $30,000 and $35,000 per year. In November 2017, the DOL requested the appellate court hold its appeal in abeyance while it undertakes further rulemaking to determine the salary threshold requirements for exempt employees. The appellate court granted the motion, and the appeal will now remain on hold while the DOL's rulemaking process proceeds.

New Form I-9: As of September 18, 2017, employers are now required to use a new version of the I-9 Employment Eligibility Verification Form, with a revision date of 7/17/2017 N. Until then, employers could continue to use the previous version of the Form I-9, with a revision date of 11/14/16 N. Employers must continue to follow existing storage and retention rules for any previously completed Forms I-9. The changes reflected in the 7/17/2017 N Form I-9 are minor and are intended to reduce completion errors.

State of California

Criminal History: As noted on January 10, 2017, in a previous *Employment Flash Alert*, local law in cities such as Los Angeles prohibits employers with more than 10 employees from inquiring into, or requiring disclosure of, the criminal history of an applicant for employment until a conditional offer of employment has been made to the applicant. AB 1008 will expand this prohibition at the state level to cover employers with as few as five employees. An employer that intends to deny an applicant employment solely or in part because of the applicant's conviction history must make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship to the specific duties of the job. Employers who make a preliminary decision to deny employment based on that individualized assessment are required to provide the applicant written notification and five business days to respond. The employer must consider the information submitted by the applicant before making a final employment decision. AB 1008 takes effect on January 1, 2018.

Equal Pay:

- SB 1063 extends the Fair Pay Act to cover unequal pay on account of race or ethnicity by prohibiting California employers from paying any of their employees at wage rates less than the rates paid to employees of another race or ethnicity who are performing substantially similar work. The new law takes effect on January 1, 2018.
- AB 1676 amends the Fair Pay Act to provide that an employee's prior salary cannot, by itself, justify a disparity in compensation between employees of the opposite sex or employees of a different race or ethnicity who are performing substantially similar work. The new law takes effect on January 1, 2018.
- AB 168 prohibits all employers from seeking an applicant's salary history information. It also requires employers to provide, upon reasonable request, the position's pay scale to an applicant. If a job applicant volunteers his or her compensation history, without any prompting to do so, AB 168 will not prohibit employers from considering such information, although prior salary alone cannot justify a pay disparity under California's AB 1676. The new law takes effect on January 1, 2018.

Immigration: AB 450 prohibits employers from providing voluntary consent to an immigration enforcement agent to enter nonpublic areas of the workplace unless the agent provides a judicial warrant. Except as required by federal law, AB 450 also prohibits an employer from providing voluntary consent to an immigration enforcement agent to access, review or obtain the employer's personnel records without a subpoena or court order. These prohibitions do not apply to I-9 Employment Eligibility Verification forms and other documents for which a notice of inspection has been provided to the employer. Employers, however, must provide a notice to each current employee of any inspections of I-9 Employment Eligibility Verification forms or other employment records to be conducted by an immigration agency within 72 hours of receiving notice of the inspection. The notice must be in the language normally used to communicate to employees and must include:

- the name of the immigration agency that will conduct the inspection of I-9 Employment Eligibility Verification forms or other employment records;
- the date that the employer received notice of the inspection;
- the nature of the inspection, to the extent known; and
- a copy of the notice of inspection.

AB 450 takes effect on January 1, 2018.

Parental Leave: SB 63 extends coverage of the current parental leave provision of the California Family Rights Act (CFRA) to employers with 20 or more employees (previously CFRA applied only to employers with 50 or more employees) within 75 miles. Employers covered under CFRA must allow an employee with more than 12 months of service who has worked at least 1,250

hours during the previous 12-month period to take parental leave. The parental leave, of up to 12 weeks, must be taken within one year of the child's birth, adoption or foster care placement. SB 63 takes effect on January 1, 2018.

Sexual Harassment Prevention: SB 396 expands the current sexual harassment training requirements under the California Fair Employment and Housing Act (FEHA). FEHA requires that employers with 50 or more employees provide at least two hours of sexual harassment and abusive conduct prevention training at least every two years to supervisors, and within six months of an individual's assumption of supervisory duties. SB 396 mandates that the curriculum include training on harassment that is based on gender identity, gender expression and sexual orientation. Employers will also be required to display, in a prominent and accessible location in the workplace, a poster developed by the Department of Fair Employment and Housing regarding transgender rights. SB 396 takes effect on January 1, 2018.

Whistleblower Protection: SB 306 will allow the California Division of Labor Standards Enforcement to investigate an employer, with or without a complaint being filed, when retaliation or discrimination is suspected during the course of a wage claim or other specified investigation. SB 306 also authorizes injunctive relief, including reinstatement of the employee, before the suspected retaliation has been completely investigated or litigated. SB 306 takes effect on January 1, 2018.

Local Ordinances in the State of California

San Francisco (City and County)

Lactation Accommodation: Effective January 1, 2018, a new San Francisco ordinance requires employers to offer breaks to employees for lactation and to adopt policies setting forth how employees may request accommodations. Employers must provide an area for lactation, other than a bathroom, that is private and free from intrusion, but employers are not required to construct such a room, remove retail spaces or incur other undue hardships to make this accommodation. The law goes beyond existing state law by specifying that the lactation area must be safe and clean, have a surface suitable for holding a breast pump and other personal items, include a place to sit and have access to electricity.

Paid Parental Leave: The Paid Parental Leave for Bonding with New Child Ordinance (PPLO) provides eligible employees with six weeks of paid family leave for purposes of bonding with a new child. The PPLO requires San Francisco employers to pay supplemental compensation to eligible employees who are receiving California Paid Family Leave (PFL). This program will phase in based on the size of the employer's business — by January 1, 2017, employers with 50 or more employees were required to be in compliance; by July 1, 2017, employers with 35 or more employees were required to be in compliance; and by January 1, 2018, employers with 20 or more employees must be in compliance. Eligible employees are those that have worked for their employer for six months (180 days), for a minimum of eight hours per week, with 40 percent of that time worked in San Francisco, and who are receiving PFL benefits. A PPLO poster that outlines the details of the PPLO must be posted in all workplaces.

State of Delaware

Compensation History Ban: Beginning in January 2018, employers in Delaware are prohibited from seeking the compensation history of applicants before making employment offers. Employers are prohibited from seeking such information from the applicants themselves and from their current or former employers. The law also prohibits employers from screening applicants based on their compensation history. However, employers are permitted to discuss and negotiate salary expectations with applicants, provided that employers do not request compensation history in those discussions and negotiations. In addition, employers are permitted to seek an applicant's compensation history, for the confirmation of salary history information, only after such an applicant accepts the employer's offer of employment. Employers who violate this law will be subject to a civil penalty of $1,000 to $5,000 for the first offense and $5,000 to $10,000 for each subsequent violation.

State of Massachusetts

Employer Medical Assistance Contributions and Taxes: A new Massachusetts law increases current employer taxes for the Employer Medical Assistance Contribution (EMAC). Presently, employers who have six or more employees must pay taxes for EMAC. Starting in January 2018, the cost per employee for the EMAC will increase from $51 to $77. The law also creates a second tax, which will require employers to pay an additional five percent (up to $750) in EMAC taxes per non-disabled employee if the employee is enrolled in a public health care plan rather than the employer's health plan.

State of New York

Overtime Exemptions: Effective December 31, 2017, the salary thresholds for executive and administrative exemptions to overtime rules will increase as follows: (1) in New York City, $975 per week for employers with 11 or more employees or $900 per week for employers with 10 or fewer employees; (2) in Nassau, Suffolk and Westchester Counties, $825 per week regardless of employer size; and (3) in the remainder of the state, $780 per week regardless of employer size.

Paid Family Leave: Effective January 1, 2018, employers will be required to provide eligible employees (*i.e.*, employees who have worked 26 consecutive weeks or, for part-time employees, 175 days in a 52-consecutive-weeks period) with paid leave each year for the birth, adoption or placement in foster care of a new child, to care for a family member with a serious medical condition or when a family member is called to active military service. Beginning January 1, 2018, eligible employees will receive up to eight weeks of paid family leave at a rate of 50 percent of the employee's weekly wage (to be capped at the 50th percentile of the state's average weekly wage). The amount of paid leave will increase annually until employees are eligible to receive 12 weeks of paid family leave at 67 percent of the employee's weekly wage (to be capped at the 67th percentile of the state's average weekly wage) in 2021. The law covers New York employers that have employed as few as one individual for 30 consecutive days, provides job protection for employees returning from paid family leave and requires that employers continue an employee's health insurance during the leave period. Employer and employee forms are available on the state of New York's paid family leave website.

Local Ordinances in the State of New York

New York City

Salary History: Effective as of October 31, 2017, almost all employers in New York City are banned from: (1) asking job applicants about their compensation history and (2) relying on a job applicant's compensation history when making a job offer or negotiating an employment contract, unless the applicant freely volunteers such information. Employers are permitted, however, to ask about an applicant's salary and benefits expectations. Further, if a job applicant volunteers his or her compensation history, the law will not prohibit employers from verifying and considering such information.

Earned Sick Time: Effective May 5, 2018, the Safe Time Amendment, which amends the NYC Earned Sick Time Act, will expand the covered reasons for leave to include situations where an employee or an employee's family member is a victim of domestic violence, sexual offenses, stalking or human trafficking. In addition, the Safe Time Amendment expands the definition of a covered family member under the law to include any other individual related by blood to the employee and any other individual whose close association with the employee is the equivalent of a family relationship. Employers must provide new employees with notice of both sick and safe time. Existing employees must be provided with information regarding safe time within 30 days of May 5, 2018.

State of Texas

Family Sick Leave: Effective as of September 1, 2017, employers in Texas with 15 or more employees must administer personal leave policies in a manner that does not treat an employee's foster child who resides in the employee's household and is under the conservatorship of the Texas Department of Family and Protective Services differently from the manner in which an employee's biological or adopted child is treated.

Uniform Trade Secrets Act: Effective as of September 1, 2017, the Texas Uniform Trade Secrets Act was amended to: (1) expand the definition of "trade secret" by adding "business, scientific, technical, economic, or engineering information, design, prototype, plan, program device, code, and procedure"; (2) clarify the proper scope and limits for injunctive relief by stating that an injunction order should "not prohibit a person from using general knowledge, skill, and experience that person acquired during employment"; (3) define (a) "willful and malicious misappropriation" to obtain exemplary damages and (b) the level of proof to establish "clear and convincing" evidence to show willful and malicious misappropriation; (4) define a trade secret owner as either someone holding legal or equitable title or someone holding rights of enforcement; (5) explain that trade secret information can be tangible or intangible "whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing"; and (6) codify a seven-factor balancing test that courts must consider before excluding a party from the courtroom while discussing trade secrets.

International Spotlight

French Labor and Employment Reforms: Major reforms to French labor and employment laws were published on September 23, 2017. Some reforms are already in effect, but most will take effect in January 2018. The new laws are expected to result in greater employment flexibility for employers. Notably, three of the employee representatives bodies in France will merge into one institution called the Social and Economic Council (*Comité Social et Economique*) by the end of 2019. The number of mandates from such bodies will be limited to three consecutive mandates, and the maximum duration of a works council consultation period will be two months, instead of three months, subject to confirmation from the soon-to-be-published implementation decree. The reform also sets the minimum and maximum amount of damages that a court can award to an employee in an unfair dismissal case. Such damages are contingent upon on an employee's length of service with the company, instead of a judge's discretion. Other reforms relate to company agreements. For example, small- and medium-sized companies will

have a broadened ability to negotiate and assign company agreements without the involvement of trade union representatives. In addition, many company agreements will take precedence over industry bargaining agreements, except with respect to certain subject matters over which the French government has retained primacy, such as employee classification, minimum wage, health care, working time, and part-time, temporary and fixed-term employment contracts. These reforms may make it easier for companies to adapt collective agreements to their respective needs and circumstances.

German Pension Scheme: Presently, the state pension benefits in the east of Germany are considerably lower than they are in the west of Germany. Germany's Pension Transition Conclusion Act aims to completely harmonize pension levels in eastern and western Germany by July 1, 2024. The pension adjustment will start on January 1, 2018, and will be implemented in seven steps. Also, the Company Pension Stabilization Act implements changes to labor, social and tax laws, with the goal of enhancing voluntary company pension plans, especially in small and medium-sized enterprises and with respect to low-income employees. In addition, the Act for the Improvement of Benefits for Pensions in Case of Disability provides a substantial increase in benefits for employees who are incapable of working as a result of disability.

UK Employment Tribunal Fees Declared Unlawful: The forum for most employment disputes in the U.K. is the Employment Tribunal (ET). In July 2013, the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) introduced a fee requirement to bring a claim in the ET as a way to reduce the number of speculative and vexatious claims filed. It was estimated that claims in the ET decreased by 70 to 80 percent. On July 26, 2017, the U.K. Supreme Court's (UKSC) decision in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, declared the ET fee regime to be an unlawful interference with the common law right of access to justice. The court found that the severe financial commitment associated with bringing a claim prevented employees from enforcing their rights. All ET fees were abolished with immediate effect and prospective claimants who were unable to bring claims during the fee regime period can submit claims retrospectively. Claimants are not required to demonstrate that they did not bring a claim as a result of the fee, but they must apply for an extension of time. The pre-claim conciliation requirement remains. Claimants who did bring claims during the fee regime period are entitled to reimbursement. Additionally, employers who were ordered to pay the fees of employees who have been successful in claims against them can recover fees that they were ordered to pay. In October 2017, the U.K. Government announced the "opening stage" of the ET refund scheme. It is possible that ET fees may be reinstated. The UKSC judgment noted that "fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice," signifying that there could be legitimate reasons for imposing fees. A new and drastically reformed fee regime could, therefore, in theory be reintroduced at some point, although there are no current plans to do so. In any event, global employers could face an increasingly litigious landscape with respect to the U.K. fee regime reform.

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