Employment Flash

Skadden

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In This Issue:

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Update: New Employment Laws Taking Effect in July 2018

There are several employment-related laws coming into effect in July 2018. We have reviewed employment developments at the state and local level where Skadden has U.S. offices (*i.e.*, California, Delaware, Illinois, Massachusetts, New York, Texas and Washington, D.C.), and all laws are effective July 1, 2018, unless otherwise stated.

California enhances the Fair Employment and Housing Act protections by prohibiting employers from maintaining English-only work environments unless there is a business necessity, and by revising the meaning of "national origin." The San Francisco "Parity in Pay" Ordinance, which is similar to ordinances in New York City, Massachusetts and Delaware, prohibits employers from inquiring about an applicant's compensation history and from using an applicant's salary history in determining whether to hire an applicant or determining compensation.

In Massachusetts, "An Act to Establish Pay Equity" is a statute that amends the Massachusetts "Pay Equity Law" by enhancing the state's existing equal pay laws. The statute explicitly defines "comparable work" as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability." "Comparable wages" includes all forms of compensation, not just salary. The law prohibits asking job candidates for salary history and other forms of compensation. In addition, the law extends the statute of limitations to three years and increases penalties. Employers also will have an opportunity to cure violations discovered in a self-evaluation under the law's safe harbor provisions.

As discussed in a previous edition of the *Employment Flash*, effective July 11, 2018, a New York law will prohibit mandatory arbitration of sexual harassment complaints. (Employers will likely challenge its enforcement as a violation of the Federal Arbitration Act.) In addition, the law prohibits having nondisclosure agreements that cover sexual harassment claims unless the employee requests confidentiality and certain requirements are met. Like long-standing California law, employers must provide sexual harassment training to employees and create a sexual harassment policy and complaint procedure. Effective July 18, 2018, New York City will require employers to allow covered employees to make two temporary schedule changes per year for certain permissible uses, which include, without limitation, caregiving and attending legal proceedings. Effective July 9, 2018, Westchester County, New York, will prohibit employers from inquiring about an applicant's compensation history.

US Supreme Court Upholds Class Action Waivers in Employment Agreements

In a 5-4 decision, the U.S. Supreme Court held that class action waivers in employee arbitration agreements are enforceable under the Federal Arbitration Act (FAA) and do not violate the National Labor Relations Act (NLRA). *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (May 21, 2018), consolidated with *Ernst & Young LLP et al. v. Stephen Morris et al.*, No.16-300, and *NLRB v. Murphy Oil USA Inc.*, No. 16-307. This decision resolved a circuit split and, at the same time, overturned the position of the National Labor Relations Board (NLRB or Board) that class and collective action waivers violate employees' rights under the NLRA. The Court's decision was based on its finding that the FAA requires arbitration agreements to be enforced on the same grounds as any other contract, and the NLRA, though enacted after the FAA, does not exclude class action waivers from the scope of the FAA.

US Supreme Court Limits Tolling for Class Actions

On June 11, 2018, in the matter of *China Agritech v. Resh*, 584 U.S. ___ (2018), the U.S. Supreme Court limited the application of its decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), in which the Court held that the filing of a class action suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has denied class certification. Six appellate courts had since interpreted *American Pipe* to allow for tolling for individual actions only and not serial class actions, whereas three other circuits had applied the ruling more broadly to mean that the limitations period is tolled not only as to individual claims but also as to future class action claims. In *China Agritech v. Resh*, the Court agreed with the six appellate courts that its *American Pipe* decision bars untimely successive class actions by would-be class members because the "'efficiency and economy of litigation' that support tolling of individual claims … do not support maintenance of untimely successive class actions." The decision reverses and remands a U.S. Court of Appeals for the Ninth Circuit decision that had revived a securities class action that was filed against China Agritech after two failed attempts for class certification.

US Supreme Court Does Not Resolve Circuit Split Over Entitlement to ADA Leave

On April 2, 2018, the U.S. Supreme Court denied *certiorari* in a case from the Seventh Circuit, *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (2017), cert. denied, No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018). In *Severson*, the U.S. Court of Appeals for the Seventh Circuit held that the Americans with Disabilities Act (ADA) did not obligate an employer to provide an employee with a supplemental multi-month leave of absence after such employee exhausted the employee's entitlement to 12 weeks of leave under the Family Medical Leave Act. The Seventh Circuit explained that the ADA is an antidiscrimination statute and not a medical leave statute, and if an employee needs long-term medical leave because the employee cannot work, "with or without reasonable accommodation," the employee will not qualify for the ADA's protections. Conversely, in *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (1999), the U.S. Court of Appeals for the Ninth Circuit rejected a district court's finding that an employee on short-term disability leave automatically fell outside of the ADA's protections. Instead, the Ninth Circuit noted that the extended medical leave itself could qualify as a reasonable accommodation. Notably, the Equal Employment Opportunity Commission filed an *amicus* brief with the Seventh Circuit in favor of the plaintiff employee in *Severson*, citing *Nunes*, among other cases. The Second Circuit has yet to weigh in on this issue, but other circuits, such as the First Circuit in *Garcia-Ayala v. Lederle Parentals, Inc.*, 212 F.3d 638 (2000), the Sixth Circuit in *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (1998), and the Tenth Circuit in *Rascon v. U.S. West Commc'ns, Inc.*, 143 F.3d 1324 (1998), *overruled on other grounds by New Hampshire v. Maine*, 532 U.S. 742 (2001), have stated that a medical leave of absence could constitute a reasonable accommodation under the ADA.

NRLB's Joint Employer Plan

The NLRB recently announced its plan to address the standard for determining joint-employer status under the NLRA. Rather than addressing the joint-employer standard by reconsidering the vacated decision in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), which overturned the landmark joint employer test described in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) (BFI Test), the Board will address the standard through notice-and-comment rulemaking. The Board generally addresses questions and controversies through case adjudication, but the use of agency rulemaking is not unprecedented in the Board's history. Given the importance of the issue and the desire to provide greater certainty as to whether one party is a joint employer of another party's employee, some, including NLRB Chairman John Ring and former NLRB Chairman Philip Miscimarra, believe that rulemaking is the proper method for determining the standard.

Typically the rulemaking process takes longer than the Board's adjudication process to set forth a standard, but the rulemaking process tends to provide employers with more certainty regarding certain business decisions, primarily because determining a standard like the joint-employer standard by using notice-and-comment rulemaking makes it more challenging for the Board to reverse or revise the rule in the future. Additionally, the issue of a potential conflict of interest of a Board member, which was the reason for vacating the Board's decision in *Hy-Brand*, is eliminated by using the rulemaking process. The NLRB has already begun the internal process for rulemaking and plans to issue a Notice of Proposed Rulemaking for the joint employer standard in the next couple of months.

California Uses 'ABC' Test for Independent Contractor Classification

As noted in the April 2018 issue of the *Employment Flash*, the California Supreme Court addressed the legal standard for determining whether a worker is an employee or an independent contractor for purposes of wage and hour laws. In *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), the California Supreme Court created a narrower standard for worker classification that relies on the "ABC" test, a standard that is applied in several other jurisdictions, such as Massachusetts. According to the ABC test, a worker is properly classified as an independent contract if: (A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) the worker performs work that is outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity. All elements of the "ABC" test must be satisfied for a worker to be properly classified as an independent contractor.

Ambiguity exists in connection with the application of the ABC test in California. For example, the retroactive application of the test is to be determined. In addition, it is unclear whether the ABC test will apply outside the context of California's Industrial Welfare Commission Wage Orders, including with respect to claims involving reimbursement of business expenses. It is clear, however, that the ABC test is intended to be stricter than California's previous *Borello* test and even stricter than the ABC tests used in other jurisdictions, especially with regard to prong (B), which is narrower in California than in other jurisdictions. It also is clear that because the California Supreme Court is the final authority regarding California state law, the case cannot be appealed to the U.S. Supreme Court. Unless revisited by the California Supreme Court, the ABC test will be the defining test under California law to determine if a worker is an independent contractor.

California Court of Appeals Confers Expanded Standing Under PAGA

A California appellate court recently addressed whether an aggrieved employee pursuing a representative action under California's Private Attorneys General Act (PAGA) could seek civil penalties for alleged Labor Code violations that affected the aggrieved employee, as well as separate California Labor Code violations that affected other employees. In *Huff v. Securitas Security Services USA, Inc*., 233 Cal. Rptr. 3d 502 (Ct. App. 2018), the court concluded that an employee affected by at least one California Labor Code violation could pursue civil penalties under PAGA on behalf of other aggrieved employees for all Labor Code violations by the same employer, even if such violations did not affect the employee initiating the PAGA action. Unless *Huff* is reversed by the California Supreme Court or abrogated by the California legislature, employers cannot rely on traditional principles of standing to limit the scope of PAGA actions. PAGA deputizes employees to enforce the California

Labor Code and sue for civil penalties previously recoverable only by the California Labor and Workforce Development Agency (LWDA). Under PAGA, 75 percent of civil penalties recovered by aggrieved employees are distributed to the LWDA and the remaining 25 percent of civil penalties recovered are distributed to aggrieved employees, in addition to costs and reasonable attorneys' fees.

New York Appellate Division Court Addresses Independent Contractor Classification

A New York appellate division court recently decided that couriers of Postmates Inc. are independent contractors. On June 21, 2018, the court in *Vega v. Postmates Inc*., No. 525233, 2018 WL 3058287 (N.Y. App. Div. June 21, 2018), reversed an earlier decision from the Unemployment Insurance Appeal Board and held that a former courier of Postmates was correctly classified as an independent contractor and therefore not entitled to unemployment insurance benefits. The court ruled that Postmates did not have sufficient control over the courier to warrant an employer-employee relationship. The court reasoned that because couriers set their own schedules, could "decline to do anything" when logged into the application and do not have to apply for their job positions, it was evident that couriers worked without much oversight or supervision. Additionally, this former courier and all other couriers of Postmates could work for competitors of Postmates. All of these factors combined led the court to determine that an independent contractor relationship exists.

New York City Enacts Anti-Sexual Harassment Legislation

On May 10, 2018, New York City signed into law the Stop Sexual Harassment in New York City Act (the Act) aimed at addressing and preventing sexual harassment in the workplace. The Act, like the anti-sexual harassment laws recently enacted by New York State , mandates that employers have written sexual harassment prevention policies and provide sexual harassment prevention training to all employees on an annual basis. Among other requirements, effective April 1, 2019, New York City employers with 15 or more employees must conduct interactive training for all new employees and interns within 90 days of commencement of employment. New York City employers also will be required to obtain signed employee acknowledgments that they received training and maintain records of the signed acknowledgments for three years.

Some of the Act's provisions took effect immediately, on May 10. First, the Act amended the New York City Human Rights Law (NYCHRL) to permit claims of gender-based harassment by all employees, regardless of the size of the employer. Previously, the anti-discrimination provisions of the NYCHRL applied only to employers with four or more employees. Second, the Act extended the statute of limitations for filing complaints for gender-based harassment under the NYCHRL from one year to three years.

As a result of the new anti-sexual harassment laws in both New York State and City, employers will face different requirements under the state and city laws and will need to review and adjust their policies and practices accordingly.

New Jersey Enacts Equal Pay Act

On April 24, 2018, the Diane B. Allen Equal Pay Act (the Act) was enacted, amending New Jersey's Law Against Discrimination (NJLAD) to provide rigorous protections against pay discrimination. The Act takes effect on July 1, 2018, and provides for several key protections. First, the Act requires equal pay for "substantially similar work." The Act also provides that, other than situations where a seniority or merit-based system is in place, employers may pay employees a different rate of compensation for substantially similar work only if the employer can show that the pay gap is based on a legitimate, bona fide factor that is job-related and based on legitimate business necessities, and is not based on any protected characteristics. Examples of bona fide factors include training and education. Unlike the federal Equal Pay Act, the Act provides that protected characteristics include not only sex but also race, age, sexual orientation, gender identity or expression, and disability, among others. Further, the Act extends the NJLAD's anti-retaliation provisions to equal pay claims; employers are prohibited from retaliating against an employee for requesting, disclosing or discussing information about compensation. In addition, state contractors are required to provide information concerning compensation and hours worked by employees based on gender, race, job title and occupational category. With respect to remedies, the Act extends the statute of limitations for pay equity violations to six years, going beyond the two-year statute of limitations under federal law. In addition, employees can recover back pay for the entire period of time during which the pay equity violation has been continuous, *i.e.*, up to six years during the statute of limitations period. Finally, courts are allowed to award treble damages

for violations of the Act. If a jury determines an employer discriminated on the basis of pay, the employee will be awarded treble damages. Treble damages would also be available to employees who succeed on a claim that the employer took reprisals against them for requesting from, discussing with or disclosing to another employee or former employee, a lawyer from whom the employee seeks legal advice, or any government agency, information related to employee compensation. In addition, treble damages are available to employees who prevail on a claim that they were required, as a condition of employment, to sign a waiver or agree not to make these types of requests or disclosures.

International Spotlight

Gender Pay Gap Reporting in the UK

The *UK Equality Act 2010 (Gender Pay Gap Information) Regulations 2017* (the Regulations) came into force on April 6, 2017. The Regulations introduced mandatory gender pay gap reporting by large private and voluntary sector employers to identify the difference between the average pay of men and women in the U.K. Over 10,000 employers were required to publish their first gender pay gap reports by April 4, 2018, including the following information:

- the mean and median average hourly pay by gender;
- the proportion of men and women in each salary quartile, based on the employer's overall pay range;
- the mean and median bonus pay in the last 12 months by gender;
- the proportion of male and female employees who received a bonus in the same 12-month period; and
- a written statement that confirms the accuracy of the published gender pay gap information.

Gender pay gap results in 2018

The vast majority of published results identified a gender pay gap favoring men, with an overall gender pay gap of 18.4 percent. A House of Commons Briefing Paper published on April 6, 2018, states that the greatest gender pay gaps are in the finance and insurance sectors. The sectors with the smallest pay gaps are accommodation and food services, and administration and support.

What should employers do now?

The Regulations do not contain specific enforcement powers or sanctions for noncompliance. However, the U.K. government has indicated that it will carry out audits for noncompliance and establish a database of compliant employers (instead of naming noncompliant organizations, as originally contemplated).

Employers with pay gaps can consider a number of potential responses, including the following:

- prepare an employee communications plan;
- set transparent and achievable targets to narrow any pay discrepancy over a reasonable timeframe;
- appoint an individual in the organization to work closely with management, employees and any employee representatives to identify ways to reduce the pay gap in that organization;
- perform periodic market pay reviews and use these as a benchmark for company pay practices; or,
- strengthen or implement female talent mentoring and coaching initiatives to support female career progression.

Employers have an opportunity to address pay discrepancies and implement new policies and initiatives to help attract and keep the best male and female talent.

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