Employment Flash

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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DOL Sets New FLSA Exemption Salary Thresholds

On March 7, 2019, the Wage and Hour Division of the Department of Labor (DOL) issued a new overtime rule that raises the minimum salary thresholds for exemption from the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA). The new rule, scheduled to go into effect on January 1, 2020, raises the minimum salary threshold from $23,660 to $35,308 for the "white collar" exemptions (*i.e.*, for executive, administrative and professional employees) and from $100,000 to $147,414 for the highly compensated employee exemption.

The rule replaces the overtime rule issued by the DOL in 2016, which, among other things, had proposed to raise the salary threshold for the "white collar" exemptions from $23,660 to $47,476 (Prior Rule). The Prior Rule was invalidated and enjoined on August 31, 2017, by Judge Amos L. Mazzant, III of the U.S. District for the Eastern District of Texas, and the DOL ultimately requested public comment on revisions to the Prior Rule. The new rule that the DOL issued on March 7, 2019, proposes updating the minimum salary thresholds every four years following public notice-and-comment periods. The new rule also allows employers to count nondiscretionary bonuses and incentive payments such as commissions — up to 10 percent of an employee's salary — when determining whether such employee qualifies for one of the exemptions under the FLSA.

Employers May Face Heightened Pay Reporting Requirements as EEOC Pushes for Increased Pay Transparency

A federal district court in *National Women's Law Center v. Office of Management and Budget*, No. 17-CV-2458-TSC (D.D.C. March 4, 2019), cleared the way for the Equal Employment Opportunity Commission (EEOC) to begin collecting compensation data from covered employers that are already required to report annual employee data based on ethnicity, race and sex. The EEOC's data collection form, known as EEO-1, must be filed annually by employers with at least 100 employees, as well as government contractors with 50 or more employees and at least $50,000 in contracts. In 2016, the EEOC proposed the collection of compensation data in an effort to quantify pay disparities along ethnic, racial and gender lines. Under the proposed EEO-1 form, employers must

indicate both the number of employees along ethnic, racial and gender lines who are employed in job titles based on 10 categories and the employees' compensation based on 12 pay ranges. The EEO-1 data is confidential, but the EEOC makes the aggregated data publicly available.

The Office of Management and Budget (OMB) approved the EEOC's data collection proposal in September 2016 but reversed course in August 2017 and stayed the collection of compensation data while the OMB requested further review of the revised EEO-1 form. On March 4, 2019, the court in *National Women's Law Center* vacated the OMB's stay of the proposed EEO-1 form and reinstated the OMB's previous approval of the form. However, the OMB may appeal and seek a stay of the court's decision. The EEOC has not confirmed whether compensation data, in addition to the regularly collected ethnic, racial and gender information, must be disclosed and, if so, whether the May 31, 2019, deadline for submitting this year's EEO-1 data will be extended.

DOL Issues New Opinion Letters Regarding Application of FMLA and FLSA

On March 14, 2019, the DOL issued three opinion letters. In the first letter, the DOL found that an employer may not delay designation of qualifying leave under the Family and Medical Leave Act (FMLA) or designate more than 12 weeks of an employee's leave as FMLA leave. This position directly contradicts the U.S. Court of Appeals for the Ninth Circuit's 2014 decision in *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, that employees may elect to first take paid vacation time off consistent with their employer's policies, delaying the available 12 weeks of unpaid leave under the FMLA for future use. The opinion letter notes that, under the FMLA, once employers have enough information to determine that leave is for an FMLA-qualifying reason, they must provide notice of the designation of FMLA leave within five days. If an employee with accrued paid leave chooses to take it at the beginning of his or her leave, then the employee's paid vacation leave will run concurrently with their FMLA leave. However, as highlighted in the opinion letter, nothing in the FMLA prevents employers from adopting leave policies that are more generous than those required under federal law.

In the second opinion letter, the DOL clarified that, although New York wage laws expressly exempt residential janitors from state minimum wage and overtime requirements, the FLSA does not. Therefore, employers of nonexempt residential janitors must comply with the FLSA's minimum wage and overtime requirements. Employers may, however, reach an agreement with such janitors about which hours on the premises will constitute actual working hours. Employers would be well-advised to reduce agreements to writing.

In the third opinion letter, the DOL affirmed that, under the FLSA, employees are not required to be paid for participating in an employer-sponsored community service program unless their participation in such program was mandatory. The DOL noted the following facts upon which it issued its opinion: (i) The employer did not control or direct the performance of the volunteer work, (ii) the employees did not suffer any adverse employment consequences for not participating in the volunteer program, and (iii) while the employer used a mobile device application to track employees' volunteer time, the application did not provide any specific instructions about how the volunteer work should be performed. If the employer had unduly influenced employees' participation in the volunteer program or instructed employees how to perform the volunteer work, the time volunteered by employees would count as hours worked under the FLSA.

DHS Implements New H-1B Cap Registration Rules

The Department of Homeland Security (DHS) recently amended regulations governing H-1B petitions subject to the annual 65,000 H-1B visa cap and petitions eligible for the advanced-degree exemption. Effective April 1, 2019, U.S. Citizenship and Immigration Services (USCIS) will reverse the order in which it selects H-1B cap-subject petitions and require petitioners to register electronically in order to file such petitions. In selecting H-1B cap-subject petitions, USCIS will first select those submitted on behalf of all beneficiaries, including those who may be eligible for the advanced-degree exemption. Next, from the remaining eligible petitions, USCIS will select a sufficient number of petitions projected to reach the advanced-degree exemption.

This change in the selection process is expected to result in a 16 percent increase in the number of H-1B beneficiaries (or 5,340 workers) with advanced degrees from higher education institutions in the U.S. DHS is expected to implement its new online registration system for fiscal year 2021 at the earliest, at which time petitioners filing H-1B cap-subject petitions — including those who may be eligible for the advanced-degree exemption — will be required to register electronically with USCIS during a designated registration period. If USCIS selects the registrant during the lottery, the petitioner would have at least

90 days to file a full H-1B cap-subject petition. USCIS expects to provide further details on its online registration system and key filing periods by early 2020. These new regulations stem from the Trump administration's "Buy American and Hire American" executive order, which in part directs DHS and other agencies to propose reforms to help ensure that H-1B visas are awarded to the most skilled or highest-paid petitioners.

NLRB Rules That Unions Cannot Make Nonmembers Pay for Lobbying

On March 1, 2019, in *United Nurses and Allied Professionals (Kent Hospital) and Jeanette Geary*, Case 01-CB-011135, the National Labor Relations Board (NLRB) ruled that unions may not force workers who opt not to join the union to pay for lobbying activities, applying the U.S. Supreme Court decision in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). In *Communications Workers of America*, the Supreme Court held that a collective bargaining representative cannot, over the objection of nonmember employees it represents, expend funds collected from those employees on activities unrelated to collective bargaining, contract administration or grievance adjustment. As the NLRB determined in *United Nurses*, although union lobbying can "incidentally affect" collective bargaining, lobbying is not part of the union's collective bargaining duties and, as such, nonunion employees cannot be forced to help fund political lobbying. Additionally, the NLRB ruled that a union must provide workers with proof that the financial information disclosed to them has been independently verified by an auditor, rather than requiring nonunion employees to accept the union's bare representations that figures were appropriately audited. The NLRB emphasized that independent verification by an auditor is essential information that nonunion employees need to decide whether to challenge the propriety of the union's fee.

New York City Has New Rules Regarding Gender Identity and Gender Expression

The New York City Commission on Human Rights (Commission) recently adopted new rules that prohibit discrimination based on gender identity or gender expression. The new rules became effective on March 9, 2019. The Commission's adoption of these new rules comes on the heels of New York's Gender Expression Non-Discrimination Act, which was signed on January 25, 2019, and added gender identity and gender expression as protected classes under New York law.

The new rules clarify the protections under the New York City Human Rights Law and define several terms related to gender, including the terms "gender," "sex," "nonbinary" and "cisgender." Additionally, the Commission included examples of conduct that it would deem to be prohibited under the New York City Human Rights Law, including the "deliberate refusal to use an individual's self-identified name, pronoun or title." For example, deliberately calling a transgender woman "Mr." after she has made clear that she uses female titles or deliberately using the pronoun "he" for a nonbinary person who is perceived as male but has indicated that they identify as nonbinary and use the pronouns "they," "them" and "theirs" could violate these rules. However, asking someone, in good faith, his, her or their pronoun preference is not prohibited. New York employers are encouraged to review the new rules and current policies, including those policies relating to directory listing and email address assignment, to ensure compliance.

California Court Rules That Retail Workers Must Be Paid for On-Call Time

On February 4, 2019, a California Court of Appeal held in *Ward v. Tilly's, Inc.*, 243 Cal. Rptr. 3d 461, 463, that a sales clerk must receive reporting time pay when the employee is required to call in prior to an "on-call" shift to determine if he or she must report to work, even if the employer does not require the employee to report to work. Under California's Wage Order 7, employees are required to be paid reporting time pay if either "an employee is required to report for work and does report, but is not put to work or is furnished less than half [their] usual or scheduled day's work," or "an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting." (Cal. Code Regs., tit. 8, § 11070, subd. (5).)

The court held that requiring an employee to call the store two hours prior to the start of his or her on-call shift constitutes "reporting to work" and triggers Wage Order 7's reporting time pay requirement, even if the employee is informed on such call that there is no need to physically report to work for the shift. The court reversed the judgment of the lower court, and the case was remanded to the trial court for further proceedings. In its decision, the majority held that the employer's on-call scheduling arrangement was "precisely the kind of abuse that reporting time pay was designed to discourage," and "on-call shifts burden employees, who cannot take other jobs, go to school or make social plans during on-call shifts — but who nonetheless receive no compensation from Tilly's unless they ultimately are called into work."

Massachusetts and New Jersey Enact Paid Family Leave Laws

On January 23, 2019, the Massachusetts Department of Family and Medical Leave issued draft regulations (Regulations) regarding the Massachusetts Paid Family and Medical Leave Program (MA PFML), a leave act enacted on June 28, 2018, that will become effective on January 1, 2021. The MA PFML will provide nearly all employees in Massachusetts with up to 12 weeks of paid family leave and 20 weeks of paid medical leave per year, funded by employee and employer contributions. While the benefits provided under the MA PFML will not begin to be paid until 2021, employers with more than 25 employees will be required to contribute to the program beginning in July 2019. The Regulations provide guidance on a number of different aspects of the leave program, including the rate of employer contributions and extension of coverage under the MA PFML to independent contractors where they constitute more than 50 percent of the employer's workforce.

In February 2019, New Jersey signed into law Assembly Bill A3975, which, effective June 30, 2019, will expand the scope of the current New Jersey Family Leave Act. Among other things, the new law requires more employers in the state to provide job-protected family leave by lowering the threshold for coverage from 50 or more employees to 30 or more employees. In addition, the new law doubles the duration of paid leave from six to 12 weeks per year and also raises the weekly maximum benefits from $650 to $859 per week.

New Jersey Bans Nondisclosure Provisions in Employment and Settlement Agreements

Effective March 18, 2019, a new law in New Jersey prohibits nondisclosure clauses in employment contracts and settlement agreements relating to claims of discrimination, retaliation or harassment (Discrimination Claims) as well as clauses that waive substantive or procedural rights, or remedies relating to such claims. These provisions are deemed to violate public policy and are unenforceable against existing or former employees. Under the new law, (i) arbitration agreements relating to Discrimination Claims as well as jury trial waivers, damages caps and other similar provisions often found in employment agreements are void, (ii) employers may not retaliate against any person who refuses to sign an agreement that contains either a nondisclosure clause or waiver relating to Discrimination Claims, and (iii) employees are entitled to written notice in a Discrimination Claim-related settlement agreement that, in the event the employee publicly reveals enough information regarding a Discrimination Claim to render the employer "reasonably identifiable," any nondisclosure clause in such agreement will also become unenforceable against the employer. The new law applies to all agreements entered into, renewed or amended on or after March 18, 2019, but expressly does not apply to collective bargaining agreements.

New Jersey's ABC Test for Independent Contractors Survives Pre-Emption Argument

On January 29, 2019, the U.S. Court of Appeals for the Third Circuit held in *Bedoya et al. v. American Eagle Express Inc*., No. 18-1641, that the Federal Aviation Administration Authorization Act of 1994 (the FAAAA) does not pre-empt New Jersey's test (ABC Test) for determining employment classification for purposes of the New Jersey Wage and Hour Law and the New Jersey Wage Payment Law. The FAAAA is a federal statute that pre-empts state laws relating to "a price, route or service of any motor carrier." Under the ABC Test, workers performing services for a company in exchange for pay are deemed employees unless the company can demonstrate each of the following: (i) such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; (ii) such service is either outside the usual course of the business for which such service is performed or performed outside of all the places of business of the enterprise for which such service is performed; and (iii) such individual is customarily engaged in an independently established trade, occupation, profession or business.

In *Bedoya*, delivery drivers filed a putative class action alleging that they were misclassified under the ABC Test. In reaching its decision that the FAAAA does not pre-empt the ABC Test, the Third Circuit found that the ABC Test has only an insignificant or tenuous effect on "prices, routes or services with respect to the transportation of property" and therefore was steps removed from the pre-emptive purview of the FAAAA.

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