Employment Flash

Skadden

December 2019

In This Issue:

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.

Four Times Square
New York, NY 10036
212.735.3000

NLRB Spotlight

NLRB Issues Decision Suggesting Reconsideration of Position on Monitoring Union Activity

On October 29, 2019, the National Labor Relations Board (NLRB) issued a ruling suggesting at least two NLRB members – Chairman John Ring and member Marvin Kaplan – "would welcome the opportunity to revisit" the board's long-standing precedent that surveillance of employees' union activity may be unlawful even when the employees are not aware of such surveillance. The ruling was issued in *National Captioning Institute, Inc. and National Association of Broadcast Employees & Technicians — Communications Workers of America, AFL-CIO*, 368 NLRB No. 105 (October 29, 2019). The surveillance precedent was promulgated in the Ninth Circuit's 1941 decision in *NLRB v. Grower-Shipper Vegetable Association of Central California*, 122 F.2d 368 (9th Cir. 1941), and has not been revisited since. Specifically, the court in *Grower-Shipper*, relying on the dictionary definitions of "interfere," "restrain" and "coerce," held that "a person can be interfered with, restrained or coerced without knowing it." Accordingly, the court upheld the NLRB's ruling that hiring agents to surveil union activities violated the National Labor Relations Act (NLRA) even though neither the union nor any of its members knew of the surveillance. *National Captioning* did not provide the NLRB with the opportunity to revisit the rule because at least one employee was aware of the employer's surveillance of a private Facebook group in which employees held union discussions. Nonetheless, *National Captioning* provided the opportunity for the two NLRB members to signal their interest in reconsidering the 1941 rule and highlight, in a footnote, "the lack of meaningful analysis" about how an employer can unlawfully interfere with, restrain or coerce employees when no employees are aware of the surveillance.

NLRB Signals Picketers Should Be Careful To Direct Picketing at Correct Party

On November 1, 2019, the NLRB submitted its answering brief to the Ninth Circuit in *Service Employees International Union Local 87 v. National Labor Relations Board*, No. 19-70334, arguing that the court should uphold the NLRB's ruling that an employer did not violate the NLRA by discharging a group of janitors who engaged in unlawful "secondary" picketing. The dispute arose from the janitors' fall 2014 picketing outside the office building where they provided cleaning services on behalf of their employer, Ortiz Janitorial Services, which had been subcontracted to provide the services to the office building by Preferred Business Services pursuant to an agreement with the building's property manager, Harvest Properties. Following the protests, Preferred canceled the contract with Harvest and Ortiz Janitorial lost its subcontract. The owner of Ortiz Janitorial discharged the janitors as a result. According to the NLRB, because, among other reasons, the janitors failed to clearly disclose that their dispute was with their primary employer and targeted neutral Harvest Properties and multiple neutral tenants of the office building, the janitors were engaged in "secondary" picketing, which is not afforded the same protection as "primary" picketing under the NLRA. Accordingly, in its brief, the NLRB urged the Ninth Circuit to find that the janitors' discharges were lawful.

NLRB Will Send 'Unilateral Change' Claims to Arbitration and Defer to the Arbitrator

As previously reported in the September 2019 *Employment Flash*, in *MV Transportation, Inc*., 368 NLRB No. 66 (September 10, 2019), the NLRB adopted the "contract coverage" standard for determining whether unionized employers violated federal labor law by making unilateral changes. Under the "contract coverage" standard, the NLRB examines the plain language in a collective bargaining agreement to see whether it allows the employer to make the unilateral change at issue. Following its decision in *MV Transportation, Inc.*, the NLRB received a number of questions from regional offices regarding procedure and application of the new standard. On November 1, 2019, the NLRB's Division of Operations-Management published a memorandum clarifying to regional directors that they should defer "unilateral change" claims to arbitrators in situations where the union has filed a grievance or, even if the union has not filed a grievance, provided that both sides do not object to arbitration, where the collective bargaining agreement calls for arbitration.

Additional US Developments

Salary Threshold for Overtime Exemption Increases on January 1, 2020

As reported in the September 2019 issue of *Employment Flash*, effective January 1, 2020, the minimum salary threshold for the executive, administrative and professional "white collar" exemptions under the Fair Labor Standards Act (FLSA) will increase from $455 per week (or $23,660 annually for a full-time worker) to $684 per week (or $35,568 annually for a full-time worker). However, there are special minimum salary levels for exempt employees in U.S. territories ($455 per week for employees in Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam and the U.S. Virgin Islands, and $380 per week for employees in American Samoa) and for exempt employees in the motion picture industry (a "base rate" of $1,043 per week). Further, the minimum annual earnings threshold for the FLSA's highly compensated employee exemption will increase from $100,000 to $107,432. Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard minimum salary threshold or the special minimum salary levels that apply to certain U.S. territories. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. No changes were made to the duties, tests or other FLSA exemptions (*e.g.*, the outside sales exemption).

State and local governments may impose higher salary thresholds. In connection, the minimum earnings threshold for overtime exemptions under certain state and local laws will increase on January 1, 2020, as well. For example, the minimum annual salary threshold for the white collar exemptions will increase from $45,760 to $49,920 for California employers with 25 or fewer employees and the threshold for California employers with 26 or more employees will increase from $49,920 to $54,080. In New York, depending on the worker's location and size of the employer, the 2019 minimum annual salary threshold range is $43,264 to $58,500, which will increase to a range of $46,020 to $58,500 on January 1, 2020. Nondiscretionary bonuses and incentive payments may not be applied to satisfy the minimum salary thresholds under these state laws.

First Circuit Rules Sun Capital Advisors Not Liable for Pension Debts

On November 2, 2019, the First Circuit ruled in favor of Sun Capital Advisors, holding that its private equity funds were not under "common control" with their portfolio company, Scott Brass Inc., and were thus not jointly and severally liable for Scott Brass' $4.5 million pension debts. *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, Nos. 16-1376, 19-1002 (1st Cir. 2019). Generally, the "common control" provision under the Multiemployer Pension Plan Amendments Act of 1980 exists to prevent employers from avoiding ERISA obligations by fractionalizing businesses into various separate entities. This decision reverses the lower court's finding that there was a partnership-in-fact formed by the private equity funds that resulted in joint and several withdrawal liability when Scott Brass left the Teamsters pension plan and filed for bankruptcy in 2008. The district court had previously held that common control existed because the Sun Capital funds were in an "implied general partnership" that together owned Scott Brass. The First Circuit disagreed, holding that most factors in the multifactored partnership test set forth in *Luna v. Comm'r*, 42 T.C. 1067 (1964), did not suggest a partnership and common control. The First Circuit noted, for instance, that the funds lacked intent to join together, expressly disclaimed any sort of partnership, lacked significant overlap among limited partners, filed separate tax returns, maintained separate bank accounts and books, and operated independently with respect to investment activity and structure. However, the First Circuit's ruling is limited in some regards. The First Circuit did not reverse its prior holding that the Sun Capital funds were engaged in a trade or business (versus serving as mere investors), such that either of the funds could have been held responsible for Scott Brass' withdrawal liability had it met the 80% ownership threshold for "common control" under the Internal Revenue Code. Private equity sponsors should continue to consider joint and several liability concerns among portfolio companies with defined benefit pension plans. A private equity fund that acquires an 80% ownership interest in a portfolio company could be held liable for such company's unpaid pension liabilities.

Judge Orders EEOC To Continue Collecting EEO-1 Component 2 Pay Data While OFCCP Reports It Will Not Use Component 2 Pay Data in Enforcement

On October 29, 2019, the U.S. District Court for the District of Columbia ordered the Equal Employment Opportunity Commission (EEOC) to continue collecting EEO-1 Component 2 data for 2017 and 2018. *National Women's Law Center v. Office of Management and Budget*, No. 1:17-cv-02458. Component 2 data, which includes wage and hour data, must be filed annually by private employers with at least 100 employees and federal contractors with at least 50 employees. As reported in the September 2019 issue of *Employment Flash*, the EEOC announced that it would stop collecting Component 2 data after 2018, but that did not affect employers' obligations to collect data for years 2017 and 2018.

The court directed the EEOC to complete Component 2 data collection for 2017 and 2018 by September 30, 2019. Further, the court stated that Component 2 collection would not be complete until the average percentage of reports filed by eligible filers for 2017 and 2018 exceeded the percentage of reports filed for the previous four years. The EEOC argued that covered employers and federal contractors met this threshold as of October 28, 2019, by which time approximately 81% of eligible filers had submitted their 2017 and 2018 reports, compared to approximately 72% of reports that had been submitted by the filing deadline in prior years. The court ruled that the threshold percentage of completed reports to be collected was the number "actually submitted" in prior years to the EEOC, not the number submitted by the filing deadline. The court ordered the agency to "continue to take all steps necessary" to complete Component 2 collection by January 31, 2020.

Nevertheless, on November 25, 2019, the Office of Federal Contract Compliance Programs (OFCCP) announced it would not make use of certain pay data collected by the EEOC in its anti-discrimination oversight of federal contractors and subcontractors. The EEOC collects demographic information about employees in selected job categories on its annual EEO-1 report. The EEOC and the OFCCP share this information to reduce duplicative employer filing. During the Obama administration, the EEOC sought to expand government records on pay gaps and began requiring businesses to provide additional pay data by race, ethnicity and gender. These revised reports required employers to continue to report demographic information (Component 1 data) as well as compensation information (Component 2 data). In its latest announcement, the OFCCP officially stated that it "will not request, accept, or use Component 2 data" submitted on the EEO-1 form. The OFCCP claims that "it does not expect to find significant utility in the data given limited resources and its aggregated nature," although the agency will continue to accept and use EEO-1 Component 1 data from covered contractors and subcontractors.

Senators Introduce Bipartisan Bill to Ban Noncompetes

On November 14, 2019, the Senate Committee on Small Business and Entrepreneurship reviewed a new noncompete bill, the Workforce Mobility Act of 2019 (Mobility Act), introduced by senators to develop a uniform nationwide noncompete law. The Mobility Act proposes a ban on noncompetes, except for those entered into in connection with (1) the dissolution or disassociation from a partnership; or (2) the sale of a business. Noncompetes that fall under one of the two exceptions may only prevent the restricted parties from "carrying on a like business" in the same geographic region in which the partnership or business operated prior to the respective dissolution, disassociation or sale. The noncompete restrictions in those contexts cannot be longer than one year in duration. The Mobility Act would give the Federal Trade Commission and the Department of Labor the ability to enforce the prohibition on noncompetes by (1) issuing civil penalties, including fines in an amount not to exceed $5,000 per each week the employer is in violation of the law; and (2) pursuing judicial action on behalf of aggrieved employees. Further, the Mobility Act creates a private right of action for aggrieved employees.

President Rescinds Executive Order Granting Job Rights to Employees of Federal Contractors

On October 31, 2019, President Donald Trump issued Executive Order 13987 (EO 13987), which repealed President Obama's Executive Order 13495 (EO 13495), issued on January 30, 2009. EO 13495 required federal contractors that (1) succeed a prior federal contractor, and (2) provide similar services at the same location as their predecessor, to offer the right of first refusal of employment to workers displaced by the successor contract. EO 13495 allowed employees of the predecessor contractor to avoid displacement as a result of their employer losing its federal contract. The right of first refusal was limited to nonsupervisory employees who were qualified for a position with the successor contractor. EO 13495 did not limit the ability of successor contractors to employ fewer workers than their predecessor for efficiency reasons. As a result of EO 13987, all pending enforcement actions and investigations related to alleged violations of EO 13495 have been terminated. EO 13987 states that the move will "promote economy and efficiency in Federal Government procurement."

New H-1B Process

On Friday, U.S. Citizenship and Immigration Services (USCIS) confirmed that it will use a new electronic H-1B registration system for the upcoming cap season. The registration period will be open from March 1 to March 20, 2020. Under the new system, all petitioners (*i.e.*, employers) will be required to submit an online registration form and pay a $10 fee for each prospective H-1B beneficiary (*i.e.*, the foreign national employee). USCIS would then conduct a lottery of the registrations received, and the successful petitioners of the lottery would file the full H-1B petition on behalf of the beneficiary named in the selected registration.

Based on screenshots of the proposed H-1B online registration system released by USCIS, the proposed information to be collected includes the petitioner's legal name, "doing business as" name, employer identification number and primary U.S. office address; and authorized signatory's legal name, title, telephone number and email address, as well as the beneficiary's legal name, gender, date of birth, country of birth, country of citizenship, passport number and whether the beneficiary has a master's or higher degree from a U.S. institution. USCIS has promised additional information and instructions on the electronic registration process in advance of the March registration.

Second Circuit Says Offers of Judgment in FLSA Claims Are Exempt From Judicial Review

On December 6, 2019, the U.S. Court of Appeals for the Second Circuit held that offers of judgment made under Federal Rule of Civil Procedure (FRCP) 68 to settle claims under the Fair Labor Standards Act (FLSA) are not required to undergo a fairness review by a trial court. *Yu v. Hasaki Restaurant Inc.*, No. 17-3388-cv (2d Cir. 2019). FRCP 68 states that before trial, a defendant may offer to allow judgment on issues that would otherwise go to the jury. The plaintiff can accept the offer and then terminate the case. If a plaintiff rejects the offer and obtains a verdict less favorable than the offer they rejected, the plaintiff must pay costs incurred after the offer was made. In *Yu v. Hasaki Restaurant Inc.*, the plaintiff employee sued his employer, alleging it had violated FLSA overtime provisions. The employer responded with an offer of judgment for $20,000 plus attorneys' fees under FRCP 68, which the employee accepted. The trial court then ordered the parties to submit their agreement for a fairness review, which both parties resisted. In a 2-1 decision, the Second Circuit ruled that a fairness review is not required when an offer of judgment is made under the FLSA. The ruling states that FRCP 68 is absolute — the clerk "must enter judgment" if a plaintiff accepts the agreement. While Congress can expressly exempt certain claims from this absolute command, the Second Circuit said that it had never done so with regard to the FLSA. Further, nothing in the text of the law requires a fairness review. The court also differentiated FRCP 68 judgments from privately negotiated waivers of employees' FLSA rights. The latter are restricted under the FLSA, on the theory that such agreements are more likely to exploit vulnerable workers. The former require the parties to file pleadings and air their grievances in public. The Second Circuit reasoned that this distinction ameliorated any fears of exploitation when the parties' enter a stipulated judgment, making a fairness review unnecessary.

Second Circuit Rules Title VII Plaintiffs Need Not Prove Equal Work to Succeed on Pay Claim

On December 6, 2019, the U.S. Court of Appeals for the Second Circuit held that a plaintiff seeking to establish a *prima facie* pay discrimination claim under Title VII of the 1964 Civil Rights Act (Title VII) need only show that they were discriminated against with respect to compensation on account of sex. *Lenzi v. Systemax, Inc*., 18-979 (2d Cir. 2019). In doing so, the Second Circuit ruled that a plaintiff need not first establish an Equal Pay Act violation, which requires showing that the plaintiff received lower pay than a member of the opposite sex despite performing equivalent work. In *Lenzi*, the plaintiff alleged that she was paid below market rate for her position, while her male colleagues at a similar level earned above market rate. She brought suit for pay discrimination, among other claims, under Title VII. A federal trial court in New York rejected the plaintiff's Title VII claim and granted summary judgment to her employer, finding that the plaintiff had failed to establish that her higher-earning male colleagues held positions that were "substantially equal" to her position. The Second Circuit reversed the dismissal and clarified that Title VII, unlike the Equal Pay Act, does not require a plaintiff to prove unequal pay for equal work. The Second Circuit stated that any sex-based discrimination in compensation is prohibited by Title VII. Thus, a pay discrimination suit can be brought under Title VII even though no member of the opposite sex earns a higher wage for an equivalent job. The Second Circuit believed that the opposite approach — requiring a showing of equal work under Title VII — would undermine the "broad remedial purpose" of Title VII.

New York City Expands Human Rights Law Protections to Independent Contractors

On October 13, 2019, the New York City Council enacted a bill expanding the protections of the New York City Human Rights Law (NYCHRL) to freelancers and independent contractors. Under the new law, freelancers and independent contractors will be able to file claims of discrimination, harassment and retaliation against employers with the New York City Commission on Human Rights. In addition, independent contractors and an employer's family members who are employees will now count toward the requisite four or more workers that trigger coverage of the NYCHRL for a particular employer. However, an employer's family members cannot themselves bring claims under the NYCHRL against the employer. The new law will become effective on January 11, 2020, and is expected to extend protections to as many as 1.3 million additional individuals working in the city. The law is broadly drafted and no further guidance has been issued at this time, making it unclear whether independent contractors and freelancers will also be able to bring claims under the various laws passed as amendments to the NYCHRL, such as the Fair Chance Act, Stop Credit Discrimination in Employment Act and reasonable accommodation mandates prohibiting discrimination on the basis of pregnancy or status as a domestic violence victim. Employers should review their policies with respect to discrimination, harassment and retaliation in light of the new and more expansive local law.

New York City Employers Must Have 'Encouraged, Condoned or Approved' Sexual Harassment To Be Strictly Liable

In *Doe v. Bloomberg, L.P*., 109 N.Y.S.3d 254 (N.Y. App. Div. 2019), New York's Appellate Division, First Department, held that company owner Michael Bloomberg could not be found strictly liable under the NYCHRL for alleged sexual harassment by a Bloomberg, L.P. supervisor. The court determined that to maintain a claim against an individual, the plaintiff must specifically allege that, in addition to having an ownership interest or the power to carry out personnel decisions made by supervising employees, an individual owner or officer of the company also "encouraged, condoned or approved" the specific discriminatory conduct which gave rise to the claim. Nothing in the complaint at issue alleged that Michael Bloomberg was directly involved in any way with the alleged discriminatory conduct. This decision clarifies the requisite standard for employees to maintain a claim against an individual owner or officer of a corporate employer, in addition to the corporate employer, under the NYCHRL.

The NYCHRL imposes strict liability on "employers" for the discriminatory acts of their managers and supervisors, but, the administrative code does not define the term "employer." It is well established under New York law that corporate employers may be strictly liable for the discriminatory acts of managers and supervisors, and that if the employer at issue concerns only an individual, then that individual can be found strictly liable. However, because the claim at issue was brought against both a corporate employer and the individual owner, the case was an issue of first impression for the state appellate court. Reversing the order of the Supreme Court, Bronx County, below, the court relied on theories of imputed liability for employers in federal case law, as well as the legislative history of the NYCHRL, and ultimately dismissed the complaint against Michel Bloomberg. The lawsuit will continue against Bloomberg's company and the supervisor who allegedly engaged in sexual harassment.

New 2020 Laws for California Employers

California Gov. Gavin Newsom signed into law a number of employment-related bills passed by the legislature in 2019, most of which will become effective on January 1, 2020. The new laws, some of which are summarized below, pertain to worker classification, discrimination, arbitration, wage and hour issues, leave policies, and sexual harassment trainings.

- California Assembly Bill 5 (AB 5) in part codifies the California Supreme Court's "ABC test" set forth in *Dynamex v. Super. Ct. of Los Angeles*, 4 Cal. 5th 903 (2018), for determining whether a worker should be classified as an independent contractor or an employee. AB 5 adds a new Section 2750.3 to the Labor Code. The law carves out several occupations from the ABC test and applies the multifactor test in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989), to determine whether workers in such occupations should be classified as employees or independent contractors. The law goes into effect on January 1, 2020. Please refer to our September 16, 2019, client alert "California Passes Landmark Bill Restricting Classification of Contract Workers" for further information about this development.
- California Assembly Bill 9 (AB 9) amends California Government Code Sections 12960 and 12965 by extending the period an employee has to file a complaint with the Department of Fair Employment and Housing (DFEH) for alleged violations of the Fair Employment and Housing Act (FEHA). AB 9 extends the filing period from one year to three years. The law goes into effect on January 1, 2020.
- California Assembly Bill 51 (AB 51) adds Section 432.6 to the California Labor Code and Section 12953 to the Government Code and makes it unlawful for any employer to require an applicant or employee "to waive any right, forum or procedure" under the FEHA or Labor Code as a condition of new or continued employment or to receive any employment-related benefit. AB 51 makes it unlawful for an employer to retaliate against an applicant or employee because he or she refuses to consent to the waiver of "any right, forum or procedure" for a violation of the FEHA or Labor Code. The law applies to agreements entered into, on or after January 1, 2020, and does not apply to post-dispute settlement agreements or negotiated severance agreements, or any arbitration agreement otherwise enforceable under the Federal Arbitration Act (FAA). The law goes into effect on January 1, 2020.
- California Assembly Bill 673 (AB 673) amends California Labor Code Section 210 by permitting aggrieved employees to bring a private action for an employer's failure to timely pay wages in order to recover either statutory penalties or to enforce civil penalties under the Private Attorneys General Act. The law goes into effect on January 1, 2020.
- California Assembly Bill 749 (AB 749) prohibits employers from including "no rehire" provisions in dispute-related settlement agreements with persons who have filed claims against their employers. However, employers may include no-hire provisions for employees who have engaged in sexual harassment or sexual assault. The law goes into effect on January 1, 2020.
- California Senate Bill 83 (SB 83) amends, repeals and adds sections to the California Government Code, Labor Code and Unemployment Insurance Code by increasing the maximum wage replacement benefits under California's Paid Family Leave from six to eight weeks. The law goes into effect on July 1, 2020. Employers' policies and notices addressing such benefits should be updated to address this change.
- California Senate Bill 778 (SB 778) amends California Government Code Section 12950.1 by extending the deadline for compliance with Senate Bill 1343 (which was passed in 2018) from January 1, 2020, to January 1, 2021. SB 1343 requires all California employers with five or more employees to provide two hours of sexual harassment training to all supervisors and managers, and one hour of training to nonsupervisory employees within six months of hire or promotion into a supervisory role. Employees must receive additional training every two years thereafter.

California Appeals Court Rules *Dynamex* Applies Retroactively

On October 8, 2019, the California Court of Appeals for the Second Appellate District held that the "ABC" test set forth in *Dynamex v. Super. Ct. of Los Angeles*, 4 Cal. 5th 903 (2018), applies retroactively to claims made under the California Industrial Welfare Commission Wage Orders (Wage Orders) and under the California Labor Code that are closely tied to the Wage Orders. *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131 (Ct. App. 2019). The court stated that, with respect to the retroactivity of the ABC test in the context of Wage Order claims, the employer had failed to address the issue on appeal and had forfeited any claim that *Dynamex* was not retroactive.

The court also stated that, with the exception of extraordinary circumstances implicating fairness and public policy, judicial decisions in civil litigation are almost uniformly given retroactive effect and applied to pending litigation. The court held that no such extraordinary circumstances were present in this case, and as such, retroactivity was appropriate. Regarding the application of *Dynamex* to Labor Code claims, the court focused on the "close, if not inseparable, ties between the alleged Labor Code violations and wage order provisions" and noted that *Dynamex*'s stated purpose was to provide clarity and consistency in resolving Wage Order and Labor Code claims. After listing Labor Code sections such as 1194 (failure to pay minimum wage) and 2802 (failure to reimburse business expenses), the court concluded that the ABC test should be applied to determine employee status under both the Wage Order and Labor Code claims seeking to enforce or advance the Wage Order requirements. However, if a Labor Code claim is not rooted in a Wage Order or is not predicated on conduct alleged to have violated a Wage Order, the multi-factor test in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989), applies.

Ballot Initiative Launched to Repeal AB5

As noted in the September 2019 issue of *Employment Flash*, California Gov. Gavin Newsom signed into law an employment bill (AB 5) that codifies the recent extension of employment protections to workers previously classified as independent contractors under the California Supreme Court decision in *Dynamex*. Under AB 5, workers are presumed to be employees unless they meet all elements of a three-part test. To limit AB 5's impact on their industries, certain companies in the ride-sharing and food delivery application industries have launched a ballot initiative called the Protect App-Based Drivers and Services Act (the Act) and are seeking to get the Act on the November 2020 ballot. The Act provides that app-based rideshare and delivery drivers would be allowed to continue working as independent contractors if certain conditions are met. For example, the Act prohibits a hiring entity from unilaterally prescribing specific dates, times or a minimum number of hours that a driver must work and prohibits hiring entities from restricting a driver's ability to work for other app-based entities or businesses. The Act requires drivers to enter into written agreements prior to performing services that must list the grounds upon which a driver's engagement can be terminated, and the appeals process for workers to dispute terminations. The Act sets the guaranteed minimum earnings of drivers as tied to 120% of the applicable minimum wage and provides potential benefits such as a health care subsidy consistent with employer contributions under the Affordable Care Act and loss and liability protection. The Act contains anti-discrimination and anti-sexual harassment provisions, as well as a criminal background check policy that prohibits applicants who have been convicted of certain enumerated crimes, including violent felonies and driving under the influence of alcohol or drugs, from working as drivers for the app-based entities.

California Governor Vetoes Worker Retaliation Protections

On October 12, 2019, California Gov. Gavin Newsom vetoed three bills that would have expanded retaliation protections for workers. First, Assembly Bill 403 (AB 403) would have extended the statute of limitations for complaints alleging workplace retaliation from six months to two years and would have authorized the payment of attorneys' fees to employees who successfully sue for retaliation based on whistleblowing. Second, Assembly Bill 171 (AB 171) would have amended the Labor Code to extend anti-retaliation and anti-discrimination protections to survivors of sexual harassment, while also establishing a rebuttable presumption of unlawful retaliation if an employer takes adverse employment action against an employee within 90 days of the employer receiving notice or obtaining knowledge of the individual's status as a victim of sexual harassment. Third, Assembly Bill 1478 (AB 1478) would have provided employees with a private right of action to sue their employers for discrimination or retaliation based on their status as a victim of domestic violence, sexual assault or stalking. In addition, AB 1478 would have provided prevailing plaintiffs with reasonable attorneys' fees.

International Spotlight

The New EU Whistleblower Protection Directive

On October 7, 2019, the Council of the European Union approved the Whistleblower Protection Directive (Directive), which aims to harmonize the protection of whistleblowers in EU member states. The Directive applies to disclosures that relate to breaches of EU law only.

To Whom Does the Directive Apply?

The Directive applies to all employers with respect to protection against retaliation. In addition, employers with at least 50 employees or with an annual turnover or total assets of more than €10 million are required to establish internal whistleblowing procedures. All financial services firms (irrespective of their turnover or number of employees) will be required to establish whistleblowing procedures.

What Does the Directive Provide?

The Directive provides for common minimum standards for the protection of any person reporting a breach of EU law, such as anti-money laundering, data protection, competition law and corporate tax avoidance.

The Directive protects "workers" against dismissal, demotion and other forms of retaliation from their employer. The definition of "workers" is broad and includes consultants, freelancers, interns and volunteers, as well as employees. The Directive places the burden of proof on the employer to demonstrate that an action was taken for a reason other than retaliation.

The Directive also includes common standards for reporting mechanisms and processes. These provide that (1) internal reporting within the employer should be the first point of contact for whistleblowers, unless an internal report could negatively impact a subsequent investigation; (2) a whistleblower can report externally to the relevant authorities if the employer does not respond to the disclosure within three months; (3) a wider disclosure to the media is permitted only if neither the employer nor the relevant authorities have dealt with the issue in a timely manner, or if immediate disclosure to the media is required to protect the public interest; and (4) employers must designate a person or a department responsible for dealing with whistleblowing reports, ensure reporting processes are secure and confidential, and respond to disclosures within three months.

Next Steps for Employers

Within the EU, Directives become law in individual member states when each state implements the Directive into domestic legislation. In this case, member states have two years to do so. However, employers should begin to take steps to evaluate their existing whistleblowing policies and procedures and ensure that compliance teams are adequately staffed to address the new requirements. The steps required will depend on where the employer is located in the EU. Notwithstanding the U.K.'s exit from the EU, for an employer operating solely in the U.K., it is likely that its internal processes and procedures (if they are already compliant with U.K. law) would require little amendment, as many of the principles underpinning the Directive are already part of domestic U.K. legislation. In contrast, in other jurisdictions in the EU, the protection afforded by the Directive extends further than the protections afforded by existing national law.

Differences for US Employers

The Directive applies more broadly than U.S. legislation by protecting all workers (as defined above) rather than solely employees. In addition, unlike U.S. law, the Directive does not provide for financial rewards for whistleblowing, and though the Directive encourages the use of internal reporting channels, a whistleblower is entitled to the same level of protection whether he or she reports internally or directly to public authorities (if the report is made in accordance with the Directive).

Contacts

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 J. Derbyshire
Of Counsel / London
44.20.7519.7086
helena.derbyshire@skadden.com

Philippe Despres
Of Counsel / Paris
33.1.55.27.11.56
philippe.despres@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