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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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NLRB Spotlight

NLRB Upholds Confidentiality Rules for Internal Investigations

In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (Dec. 16, 2019), the National Labor Relations Board (NLRB) held that employers do not violate Section 7 of the National Labor Relations Act (NLRA) by imposing facially neutral rules that require employees to maintain confidentiality during ongoing workplace investigations. The NLRB's recent decision in *Apogee* expressly overruled its Obama-era decision in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015). Under *Banner Estrella*, employers could mandate confidentiality with respect to workplace investigations only when the employer could prove that its "legitimate business interests" outweighed employees' Section 7 rights under the NLRA to engage in "concerted activity for mutual aid and protection." In a 3-1 majority decision, the NLRB found confidentiality rules applicable during a workplace investigation presumptively valid. The majority in *Apogee* cited several legitimate business justifications employers have for requiring confidentiality from their employees who are aware of, or involved in, internal investigations, including reconciling misconduct quickly, protecting complainants and witnesses from potential retaliation from fellow coworkers and, above all, protecting the integrity of the investigation from false defenses, destruction of evidence and other interference. The NLRB also cited guidance and recommendations from the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration, both of which endorse maintaining confidentiality with respect to complaints and investigations of

employer discrimination and workplace safety, respectively. The new standard announced in *Apogee* does not cover employers' confidentiality rules that apply once an investigation has ended, and in such instances, the burden would again shift back to the employers to demonstrate the business justifications for such rules as weighed against employees' Section 7 rights under the NLRA.

As discussed below, on January 21, 2020, the NLRB general counsel released an advice memorandum that did not cite *Apogee* but reached the same outcome that the NLRB reached in *Apogee*.

NLRB Issues Advice Memos on Internal Investigations and Employee Arbitration

The NLRB recently issued three guidance memoranda regarding confidential internal investigations, internal grievance processes at unions and arbitration agreements.

Confidential Internal Investigations

On January 15, 2020, the NLRB general counsel released the advice memorandum *ADC LTD NM*, 12-CA-225371 and 12-CA-230301, addressing whether employer rules that require internal investigations to be kept confidential violate the NLRA. At issue was an investigation into employee misconduct, which resulted in the employee being given a warning. During the investigation, the employee was directed by the employer not to discuss details of the investigation with coworkers, consistent with the employer's confidentiality policy. The employee nonetheless discussed the investigation with coworkers and confronted the employee who had reported the initial misconduct. In response, the employer issued a second warning to the employee. The employee challenged this second warning, arguing that the restriction on discussing employee investigations was illegally overbroad under Section 7 of the NLRA. In the *ADC LTD NM* advice memorandum, the NLRB General Counsel's Office advised that disciplining the employee was not unlawful, because the employee had not engaged in concerted activity or conduct for mutual aid or protection (*i.e.*, activity or conduct that is protected under Section 7 of the NLRA).

The General Counsel's Office reached its conclusion despite finding that the employer's confidentiality rule was unlawful under *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), in which the NLRB held that employers' confidential investigation policies are generally unlawful under the NLRA. In the *ADC LTD NM* advice memorandum, however, the General Counsel's Office stated that it disagreed with the NLRB's *Banner Estrella* decision because it "fail[ed] to give appropriate weight to the shared employee and national interest furthered by the maintenance of confidentiality in the course of sensitive workplace investigations."

Since the time that the *ADC LTD NM* memorandum was sent to the regional director, and as discussed above, the NLRB overturned *Banner Estrella* in *Apogee*, stating that "investigative confidentiality rules are lawful ... where by their terms the rules apply for the duration of any investigation." 368 NLRB No. 144 (December 17, 2019).

Internal Procedures for Union Member Grievances

On January 15, 2020, the NLRB general counsel released the advice memorandum *National Association of Government Employees, Local R14-139 (EDP Enterprises, Inc.)*, 14-CB-227097. In *National Association of Government Employees*, an employee filed a charge against his union, alleging the union had failed to timely file a grievance over the employee's termination of employment. The union responded that the employee lacked standing to file a charge, because the employee failed to exhaust internal union grievance procedures, as per Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (LMDRA), under which a union may require its members to exhaust internal procedures before instituting an administrative or judicial action against the union. These internal procedures may last up to four months under the LMDRA, after which an employee may continue to pursue his or her complaint with the appropriate administrative or judicial body. The NLRB decided in *IATSE Local 151 (Freeman Decorating Services, Inc.)*, 364 NLRB 89 (Aug. 26, 2016), that a union's rule on the exhaustion of internal remedies did not violate the LMDRA, despite the fact that the rule did not explicitly set forth the four-month limit on internal remedies. Based on this precedent, the advice memorandum issued by the general counsel in *National Association of Government Employees* stated that the exhaustion-of-internal-remedies policy at issue did not violate the NLRA. However, the general counsel directed the regional director to urge the NLRB to reconsider its *IATSE Local 151* decision. Without being notified that a union member has a right to pursue claims against a union after four months of internal procedures, a union member might reasonably, though erroneously, believe that he or she could not pursue actions against a union until the internal process was completed. As a result, the general counsel wrote, the statute of limitations for filing a charge against the union with the NLRB may pass, frustrating an overriding policy of the NLRA to allow "unfettered access" to NLRB processes.

Class Action Waivers and Arbitration Agreements

On January 15, 2020, the NLRB general counsel released the advice memorandum *Bristol Farms*, 21-CA-103030. In *Bristol Farms*, new hires were presented with a voluntary arbitration agreement to settle employment disputes. The employer later successfully used the arbitration agreement to compel individual arbitration after a class action suit was filed by employees. The general counsel stated in the memorandum that arbitration agreements prohibiting class action suits by employees violated the NLRA under existing board precedent, even though the agree-

ments were not mandatory for employees. However, before this memorandum was released on January 15, 2020, the Supreme Court held in *Epic Systems v. Lewis*, 584 U.S. —- (2018), that class action waivers in arbitration agreements do not violate the NLRA. The dispute between the employer and the NLRB regional office at issue in Bristol Farms settled in light of the Supreme Court's *Epic Systems* decision.

NLRB Restores Standards for Arbitral Deference

In *United Parcel Service and Robert C. Atkinson, Jr.*, Case No. 06-CA-143062 (Dec. 23, 2019), the NLRB overturned a 2014 decision — *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014) — that limited the circumstances in which the NLRB defers to an arbitral decision when illegal discharge or discipline are alleged. Under *Babcock*, the party urging the NLRB to defer to the arbitral decision had the burden of proving that the deference standard was met, including that the arbitrator was explicitly authorized to decide the unfair labor practice issue. This burden limited the NLRB's deference to arbitral decisions, even in circumstances where fair arbitration procedures were observed. The NLRB's decision in *United Parcel Service* restores earlier NLRB precedent that favored deference to arbitral decisions. The decision states that the NLRB will defer to arbitral decisions in discharge and discipline disputes if the arbitral proceedings were fair, the parties agreed to be bound by the arbitration, the arbitrator received relevant facts and the arbitrator's decision was not "clearly repugnant" to the NLRA. The decision also shifts the burden of proof back to the party opposing arbitral deference. The NLRB majority stated that the new deference standard reduces the risk of multiple litigations and aligns with federal policy favoring arbitration.

NLRB Implements New Rules for Union Elections

On December 18, 2019, the NLRB published new election rules in the Federal Register that alter election procedures that were first introduced by the NLRB in 2014. 84 Fed. Reg. 69524. The new rules will lengthen the union election process, undoing the more expedited timeline created by the 2014 rules. Below are several of the major changes in the new rules:

- All disputes regarding voter eligibility and bargaining unit scope will be resolved prior to an election. Under current rules, these disputes are not required to be resolved until after an election.
- Preelection hearings, when questions concerning representation are resolved, will be scheduled 14 business days from the notice of hearing. Currently, most preelection hearings must be scheduled eight calendar days from the notice of hearing.
- Employers must distribute a notice of petition for election within five business days after a service of notice hearing, rather than two days under current rules.
- Non-petitioning parties must file a statement of position within eight business days after a notice of hearing is served, rather than seven calendar days under the current rules.
- Petitioning parties must file a responsive statement of position, addressing issues in the non-petitioner's statement. Current rules do not require a responsive statement from the petitioner.

The new rules are set to take effect on April 16, 2020. However, potential legal challenges regarding the manner in which the rules were implemented by the NLRB could delay implementation.

NLRB Reinstates Employer's Right to Restrict Employees' Use of Work Email for Nonbusiness Purposes

In *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 16, 2019), the NLRB held that employees do not have a right to use employer-provided email for the purposes of organizing, joining or assisting a union under Section 7 of the NLRA. Instead, such employee rights must yield to an employer's right to control the use of its equipment, including its email and other IT resources. The decision in *Caesars Entertainment* overturned a prior Obama-era NLRB decision, *Purple Communications, Inc*., 361 NLRB 1050 (2014), which held that employees who have been given access to use employer-provided email have a statutory right to use it for communications protected by Section 7 of the NLRA during nonworking time. The NLRB cited a long line of U.S. Supreme Court precedent that established that an employer's property rights must yield to employees' NLRA rights to organize when it is necessary to avoid creating an "unreasonable impediment to the exercise of self-organization." However, the NLRB also considered the fact that employees have sufficient methods of communication outside of work-provided email in the current technological landscape, where most employees have smartphones, social media accounts and personal email accounts. The NLRB's decision suggests that exceptions could exist when employer-provided email is the only reasonable means for employees to communicate with each other during nonworking time during the workday.

Additional US Developments

2019 State and Local Trends Affecting Employers

States and local governments were active in 2019, passing a patchwork of laws to provide employees with protection above and beyond current federal laws, particularly in the areas of worker classification, overtime exemptions and paid family leave. Most notable with respect to worker classification is California's Assembly Bill 5 (AB 5), which was signed into law on

September 18, 2019. AB 5 codifies the California Supreme Court's decision in *Dynamex v. Super. Ct. of Los Angeles*, 4 Cal. 5th 903 (2018), tracking the *Dynamex* three-part "ABC" test, with certain occupations considered exempt. This year other states, including New York, New Jersey and Washington, are considering following California's lead. Additionally, the federal government increased the annual salary threshold to be considered exempt from overtime pay from $23,660 to $35,568, and some states, including New York and California, have raised that threshold significantly higher. Additionally, several states, including Colorado, Maine, Michigan, Pennsylvania and Washington, have implemented, will be implementing or are considering implementing salary threshold increases. Finally, while federal law has provided protection to employees to take certain unpaid family leave, more states are joining California and New Jersey in requiring employers provide employees with paid family leave — and even more states are expected to pass similar laws this year.

Developments in Noncompetition Laws and Regulations

Regulatory agencies, the legislature and courts are considering noncompete laws in 2020. In January 2020, the U.S. Federal Trade Commission (FTC) held a public workshop with stakeholders to determine whether there is support for a commission rule that would restrict the use of noncompete provisions in employment contracts. The FTC sought public comment on the impact of noncompete clauses on the labor market, business justifications for such clauses and whether state law is sufficient for addressing such harms. The federal trade commissioner addressed the impact of noncompete clauses on job mobility and employee wages. In October 2019, U.S. senators introduced the Workforce Mobility Act of 2019, which would ban noncompete agreements, except in connection with a sale of business or the dissolution of or disassociation from a partnership. The California Supreme Court will also consider whether businesses can enter into noncompete agreements with one another under California law. Currently, California Business and Professions Code Section 16600 generally bans noncompete restrictions between employers and employees. Section 16600 states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." In mid-2019, the California Supreme Court accepted a certified question from the Ninth Circuit as to whether "anyone," as used in the statute, means any person, or whether it can include a business entity.

FLSA Joint Employer Test

On January 16, 2020, the U.S. Department of Labor (DOL) published a final rule to revise its joint employer test under the Fair Labor Standards Act (FLSA). The effective date of the final rule is March 16, 2020. The final rule sets forth a general joint employment standard when an employee performs work for his or her employer that simultaneously benefits another entity. The rule provides a four-factor balancing test to determine when a potential joint employer is directly or indirectly controlling the employee, including factors such as whether the potential joint employer (i) may hire or fire the employee; (ii) supervises and controls the employee's work schedule or his or her conditions of employment; (iii) determines the employee's rate and method of pay; and (iv) maintains employment records. The rule clarifies that an employee's economic dependence on a potential joint employer is not determinative of joint employer status. The NLRB has been reviewing public comments on a proposed rule from 2018 to revise its joint employer analysis under the NLRA. The NLRB's proposed rule would reinstitute a prior test under which an entity is considered a joint employer only if it possesses and actually exercises "substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." The new rule specifies that an employer's similar business model or brand and contractual agreements or business practices do not make joint employer status under the FLSA more or less likely, and provides different factual scenarios applying the DOL's new test of joint employer status. The U.S. Equal Employment Opportunity Commission (EEOC) also intends to clarify its stance on joint employment under the anti-discrimination laws that it enforces.

DOL Updates Regulations Defining FLSA's Regular Rate of Pay

Published December 16, 2019 and effective January 15, 2020, the DOL promulgated a final rule updating the regulations governing a nonexempt employee's regular rate of pay for purposes of calculating overtime under the FLSA. The FLSA defines "regular rate" to mean all remuneration paid to an employee, excluding certain perks and benefits. The DOL's new rule clarifies that employers may exclude the following eight categories of perks and benefits without risk of additional overtime liability:

1. Parking benefits, wellness programs, on-site specialist treatments, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits, and adoption assistance;
2. Payments for unused paid leave (vacation and sick leave buy backs), regardless of whether such payments are made in the same period in which the employee forgoes taking paid leave or in a subsequent pay period;
3. Payments of certain penalties required under state and local scheduling laws;
4. Reimbursed expenses for cellphone plans, credentialing exam fees, organization membership dues and travel, even if not "solely" for the employer's benefit;

5. Certain sign-on and longevity bonuses;
6. The cost of complimentary office coffee and snacks;
7. Discretionary bonuses; and
8. Contributions to benefit plans for accident, unemployment, legal services or other events that could cause a financial hardship or expense in the future.

The final rule clarifies that a label is not determinative as to whether a bonus is discretionary and therefore excluded from the regular rate calculation. The rule states that bonuses are excludable as discretionary if both the actual payment and amount of the bonus are determined at the sole discretion of the employer, and the bonuses are not paid pursuant to any sort of prior promise or agreement giving the employee an expectation to such payments regularly. Examples of discretionary bonuses provided by the DOL include, among others, employee-of-the-month bonuses, severance and bonuses for overcoming challenging or stressful situations. Promised bonuses, which are not excluded pursuant to the regular rate regulations and should be considered part of an employee's regular rate for purposes of calculating overtime, include, among other types of bonuses, retention bonuses, efficiency bonuses, most attendance bonuses, production bonuses, bonuses for quality and accuracy of work, and bonuses contingent upon the employee's continued employment through the payment date.

Recently Issued DOL Opinion Tackles Focus on FLSA and FMLA Compliance

On January 7, 2020, the DOL published three opinion letters providing guidance regarding compliance with the FLSA and the Family and Medical Leave Act (FMLA). The first opinion letter pertains to calculating overtime pay under the FLSA when a non-discretionary lump-sum bonus is tied to, for example, both completion of a 10-week training program and enlisting in another eight-week training program. Under the FLSA, when a bonus covers more than one weekly pay period and is not allocated based on the amount actually earned in each workweek during the bonus period, employers may divide the bonus and allocate it equally to each workweek in the bonus period for purposes of calculating the regular rate of pay and overtime, unless doing so would be inappropriate based on the facts. In the opinion letter, the DOL opined that, under the example provided, the employer may allocate the lump-sum bonus equally to each week in the initial 10-week training period, with no amount allocated to the additional training program. The DOL reasoned that, because employees do not have to complete the additional training, the bonus should be entirely allocated to the initial 10-week training and overtime pay due during the 10-week training period should be calculated based on this allocation.

The second opinion letter also addressed FLSA compliance. In response to a question from an employer regarding whether amounts paid to educational consultants per project constituted payments on a fee basis or salary basis, the DOL opined that such payments satisfied the salary basis test for overtime exemption purposes. Specifically, the DOL found that the educational consultants were paid a set amount in equal installments during the project regardless of hours worked or performance, which meets the salary basis requirements to be exempt from overtime. The DOL noted that the fact that compensation could change throughout the year from project to project did not matter, as long as the salary basis requirements were still met (*e.g.*, total compensation is above the minimum salary threshold).

The third opinion letter issued by the DOL addressed whether a combined general health district is considered the same public agency as the county in which the health district is located for purposes of determining FMLA eligibility. Although the DOL noted that the determination as to whether two public agencies constitute the same public agency for purposes of the FMLA must be made on a case-by-case basis, the opinion letter concluded that the health district and the county are not a single public agency for purposes of determining employee eligibility under the FMLA. The opinion letter explained that the applicable law (Ohio law) treats health districts as political subdivisions that are separate and distinct from any county or other local government agency or body and that the health district in question operates as an independent employer by, among other things, managing its own budget without funding from the county and making its own hiring and firing decisions without input from the county.

Update to New H-1B Process and New Form I-9

On February 6, 2020, U.S. Citizenship and Immigration Services (USCIS) released additional details regarding the new electronic H-1B registration system for the upcoming cap season. Beginning February 24, 2020, petitioners (*i.e.*, employers) will need to create an account for each employer identification number entity that will sponsor beneficiaries (*i.e.*, employees) for the upcoming cap season. The registration period will be open from noon Eastern Standard Time on March 1, 2020, through noon Eastern Standard Time on March 20, 2020. Registrations may not be drafted before the registration period opens on March 1. USCIS will then conduct a lottery of the registrations received by March 31, 2020, and the successful petitioners of the lottery may submit the full H-1B petition on behalf of the beneficiary named in the selected registration starting April 1, 2020.

In addition, USCIS recently updated the Form I-9. From January 31, 2020, employers may use either the prior Form I-9 (07/17/17) or may begin to use the new Form I-9 (10/21/19).

Starting May 1, 2020, employees may use only the new 10/21/19 version. Employers can check to ensure that they are using the correct version by locating the edition date at the bottom of the Form I-9.

US Women's National Team Pay Equity Trial Set for May 2020

On March 8, 2019, members of the World Cup champion U.S. Women's National Team (USWNT) filed a putative class and collective action complaint against their employer, the U.S. Soccer Federation (USSF). The players allege that USSF has a policy and practice of discriminating against USWNT players on the basis of gender by paying them less than members of the U.S. Men's National Team (USMNT) for substantially equal work, and by denying them at least equal playing, training and travel conditions; equal promotion of their games; equal support and development for their games; and other terms and conditions of employment equal to those offered to the USMNT. For example, the USWNT players contend that if each national team played 20 "friendlies" in a year and each team won all 20 friendlies, the USWNT players would earn a maximum of $99,000 (or $4,950 per game), while similarly situated USMNT players would earn an average of $263,320 (or $13,166 per game). A jury trial is scheduled to begin in Los Angeles on May 5, 2020.

Second Circuit Rules Title VII Plaintiffs Need Not Prove 'Equal Work for Unequal Pay' To Succeed on Pay Discrimination Claims

On December 6, 2019, the U.S. Court of Appeals for the Second Circuit held in *Lenzi v. Systemax, Inc.*, 944 F.3d 97, that a plaintiff seeking to assert claims under Title VII of the Civil Rights Act of 1964 (Title VII) for discriminatory substandard pay does not have to meet the exacting statutory standards of proof under the federal Equal Pay Act of 1963 (EPA), which requires an employee-plaintiff alleging discriminatory pay to prove that he or she was paid less than a similarly situated employee of the opposite sex (a comparator). Previously, the Second Circuit in *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (1995), held that a "claim of unequal pay for equal work under Title VII ... is generally analyzed under the same standards used in an EPA claim." Following *Tomka*, district courts rejected Title VII claims in which a plaintiff was unable to identify a similarly situated comparator. The latest Second Circuit ruling holds that "any form of sex-based compensation discrimination" is unambiguously actionable under Title VII. *Lenzi*, 944 F.3d at 110. The Second Circuit acknowledged a variety of scenarios in which the employee-plaintiff, who is female in the *Lenzi* case, may have claims under Title VII, but not under the EPA, where there was no similarly situated comparator. For instance, an employer could hire a woman for a "unique position in the company" but then pay her less than it would "had she been male" *Id.* (quoting *Wash. Cty. v. Gunther*, 452 U.S. 161, 179 (1981)). Additionally, an employer could use "a transparently sex-biased system for wage determination" without any direct male comparators. The Second Circuit held that "grafting the EPA's equal-work standard onto Title VII would mean 'that a woman who is discriminatorily underpaid could obtain no relief — no matter how egregious the discrimination might be — unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay.'" *Lenzi*, 944 F.3d at 110 (citation omitted). Though it is unclear whether other circuit courts may follow, the Second Circuit will not require employees who allege they were underpaid on the basis of sex in violation of Title VII to first establish an EPA claim. Rather, such employees need only prove that the employer discriminated with respect to compensation because of sex. Therefore, in conducting pay equity audits and addressing potential pay inequity issues, employers should consider that the basis for a Title VII claim could exist even in the absence of a comparator.

New York State To Eliminate Tip Credit Except for Certain Employees

On December 31, 2019, Gov. Andrew Cuomo announced that the New York State DOL will issue an order to eliminate the tip credit applied to the minimum wage paid to employees whose employers are covered by the Miscellaneous Industries and Occupations Wage Order. Such employees working in "miscellaneous industries and occupations" primarily consist of nail salon workers, hairdressers, aestheticians, car wash workers, valet parking attendants, door-persons, tow truck drivers, dog groomers and tour guides. The new order will not impact employees working in the hospitality industry, such as wait staff, bartenders and other service employees. The tip credit for impacted workers will be eliminated during 2020 in two phases. First, by June 30, 2020, the difference between the minimum wage and current "subminimum wage" for such tipped workers will be cut in half. Then, on December 31, 2020, the subminimum wage will be eliminated entirely. The new order is expected to impact an estimated 70,000 tipped workers in the state by guaranteeing such employees the applicable state minimum wage rate in addition to any tips they receive.

Pre-Employment Testing for Marijuana Considered 'Unlawful Discriminatory Practice' in NYC

On May 10, 2019, New York City became the first municipality in the country to prohibit employers from requiring prospective employees to undergo drug tests for marijuana or tetrahydrocannabinols (THC), the active ingredient in marijuana. Determining that such pre-employment testing is an "unlawful discriminatory practice," the law, passed by a 40-4 vote by the New York City Council, generally expands upon the existing list of significant employee protections under the New York City Human Rights

Law. However, it provides several carve-outs for jobs for which pre-employment drug testing for marijuana and THC will be permitted, including the following: (i) safety-related positions; (ii) transportation-related positions; (iii) caregiver positions; (iv) positions for which drug testing is required by any federal or state statute, regulation or order for purposes of safety or security; (v) positions for which drug testing is required by a contract with the federal government, or for which the federal government provides funding; and (vi) positions for which drug testing is required pursuant to a collective bargaining agreement. The law will take effect on May 10, 2020, in order to provide New York City employers one year to comply. Until then, employers should consider reviewing their internal drug testing requirements to ensure compliance with the law, determine whether any employees or potential employees fall within any of the noted exceptions from the law, revise potential job advertisements and employment applications to comport with the law, and stay updated on forthcoming guidance from the New York City Commission on Human Rights regarding implementation of such policies.

Please see the December 2019 issue of *Employment Flash* for further information about the expansion of protections under the New York City Human Rights Law to freelancers and independent contractors. The new law went into effect on January 11, 2020.

Illinois Becomes 11th State To Legalize Recreational Marijuana Use

On January 1, 2020, Illinois became the 11th state to legalize recreational marijuana use. Under the Illinois Cannabis Regulation and Tax Act (Illinois Cannabis Act), Illinois residents over 21 years of age can legally possess up to 30 grams of marijuana flower and five grams of marijuana concentrate for personal recreation. Previously, Illinois permitted only medical marijuana use. Illinois' transition from a medical-use to a recreational-use state has raised unique questions for employers, who are covered by extensive protections under the Illinois Cannabis Act but now will need to consider implications on how the law will impact existing drug policies. For instance, employers can prevent employees from using cannabis in the workplace or while performing duties on call, discipline or terminate the employment of employees for violating workplace drug policies, and maintain zero-tolerance drug policies at work sites. Nonetheless, the law could lead to increased challenges regarding disciplinary actions, particularly when employees dispute whether they are impaired on the job due to cannabis use. Though the Illinois Cannabis Act requires employers to possess a "good faith belief" that employees are under the influence of cannabis, there is no standardized test that would easily determine an employee's impairment by marijuana. Therefore, among other considerations, Illinois employers should communicate the extent to which cannabis would be permitted on duty, establish clear written procedures for employees to contest disciplinary actions, train supervisors regarding non-discriminatory signs of marijuana-related impairment, and establish definitive steps supervisors could take if they believe that an employee is impaired on the job.

Dynamex and AB 5 Developments

As noted above and in the September 2019 issue of *Employment Flash*, California Gov. Gavin Newsom signed a landmark bill (AB 5) into law, which codified and expanded the reach of the California Supreme Court's 2018 *Dynamex v. Superior Court* decision. Currently, under California law, workers are presumed to be employees unless they meet all elements of the three-part "ABC" test.

On January 8, 2020, a California state court ruled that California's ABC test does not apply to certain motor carriers and their drivers because the law has an impermissible effect on motor carriers' prices, routes and services and is thus preempted by the Federal Aviation Administration Authorization Act. On January 16, 2020, a California federal court granted the California Trucking Association's preliminary injunction to prohibit enforcement of the ABC test against motor carriers and owner-operators in the trucking industry until the court reaches a final judgment on the merits. As a result, the *Borello* test will apply to worker classification claims brought under California law against certain motor carrier companies.

In addition, two gig economy companies and two gig economy workers unsuccessfully sought injunctive relief in a California federal court. The plaintiffs are also seeking a declaration that AB 5 is unconstitutional on the basis that AB 5 violates the equal protection, due process and contracts clauses of the U.S. and California Constitutions, and that enforcement of AB 5 would cause irreparable injury to them and "an astronomical upheaval in the on-demand economy, and in the economy at large … ." Similarly, organizations representing freelance writers and photographers are seeking injunctive and declaratory relief in federal court on the basis that AB 5 is unconstitutional. A preliminary injunction hearing in the freelance writers and photographers case has been scheduled for March 2020. Notably, a California federal court denied the request of freelance writers and photographers for a temporary restraining order on January 3, 2020.

Finally, companies have challenged the retroactive application of *Dynamex*. As previously reported in the December 2019 issue of *Employment Flash*, a California state appellate court ruled that *Dynamex* applies retroactively. *See Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131 (2019). The employer appealed the

decision to the California Supreme Court, and the state Supreme Court agreed to hear the appeal, but denied the employer's request to de-publish the appellate court's decision. Also, the California Supreme Court accepted the Ninth Circuit's request to decide whether *Dynamex* applied retroactively after the Ninth Circuit initially ruled that *Dynamex* indeed applied retroactively, but later vacated its opinion and certified the question for the California Supreme Court to decide. *See Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 930 F.3d 1107 (9th Cir. 2019).

Please refer to the May 2019 and September 2019 issues of *Employment Flash*, as well as our September 16, 2019, client alert "California Passes Landmark Bill Restricting Classification of Contract Workers" for further information about *Dynamex*, AB 5 and California's worker classification law.

See the December 2019 issue of *Employment Flash* for further information about the expansion of the protections of the New York City Human Rights Law to freelancers and independent contractors.

California Judge Blocks Mandatory Arbitration Ban

On December 30, 2019, a U.S. District Court judge in the Eastern District of California granted a temporary restraining order on the enforcement of California's new law prohibiting employers from requiring workers to arbitrate employment-related disputes, as it is likely preempted by the Federal Arbitration Act (FAA). *Chamber of Commerce of the United States of America v. Becerra*, No. 2:19-cv-02456-KJM-DB. On January 31, 2020, the same judge granted a motion by the U.S. Chamber of Commerce and several other business groups for a preliminary injunction blocking the law indefinitely. *Id.* As noted in the December 2019 issue of *Employment Flash*, AB 51, which was supposed to take effect on January 1, 2020, banned employers from requiring employees to sign mandatory arbitration agreements as a condition of employment. The U.S. Supreme Court has found that the FAA preempts state laws that explicitly prohibit arbitration, and the U.S. District Court in this case noted that California's new law could disrupt the creation of employment contracts, especially given that a violation of California's new arbitration law is a misdemeanor.

New Jersey Passes New Worker Misclassification and Severance Laws

On January 21, 2020, New Jersey Gov. Phil Murphy signed a series of bills into law that increase protections for workers. First, AB 5839 allows New Jersey's DOL to levy fines against employers for intentionally misclassifying workers as independent contractors. Employers are required to pay the misclassified individuals up to 5% of their earnings over the previous year and a penalty of $250 per misclassified worker for a first offense and up to $1,000 per misclassified worker for every subsequent violation. Second, AB 5840 amends New Jersey's Wage Theft Act and provides that entities entering into an arrangement with a labor contractor to provide workers will share liability for misclassification of workers (and any other civil violations of tax or wage laws). Gov. Murphy signed several other bills into law, including SB 3170, which amends parts of the state's Millville Dallas Airmotive Plant Job Loss Notification Act (NJ WARN). SB3170 amends NJ WARN by, among other things, providing that if at least 50 workers are to be laid off in a 30-day period, New Jersey employers must (i) give employees a 90-day notice (rather than 60-day notice) that they will be laid off; and (ii) pay employees severance in the amount of one week's pay for each full year of service (in addition to the 90-day notice). If employers cannot meet the 90-day notice requirement, they must give the affected individuals an additional four weeks of severance pay.

Cases To Watch in 2020

There are several cases making their way through the federal courts that could have a big effect on employers.

Discrimination Against Gay and Transgender Workers

In May 2019, the U.S. House of Representatives passed the Equality Act, which would prohibit discrimination based on an individual's sexual orientation and gender identity. The Equality Act would amend civil rights statutes pertaining to employment, education, housing and public accommodations to add protections on the basis of sexual orientation and gender identity. Many jurisdictions currently have state and local LGBT anti-discrimination laws, although such protections do not exist at the federal level.

In addition, the U.S. Supreme Court is set to decide whether discrimination on the basis of sexual orientation qualifies as sex discrimination and prohibited under Title VII of the Civil Rights Act. There are three cases currently before the U.S. Supreme Court out of the Second Circuit, Sixth Circuit and Eleventh Circuit, respectively: *Altitude Express Inc. v. Zarda*, Case No. 17-1623; *Bostock v. Clayton County*, *Georgia*, Case No. 17-1618; and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission et al.*, Case No. 18-107. The federal circuit courts are divided on the issue. The Second and Sixth Circuits have held that discrimination on the basis of sexual orientation is prohibited under Title VII, and the Eleventh Circuit has taken the opposite view. The U.S. Supreme Court heard oral argument on the trio of cases in October 2019 and is set to issue a decision within the first half of this year. If the U.S. Supreme Court rules that Title VII protections do not extend to sexual orientation or gender identity, Congress could be faced with increased pressure to pass the Equality Act to ensure such protections federally.

Job Advertisements in a Digital Age

The Communications Workers of America has filed a class action lawsuit in the U.S. District Court for the Northern District of Illinois against T-Mobile US, Inc., Amazon.com, Inc. and other businesses, alleging they discriminated against older job applicants by using advertisements on Facebook to target younger workers. Similarly, in July 2019, the EEOC found "reasonable cause" to conclude that certain employers may have violated federal discrimination laws by excluding older workers and women from seeing certain job advertisements on Facebook.

International Spotlight

Former French Executives Sentenced to Jail for Implementing System of 'Institutionalized Moral Harassment'

On December 20, 2019, a French criminal court rendered a landmark decision against Orange, formerly France Telecom, which is one of the largest French telecom operators, and its former chief executive officer, its former executive director and its former head of human resources, in a case regarding moral harassment of the company's employees between 2007 and 2010. The court sentenced the company to a fine of €75,000 and all three directors to fines of €15,000 each, a one-year prison sentence, of which eight months of probation are to be served, and the court declared that the executives had implemented a company-wide managerial strategy that resulted in a form of "institutionalized moral harassment" of its employees.

Moral harassment, which has been a criminal offense in France since 2007, is defined as repeated actions toward a third party, in this case employees, that result in the alteration of their mental or physical health, violate their rights or dignity, or jeopardize the advancement of their professional careers. The French criminal code provides for a maximum sentence of two years in prison and/or a fine of up to €30,000 for individuals and a fine of up to €150,000 for corporations for moral harassment violations.

France Telecom was a publicly owned company until 2004, when the government sold its majority share of the company. In 2007, and in the context of this privatization, the company brought in new management, which had a plan (NExT) to change the managerial structure and the corporate culture of the company, and to reduce headcount by over 20,000 employees in three years, without implementing any collective redundancies. While implementing NExT, the company experienced a series of employee complaints regarding working conditions and the new managerial strategy, and the company was accused of being responsible for the suicides of 35 employees over two to three years.

In its 345-page long decision that has yet to be published, the Paris criminal court found that the company, and the defendants, although they had not personally interacted with the individuals who had committed suicide, had implemented a managerial strategy that constituted "institutionalized moral harassment" and, therefore, were themselves guilty of moral harassment. The court found evidence of "institutionalized moral harassment" when Didier Lombard, the company's CEO at the time, held a conference with a large number of middle managers and stated that headcount reduction would be implemented and employees would leave the company "through the door or through the window." The court also noted that the labor inspectors as well as occupational doctors issued warnings regarding the situation a number of times, and the variable pay of the company's middle and top management was directly tied to the number of employees who had left the company. These findings showed that the suicides were not the result of the pressures of individual middle managers acting alone. Rather, these managers were attempting to achieve the goals that had been defined by top management, using the managerial tools the company had provided to them.

The decision is far from final given that all three defendants, but not the company, have appealed. In addition, given the legal implications of this decision, any appellate decision will most likely be challenged before the French Supreme Court. Opponents of the court decisions argue that the concepts of "institutionalized moral harassment" do not exist in the French criminal code, and given that this is a criminal matter, courts must have a strict understanding of the letter of the law and cannot create new legal concepts that are not explicitly provided by existing statutes.

This decision, which was widely covered by the French mainstream media, reinforces the idea that when implementing large-scale restructurings in France, employers should consider using all of the legal tools at their disposition, including collective redundancies, consultations with works councils and cooperation with works council experts, in particular regarding working conditions, as well as with the labor inspectors and occupational doctors, and employers should not dismiss such individuals' opinions.

Finally, beyond the criminal liability of the company's top management, and the fine that the company will pay, this decision represents a significant financial risk for Orange given that the decision opens the door to anyone employed during the implementation of the NExT plan to claim damages for the moral harassment he or she suffered during the implementation of the plan. Indeed, in addition to the fines and prison sentence imposed by the court, the defendants were found jointly and severally liable for the payment of approximately €3 million of civil damages to plaintiffs. Given that 22,000 employees were impacted by the NExT plan, the potential risk for the company and its former executives may be billions of euros.

Ethical Veganism a Protected 'Philosophical Belief' Under the UK Equality Act

The U.K. Equality Act 2010 (the Act) protects employees and certain other groups against discrimination and harassment on the basis of a protected characteristic. The protected characteristics under the Act include religion or belief, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation. On January 3, 2020, in *Mr J Casamitjana Costa v The League Against Cruel Sports [3331129/2018]*, an English employment tribunal held ethical veganism — the belief that all cruelty and suffering to animals should be avoided at all practical costs — to be a "philosophical belief" and a protected characteristic under the Act.

For a belief to be protected, it must meet several tests, including: (i) being worthy of respect in a democratic society; (ii) being compatible with human dignity; and (iii) not conflicting with the rights of others. It is rare for beliefs, other than religious beliefs, to be protected because they frequently lack the necessary seriousness or cogency to amount to a "philosophical belief." Previous employment tribunals have held, for example, that vegetarianism is not a belief that qualifies for protection under the Act because it is a lifestyle choice rather than a belief about human life and behavior, and it did not attain the required level of cogency, seriousness, cohesion and importance given that individuals' reasons for being vegetarians differ greatly.

However, the Tribunal in the *Casamitjana* case considered ethical rather than dietary veganism. Ethical veganism specifically avoids all potential exploitation of animals. The belief is more consistent than vegetarianism in this sense because all products and services that might exploit animals, and not just food, are avoided. This level of commitment to the belief appears to have been important in the Tribunal's consideration of veganism's cogency and seriousness. Indeed the claimant in the case, Mr. Casamitjana, had explained that his belief extended to choosing to walk rather than take a bus to reduce the chance of killing insects or birds if they were hit by the vehicle. If in the next hearing, the Tribunal rules that Mr. Casamitjana was dismissed for gross misconduct because of his belief in ethical veganism, he may be entitled to compensation for discrimination or harassment. Such damages are based on Mr. Casamitjana's losses as a result of his dismissal and are uncapped. He also may be able to claim damages for injury to feelings.

The ruling made by the first instance Tribunal is not binding in other U.K. courts. The tribunals have, thus far, drawn a clear distinction between the likes of ethical veganism and dietary-focused beliefs like vegetarianism, thereby stressing the importance of the cogency and seriousness requirements for a belief to be protected under the Act. However, given the increasing number of ethical vegans in the U.K., the ruling could protect, for example, shop workers who refuse to handle products manufactured from animals or products that are tested on animals. Furthermore, as philosophical beliefs are also protected outside of the employment context, this case may have an impact on education, transportation and the provision of goods and services.

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