Employment Flash

Skadden

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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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COVID-19 Spotlight

With much material published about COVID-19-related employment issues, we provide an overview of information from employment-related COVID-19 publications that the Skadden Labor and Employment Law Group has distributed to date this year, in the order in which they were released, as well as links to each of the original publications. Please refer to the original publications for additional information. The summaries in the "COVID-19 Spotlight" below are based on information available at the time of the original publication. Given the frequent legal developments occurring in connection with the rapidly evolving COVID-19 pandemic, employers should seek guidance from counsel regarding the most recent developments.

Families First Coronavirus Response Act Amends FMLA

As of April 1, 2020, the Families First Coronavirus Response Act (FFCRA) amended the Family and Medical Leave Act (COVID FMLA) and created a new Emergency Paid Sick Leave Act (COVID Paid Sick Leave) applicable to private employers with fewer than 500 employees. COVID FMLA provides up to 12 weeks of leave within a 12-month period to an employee who is unable to work (or telework) due to a need to care for the employee's child if the child's school or place of care has been closed or the child care provider is unavailable due to the COVID-19 public health emergency. The first 10 days of COVID FMLA are unpaid, unless the employee otherwise received COVID Paid Sick Leave or elects to substitute any accrued leave, with the remaining 10 weeks paid at two-thirds the employee's regular rate of pay with a cap of $200 per day.

COVID Paid Sick Leave provides up to 80 hours of paid leave to an employee who is unable to work and is either herself or himself subject to a quarantine order, advised to self-quarantine or experiencing COVID-19 symptoms and seeking a medical diagnosis, caring for an individual subject to a quarantine order or who has been advised to self-quarantine, or caring for her or his child whose school or place of care has been closed or is unavailable due to COVID-19. If the reason for the employee's COVID Paid Sick Leave is related to herself or himself, the leave is paid at the employee's regular rate of pay with a cap of $511 per day. If the reason is related to the care of another, the leave is paid at two-thirds the employee's regular rate of pay with a cap of $200 per day.

For more information, please refer to our March 27, 2020, chart on this topic.

CARES Act Expands Unemployment Compensation Programs

The Coronavirus Aid, Relief and Economic Security (CARES) Act became effective on March 27, 2020. Among other provisions in the $2 trillion stimulus package, the CARES Act expands unemployment compensation programs in several ways:

- **Pandemic Unemployment Assistance:** Extends unemployment compensation through December 31, 2020, for up to 39 weeks to individuals who are unable to work due to COVID-19 and who are not traditionally eligible for unemployment benefits, including independent contractors, sole proprietors and those with insufficient work history.
- **Federal Pandemic Unemployment Compensation:** Provides an additional $600 weekly payment through July 31, 2020, to all individuals collecting unemployment compensation, regardless of the individual's prior earnings.
- **Pandemic Emergency Unemployment Compensation:** Provides an additional 13 weeks of unemployment benefits through December 31, 2020 to individuals who have otherwise exhausted their benefit eligibility under state law.
- **Fully Funded First Week:** Provides federal funding to states to cover the cost of the first week of unemployment benefits. (Unemployment compensation claimants were traditionally ineligible for benefits during their first week of unemployment.)
- **Work Share Program Expansion:** Additional federal funds were made available to states to fully fund work share programs, under which employees receive partial unemployment benefits if their hours are reduced but not eliminated by their employer.

All states have opted in to the expanded unemployment compensation programs created by the CARES Act. Continuation or expansion of some programs, such as Federal Pandemic Unemployment Compensation, will require new legislation by Congress.

Another major aspect of the CARES Act is the Paycheck Protection Program (PPP), which originally allocated $349 billion for new partially forgivable small business loans to cover, among other things, payroll costs for employers with 500 or fewer employees. The PPP allows small businesses to receive fully forgivable loans for up to eight weeks of the cost of payroll and certain other expenses, provided that the employer maintains certain employee levels and compensation amounts.

For more information, see our March 27, 2020, client alert, "CARES Act Provides Much-Needed Stimulus for U.S. Businesses, Individuals."

Considerations for Returning to Workplaces in the Wake of COVID-19

Employers should consider preparing policies regarding COVID-19 and the workplace by following employee return-to-workplace guidance, regulations, statutes and orders issued by federal, state and local governments and agencies, including the World Health Organization, the Centers for Disease Control and Prevention, the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration. In addition, employers should follow state and local stay-at-home orders.

COVID-19-related policies and protocols for implementing preventative safety measures include: (i) identifying where and how workers might be exposed to COVID-19 in the workplace; (ii) promoting handwashing and providing resources that promote personal hygiene; (iii) sanitizing the workplace regularly; (iv) maintaining and updating facilities (*e.g.*, installing high-efficiency air filters); (v) restricting nonessential business travel; and (vi) creating training for employees regarding proper sanitization and prevention techniques. In addition, employers should consider measures to monitor and respond to infections, including: (i) requiring workers to stay at home if they are sick; (ii) monitoring for local outbreaks; (iii) preparing to manage employees' leaves of absences under federal, state and local laws; and (iv) developing policies and procedures for employees to report COVID-19 symptoms or diagnoses, or for interacting with others with such symptoms or diagnoses. If an employee is diagnosed with COVID-19, employers should send the employee home immediately, disinfect surfaces in their workspace, inform other employees who had contact with the employee of possible exposure and maintain the confidentiality of the infected employee's medical information as required by the Americans With Disabilities Act (ADA). Employers should update personnel

policies based on federal, state and local COVID-19-related laws with respect to employee paid sick leave and leaves of absences. Employers may also consider drafting and implementing health certifications for employees and visitors at each worksite.

In connection with employees returning to the workplace, employers should train and inform employees regarding COVID-19-related office policies and procedures by providing return-to-work documents, such as wage payment notices and other onboarding paperwork, and updated policies, protocols and procedures, as necessary. Employers should also train and inform workers regarding personal hygiene and personal protective equipment. Employers should implement policies to minimize contact between employees, including by enforcing social distancing; modifying workspaces; decreasing the number of employees in the workplace; considering telecommuting, virtual communications and/or the specific job positions that should return to the worksite; and the order in which workers should return. Employers may screen employees for COVID-19 when entering the workplace, including by checking temperatures, asking questions regarding symptoms and/or requiring self-reporting. Employers should consider which employees are brought back from furloughs or layoffs in the early phases of opening a workplace and stage subsequent returning groups to avoid any discriminatory treatment or influence in decision-making.

For more information, please see our April 30, 2020, client alert, "Considerations for Returning to Workplaces in the Wake of COVID-19."

Los Angeles Enacts COVID-19-Related Ordinances Regarding Worker Rights of Recall and Retention

On May 3, 2020, Los Angeles Mayor Eric Garcetti signed into law two COVID-19-related ordinances regarding worker recall and retention rights. The ordinances apply to certain workers employed by or contracted to provide services to covered businesses, including airports and certain event centers, commercial properties and hotels, in each case operating in the city of Los Angeles. Collective bargaining agreements with recall or retention rights supersede the ordinances. A covered worker may bring a civil action for a violation of the ordinances once the worker has provided the covered employer with written notice of the alleged violation and allowed the covered employer 15 days to cure the alleged violation.

The COVID-19 Right of Recall Ordinance applies to "laid off worker[s]," defined as any person who: (i) in a particular week, performs at least two hours of work in the city of Los Angeles for a covered employer; (ii) has worked for the covered employer for at least six months; and (iii) whose most recent termination occurred on or after March 4, 2020, due to lack of business, a reduction in workforce or other economic, nondisciplinary reason(s). The definition of "laid off worker" excludes managers, supervisors, confidential employees and individuals who perform sponsorship sales for an event center. The ordinance requires employers to make written offers to laid-off workers for any position that becomes available after June 14, 2020, for which the worker is qualified and to provide workers with no less than five business days to accept.

The COVID-19 Worker Retention Ordinance requires incumbent business employers, meaning those employers who operate a covered business prior to a change in control, to provide successor business employers with a list of workers to be hired in preferential order following a change in control. Within 15 days after a transfer document is executed, an incumbent employer is required to provide the successor business employer with a list of covered workers, including their names, addresses, dates of hire and occupation classifications. The successor business employer is required to hire from this list for a period beginning with the execution of the purchase agreement and continuing for six months after the business is open to the public under the successor employer, and keep a written verification of all offers made for three years. The covered worker has at least 10 business days to accept the offer, and the successor business employer must retain each covered worker hired for at least 90 days following the worker's employment start date, unless there is cause for discharge. Following the 90-day transition period, the successor business employer should conduct a written performance evaluation regarding whether to offer the covered worker continued employment. The ordinance requires the incumbent business employer to post a written notice of the change in control within five business days following the execution of the purchase agreement.

For more information, please refer to our May 2020 publication, "City of Los Angeles Enacts COVID-19-Related Ordinances Regarding Worker Rights of Recall and Retention."

Additional US Developments

Supreme Court Rules Employment Discrimination Laws Protect Gay and Transgender Employees

On June 15, 2020, the U.S. Supreme Court ruled, in *Bostock v. Clayton County*, *Georgia*, that the prohibition against discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 (Title VII) protects gay and transgender employees. The question was presented to the Court through three separate employment cases involving the termination of employment shortly after the employer learned that the employee was either gay or transgender. Specifically, Gerald Bostock, a

child welfare advocate employed by Clayton County, Georgia, for over a decade, joined a gay recreational softball league. Clayton County terminated his employment shortly thereafter for "conduct 'unbecoming' a county employee." In addition, a company terminated the employment of Donald Zarda, a skydiving instructor employed by the same company for several seasons, days after he "mentioned" that he was gay. Aimee Stephens, a funeral home employee for over six years, informed her employer she would be transitioning, following a diagnosis of gender dysphoria, to living and working as a woman full-time upon her return from a planned vacation. Her employer informed her, prior to her vacation, that it was "not going to work out" and terminated her employment.

In finding that Title VII protects gay and transgender employees, the Court held that employers who "discriminate against" employees (*i.e*., "treat[]…[an] individual worse than others who are similarly situated") based on their sexual orientation or gender identity necessarily make a sex-based decision. The law is triggered even if a protected characteristic, such as sex, is only one "but for" cause of the decision. Thus, as the Court explained in *Bostock*, "if changing the employee's sex would have yielded a different result ... a statutory violation has occurred" regardless of the underlying motivation for the decision. The Supreme Court pointed out that, if the two male employees whose employment was terminated for being gay had instead been females attracted to males, their employment would not have been terminated. Therefore, the decision to terminate the employment of these employees was, in part, because of sex. Likewise, "[i]f the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." Again, sex is a "but for" cause of the decision to terminate the employment of a transgender employee. Accordingly, the Court opined that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

Supreme Court Clarifies Standard for Age Discrimination Suits Against Federal Government

The U.S. Supreme Court clarified the scope of the Age Discrimination in Employment Act (ADEA), holding that personnel actions by the federal government must be "untainted by any consideration of age." *Babb v. Wilkie*, 140 S. Ct. 1168 (2020). The decision distinguishes ADEA claims against the federal government from those against private sector employers. In 2009, the Court held that, to succeed in an ADEA claim against a private sector employer, an individual must prove by a preponderance of the evidence that the employer would not have taken the alleged adverse employment action but-for the individual's age. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009). The decision in *Gross* was based on the language of 29 U.S.C. § 623(a)(1), which prohibits private sector employers from taking an adverse employment action against an individual "because of such individual's age."

In contrast to the ADEA provisions applicable to private sector employers, those applicable to the federal government require the government to make personnel decisions "free from any discrimination based on age." 29 U.S.C. 633a(a). Therefore, the Court held, a plaintiff may successfully pursue an ADEA claim against the federal government by proving that age was a motivating factor behind the government's adverse employment action. This is true even if he or she cannot prove that the outcome would have been different had age not been taken into account. The Court held that the language of the statute evinced intent by Congress to apply a different standard to the federal government than for the private sector. The Court clarified that a plaintiff may receive only back pay and compensatory damages from the federal government if he or she proves that age was the but-for cause of an adverse personnel action. An individual who proves only that age was a motivating factor behind an adverse action may still receive "forward-looking relief," such as an injunction against the adverse action.

EEOC Warns Employers Preparing To Reopen Not To Discriminate Against Older Workers

The EEOC issued new guidance on June 11, 2020, reminding employers who are preparing to reopen their businesses as the COVID-19 pandemic continues that they cannot prevent older workers from returning to work, even if employers want to do so to protect some of their most vulnerable employees. The EEOC acknowledged that many federal, state and local public health authorities have identified individuals ages 65 and older as being at heightened risk for a severe case of COVID-19 if they were to become infected with the virus. However, given that the ADEA prohibits discriminating against those who are 40 and older, federal law also prohibits excluding individuals from the workplace because they are at least 65 years old. The guidance clarifies that employers can provide older workers with flexibility through telework options; under the ADEA, providing more flexibility to workers 65 and older is legally permissible even if workers between the ages of 40 and 64 are not given the same degree of flexibility. The EEOC also pointed out that though the ADEA does not guarantee older workers any reasonable accommodation, employees ages 65 and older also may have medical conditions that would qualify as a disability under the ADA and

would allow such employees to request a reasonable accommodation to work. Employers developing return-to-work policies should keep both federal statutes in mind as they relate to older workers, and must formulate return-to-work policies that are age neutral, even if the justification for such policies is to protect older employees.

DOL Publishes Workplace Posters on Families First Coronavirus Response Act

The Department of Labor (DOL) has published workplace posters for covered employers to fulfill their notice obligations under the FFCRA, effective April 1, 2020. The posters notify employees of their rights to paid sick leave and expanded FMLA leave under the FFCRA. The new posters for covered employers can be found on the DOL's website. Each covered employer must post an FFCRA notice in a conspicuous place on its premises. Since many workforces are currently teleworking, the DOL has advised that employers may satisfy this posting requirement by "emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website."

DOL Finalizes New Overtime and Foreign Labor Certifications Rules

The DOL issued three final rules in May 2020. The first new rule pertains to overtime exemptions under the Fair Labor Standards Act (FLSA) for certain commissioned employees of a "retail or service establishment." As an initial matter, FLSA Section 13(a)(2) defines a retail or service establishment as "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." The DOL had previously interpreted this definition as requiring the establishment to have a "retail concept." Further, the DOL had issued lists of establishments that it presumptively viewed as "non-retail" or "may be retail." The DOL's new rule withdraws all such lists and applies solely the criteria specified in the relevant FLSA regulation to determine whether an establishment has a retail concept. These criteria include whether the establishment typically sells goods or services to the general public, serves the everyday needs of the community, is at the very end of the stream of distribution, disposes its products and skills in small quantities, and does not take part in the manufacturing process.

The second new DOL rule addresses the computation of overtime compensation under the FLSA for nonexempt salaried employees who work fluctuating hours from week to week and who, pursuant to a clear and mutual understanding with their employer, earn a fixed salary as straight time compensation for hours worked. Under the FLSA, nonexempt employees are entitled to overtime compensation at a rate of one and a half times their "regular rate of pay" for each hour worked beyond the 40-hour workweek. Generally, the regular rate of pay is determined by dividing the number of hours worked in the workweek by the amount of the nonexempt employee's salary or wage rate. The DOL's final rule confirms that incentive payments, such as bonuses, commissions, hazard pay and other forms of premium payments, are compatible with the "fluctuating workweek method" of computing regular rate of pay, and any such payments must be included in calculating a nonexempt employee's regular rate of pay unless specifically excludable under FLSA Section 7(e)(1)-(8). Importantly, this final rule does not supersede state laws, including California law, that prohibit the fluctuating workweek method.

The third new DOL rule establishes a system of discretionary review by the secretary of labor over cases pending before or decided by the Board of Alien Labor Certification Appeals (BALCA) and the Administrative Review Board (ARB). The BALCA hears appeals of decisions from the DOL's internal adjudication of foreign labor certification applications. The ARB hears appeals from the decisions of DOL administrative law judges and issues final agency decisions regarding worker protection laws, including whistleblower, child labor, workplace discrimination and federal public contract laws. Under the new DOL rule, the secretary of labor may assert discretionary power to review and potentially modify, clarify or take other actions regarding any decisions issued by the BALCA or the ARB. According to current Secretary of Labor Eugene Scalia, the intent of this rule is to promote accountability by ensuring that the secretary has the ability to properly supervise and direct the actions of the DOL and assert the secretary's decision-making prerogatives.

NLRB Suspends Requirement To Notify Employees of Adverse Decisions for Employers Shut Down Due to COVID-19

The National Labor Relations Board (NLRB) routinely orders employers to disclose adverse NLRB rulings to employees at the relevant facility within 14 days of the decision and remind employees of their rights under the National Labor Relations Act. However, on May 6, 2020, in *Danbury Ambulance Service, Inc*., 369 NLRB 68 (2020), the NLRB suspended the remedial notice requirement for employers that shut down due to the COVID-19 pandemic. The NLRB explained that only those employers that shut down their facilities and have employees who are not reporting to work will be excused from immediately satisfying the remedial posting requirement, and the 14-day clock will start running for such employers if and when they reopen. Employers who remain open and are staffed by a "substantial complement of employees" are required to provide

notice of adverse NLRB decisions to their employees within 14 days. The NLRB's rationale — that the notice requirement would be futile if employees are not present to read the notice — is clear when considering physical postings at the workplace. The NLRB rejected the argument that a different result should govern situations in which employers communicate regularly with their remote employees through electronic methods, noting that even those employers who communicate with their employees electronically may not be doing so to the same extent while the workplace remains closed.

NLRB Issues New Standard for Ballots With Dual Markings

The NLRB modified its standard for assessing ballots with dual markings (*i.e.*, markings both for and against union certification) in a precedent-shifting decision. *Providence Health & Services — Oregon*, 369 NLRB No. 78 (May 13, 2020). At issue was a single ballot that was marked during a union certification election in 2018. The voter marked the "Yes" square with an "X," as instructed, but also marked the "No" square with a single smudged, diagonal line. This dual-marked ballot was determinative to the outcome of the certification election — if counted as a vote for certification, the union would have been certified as the employees' bargaining representative by a single vote, 384 to 383.

Under prior NLRB precedent, a dual-marked ballot was void unless the voter's intent could be ascertained from other markings on the ballot, such as an attempt to erase an errant mark. *TCI West*, *Inc.*, 322 NLRB 928, 928 (1997); *Brooks Brothers*, *Inc.*, 316 NLRB 176, 176 (1995). Applying these earlier decisions, the NLRB regional director held that the clear "X" in the "Yes" square, combined with the voter's "obvious attempt" to erase the mark in the "No" square, evinced intent by the voter to vote in favor of certification.

In reviewing the regional director's decision, the NLRB held that "attempts to determine voter intent based on additional markings," such as smudges and attempts to erase markings, was "impermissibly subjective." Instead of trying to determine a voter's subjective intent on a dual-marked ballot, the NLRB adopted a "bright line" rule under which any ballot containing markings in more than one square is void. The NLRB reasoned that this "clear, objective standard" would help avoid litigation over dual-marked ballots, make the certification process move more quickly by cutting down on ballot challenges, and preserve time and money that would otherwise be spent analyzing ballots for voter intent. Because the ballot at issue contained markings in both boxes, the NLRB determined that the ballot was void. The union certification election ended in a 383-383 tie vote, and thus the union certification was unsuccessful.

New York Court of Appeals Holds That Postmates Delivery Drivers Are Employees Entitled to Unemployment Benefits

On March 26, 2020, the New York State Court of Appeals affirmed the state Unemployment Insurance Appeals Board and held that food couriers for Postmates are employees (and not independent contractors) for the purposes of determining unemployment benefits. *Matter of Vega*, 2020 NY Slip Op 02094 (Ct App Mar. 26, 2020). The court applied its multifactor "control test" and ultimately determined that Postmates retains sufficient control over its workers to consider them employees, including retaining complete control over the means for obtaining customers, connecting the customer to a delivery person, and determining whether and how food couriers are compensated. Postmates had argued that its workers could decide when they want to work, could accept or reject specific delivery jobs, and remain free to choose their own delivery route. New York's highest court also stressed that food delivery persons were low-paid, unskilled workers, and that Postmates limits access to specific delivery assignments to certain workers, determines the delivery fee charged to customers and the percentage of that fee paid to couriers, provides couriers with prepaid debit cards for some business expenses and handles customer complaints. The *Vega* case was decided in late March 2020, when state and federal officials were initially facing the threat posed by COVID-19 and amid discussions about the type of financial help that should be provided to gig economy workers. It remains to be seen whether such workers will be considered employees for the purposes of determining other benefits, including workers' compensation, paid family leave, paid sick leave and overtime pay.

District Court Weighs In on Enforceability Limits of New York Restrictive Covenants

A March 20, 2020, decision by the U.S. District Court for the Southern District of New York in *Flatiron Health, Inc. v. Carson*, No. 19 CIV. 8999 (VM), 2020 WL 1320867 (S.D.N.Y. Mar. 20, 2020), signals to New York employers that they should not assume that New York courts will blanketly exercise their discretion to partially enforce overbroad restrictive covenants, despite the general willingness of New York courts to do so in the past.

In 1999, the New York State Court of Appeals in *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1226, stated that partial enforcement of an overbroad restrictive covenant may be appropriate if "the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing." Since then, New York courts have generally severed and partially enforced overbroad restrictive covenants.

However, applying the principles set forth in *BDO Seidman*, the district court in *Carson* declined to partially enforce the restrictive covenants in an agreement between the defendant-employee and the plaintiff, his former employer, in large part, because the restrictive covenants were so obviously overbroad that they called into question the former employer's good faith. In reaching this decision, the court in *Carson* relied, in part, on testimony from the former employee's co-founder and CEO indicating that he believed that the noncompetition covenant in the agreement would prevent the former employee from "working as a janitor" for a competitor, even though the "Janitor Rule," which provides that noncompetition agreements are unlikely to be enforceable if they are drafted so broadly as to prevent a former employee from working for a competitor in any position (*e.g.*, even as a janitor), has not yet been adopted by New York courts.

Additionally, the employment agreement at issue in *Carson* contained a customer nonsolicitation covenant that would have restricted the former employee from soliciting any of the employer's customers, regardless of whether the former employee developed a relationship with those customers in connection with his employment. Relying on another rule articulated in *BDO Seidman* — that employers do not have a legitimate interest in restricting the solicitation of customers with whom a former employee did not develop a relationship "in the course of employment" — the *Carson* court found that the covenant at issue was overbroad and declined to partially enforce it, even though courts have generally exercised their judicial discretion to sever and partially enforce such a covenant since *BDO Seidman*. The district court's decision in *Carson* reinforces the *BDO Seidman* customer nonsolicitation rule and suggests that not all New York courts will partially enforce covenants that violate the rule, even though New York courts have partially enforced such covenants in the past.

California Court Addresses Unlimited Vacation Policies

On April 4, 2020, in *McPherson v. EF Intercultural Foundation, Inc.*, 47 Cal.App.5th 243 (2020), a California Court of Appeals held that an employer failed to establish a valid unlimited vacation policy, and as such, was required to pay unused vacation to employees upon termination of their employment. In *McPherson*, the court found that the employer's policy was "undefined" rather than "unlimited" because the policy had an implied cap and the employer did not communicate the "unlimited" nature of its time-off policy. The court stated that it appeared the parties had an understanding that the employees had the right to take an amount of approved vacation that was the same amount that other employees of the employer were permitted to take. The court explained that a time-off policy may be considered truly unlimited if, in writing, it: (i) clearly provides that employees' ability to take paid time off is not a form of additional wages for services performed but perhaps part of the employer's promise to provide a flexible work schedule — including employees' ability to decide when and how much time to take off; (ii) spells out the rights and obligations of both the employee and employer and the consequences of failing to schedule time off; (iii) in practice allows sufficient opportunity for employees to take time off or work fewer hours; and (iv) is administered fairly so that it neither becomes a de facto "use it or lose it policy" nor results in inequities, such as a situation in which an employee works many hours but takes minimal time off whereas another employee works fewer hours yet takes more time off.

Ninth Circuit Clarifies Disclosure Statement and Standalone Document Requirements Under the Fair Credit Reporting Act

On March 24, 2020, and April 24, 2020, the U.S. Court of Appeals for the Ninth Circuit clarified certain requirements under the Fair Credit Reporting Act (FCRA).

On March 24, 2020, the Ninth Circuit held in *Walker v. Fred Meyer, Inc*., 953 F.3d 1082 (2020), that an explanation of a job applicant's rights in a consumer report disclosure was extraneous information in a disclosure not allowed by the FCRA, even if it was included by the employer in good faith. The Ninth Circuit stated that an employer is permitted to include a brief explanation of what the consumer report entails, how it will be obtained and for which type of employment purposes it may be used. However, extraneous information is prohibited, even if the information is related to the disclosure. *Gilberg v. Cal. Check Cashing Stores*, *LLC*, 913 F.3d 1169, 1175 (9th Cir. 2019). In addition, the Ninth Circuit held that the right provided by the FCRA to dispute inaccurate information in a consumer report does not require employers to provide job applicants with an opportunity to discuss their consumer reports directly with the employer. Rather, the employer must provide a pre-adverse action notice to the job applicant with a description of their rights to dispute the completeness of the information with a consumer reporting agency.

On April 24, 2020, the Ninth Circuit held in *Luna v. Hansen & Adkins Auto Transp*., 956 F.3d 1151 (9th Cir. 2020), that the FCRA notice requirement must be satisfied in a stand-alone document that is separate from other employment documents, but it does not have to be provided at a separate time from other employment documents. The Ninth Circuit found that requiring employers to present a disclosure separate in time from other employment application materials would stretch the FCRA's requirements "beyond the limits of law and common sense."

November Ballot Measure Could Classify California App-Based Drivers as Independent Contractors

On November 3, 2020, the California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative will appear on the California ballot. If passed, the initiative would classify app-based drivers and couriers as independent contractors, rather than employees, and exempt them from the requirements of California Assembly Bill 5 (AB 5). As noted in the September 2019 issue of *Employment Flash*, AB 5 codifies the presumption that workers are employees and sets forth the "ABC test" as the standard for determining whether, under state wage and hour law, a worker is an employee or an independent contractor.

The ballot initiative defines app-based drivers as workers who (i) provide delivery services on an on-demand basis through an application or online platform; or (ii) use a personal vehicle to provide prearranged transportation services for compensation via an application or online platform. The initiative provides that companies with app-based drivers will be required to provide alternative benefits, including minimum compensation and health care subsidies based on driving time, workers' compensation, vehicle insurance and safety training. Additionally, companies with app-based drivers will be required to develop anti-discrimination and sexual harassment policies, among other things.

San Francisco Issues Emergency Rehire Order

On June 23, 2020, the San Francisco Board of Supervisors passed an emergency ordinance requiring large employers to rehire workers laid off due to the COVID-19 pandemic before offering the same or a substantially similar position to a new applicant. The ordinance covers for-profit and nonprofit employers in San Francisco that employ (or have employed) 100 or more employees on or after February 25, 2020. The ordinance defines a layoff as a separation of 10 or more employees during any 30-day period caused by the employer's lack of funds or lack of work for its employees due to the COVID-19 public health emergency. Employers providing health care operations and government entities are exempt from the ordinance.

DC Paid Family Leave Now in Effect

On July 1, 2020, employees working in Washington, D.C. became eligible to apply for and receive paid family leave benefits pursuant to the Universal Paid Leave Amendment Act of 2016 (DC PFL), which was enacted on February 17, 2017. Although the benefits provided under the DC PFL were not yet available, on July 1, 2019, D.C. employers began remitting payroll taxes to fund the program. Additionally, employers were required to provide notice by February 1, 2020, to all covered employees regarding the DC PFL benefits.

The DC PFL provides covered employees with up to eight weeks of paid family leave benefits each year, which may consist of up to eight weeks per year to bond with a new child, up to six weeks per year to care for a covered family member with a serious health condition and up to two weeks per year for an employee's own serious health condition. Employees are eligible to receive paid family leave benefits under the DC PFL if they spend more than 50 percent of their time working in D.C. In addition, the DC PFL provides that employees are eligible to receive up to $1,000 per week of paid family leave benefits. An employee's weekly benefit amount is calculated based on the employee's weekly wage rate, as reported to the Department of Employment Services. Employers' paid leave policies may run concurrently with any paid leave benefits that covered employees receive pursuant to the DC PFL. The DC PFL also implements quarterly wage reporting and payroll record-keeping requirements for D.C. employers.

The Office of Paid Family Leave has published frequently asked questions (FAQs) and indicated that it is still on schedule to accept claims for benefits under the DC PFL. The FAQs make clear that employees must be employed by a covered employer to be eligible for DC PFL benefits, that such benefits are not available to individuals who are quarantined but have not been diagnosed with COVID-19, and that the DC PFL benefits will not be paid retroactively for leave taken by individuals diagnosed with COVID-19 prior to July 1, 2020. The FAQs also state that an individual may apply for DC PFL benefits to care for a family member diagnosed with COVID-19.

International Spotlight

The United Kingdom

Confirming the Limits of Employer Vicarious Liability

The UK Supreme Court ruled in *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 that a large supermarket chain cannot be held vicariously liable for the wrongful acts of an employee who published on the internet the payroll data relating to 100,000 employees as part of a "personal vendetta" against the supermarket for initiating disciplinary proceedings against the employee several months earlier. Criminal charges followed, and the employee was sentenced to eight years of imprisonment. In addition, almost 10,000 of the supermarket employees sought damages from the supermarket for misuse of private information and breach of confidence and for breaching its statutory duty under the Data Protection Act 1998. The claimants asserted that the supermarket was either primarily or vicariously liable for the actions of the employee.

The Supreme Court held that the supermarket could not be primarily liable, as it had not directly misused or permitted the misuse of any personal data. In addition, the Supreme Court held

that the supermarket was not vicariously liable for the employee's wrongful acts. The Supreme Court clarified that it was not enough for the lower courts to have concluded that vicarious liability was established merely because the employee's wrongful acts arose from a task "closely related to what he was tasked to do." Rather, the employee's personal vendetta resulted in him engaging in a "frolic of his own" such that vicarious liability could not arise in these circumstances.

COVID-19, Contact Tracing and Data Protection in the Workplace

The U.K. has required individuals who are able to do so to work from home to combat the spread of COVID-19. On May 11, 2020, the government took the first step toward easing work-from-home restrictions by announcing that those employees who cannot work from home should be encouraged to return to work. As a result, employers may look toward "contact tracing" as a way of getting the business up and running safely. Contact tracing involves processing personal data in order to inform individuals who may have come into contact with a person infected with COVID-19. Thus, employers who wish to deploy such a strategy should carefully consider how they can lawfully process this data in accordance with General Data Protection Regulation 2016/679 (GDPR).

For more information, see the March 2020 issue of Skadden's *Privacy & Cybersecurity Update*.

In addition, the U.K.'s Information Commissioner's Office has issued guidance regarding workplace testing.

France

European Court of Justice Rules on Host Member State's Ability To Disregard a Fraudulent EU Labor Certificate

The European Union Court of Justice (ECJ) rendered a preliminary ruling in a case involving Vueling Airlines S.A., an airline with its registered office in Spain, and the CRPNPAC, the French supplementary retirement plan for professional cabin crew in civil aviation, regarding the competence of the court of the host member state to disregard an E 101 certificate that was fraudulently relied upon or obtained. The E 101 certificate is a specific tool in the European Union that allows employers to continue to maintain an employee's affiliation with the social security regime of their country of origin while the employee is temporarily posted in another member state. The main purpose of this certificate is to ensure the freedom of movement for workers and freedom to provide services. EU regulation provides that a specific process must be followed by the member state of destination (the country in which the employee would be seconded) in order to challenge the validity of an E 101 certificate.

In this case, in 2008 following an inspection, the French labor inspectorate stated that Vueling had fraudulently obtained the E 101 certificate from the relevant Spanish authorities by filing requests that contained erroneous information or omitted key information. The labor inspectorate found that Vueling had failed to declare employees to the French social security administration when it should have, which could be considered a criminal offense of "concealed work" under French law.

Though the French authorities did not follow the legally required process to challenge the validity of the E 101 certificate, in 2012, a French criminal court found the company guilty of concealed work, and the French Supreme Court (Cour de Cassation) confirmed the decision in 2014. Both courts ruled that Vueling had fraudulently obtained the E 101 certificates, which were therefore unenforceable by the French social security administration. Based on these decisions, the CRPNPAC, to which Vueling did not contribute for the posted employees by virtue of the E 101 certificates, commenced civil proceedings against Vueling, which the French Supreme Court decided to stay. The French Supreme Court raised two preliminary questions for the ECJ to rule on:

- May the courts of a host member state, in which legal proceedings are brought against an employer, and the facts indicate that E 101 certificates were fraudulently obtained or used, disregard those certificates?
- If not, in a situation where an employer has been convicted by a criminal court in the host member state for fraud in breach of EU law, is a civil court of that same member state bound by the criminal decision rendered against the employer, which therefore would be liable to pay damages to workers or a pension fund of that member state?

On the first question, the ECJ ruled that courts of a host member state may not disregard any E 101 certificates, even those obtained fraudulently, without following the specific process that member states are bound by to challenge the validity of E 101 certificates. The ECJ ruled that the issuing member state therefore had sole jurisdiction to cancel or withdraw E 101 certificates that had been issued. The only exception to that rule is if the issuing member state has failed to review a request made by the host member state or has failed to make a decision, within a reasonable time, on the evidence provided.

On the second question, the ECJ ruled that given the importance of the matter at hand and according to EU law, an employer cannot be held liable for damages intended to provide compensation to the workers or a pension fund of that member state claiming to be affected by that employer's conduct, solely by reason of a criminal conviction.

This decision marks a cornerstone in a decade-long legal debate regarding the enforceability of E 101 certificates in the EU. The EU has in recent years reinforced the cooperation obligation between member states in establishing whether E 101 certificates had been obtained fraudulently.

COVID-19 Update in France

In connection with the easing of COVID-19 lockdown measures, France entered "phase 2" on June 2, 2020, meaning individuals could now travel freely across the country. However, the French government has insisted that remote working continue to be the norm. Employers may use their own contact tracing application but should be careful about how it does so, given that the relevant information gathered by the application is covered by the GDPR as well as French regulations pertaining to the automatic treatment of personal data.

Furthermore, employers responding to the impact of COVID-19 on their businesses by, among other measures, reducing salaries, wages or paid holidays, can do so through collective bargaining but should always involve the relevant works council. In addition, as of July 1, 2020, employers whose activity remains impacted by the pandemic can negotiate a new collective bargaining agreement and implement long-term furloughs, a new legal mechanism under which employers can reduce employees' working hours for up to 24 months. Up to 84% of affected employees' salaries will be covered by the government.

Germany

Employment Law Issues Related to COVID-19

Short-Time Work

The German government has modified the rules to apply for short-time work benefits. Short-time work is a government program to compensate employees for a reduction in work hours and reduced compensation based on circumstances beyond their control. If 10% of the work force (previously 33%) experiences a 10% or more decrease in work volume and an employer has a legal basis to reduce the employees' work hours — such as with an individual agreement, a works agreement with a works council or a collective bargaining agreement with a union — the employer can order a reduction of work hours of up to 100% for certain individuals or, in the case of a complete closure, all employees, in which case the employees receive 60%-67% of their previous net income as a short-time work allowance. In addition, the unemployment agency covers 100% of the social security contributions to be paid during short-time work.

A recent change in the law raises the allowance to 70%-77% after four months of short-time work and to 80%-88% after seven months, through December 31, 2020. The maximum duration for short-time work is 12 months.

Working From Home

Employees are not legally permitted to unilaterally decide to work from home because of fears of being infected with COVID 19, even if work from home is possible. In addition, employers are not legally permitted to order the employee to work from home. However, usually employers and employees mutually agree on home office arrangements. This mutual agreement should be documented in an amendment agreement to the employment agreement and should cover appropriate confidentiality, data protection regulations and work safety, given that statutory accident insurance covers only accidents that are directly related to the actual work performed at home. All private activities at home are excluded, such as walking from a desk to the kitchen or bathroom.

Salary Payment During Absence From Work

An employee who is absent from work without a reason is not entitled to salary payments and can be sanctioned with a formal warning and, in the case of a continued absence, dismissed for cause. If the employee had direct contact with a person infected by COVID-19, the employee must stay home and quarantine for 14 days, during which time the employer continues to pay the employee a salary but is reimbursed through social security insurance. If the employee is infected with COVID-19, the employer must pay the employee regular sick pay for a maximum of six weeks without reimbursement. In addition, an employer cannot legally sanction an employee who is absent from work because the employee must care for a child due to the closure of the child's school or nursery. Due to a recent change in the law, the employer is obliged to continue to pay the salary during such absence for up to six weeks but is reimbursed through social security insurance.

Vacation

An employer cannot order all employees to take vacation while the business is shut down unless a collective bargaining agreement or an agreement with the works council permits such action. Furthermore, employees cannot unilaterally cancel vacation time that an employer has already granted and approved (*i.e.*, employer consent is required).

Medical Information Regarding COVID-19

An employer cannot request medical information from employees or require medical tests, such as taking employees' temperatures, without employee consent. However, in the case of a COVID-19 infection, an exception exists due to an employee's general loyalty obligation to the employer. Specifically, an employee must notify his or her employer about a positive COVID-19 test result so that the employer can take appropriate steps to protect other employees.

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