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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DOL Proposes New Economic Reality Test for Determining Independent Contractor Status

On September 22, 2020, the Department of Labor (DOL) announced a rule for determining a worker's status as an employee or independent contractor under the Fair Labor Standards Act (FLSA). Under the proposal, independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to economically dependent on the potential employer for work. The rule contains two core factors: (1) the nature and degree of the individual's control over the work and (2) the individual's opportunity for profit or loss. If the two factors point to the same classification, there is a substantial likelihood that classification is accurate. In addition, the proposal contains three other factors that may serve as additional guideposts in the analysis, but which are less probative and afforded less weight than the first two factors: (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship between the individual and the potential employer and (3) whether the work is part of an integrated unit of production. The notice of proposed rulemaking will be available for review and public comment for 30 days after it is published in the Federal Register.

Executive Order Sets New Rules for Workplace Anti-Bias Trainings

On September 22, 2020, President Donald Trump issued an "Executive Order on Combating Race and Sex Stereotyping" (Order). The Order prohibits federal contractors with new government contracts as of November 22, 2020, from administering any workplace training "that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." Examples of training topics prohibited by the

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Order include concepts that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously," "members of one race or sex cannot and should not attempt to treat others without respect to race or sex" and "an individual's moral character is necessarily determined by his or her race or sex."

Federal contractors have 60 days from September 22, 2020, to comply, including by revamping any workplace trainings to make them consistent with the Order. Additionally, federal agency contracting offices must prepare a notice pursuant to the Order, which contractors must distribute to labor unions and post in a conspicuous place available to employees and applicants. Contractors that fail to comply with the Order may risk losing their government contractor status.

The Office of Federal Contract Compliance Programs (OFCCP) of the DOL issued guidance on October 7, 2020, to clarify the Order. The OFCCP notes that many types of implicit bias trainings are now prohibited and that the OFCCP will establish a new hotline and probe complaints that such training sessions are taking place.

DOL Revises COVID-19 Paid Leave Regulations in Response to Court Ruling

On September 16, 2020, revised DOL regulations took effect that clarify who qualifies for emergency paid sick leave under the Families First Coronavirus Response Act (FFCRA), in response to a federal judge recently invalidating parts of the prior DOL regulations.

As described in the July 2020 issue of *Employment Flash*, as of April 1, 2020, the FFCRA amended the Family and Medical Leave Act (COVID FMLA) and created the 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 in light of the COVID-19 public health emergency. The first 10 days of COVID FMLA are unpaid, unless the employee otherwise is eligible to receive 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, up to a cap of $200 per day and $10,000 in total.

COVID Paid Sick Leave provides up to 80 hours of paid leave to an employee who is unable to work because he or she has been advised to quarantine or is taking care of an individual who has been advised to quarantine, he or she is experiencing COVID-19 symptoms and seeking a medical diagnosis, or he or she is caring for his or her child whose school or place of care has been closed or is unavailable due to COVID-19. If the employee is on leave because he or she has been advised to quarantine or is experiencing COVID-19 symptoms and seeking a diagnosis, the leave is paid at the employee's regular rate of pay, up to a cap of $511 per day and $5,110 in total. Otherwise, the leave is paid at two-thirds the employee's regular rate of pay, up to a cap of $200 per day and $2,000 in total.

On August 3, 2020, a New York federal judge struck down the following four parts of the DOL's prior regulations relating to COVID FMLA and COVID Paid Sick Leave: (1) the requirement that such leave is available only if an employer has work and is providing work from which leave can be taken (*i.e.*, the employee is not on furlough or there is no business closure); (2) the requirement that employer consent is required for an employee to take intermittent COVID FMLA; (3) the expansive definition of "health care providers" who are excluded from eligibility for COVID FMLA and COVID Paid Sick Leave; and (4) the requirement that documentation and notice be provided to the employer prior to an employee taking COVID FMLA and COVID Paid Sick Leave. *New York v. U.S. Dept. of Labor*, 1:20-cv-03020-JPO (S.D.N.Y. Aug. 3, 2020). The decision of the U.S. District Court for the Southern District of New York states that the DOL's FFCRA regulations overstepped the authority granted to the agency by Congress.

In response, the DOL's updated regulations: (1) reaffirm that an employer must have work available for the employee in order for the employee to be eligible for COVID FMLA and COVID Paid Sick Leave; (2) reaffirm that employer consent is required for intermittent COVID FMLA; (3) narrow the definition of "health care provider" from anyone employed at a health care-related institution or employed at an entity that has contracted with a health care-related institution to an employee whose duties or capabilities are directly related to the provision of health care services or who is "employed to provide diagnostic services, preventive services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care"; and (4) revise the documentation timing requirement, such that documentation must be provided "as soon as practicable, which in most cases will be when the employee provides notice" of the need for COVID FMLA or COVID Paid Sick Leave. The FFCRA is currently in effect through December 31, 2020.

SDNY Strikes Down DOL's Joint Employer Rule

On September 8, 2020, the Southern District of New York found that the DOL's new joint employer rule under the FLSA violates the Administrative Procedure Act (APA), granting in part summary judgment in favor of the plaintiffs — a coalition of 17 states and the District of Columbia — that challenged the rule. As described in the February 2020 issue of *Employment Flash*, on January 16, 2020, the DOL published a final rule revising its joint employer test under the FLSA, which became effective on March 16, 2020. The new rule set forth a four-factor balancing test for determining "vertical" joint employment status under the FLSA (*i.e.*, determining whether the employee's work "simultaneously benefits" the employee's employer, such as a staffing agency, and another person or entity). Specifically, the rule revised the test for a finding of vertical joint employment status by placing the emphasis on the third-party entity's degree of control over the employee and excluding consideration of the employee's economic dependence on a potential joint employer.

The court in *State of New York, et al. v. Eugene Scalia, et al.*, No. 1:20-CV-1689-GHW, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020), struck down the revised rule for vertical joint employer liability, finding that it "conflicts with the FLSA" and is arbitrary and capricious. The court found that the rule improperly applied different tests to determine whether an entity is an "employer" or "joint employer." In doing so, the DOL did not adhere to the text of the FLSA, prior DOL interpretations of the FLSA or case law regarding the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and FLSA. Further, the court found that the rule is arbitrary and capricious because the DOL did not provide sufficient justification for its departure from its prior interpretation related to joint employer status under the FLSA, did not address or consider the conflict between the rule and the manner by which joint employer status is determined under the MSPA, and did not adequately consider the cost to workers. Accordingly, the court set aside the DOL's rule for "vertical joint employer liability" under the APA. However, the court left in place the DOL's revisions to the standard for determining "horizontal" joint employer status (*i.e.*, when an employee is employed by two businesses "sufficiently associated" with respect to the employee).

This decision follows the DOL's rescission of two prior memos in 2017, which had broadened the scope of joint employment liability, placing emphasis on the economic realities of the employment relationship. According to the court in *Scalia*, the DOL rule issued in January 2020, which placed the emphasis on control over an employee, unlawfully narrowed the scope of joint employment liability.

EEOC Updates COVID-19 Guidance

On September 8, 2020, the Equal Employment Opportunity Commission (EEOC) issued revised guidance to address frequently asked employer questions concerning the application of federal equal employment opportunity (EEO) laws to common COVID-19 scenarios. The revised guidance addresses COVID-19 testing and inquiries, sharing employee medical information, reasonable accommodations, and furloughs and layoffs.

Testing and Inquiries

With respect to testing and inquiries, the EEOC's revised guidance reiterates that employers may continue requiring employees entering the workplace to submit to COVID-19 tests. The EEOC recommends reviewing information from the Food and Drug Administration, Centers for Disease Control and Prevention (CDC) or other public health authorities to ensure that administered tests are considered safe, accurate and reliable. The revised guidance also clarifies that, as part of workplace screenings for COVID-19, employers may inquire about whether an employee has COVID-19, whether an employee has symptoms related to COVID-19, whether an employee has had contact with anyone diagnosed with COVID-19 or who may have symptoms related thereto, why an employee has been absent from work and where an employee has traveled. Any employee who refuses to cooperate with an employer's legitimate COVID-19 screening protocol may be barred from entering the workplace. The revised guidance, however, cautions employers about selective employee testing or inquiries, stating that selective tests or inquiries are only permissible when an employer has a reasonable belief based on objective evidence that a particular employee might have COVID-19. In addition, the EEOC's guidance states that employers may not ask employees whether a family member has COVID-19 or COVID-19 symptoms, because this inquiry would violate the Genetic Information Nondiscrimination Act.

Sharing Employee Medical Information

The revised guidance also addresses questions concerning the federal Americans With Disabilities Act of 1990 (ADA) obligation to maintain the confidentiality of employee medical information. Although a COVID-19 diagnosis or COVID-19 symptoms would constitute medical information, the EEOC's guidance clarifies that employees may report such information about themselves or co-workers to a supervisor, and the supervisor may report such information to appropriate employer officials. The EEOC cautions employers to limit the number of individuals who know the name of any employee who tests

positive for COVID-19 or experiences COVID-19 symptoms. The guidance also provides that nothing in the ADA would prevent an employer from attempting to contact trace, so long as the employer does not reveal the identity of the infected or potentially infected employee. Any medical information about an employee involving COVID-19 must be safeguarded to the greatest extent possible, including storing such information separately from regular personnel files.

Reasonable Accommodations

According to the EEOC, employers are permitted to invite employees to request future reasonable accommodations that may be needed when employees are permitted to return to the workplace. Employees also have the option to request an accommodation at a later time. Whenever a request is received, the employer should begin an interactive process with the employer. The revised guidance recognizes that there may be excusable delays during the interactive process due to the pandemic's disruption of normal work routines.

With respect to teleworking, the guidance recommends that employers and employees be creative and flexible in considering whether teleworking employees can be provided the same reasonable accommodations that such employees are provided when working in the workplace. Second, the guidance clarifies that employers who granted telework to employees for the purpose of slowing or stopping the spread of COVID-19 do not automatically have to grant telework as a reasonable accommodation under the ADA when the workplace reopens. However, if an employee has a disability-related limitation that necessitates telework as an accommodation, the employee can perform the essential functions of the job while teleworking and such an accommodation does not cause an undue hardship, then an employer must allow the employee to telework as a reasonable accommodation under the ADA. Third, with respect to employees who requested and were denied telework as an accommodation before the pandemic, the EEOC's guidance says that employers should consider any renewed requests for teleworking and that the employer should consider any temporary telework experience during COVID-19 in determining whether to grant the renewed accommodation request. Fourth, the revised guidance states that older workers may not be treated less favorably based on their age and must be offered flexibilities such as telework that are offered to other comparable workers.

Furloughs and Layoffs

Finally, the revised guidance reiterates that selecting employees for furlough or layoff based on a protected characteristics or in retaliation for engaging in protected EEO activities is prohibited.

DOL Issues Guidance on Reimbursing Delivery Drivers

On August 31, 2020, the DOL issued an Opinion Letter, FLSA2020-12 (Opinion Letter), addressing the reimbursement of expenses incurred by delivery drivers who use their personal vehicles to make deliveries. Pursuant to the FLSA, employees must be paid at least minimum wage for all regular (*i.e.*, nonovertime) hours worked in a workweek, which must be "free and clear." In other words, employees are entitled to at least minimum wage after deductions are made for expenses incurred by the employee that are "primarily for the benefit or convenience of the employer." Such expenses include those resulting from the employee's required use of a personal vehicle.

Prior to the DOL issuing its Opinion Letter, there was uncertainty as to whether employers must reimburse delivery drivers based on the Internal Revenue Service (IRS) annual standard mileage rate, some other methodology or for actual expenses incurred. The Opinion Letter addresses this uncertainty, confirming that employers do not have to reimburse delivery drivers based on the IRS standard rate, nor do they have to reimburse employees for actual expenses. Employers have leeway to use any method for calculating reimbursement that reasonably approximates the actual expenses incurred by the delivery drivers for the benefit of the employer. In short, the Opinion Letter clarifies that the IRS standard rate is one method of approximating actual expenses incurred by a delivery driver for the benefit of the employer, but it is not the only method. Employers are permitted to use a method that approximates expenses at a rate that is lower than the IRS standard rate. Although the DOL was presented with a number of calculation methods for approximating expenses of delivery drivers, the DOL declined to opine on the validity of any method, except to note that a percentage of a delivery driver's net sales is unlikely to provide a reasonable approximation of the delivery driver's expenses.

The DOL also examined whether, in addition to variable costs (such as gas, oil, routine maintenance and repairs, and depreciation value), reimbursements to delivery drivers must include fixed costs (such as car payments, registration fees, license fees and insurance costs not required by the employer). The DOL clarified that employers are expected to reimburse fixed vehicle expenses only if they are incurred by the delivery driver primarily for the benefit of the employer. To illustrate this position, the DOL analogized to employee uniforms, explaining that, when an employer requires a specific uniform be worn by employees, the employer must supply or reimburse such uniform. However, if the employer merely requires "a certain style of dress" (*e.g.*, a button-down shirt of a particular color and black pants), which leaves room for variations based on the preference of the employee, then the employer

need not supply or reimburse such uniform. Accordingly, unless a particular vehicle was required by the employer and used primarily as a "tool of the trade" (*i.e.*, primarily for the benefit of the employer), similar to a specific uniform, the employer would be required to reimburse only the variable costs attributable to the delivery driver's use of the vehicle for the benefit of the employer and not the fixed costs.

Recent NLRB Rulings Allow Employer Policies Limiting Employee Activity

The National Labor Relations Board (NLRB) recently issued decisions upholding employment policies restricting certain employee activity. As noted in the December 2017 issue of *Employment Flash*, the NLRB adopted a new standard of review for employment policies in *The Boeing Co.,* 365 NLRB No. 154 (2017), which standard replaced the NLRB's prior standard established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The NLRB's current standard evaluates: (1) the nature and extent of the potential impact on rights under the National Labor Relations Act and (2) the legitimate justifications associated with the employer's rule. The employment policies that the NLRB has recently upheld under the current standard include: a policy setting forth an expectation that employees be respectful and professional when using social media tools and that employees effectively safeguard the reputation and interests of the employer (*Bemis Company, Inc.*, 370 NLRB No. 7 (2020)); a policy banning employee cellphones on a manufacturing floor and at workstations (*Cott Beverages Inc.*, 369 NLRB No. 82 (2020)); a policy prohibiting employees from linking to an employer's external or internal website from any personal blog (*Shamrock Foods Company*, 369 NLRB No. 140 (2020)); and a policy prohibiting employees from working second jobs and a policy prohibiting participation in illegal slowdowns, strikes or walkouts (*Nicholson Terminal & Dock Company*, 369 NLRB No. 147 (2020)).

Noncompete Law Developments

On August 3, 2020, the Supreme Court of California addressed whether California Business and Professions Code Section 16600 applies to business-to-business noncompete restrictions, and, if so, whether a reasonableness standard applies to the evaluation of whether contractual restraints on business operations are void. 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 *Ixchel Pharma, LLC v. Biogen, Inc.*, the California Supreme Court held that Section 16600 applied in the business context, and that the validity of noncompete restrictions in the business context will be determined by applying a rule of reason. Prior to the Supreme Court's decision in *Ixchel*, no California court had specifically opined on the application of Section 16600 other than in the employment or partnership and LLC context, in which case a noncompete restriction between an employer and employee is *per se* invalid without regard to whether the restraints are reasonable.

On April 8, 2020, in *NuVasive, Inc. v. Day*, 954 F.3d 439 (1st Cir. 2020), the U.S. Court of Appeals for the First Circuit upheld a Delaware choice of law provision to enforce a nonsolicit in an employment agreement signed by an employee located in Massachusetts. Specifically, the court rejected the employee's argument that the Massachusetts Noncompetition Agreement Act (Act) represents a fundamental Massachusetts policy that would be violated by the application of Delaware law. The First Circuit found it relevant that the employee signed the agreement prior to the effective date of the Act and the nonsolicit at issue fell outside the Act, which expressly excludes nonsolicits from its scope. It is unclear whether and in which circumstances the First Circuit would uphold a choice of law provision designating the law of a state other than Massachusetts in restrictive covenant agreements entered into with employees located in Massachusetts after the effective date of the Act (October 1, 2018), despite the text in the Act stating that "[n]o choice of law provision that would have the effect of avoiding the requirements of this section will be enforceable if the employee is ... a resident of or employed in Massachusetts at the time of his or her termination of employment."

As previously reported in the February 2020 issue of *Employment Flash*, in January 2020 the 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. Following this workshop, the FTC issued a request for public comment and extended the deadline for public comment on potential rulemaking to March 11, 2020. On April 13, 2020, the FTC, in a joint statement with the Department of Justice, warned employers that they are "on alert" for anti-competitive conduct and threatened enforcement action against employers using "anticompetitive non-compete agreements." The FTC has yet to issue a proposed rule restricting the use of noncompete agreements. In a letter dated July 21, 2020, Sens. Elizabeth Warren, D-Mass., and Chris Murphy, D-Conn., urged the FTC to finalize this rule and criticized the FTC for its lack of movement on this front, noting that the COVID-19 pandemic has "exacerbated the problems created by non-compete agreements." The senators also appealed to the FTC to take emergency action to limit the enforcement of noncompete agreements by employers during the current COVID-19 pandemic and thereafter.

New York City's Earned Sick and Safe Time Act Amended To Align With State's Paid Sick Leave Law

On September 28, 2020, New York City Mayor Bill de Blasio signed into law an amendment to New York City's Earned Sick and Safe Time Act (ESSTA) that updated its requirements and aligned it with the state's Paid Sick Leave Law (PSLL). Both ESSTA and PSLL became effective on September 30, 2020. However, employees are not entitled to use the additional leave provided under the laws until January 1, 2021.

The amendment to ESSTA removed the requirement that employees work at least 80 hours per year within the city limits in order to be eligible for paid sick and safe time, removes any safe and sick leave waiting time requirements and allows employees to use safe and sick leave as it is accrued. Additionally, if employers require employees to provide medical documentation for taking more than three consecutive workdays of leave, the ESSTA now requires employers to reimburse employees for expenses related to obtaining such documentation. Employers must include on employees' paystubs (or other written documentation issued each pay period) the amount of safe and sick time accrued and used during the pay period, and the total balance of accrued safe and sick time. The amendment states that employee notices of rights provided pursuant to the ESSTA must be provided to each employee at the commencement of their employment. For those already employed prior to September 30, 2020, notice must be provided within 30 days of such date.

In addition, effective January 1, 2021, employers with 100 or more employees must provide each employee with up to 56 hours of paid leave annually, and employers with four or fewer employees and a net income of at least $1 million must provide each employee with up to 40 hours of paid sick leave annually.

The amendment expands the definition of "adverse action" in the ESSTA's anti-retaliation provision. The amendment adds that the New York City corporation counsel may initiate investigations and civil actions for ESSTA violations, in which a civil penalty of up to $15,000 may be imposed if the employer has engaged in a pattern or practice of violations. Additionally, employees affected by the employer's policy or practice of not providing or allowing the use of earned time may be awarded relief of up to $500 per employee.

California Expands Family and Medical Leave

California's SB 1383, signed into law by Gov. Gavin Newsom on September 17, 2020, and effective on January 1, 2021, requires employers with five or more employees to provide 12 weeks of job-protected unpaid time off during any 12-month period to bond with a child or care for a sick relative, thus significantly expanding protections for California employees. Previously, California employers were not required to provide family care and medical leave under the California Family Rights Act (CFRA) to employees at worksites with fewer than 50 employees within a 75-mile radius. Similarly, under California's New Parent Leave Act, employers were not required to provide leave to bond with a new child to employees at worksites with fewer than 20 employees within a 75-mile radius. SB 1383 not only expands protections for employees of smaller businesses but also broadens the definition of "family member" for purposes of family care leave to include siblings, grandparents, grandchildren and adult children. (Previously, an employee could only seek leave to care for a child, parent, spouse or domestic partner.)

In addition, under SB 1383, if an employer employs both parents of a child, each parent is entitled to up to 12 weeks of leave for baby bonding, as compared to a combined total of 12 weeks of leave for both parents under previous law. Furthermore, SB 1382 requires employers to provide up to 12 weeks of unpaid job-protected leave during any 12-month period due to a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the U.S. armed forces. Lastly, SB 1383 prohibits an employer from refusing to reinstate "key employees," which the CFRA previously permitted in certain circumstances. As with the CFRA, employees seeking leave under SB 1383 must meet eligibility requirements in order to qualify for family and/or medical leave (*e.g.*, 12 months of service and a minimum of 1,250 hours worked in the previous 12-month period).

California Expands Employer Obligations for Potential Exposure to COVID-19 in the Workplace

California's AB 685, signed into law by Gov. Gavin Newsom on September 17, 2020, and effective January 1, 2021, requires that within one business day of receiving notice of potential exposure to COVID-19 in the workplace, employers: (1) provide written notice to all employees who were at the worksite of the potentially exposed person; (2) provide written notice of the same to the union representative (where applicable) of those employees; (3) provide all potentially exposed employees and their union representatives with information about federal, state or local COVID-19-related benefits and protections; and (4) notify employees and their union representatives (where applicable) of the employer's disinfection and safety plan pursuant to CDC guidelines. AB 685 requires employers to notify local public

health officials within 48 hours if the number of employee cases of COVID-19 qualifies as an outbreak, which the California Department of Public Health defined as "three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period."

Under AB 685, an employer's notice obligations are triggered if: (1) a public health official or licensed medical provider notifies the employer that an employee was exposed to a "Qualifying Individual" (as defined below); (2) the employer is notified that an employee is a Qualifying Individual; (3) the employer's own testing protocol reveals that an employee is a Qualifying Individual; or (4) a subcontracted employer notifies the employer that a Qualifying Individual was on the employer's worksite. A Qualifying Individual is an employee who has: (1) a laboratory-confirmed case of COVID-19; (2) a positive COVID-19 diagnosis from a licensed health care provider; (3) a COVID-19-related order to self-isolate provided by a public health official; or (4) died due to COVID-19. Employers must maintain confidential records of their written notifications of COVID-19 potential exposure or outbreaks for at least three years. AB 685 makes it unlawful to retaliate against an employee for disclosing a positive COVID-19 test, diagnosis or order to quarantine/self-isolate.

AB 685 empowers the California Division of Occupational Safety and Health (CAL-OSHA) to shut down and/or bar entry into an employer's worksite if it believes that exposure to COVID-19 at the employer's worksite poses an imminent hazard to employees. According to CAL-OSHA, a hazard is "imminent" if: (1) there is "a threat of death or serious physical harm"; (2) for a health hazard, there is "a reasonable expectation that toxic substances are present and exposure to them will shorten life or cause significant reduction in physical or mental efficiency"; and (3) the threat is "imminent or immediate." The AB 685 provision empowering CAL-OSHA with the ability to shut down worksites will be automatically repealed effective January 1, 2023.

California Law Expands COVID-19 Supplemental Paid Sick Leave

On September 9, 2020, California Gov. Gavin Newsom signed into law AB 1867, which takes effect immediately and expands paid sick leave benefits for California workers affected by COVID-19. AB 1867 offers broader coverage for employees than the federal FFCRA passed by Congress in March 2020, which generally requires companies with fewer than 500 employees to provide two weeks of paid sick leave to employees affected by COVID-19. AB 1867 includes employers with 500 or more employees, as well as emergency responders and health care providers, whom employers have the discretion to exempt from the FFCRA's emergency paid sick leave provisions.

Under the COVID-19 supplemental paid sick leave provision of AB 1867, a covered hiring entity is any private entity that employs 500 or more employees in the United States, as well as an entity, "including a public entity, that employs health care providers or emergency responders ... and that has elected to exclude such employees from emergency paid sick leave under the federal [FFCRA]." A covered worker is anyone employed by a covered hiring entity who leaves his or her residence to perform work for the hiring entity. AB 1867 entitles workers to COVID-19 supplemental paid sick leave if the worker: (1) is subject to a federal, state or local quarantine or isolation order related to COVID-19; (2) is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or (3) is prohibited by the hiring entity from working due to health concerns related to the potential transmission of COVID-19.

Workers are entitled to 80 hours of supplemental paid sick leave if the worker is considered "full time" or was scheduled to work, on average, at least 40 hours per week for the two weeks preceding the date the worker used COVID-19 supplemental paid sick leave. If the worker does not meet these criteria, the worker is entitled to a lesser amount of paid sick leave based on the number of hours normally worked.

Covered workers are entitled to receive supplemental paid sick leave at a pay rate equal to the highest of the employee's regular rate of pay for the last pay period, or the state or local minimum wage rate, up to a cap of $511 per day, or $5,110 in the aggregate, to each covered worker. A hiring entity may not require a covered worker to exhaust any other paid or unpaid leave or paid time off in order to use the COVID-19 supplemental paid sick leave.

AB 1867 requires the California labor commissioner to publish a model notice relating to COVID-19 supplemental paid sick leave for covered workers, which employers must post. (The notice has been published.) The bill permits electronic notice in lieu of postings for covered workers that do not frequent the workplace. The bill incorporates the Healthy Workplace Healthy Family Act of 2014 in several respects, including that employers must provide notice of the worker's available COVID-19 supplemental paid sick leave on the worker's wage statement (or in a separate writing) each pay period. Employers also must retain, for three years, records documenting hours worked and paid sick time accrued and used by each worker.

COVID-19 supplemental paid sick leave for covered workers will be provided through December 31, 2020, or until the expiration of the federal FFCRA's emergency paid sick leave requirements, whichever is later.

The bill permits the labor commissioner to enforce the paid sick leave requirements. If it is determined that a violation has occurred, the labor commissioner "may order any appropriate relief, including reinstatement, backpay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty."

AB 1867 includes handwashing requirements and COVID-19 supplemental paid sick leave specifically for food sector workers, and creates a small employer family leave mediation pilot program.

California Passes New Pay Data Law

Modeled after the now defunct EEO-1 Component 2 data reporting requirement, the California Legislature recently passed SB 973, which would require California employers with 100 or more employees to submit annual pay data reports to the state's Department of Fair Employment and Housing no later than March 31, 2021, and annually thereafter. Gov. Gavin Newsom signed the bill into law on September 30, 2020.

Under SB 973, California employers' annual reports would include the following information: (1) the number of employees by race, ethnicity and sex broken down into nine specified job categories; (2) the number of employees by race, ethnicity and sex whose annual earnings fall within specified pay bands; (3) the total number of hours worked by each employee counted in each pay band during the reporting year; (4) for employers with multiple establishments, a report for each establishment and a consolidated report that includes data on all employees; and (5) any optional clarifying remarks regarding the information provided. For purposes of calculating the number of employees by job category and determining their annual earnings, a California employer would select a single pay period between October 1 and December 31 of the reporting year, take a snapshot of that pay period that counts all individuals employed in each of the nine specified job categories, and report the IRS Form W-2 total earnings for each such individual employed as of the snapshot pay period (irrespective of whether such individual worked the entire year). SB 973 also authorizes state agencies to utilize the annual pay data reports to identify wage patterns and allow for targeted enforcement of state equal pay and anti-discrimination laws, when appropriate.

California Amends and Expands Exemptions to California AB 5

The California Legislature recently proposed several amendments to AB 5 to exempt certain professions and relationships from California's ABC test for whether a worker is properly classified as an independent contractor. One of those amendments, AB 2257, was signed into law by Gov. Gavin Newsom on September 4, 2020, and took effect immediately.

AB5 as drafted contains an exemption for a bona fide business-to-business contracting relationship. AB 2257 expands this business-to-business exemption. It adds "an individual acting as a sole proprietor" to the definition of "business service provider" and also adds a public agency or quasi-public corporation to the definition of "contracting business." In addition, AB 2257 modifies AB 5's existing exemption for the relationship between a referral agency and service provider with respect to business licenses and business tax certifications. AB 2257 also adds additional employment categories to the definition of "referrals for service."

The original AB 5 business-to-business and referral agency exemptions did not apply to individual workers; however, AB 2257 expands these exemptions to individual workers. AB 2257 revises the exemption for services provided by still photographers, photojournalists, freelance writers, editors or newspaper cartoonists. AB 2257 adds a new exemption for "the relationship between two individuals wherein each individual is acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract at the location of a single-engagement event," subject to certain conditions. AB 2257 exempts several additional occupations, including related to the music industry.

App-Based Ride Services Must Reclassify Drivers as Employees

On August 10, 2020, the San Francisco Superior Court granted the state of California a preliminary injunction to make app-based ride hailing companies reclassify their independent contractor drivers as employees. The court focused on the allegation that the drivers are not performing work that is outside the usual course of the companies' business, and as such, should be reclassified as employees, extending sick leave and minimum wage protections for the workers. A California Court of Appeals granted the companies an emergency stay and is now reviewing the companies' appeal to overturn the trial court's decision.

On September 18, 2020, in a related federal court lawsuit, the U.S. District Court for the Central District of California denied claims brought by Uber, Postmates and two individual drivers alleging that California's AB 5 is unconstitutional. *Olson, et al. v. State of California, et al*., No. 2:19-cv-10956-DMG-RAO (C.D.C.A. Sept. 18, 2020). According to the ruling, California lawmakers had a legitimate state interest in enacting AB 5, and although AB 5 exempts other industries from its "ABC" worker classification test, there was no evidence to suggest that state lawmakers unfairly singled out gig economy companies in excluding them from AB 5's exemptions. The district court noted that drivers would still have the option of working as part-time employees, rejecting the argument that AB 5 unconstitutionally denies drivers the right to pursue their chosen occupation as well as the often desirable flexibility and autonomy that comes with working as an independent contractor. The court allowed the plaintiffs to amend their equal protection, due process and contracts clause claims by October 9, 2020.

International Spotlight

France

Long-Term Partial Activity Mechanism Allows Employers To Reduce Workers' Hours

Long-Term Partial Activity (LTPA) is a mechanism, established by Decree No. 2020-926 of July 28, 2020 (Decree), to help companies facing a long-term reduction in their activity to cope with the impact of COVID-19 by allowing them to reduce their employees' working hours without their consent. Employees whose hours are reduced will receive partial compensation from the employer for nonworked hours, and the employer will, in turn, receive government indemnities covering part of the payments made to the employees. Employers must make certain commitments with the goal of preserving employment. The Decree does not specifically define such commitments, but the French government has indicated that it can consist of training programs, maintaining employment or restoring the company's economic situation during the LTPA.

How Can Employers Implement LTPA?

LTPA is available to all companies encountering a long-term reduction in activity due to COVID-19. The Decree does not define the notion of "long-term reduction," and each employer must justify the existence of a long-term reduction to the French Labor Administration. The total reduction in an employee's working hours may not exceed 40% of the legal working hours per employee over the total duration of the LTPA agreement. In exceptional cases, the reduction may not exceed 50% of the legal working hours. The LTPA agreement can be established for a maximum of 24 months over a period of 36 consecutive months. LTPA requires that a collective bargaining agreement be negotiated and entered into with unions and describe how LTPA will work within the company by at least determining, for instance, the duration of LTPA within the company, the reduction in working hours, the activities and employees to which LTPA applies, and job preservation commitments. The LTPA agreement also determines the manner by which the works council is informed of the process as well as continuously informed of the manner in which the agreement is applied over time, and at least every three months. The employer must submit the LTPA agreement to the Labor Administration for review and approval. Failure to respect the commitments contained in the LTPA could result in the Labor Administration ceasing payments to the employer or requiring the employer to reimburse the government indemnities it received if an employer implements collective redundancies (the dismissal of 10 or more employees within a 30-day period) despite having committed not to do so.

What Are the Allowance Amounts?

An employee receives an allowance, paid by the employer, corresponding to 70% of his or her hourly gross wage with a fixed minimum of €8.03 per hour, up to a maximum of 4.5 times the minimum hourly wage (approximately €32 per hour and €4,850 per month).

The employer receives the following allowances:

- For agreements submitted before October 1, 2020, 60% of the employee's gross hourly wage with a fixed minimum of €7.23 per hour, up to a maximum of 4.5 times the minimum hourly wage (approximately €27.5 per hour and €4,154 per month).
- For agreements submitted after October 1, 2020, 56% of the employee's gross hourly wage with a fixed minimum of €7.23 per hour, up to a maximum of 4.5 times the minimum hourly wage (approximately €26 per hour and €3,877 per month).

In practice, an employer must use its own funds to pay either 10% or 14% of the indemnity owed to an employee.

Are Any Changes to LTPA Anticipated?

As of November 1, 2020, LTPA is expected to be passed into law, subject to any adjustments in favor of industry sectors and companies most affected by COVID-19.

Implementation of Collective Redundancies

Collective redundancies are an administrative process through which a French employer asks the French Labor Administration whether it can dismiss 10 or more employees. The amount of control the Labor Administration has on the implementation of a collective redundancy depends on whether the employer negotiated a collective bargaining agreement with unions that establishes the conditions under which the collective redundancy can be implemented (*i.e.*, a social plan detailing the employer's measures to limit the impact of the collective redundancies on employment). If it did, the Labor Administration's powers are limited, but if the employer imposed these conditions unilaterally, without union consent, the Labor Administration's powers are more expansive. In the latter case, the French Labor Authority can refuse to authorize a collective redundancy if the Labor Administration considers the measures in the employer's social plan insufficient.

In addition, collective redundancies can be implemented in France only if the company can justify that the economic rationale of the project falls within a legally defined list of cases that permit redundancies, such as safeguarding the competitiveness of the company or reorganizing the company to prevent the impact of technological changes. Implementing a collective redundancy in France requires advance preparation because they require that the relevant works council be consulted, and the consultation process lasts between two to four months, depending on the number of employees deemed redundant. Employees can challenge their dismissal if the rationale is either not sufficiently precise or does not fall within one of the legally defined cases permitting redundancies.

For more on collective redundancies, see our September 8, 2020, client alert, "Questions and Answers Regarding Collective Redundancies in France."

Germany

Short-Time Work Regulations Extended to End of 2021

Short-time work, or the temporary reduction of the regular working time, helps employers reduce labor costs and avoid layoffs. The German Federal Employment Agency partially compensates for the gap in remuneration that employees suffer from reduced working time. Due to the COVID-19 pandemic, the German government modified the rules for applying for short-time work benefits in March 2020 and raised the level of government support by 10% (to 70-77% after four months of short-time work and to 80-87% after seven months of short-time work, in either case subject to a maximum net income basis of approximately €4,300). This increase was initially in effect until December 31, 2020, but has since been extended by 12 months, until December 31, 2021.

Legal Entitlement to Home Office Work Under Consideration

German law does not provide for a legal entitlement to work from home. Because many employees have worked and continue to work from home, the German government is considering implementing a legal entitlement for employees to work from home. According to recently published information, the Labor Department plans to implement a legal entitlement for employees to apply for 24 work-from-home days during a calendar year, which application the employer can only refuse due to urgent organizational reasons. However, it is uncertain whether the plans will be implemented because there are opposing opinions within the German federal government regarding the home office initiative and the Labor Department cannot move forward without the consent of the entire government.

Prohibiting the Hiring of Temporary Staff During Labor Strike Deemed Constitutional

German law prohibits employers from mitigating the impact of a labor strike by employing temporary workers during the strike. In a decision dated June 19, 2020 (Case # 1 BvR 842/17), the German Federal Constitutional Court held that such prohibition does not violate the constitutional rights of an employer or a temporary worker, because it is a legitimate tool to ensure the effectiveness of a strike.

Appellate Court Declares Instruction To Record Work Time by Fingerprint Invalid

On June 4, 2020, the Appellate Labor Court Berlin-Brandenburg (Case # 10 Sa 2130/19) held that an employee can refuse the employer's instruction to register the beginning and end of a workday with a fingerprint scanner. The court classified the fingerprint as biometric data according to Sec. 9 of the European Union's General Data Protection Regulation. This provision allows the processing and use of such data only in exceptional cases; the court did not recognize registering a workday as one.

UK

Considerations for Continuing To Work From Home During COVID-19

As it becomes clear that working from home was not just for the initial period of lockdown but is likely to continue for at least the duration of the COVID-19 pandemic, U.K. employers that have not already done so should consider putting in place a more fulsome work-from-home policy. Doing so will provide an effective way to address important considerations for managing employees who continue to work remotely, including to ensure compliance with the employer's health and safety obligations, and to maintain the security of confidential and commercially sensitive information in the home environment. Employers should also consider how to manage the tax and employment law issues that can result from employees working remotely in a foreign jurisdiction for long periods of time.

For more, see our September 10, 2020, client alert.

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