Employment Flash

Skadden

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I-9 Inspection Requirement Resumes

In March 2020, the Department of Homeland Security (DHS) announced that it would temporarily excuse employers and employees whose workplaces were operating remotely due to the COVID-19 pandemic from the physical presence requirements of the Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act. Since then, employers taking physical proximity precautions because of COVID-19 have not been required to review an employee's work authorization documentation in the employee's physical presence if such employee is working exclusively in a remote setting. DHS guidance has instead permitted employers to inspect such documentation by video, fax or email, provided that they (i) obtain, inspect and retain copies of the required documents within three business days; (ii) keep written documentation of their remote onboarding and teleworking policies; and (iii) complete in-person inspections of relevant documents upon the eventual return to the workplace.

Notably, this stay on the in-person inspection requirement has only applied to employers and workplaces operating entirely remotely due to the COVID-19 pandemic and is set to expire on August 31, 2021. Accordingly, as in-person operations resume and employees begin to physically report to work on a regular, consistent or predictable basis, employers should be prepared to physically inspect Form I-9 identity and employment eligibility documentation for those employees temporarily exempt from the otherwise applicable physical inspection requirement. Specifically, in the case of employees onboarded using remote verification, employers must conduct an in-person verification of identity and employment eligibility documentation within three business days and add the phrase "documents physically examined," along with the date of physical inspection, to the additional information field under Section 2 (or Section 3 as appropriate) of the Form I-9.

IRS Issues Guidance Interpreting COBRA Premium Eligibility Under ARPA

As reported in the June 2021 edition of the *Employment Flash*, the American Rescue Plan Act of 2021 (ARPA) requires employers to pay 100% of the premiums required under the Consolidated Omnibus Budget Reconciliation Act (COBRA) for eligible employees who are enrolled, or who will enroll, in COBRA continuation coverage from April 1, 2021, through September 30, 2021. To be eligible for this COBRA premium, the former employee must have lost coverage under an employer-sponsored plan as the result of a reduction in hours or an involuntary termination of employment. The Internal Revenue Service (IRS) recently issued guidance (Notice 2021-31) regarding the application of the COBRA premium that answers many questions left open by the ARPA, including clarification regarding what constitutes a "reduction in hours" and an "involuntary termination."

The IRS guidance interprets "reduction in hours" broadly to include both voluntary and involuntary reductions in hours, along with furloughs (defined as "a temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption of hours (for example, due to an expected business recovery of the employer) such that the employer and employee intend to maintain the employment relationship"). A furlough counts as a "reduction in hours" regardless of whether the employer initiated the furlough or the employee sought participation in the furlough program. Also included in the broad-sweeping interpretation of "reduction in hours" are lawful work stoppages, as long as the employer and employee intend to maintain the employment relationship at the start of any such lawful work stoppages. The IRS guidance describes lawful work stoppages as either "a lawful strike initiated by employees or their representatives or a lockout initiated by the employer."

The IRS interpretation of "involuntary termination" is similarly broad. According to the IRS guidance, an "involuntary termination" generally consists of: (i) a "severance from employment"; (ii) due to the "independent exercise of the unilateral authority of the employer to terminate the employee's employment, other than due to the employee's implicit or explicit request"; (iii) "where the employee was willing and able to continue performing services." This includes employee-initiated employment terminations for "good reason" — *i.e.*, "where an employer action results in a material negative change in the employment relationship for the employee analogous to a constructive discharge." Importantly, the IRS guidance indicates that it will consider all facts and circumstances when making a determination about whether a termination is "involuntary." In other words, simply agreeing with an employee to designate a termination as a "resignation" or "voluntary" or even "retirement" will not allow employers to avoid the COBRA premium if, under the full facts and circumstances, the employee's employment would have still been terminated absent such agreement with respect to designation.

To further clarify its expansive interpretation of "involuntary termination," the IRS guidance explains that: (i) a termination of employment for cause would qualify as an involuntary termination unless the "cause" involved gross misconduct by the employee (ii) a termination of employment resulting from the employer's failure to renew an employment contract would be an involuntary termination unless the parties understood, at all times, that the contract was for a set time and would not be renewed and (iii) an involuntary termination includes an employee's participation in a "window program" (*i.e.*, a program where severance is offered to an employee to terminate employment within a specified period of time).

Executive Order Set To Restrict Noncompete Agreements

During his presidential campaign in fall of 2021, U.S. President Joe Biden vowed to "work with Congress to eliminate all noncompete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets." During his campaign, President Biden issued a "Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions," in which he argued that noncompete agreements drive down wages by inhibiting workers' ability to move to better-paying jobs. President Biden is now fulfilling his promise. On July 9, 2021, he issued an "Executive Order on Promoting Competition in the American Economy," which directs federal agencies to implement 72 different initiatives intended to promote competition across the American economy. These initiatives address competition in the labor, health care, agriculture, internet services, technology, and banking and consumer finance markets. Among other effects, the initiatives are intended to make changing jobs easier, lower prescription drug prices, save Americans money on their internet bills, facilitate consumers' ability to secure refunds from airlines, reduce costs to repair items, remove obstacles to switching banks, empower family farmers and increase opportunities for small businesses. A key element in the executive order aims to "curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." Essentially, President Biden is encouraging the Federal Trade Commission to ban or limit noncompete agreements.

During an address at the signing of the order, President Biden called noncompete agreements "ridiculous" and noted that they are implemented to keep wages low, rather than to protect the legitimate interests of the employer. Government data estimates that roughly half of private sector businesses require at least some of their employees to enter noncompete agreements, affecting anywhere between 36 to 60 million workers. A survey conducted by the Economic Policy Institute found that almost 30% of establishments offering an average hourly wage below $13 require noncompete agreements for all their workers. Although no rules have been promulgated regarding the enforceability of noncompete agreements on a federal level, California, North Dakota and Oklahoma have already banned most employment-based noncompete agreements, and close to a dozen states prohibit their use with low-wage workers.

DOL Proposes 30-Minute Cap for Tipped-Wage Side Work

On June 21, 2021, the U.S. Department of Labor (DOL) proposed a new regulation that would limit the circumstances under which an employer may pay nonexempt workers who earn tips a lower minimum wage. Under the DOL's new proposed regulations, anyone who spends more than 30 minutes of uninterrupted time per each working hour on side work that "directly supports" tip-producing activity must be paid a standard federal minimum wage of $7.25. Duties that directly support tip-producing activity include cleaning and setting tables, toasting bread, making coffee, rolling silverware and filling salt shakers. The proposal also reinstates the "80/20" Rule, which allows employers to pay a tipped employee a minimum wage as low as $2.13 per hour, with the assumption that tips will carry the employee's pay to standard minimum wage, as long as they can show that no more than 20% of the tipped employee's time was spent performing tasks that directly support allegedly tip-generating duties. The proposal does not, however, address a related portion of the now outdated final rule that clarifies willful violations and heightened penalties.

U.S. District Judge Upholds Hospital's Worker Vaccine Mandate

On June 12, 2021, U.S. District Judge Lynn N. Hughes dismissed a suit brought by 117 unvaccinated employees from Houston Methodist Hospital challenging the hospital's mandatory vaccine policy. This decision is significant as it is the country's first federal ruling on vaccine mandates.

The employees filed suit in late May of 2021, claiming wrongful termination in violation of public policy. The employees argued that Houston Methodist Hospital is unlawfully forcing its employees to be injected with one of the currently available vaccines or be fired.

In a five-page order, Judge Hughes said that the plaintiffs, led by Jennifer Bridges, were wrong to argue that the currently available COVID-19 vaccines are dangerous, and concluded that public policy supports vaccination efforts. The court noted that Ms. Bridge's wrongful termination claim fails because Texas law only protects employees from being terminated for refusing to commit an illegal act, and receiving a COVID-19 vaccine is not an illegal act. The court also pointed to the Equal Employment Opportunity Commission guidance, which states that employers can require employees be vaccinated against COVID-19, subject to reasonable accommodations for employees with disabilities or sincerely held religious beliefs that preclude vaccination.

In addition, the court found that Ms. Bridge's public policy argument fails because she misconstrues a federal law which does not apply to private employers, like the hospital in this case. Further, the court clarified that Ms. Bridges was not coerced into receiving the COVID-19 vaccine since she could freely refuse the vaccine and work somewhere else.

This decision may give reluctant employers reassurance in implementing vaccine mandates for employees in the future. The court's ruling indicates that requiring employees to receive the COVID-19 vaccine is not an illegal act, and public policy supports such inoculation.

New York Publishes Guidance on Recent Amendments to Criminal Background Check Inquiries

On July 15, 2021, the New York City Commission on Human Rights (NYCCHR) issued updated guidance on the New York City Fair Chance Act (FCA), also known as the "Ban the Box" law, which took effect on July 29, 2021. The FCA, which was enacted in 2015 to prohibit discrimination based on prior arrests or criminal records, bans a prospective employer's inquiry into an applicant's criminal history until after a conditional offer of employment is made. As of July 29, 2021, a significant amendment affects this order of review for preemployment screening information, posing complicated compliance issues for employers who wish to consider an applicant's criminal history.

As amended, the FCA narrowly states that a conditional offer of employment can only be revoked under certain conditions. One of these conditions is if the employer bases its decision on "other information" the employer could not have reasonably known before the conditional offer (for example, if the employer can show that, based on the new information, it would not have made the offer regardless of the results of the criminal background check). In other words, prospective employers who rescind conditional job offers must demonstrate that they would not have made the offer regardless of the applicant's criminal history.

The NYCCHR guidance clarifies that these grounds for rescission of a conditional offer effectively require employers to implement a two-tiered screening method, whereby (i) all noncriminal preemployment screenings, such as a review of the applicant's previous employment history, must be completed and passed by the applicant before a conditional offer of employment is made; and (ii) only after making a conditional offer employment may prospective employers request and review the applicant's criminal history.

The guidance tackles challenges that potential employers will likely encounter as a result of this two-tiered screening process. For example, the NYCCHR expects employers to work with consumer reporting agencies to procure separate noncriminal and criminal background check reports. When employers are unable to obtain separate background checks, or for those who otherwise find a "substantial impediment" to obtaining two separate reports, employers must implement a system to "internally segregate" the criminal record from the noncriminal record in order for the decision-maker to remain neutral until after giving the conditional job offer. To avoid other potential difficulties, the guidance advises prospective employers not to ask about an applicant's criminal background while seeking their authorization for a background check before extending a conditional offer. Specifically, the guidance advises avoiding the words "background check," in favor of terms such as "consumer" or "investigative" report.

Oregon Senate Bill 169 Imposes Additional Restrictions on Noncompetition Agreements

Oregon Revised Statute 653.295 (ORS 653.295) currently provides that a noncompete contract is "voidable and may not be enforced by a court" unless the following conditions are met: (i) the employer advises the employee in a written employment offer at least two weeks before the first day of employment that a noncompetition agreement is required, or the noncompetition agreement is executed upon a bona fide advancement; (ii) the employee performs predominantly intellectual, managerial or creative tasks, exercises discretion and independent judgment, and is exempt from Oregon overtime laws; (iii) the employer has a protectable interest, such as the employee having access to trade secrets or competitively sensitive confidential business information; (iv) the employee makes more than the median family income for a family of four as determined by the U.S. Census Bureau; and (v) the duration of the noncompetition agreement does not exceed eighteen months.

Oregon S.B. 169, which is set to take effect on January 1, 2022, will significantly alter ORS 653.295, further restricting the ability of Oregon employers to enter into noncompete agreements with their employees. First and foremost, noncompetition agreements that don't meet the requirements of the law will no longer be voidable, but void. This means that the burden will no longer fall on employees to seek to void noncompete agreements they believe violate the law. Rather, such agreements will automatically be null and void regardless of employee inaction. S.B. 169 also decreases the maximum length of a noncompetition restricted period from eighteen to twelve months. Finally, it changes the minimum income threshold necessary to enter into a noncompete agreement to $100,533 (adjusted annually for inflation).

California Trial Court Strikes Down Prop 22 Exemptions for App-Based Drivers From Labor Regulations

On August 20, 2021, in a decision with potentially far-reaching consequences for ride-sharing companies and other companies that utilize app-based drivers, the Alameda County Superior Court issued an order nullifying Proposition 22 (Prop 22) — a 2020 initiative statute that categorically classified app-based drivers as independent contractors for purposes of California labor law (*Castellanos v. California*, No. RG21088725 (Cal. Super.)). In *Dynamex Operations West, Inc. v. Superior Court* (4 Cal. 5th 903 (2018)), the California Supreme Court adopted narrow standards restricting workers who may be classified as independent contractors rather than as employees. In a 2019 law known as Assembly Bill 5 (AB-5), the California Legislature codified the *Dynamex* standards and expanded their application to most industries statewide. Under AB-5, courts held that app-based drivers, such as drivers for ride-sharing and food delivery services, could not be classified as independent contractors (see *People v. Uber Techs., Inc.*, 56 Cal. App. 5th 266 (2020)). In response to *Dynamex* and AB-5, the ride-sharing industry (among others) sponsored Prop 22, which categorically exempted app-based drivers from most facets of California's labor regulations, and instead adopted a unique series of labor and wage policies specific to app-based drivers, including an earnings floor, limits on working hours, health care subsidies and occupational insurance benefits. The voters overwhelmingly approved Prop 22 in the November 2020 general election after the most expensive ballot measure campaign in state history. After Prop 22 took effect, a group of plaintiffs, including the Service Employees International Union, challenged several of Prop 22's provisions as inconsistent with the California Constitution. In August 2021, Judge Frank Roesch of the Alameda County Superior Court sustained three of those challenges and issued a writ of mandate striking down Prop 22 in its entirety.

First, the court agreed with the plaintiffs that Prop 22's central provision defining app-based drivers as independent contractors (Section 7451) unconstitutionally diminishes the California Legislature's power to establish a workers' compensation system by removing app-based drivers from the workers' compensation system via a statute that the legislature cannot repeal without the consent of the voters.

Second, the court partially sustained the plaintiffs' challenge to a provision of Prop 22 that allows the California Legislature to amend Prop 22 with only a 7/8 supermajority in each chamber. The court construed Prop 22's supermajority requirement as only applying to legislative amendments that are not backed by a subsequent referendum.

Third, the court agreed with the plaintiffs that Prop 22's provision prohibiting the California Legislature from adopting any amendment that would allow app-based drivers to collectively bargain is unconstitutional in two respects:

- The court ruled that a legislative act allowing collective bargaining would not actually amend Prop 22's provisions or conflict with its purposes, and therefore the provision was an invalid restriction on the legislature's authority.
- Prop 22 does not otherwise address collective bargaining, and its provision disabling the legislature from allowing app-based drivers to collectively bargain violates the constitutional rule that ballot measures can only address a single subject.

Ordinarily, when a court finds certain provisions or applications of a ballot measure unconstitutional, it annuls the offending provisions or applications and allows the rest of the measure to stand. However, Prop 22's proponents included a highly unusual severance provision stating that "if any … application of Section 7451 … is for any reason held to be invalid," then Prop 22 is void in its entirety (Bus. & Prof. Code § 7467(b)). Because the court found that Section 7451 could not apply to California's workers' compensation regime, it applied Prop 22's severance provision to strike down the entire law.

If the court's decision is not stayed or reversed on appeal, app-based drivers may immediately become subject to state wage, hour, overtime and workers' compensation rules. The court's decision adds considerable uncertainty to a sizable industry that thought its core rules had been settled by Prop 22's passage. Regardless of Prop 22's ultimate fate, working conditions for app-based drivers seem likely to remain unsettled in the near term.

California Court Rejects Gig Economy Companies' Renewed Bid to Block AB-5

In a July 2021 decision, a federal judge upheld as constitutional California Assembly Bill No. 5 (AB-5), a state law that extends employment protections to workers previously classified as independent contractors (see our September 16, 2019, client alert "California Passes Landmark Bill Restricting Classification of Contract Workers" for more information about AB-5), after renewed challenges from a ride-sharing company, a food delivery company and two of its workers (*Lydia Olson, et al. v. Rob Bonta, et al.*, No. CV 19-10956-DMG (RAOx) at 2-3 (D. Cal., July 16, 2021)(order granting motion to dismiss)). In her in-chamber order granting the state's motion to dismiss, Judge Dolly M. Gee determined that the companies and workers failed to show that the state's worker classification test violated the equal protection, due process and contract clauses of the federal and state constitutions. She also dismissed, with prejudice, a bill of attainder claim added by the companies and drivers in their most recent complaint. Judge Gee said that the claim, which alleged that exemptions to the law for certain gig economy-based companies demonstrated that there was no rational basis for AB-5, did not prove that the law was motivated by animus towards certain gig economy companies because the law "sweeps far more broadly" than the specific companies at issue.

The dismissal is the latest in a series of disputes between app-based companies and the state. In a recent related matter, a California state appellate court unanimously held that couriers for an on-demand food delivery app did not have to arbitrate their wage claims against the company (*Melanie Winns, et al. v. Postmates Inc*., No. A155717 (Cal. Ct. App. 2021). The court reinforced the lower court's denial to compel individual and class claim arbitration between couriers and the company under the state labor code and unfair competition law by rejecting the company's argument that Supreme Court precedent preempted these claims. This denial could have significant implications for gig economy companies seeking to enforce arbitration agreements with drivers and couriers in the state of California, especially since the local regulations governing the classification of these employees continue to be contested in court.

AB-5 Challenge Will Not Be Reheard by the Full Ninth Circuit

The full Ninth Circuit will not reconsider its earlier rejection of the California Trucking Association's challenge to a California worker classification law. In a 2-1 decision announced on June 21, 2021, the court denied the petition for rehearing *en banc*, finding that federal law does not preempt the state's higher standard for classifying independent contractors. The California contractor classification law, which codifies a worker classification test from the California Supreme Court's 2018 ruling in *Dynamex Operations West Inc. v. Superior Court*, raises the standards by which an employer can classify workers as independent contractors. (See our September 16, 2019, client alert "California Passes Landmark Bill Restricting Classification of Contract Workers" for more information about AB-5.) The court's denial likely impacts transportation carriers' business practices with respect to contractor classification, as the preliminary injunction that had previously shielded the employers from its effects is no longer in place. This, in turn, could have significant implications for carriers in terms of complying with insurance and tax requirements, as well as wage and hour laws, for their newly classified workers.

California Supreme Court Rules on Meal Premium/Overtime

On July 15, 2021, the California Supreme Court ruled that employers must include nondiscretionary payments in addition to hourly wages when determining compensation for employees' missed meal and rest periods. California law requires employers to provide meal, rest and recovery periods to employees. If an employer fails to provide these periods, California Labor Code Section 226.7(c) obligates the employer to pay one additional hour of pay at the employee's "regular rate of compensation." When calculating overtime pay, section 510(a) of the Labor Code requires an employer compensate an employee by a multiple of the employee's "regular rate of pay." In *Ferra v. Loews Hollywood Hotel, LLC*, the court held that the term "regular rate of compensation" in section 226.7(c) has the same meaning as "regular rate of pay" in section 510(a). Therefore, the court explained that the "regular rate of compensation" calculation "encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee."

For employers, this means that any payments employers include in overtime pay calculations must now be included in the rate at which meal or rest break premiums are paid. The California Supreme Court also held that this decision will apply retroactively and thus applies to any past practices that occurred before this court decision. However, this is subject to applicable statutes of limitations. For example, for a claim of underpaid meal and rest break premiums, the statute of limitations is three years. If the claim falls under the Private Attorneys General Act, the statute of limitation is one year. California employers should review their payroll practices to determine correct calculations for meal and rest break premiums, whether violations are occurring and at what rate. Additionally, employers should look into payroll history to assess if violations occurred and, if so, seek counsel to determine how to address them.

Labor Commissioner Releases Guidance Regarding California's COVID-19 Right of Recall Law

The California Labor Commissioner's Office has released guidance that provides clarification on the state 's COVID-19-related worker recall law, Senate Bill 93 (added as Section 2810.8 to the California Labor Code). As discussed in the June 2021 edition of the *Employment Flash*, this law requires employers in specific industries to offer to rehire certain employees who were laid off due to a reason relating to the COVID-19 pandemic. This law was enacted on April 16, 2021, almost one year after the mayor of Los Angeles, Eric Garcetti, signed into law two COVID-19-related ordinances regarding recall and retention rights for workers in specified jobs in Los Angeles. The guidance from the Labor Commissioner's Office explains the state law's requirements, including which employers are covered under the law, how to recall employees, required documentation and record-keeping requirements, and enforcement issues.

The guidance confirms that employers must offer job positions to qualified laid-off employees as jobs become available — in order of seniority based on date of hire with the enterprise and not job seniority. A laid-off employee is considered qualified for a position if the employee held the same or similar position at the enterprise at the time of the employee's most recent layoff with the employer. Employers may make a single offer to the employee with the most seniority or extend multiple contingent offers to a group of qualified laid-off employees. However, if multiple laid-off employees accept the same offer, the employer must hire the employee with the greatest seniority (based on enterprise hire date). The guidance also states that if no laid-off employee accepts the job offer, the employer may hire anyone else, including a new employee, to fill the position. Notably, even if a laid-off employee turns down a job, the employer must offer that employee subsequent jobs for which the employee is qualified as they arise. Essentially, as new positions become available, employers must notify and offer jobs to all qualified laid-off employees, including those who previously declined an offer to be rehired. While employers do not have to recall unqualified employees, they must provide these employees with a written notice within 30 days of the date that they fill a job with a less senior employee, including the length of service of the individual hired, along with all the reasons for the hiring decision. If parties later determined that a laid-off employee who was not offered recall was in fact qualified, the employee may be awarded reinstatement, front and/or back pay and benefits, and liquidated damages of $500 per day from the time the job was filled by a less senior person. A court may also issue an injunction to enforce recall rights.

Additionally, the guidance clarifies that cities and counties may still enact greater protections through local ordinances, and employers must still comply with applicable local and state laws. The Labor Commissioner's Office is the sole enforcement authority for Labor Code Section 2810.8 — employees have no private right of action. In contrast, while local governments may enforce the county or municipal laws providing worker recall rights, an individual employee may also have a right to file a civil lawsuit under a local ordinance. Unlike Mayor Garcetti's local ordinances, however, Labor Code Section 2810.8 does not provide employers with an opportunity to cure alleged violations prior to enforcement. Recall rights may be explicitly waived in a valid collective bargaining agreement under both the California state law and Los Angeles ordinances.

Illinois Amends State Equal Pay Act

In the first half of 2021, the Illinois legislature amended the Illinois Equal Pay Act and the Illinois Business Corporation Act to impose reporting and registration requirements concerning equal pay compliance and workforce demographic data, among other disclosures. SB 1847, signed into law by Gov. JB Pritzker on June 25, 2021, further amends the Illinois Equal Pay Act and covered employers' obligations with respect to reporting and registration.

- **Equal pay registration certificate:**
  - **Application deadline:** Any private employer with more than 100 employees in the state of Illinois must obtain an equal pay registration certificated from the Illinois Department of Labor (IDOL). Employers authorized to transact business in the state before or on March 23, 2021, must apply between March 24, 2022, and March 23, 2024, on a date determined by the IDOL. Employers authorized to transact business in the state after March 23, 2021, must apply within three years of commencing business operations, but no earlier than January 1, 2024. Covered employers must recertify every two years thereafter.
  - **Compliance statement:** Previously, the equal pay compliance statement required an employer to (i) indicate how often wages and benefits are evaluated to ensure compliance with certain laws cited in the Equal Pay Act and (ii) specify whether the employer, in setting compensation and benefits, utilized a market pricing approach, state prevailing wage or union contract requirements, a performance pay system, an internal analysis or an alternative approach (described in sufficient detail). However, under SB 1847, employers must (i) more broadly certify that they are in compliance with the Equal Pay Act and "other relevant laws" (including but not limited to Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Illinois Human Rights Act and the Equal Wage Act) and (ii) describe the approach they take in determining what level of wages and benefits to compensate employees.
  - **Demographic data:** SB 1847 adds the following additional categories of information to the workforce data that covered employers must compile and provide to the IDOL: (i) the county in which an employee works; (ii) the date on which an employee started working; and (iii) "any other information the [IDOL] deems necessary to determine if pay equity exists among employees."
- **Penalties:** Previously, the Equal Pay Act authorized the IDOL to impose a civil penalty equal to 1% of an employer's gross profits if (i) an employer did not obtain an equal pay registration certificate or (ii) an employer's equal pay registration certificate was suspended or revoked after an investigation by the IDOL. SB 1847 eliminates this penalty and instead imposes a fine of "up to $10,000" for "a violation" of Section 11 of the Equal Pay Act, which includes the relevant certification and compliance requirements.
- **Civil fines for violations by large employers**: Previously, the Equal Pay Act imposed certain fines that ranged from $2,500 to $5,000, depending on the number of offenses and the size of the employer. SB 1847 retains these fines, but also imposes on employers with 100 or more employees a $10,000 fine per employee affected for other violations of the Equal Pay Act.
- **Access to data:** As amended earlier this year, the Equal Pay Act protects equal pay registration "data" submitted to the IDOL as "private data" exempt from disclosure under the Illinois Freedom of Information Act. SB 1847 extends this protection to "individually identifiable information submitted to the Director [of the IDOL] within or related to an equal pay registration application or otherwise provided by an employer in connection with its equal pay compliance statement." However, SB 1847 also permits a current employee to request anonymized data regarding his or her job classification or title and the pay for that classification.
- **Whistleblower protections:** Previously, the Equal Pay Act included whistleblower protections for employees who, among other actions, disclosed or threatened to disclose an activity, inaction, policy or practice that they reasonably believed was in violation of a law, rule or regulation. SB 1847 eliminates these protections.

Maryland Court Dismisses Pandemic-Related OSH Case

On June 23, 2021, in *Estate of William Madden et al. v. Southwest Airlines, Co.*, No. 21-cv-672, complaint filed (D. Md. Mar. 17, 2021), a Maryland federal court dismissed a case brought by a flight attendant who alleged the airline held an unsafe training that exposed her to COVID-19 and resulted in her husband's death. The plaintiff claimed that the airline held a mandatory training in an unventilated and crowded room, with employees fewer than six feet from each other, and did not require masks. She further alleged that she contracted the virus after attending this training and subsequently infected her husband. She claimed the airline failed in its duty of care towards its employees. The court found that the majority of factors weighed in favor of her case. However, allowing the suit to go forward would "open the floodgates" for lawsuits against employers by third parties claiming the employers of their family members, friends or acquaintances exposed them to the virus. Additionally, the court noted that while the airline likely owed a duty of care to its employees and the risk of infection was foreseeable, there were multiple ways employees could have been exposed to the virus outside of the training session, so that ruling in favor of the plaintiff would expand the liability of the company too widely. Notably, the court granted the plaintiff leave to amend her suit and replead the case, and the plaintiff's counsel is considering appealing the decision.

Under Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act), an employer has a general duty of care to keep its workplace free of any recognized hazards that are likely to cause death or serious physical harm to its employees (29 U.S.C. §654(a)(1)). The employer must either be aware that the hazardous condition existed, or an employee can show proof that the industry is aware of the condition. If the court finds that an employer has a duty of care either on appeal or in a case with more favorable facts, it could raise the liability of employers.

International Spotlight

EU

European Court of Justice Rules on Headscarf Ban

According to a recent decision of the European Court of Justice on July 15, 2021 (Case C-804/18 and C-341/19), an employer's need to convey an image of neutrality to customers or to avoid social conflicts justifies the employer's prohibiting its employees from wearing any visible form of expression of political, ideological or religious convictions.

However, this justification must meet a real need of the employer, and the national courts can, in the context of balancing the rights and interests in question, take into account the context of respective member states, and in particular the more favorable national provisions regarding the protection of religious freedom.

France

New Law Requires Employee Proof of COVID Status

As of August 30, 2021, employees at French companies whose activities are prone to a heightened risk of infection and transmission of COVID-19 must present a health pass containing either proof of full vaccination, a valid certificate of recovery, a medical certificate of contraindication or a negative COVID-19 test result within the last 48 hours to their employers. Specifically, the new law on health crisis management adopted on July 25, 2021, applies to employees in the following settings or roles:

- leisure activities;
- commercial catering or drinking establishments, with the exception of collective catering, take-away sales of prepared meals and professional road and rail catering;
- trade fairs, seminars and exhibitions;
- long-distance travel by interregional public transport (except in emergencies);
- health, social and medico-social services and establishments as well as firefighters and ambulance drivers (except in emergencies), who are also subject to mandatory vaccination as of September 15, 2021.

An employee who refuses to present a valid health pass may be sanctioned by way of suspension for a maximum period of two months without pay and until the employee presents the required health pass. This suspension must be preceded by an interview to discuss options for regularizing the situation, such as by easing access to vaccination during working hours or, as a last resort, by way of a temporary assignment to another post not subject to mandatory vaccination. Employees whose contract and pay have been suspended may make use of contractual rest days or paid holidays during their suspension at the employer's agreement. Early termination of fixed-term contracts or of a temporary employee's assignment contract at the employer's initiative and without damages, as originally permitted by the law to sanction noncompliance, was judged to be unconstitutional by the ruling of the Constitutional Council on August 5, 2021, and revoked from the text of the latest policy. Finally, at the recruitment stage, employers may refrain from employing a candidate who refuses to be vaccinated and who does not demonstrate any medical justification if the position for which he or she is applying is subject to compulsory vaccination.

The bill stipulates that employers need to implement control measures as of August 30, 2021. Failure to do so is punishable by a fine of up to €1,500. A repeated violation within a period of thirty days on more than three occasions is punishable by up to one year's imprisonment and a fine of €9,000.

A more progressive sanctioning regime applies to operators of an establishment or to the person in charge of an event: First, the administrative authority will give formal notice of noncompliance, triggering a grace period of 24 working hours. If the notice remains unanswered, the operator risks an administrative closure of up to seven days. The fourth failure to comply within a period of 45 days is punishable by up to one year's imprisonment and a fine of €9,000. As these measures may have an impact on the organization, management and general operation of a company, the Social and Economic Council must consult on their implementation in companies of at least 50 employees. Employers are required to grant paid leave to the respective employees for the purpose of receiving vaccination.

Germany

Obligations for Employers To Offer COVID Self-Tests to Employees and Home Office Work Have Expired

Due to reduced incidence of infection, the pandemic resolution that had been effective until June 30, 2021, and that was the basis for employers' obligations to offer COVID self-tests and home office arrangements expired on June 30, 2021.

UK

Evolving Health and Safety Assessments Shape Return-to-Office Policies

With the majority of COVID-19 restrictions now lifted in the U.K., many employers have implemented their return-to-office plans or intend to do so over the course of autumn 2021. When assessing policies and procedures for returning to work, employers operating in the U.K. should consider the following.

- Employers should conduct a health and safety risk assessment in relation to the specific COVID-19 risks associated with a return to the office. Health and safety risk assessments are required for all workplaces, and COVID-19 specific assessments will help employers demonstrate that any measures they implement are proportionate and account for the associated health and safety risks of COVID-19 and office working. If significant changes develop in the risk profile of the virus, or if vaccine efficacy wanes substantively over the autumn and winter, then employers will need to update previous health and safety assessments.
- While requiring vaccination as a condition to returning to the office is a common practice in some jurisdictions, outside of certain care settings, making vaccination a condition to returning to work has not been tested in the English courts. While Public Health England advice supports employers encouraging employees to get vaccinated, a mandatory vaccination policy could risk potential discrimination claims from employees who are not vaccinated for health or religious reasons. As a result of this uncertainty and to minimize the risk of claims, many U.K. employers have instead required either vaccination or evidence of a negative COVID-19 test as a condition for entry to the office.
- Now that the U.K. government is no longer mandating working from home as the default working arrangement, many employers have implemented permanent flexible working policies to enable employees to continue some element of home working. Flexible working policies should encourage all employees to take up the offer to avoid creating a two-tier workforce defined by where employees choose to work. While flexible working can be especially productive for certain groups of employees (in particular those with childcare responsibilities), mandating (or at least strongly encouraging) home work for at least some of the working week can create even conditions between those who want to work from home and those who prefer to work in the office.

Finally, employers should stay flexible regarding work arrangements through the remainder of 2021. If further virus surges occur, vaccine efficacy wanes or large numbers of staff become sick, changes to policies and procedures will likely be required with short notice. Maintaining operational flexibility to address such changes will be key to ensuring employees can continue to work, either remotely or in the office, throughout this period.

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