Employment Flash

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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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US Federal Developments

Proposal Suggests New 'Joint Employer' Standard

On September 6, 2022, the National Labor Relations Board (NLRB) released a notice of proposed rulemaking that would rescind and replace the final rule entitled "Joint Employer Status Under the National Labor Relations Act," which took effect on April 27, 2020. Under the new rule, the joint employer standard under the National Labor Relations Act (NLRA) would revert to pre-Trump era common law principles. The NLRA joint employer standard affects employer liability with respect to unfair labor practice charges, obligations to collectively bargain with employees and susceptibility to union picketing, among other things.

The 2020 rule codified the joint employer standard for the first time, but significantly narrowed which entities could be considered "joint employers," limiting them to those entities that possess and exercise substantial direct and immediate control over one or more essential terms or conditions of employment described in an exhaustive list. The new rule would instead consider whether both entities have an employment relationship with employees under common law agency principles and whether the entities share or codetermine at least one of the employees' essential terms and conditions of employment, taking into account evidence of each entity's reserved or indirect control over employment terms. The proposed rule reflects the majority view of the NLRB that the purposes of the NLRA to promote collective bargaining and stabilize labor relations "are best served when two or more statutory employers that each possess some authority to control or exercise the power to control employees' essential terms and conditions of employment are parties to bargaining over those employees' working conditions."

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The notice of proposed rulemaking remains subject to public comment until November 7, 2022.

SEC Further Incentivizes Whistleblowers With Program Amendments

On August 26, 2022, the Securities and Exchange Commission (SEC) adopted two amendments to the rules implementing its whistleblower program, intended to further encourage individuals to come forward with information regarding potential violations of federal securities laws.

The first amendment expands the scope of claims that are eligible for an award under the SEC's whistleblower program in a "related action" where the original information that a whistleblower provided to the SEC is used by another governmental agency to obtain monetary sanctions exceeding $1 million. Currently, if such other agency's whistleblower program has a "more direct or relevant connection" to the enforcement action than the SEC does, the whistleblower would not be eligible for an award as a related action. The amendment will allow the SEC to pay a related action award in these cases if the non-SEC whistleblower program is not comparable to the SEC's program (*i.e.*, the non-SEC award program's award range is limited or capped, or the decision to grant an award under the non-SEC program is discretionary and not mandatory) or if the maximum amount that the SEC could award is no more than $5 million.

The second amendment clarifies that the SEC may use its statutory authority to increase (but not to decrease) the amount awarded to a whistleblower. The SEC previously amended Rule 21F-6 of the Securities Exchange Act of 1934 (Exchange Act) in 2020 to provide the SEC with discretion to consider the dollar amount of a potential award when making an award determination.

These amendments, which become effective on October 3, 2022, will continue incentivizing whistleblowers to provide tips to the SEC about issuers' potential misconduct. Companies should take the opportunity now to enhance their internal whistleblower procedures. Below are some general recommendations:

- Companies should consider adopting or refreshing compliance controls, policies and procedures and assess whether their whistleblower reporting programs are operating effectively in practice.
- Companies should consider avoiding actions that could trigger whistleblower retaliation exposure under Section 21F of the Exchange Act, which generally means that employers may not discharge, demote, suspend, harass or in any way discriminate in the terms and conditions of employment against an employee who has reported conduct to the SEC that the employee reasonably believed violated federal securities laws. In one action settled in April 2022, the SEC charged the co-founder of a technology company with violating Rule 21F-17(a) of the Exchange Act after an employee raised concerns that the company overstated its number of paying customers and noted that he would reveal the allegations to the company's customers, investors and any other interested parties if the company did not address the issue. The SEC alleged that the co-founder impeded the employee's communication with the SEC by removing the employee's access to the company's computer systems and by using the company's administrative account to access the employee's company computer.
- Companies should review provisions in employment, consulting, confidentiality, restrictive covenant and separation agreements that could potentially restrict or discourage workers from reporting information to the SEC. Rule 21F-17(a) of the Exchange Act prohibits any person from taking any action to prevent a person from contacting the SEC directly to report a possible securities law violation.

Further information about the recent amendments to the whistleblower rules can be found in the SEC's press release, Amendments to Whistleblower Program Rules fact sheet and adopting release 34-95620.

US Department of Justice, Federal Trade Commission and National Labor Relations Board Partner To Crackdown on Employer Anticompetitive Practices and Unfair Labor Practices

Anti-poaching and wage-fixing agreements between employers have garnered increased attention over the past several years. In October 2016, the U.S. Department of Justice, Antitrust Division (DOJ) and the Federal Trade Commission (FTC) released guidance for human resource professionals, with a particular focus on anti-poaching and wage-fixing agreements between employers. The guidance emphasized the importance of antitrust laws in creating free and open markets as the foundation of a vibrant economy and signaled an increased focus by the DOJ and FTC on employers that engage in antitrust activities.

The DOJ and FTC continue their focus on anticompetitive practices, now partnering with the National Labor Relations Board. On July 19, 2022, the FTC and NLRB entered into a Memorandum of Understanding (MOU) that will allow the FTC and NLRB to share information, conduct cross-training for staff and partner on investigative efforts — all to assist the agencies in promoting fair competition and to advance workers' rights. A related press release explained that the FTC and NLRB share several regulatory interests, including developments relating to the "gig economy" and other alternative work arrangements as well as the use of noncompetition and nondisclosure provisions.

One week later, on July 26, 2022, the DOJ and the NLRB signed a MOU, allowing the agencies to work together to "better protect competitive labor markets and ensure that workers are able to freely exercise their rights under the labor laws." Pursuant to the MOU, the agencies will now work together to share information and to coordinate on enforcement, policy, strategy and training. As explained in the press release announcing the partnership, the DOJ and the NLRB have a shared interest in promoting open and competitive labor markets, including by protecting workers from anticompetitive employer practices and unlawful interference with employees' right to unionize.

EEOC Releases Updated COVID-19 Guidance for Employers

Since the start of the pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) has periodically updated its initial COVID-19 workplace guidance. The most recent updates were made on July 12, 2022.

One important change in the EEOC's guidance to employers relates to mandatory COVID-19 viral testing of employees in the workplace. Because a COVID-19 viral test is a medical examination under the Americans with Disabilities Act (ADA), a mandatory test must be job-related and consistent with business necessity. At the outset of the pandemic, the EEOC considered the ADA conditions to be automatically satisfied, and employers were free to conduct on-site COVID-19 viral testing of their employees. This guidance has changed. Employers now need to conduct an individualized assessment to determine whether the particular circumstances meet the necessary ADA conditions to administer a test. Notably, the "business necessity" standard will be met when the testing is consistent with guidance from the Centers for Disease Control and Prevention, the Food and Drug Administration and/or state and local public health authorities.

US State Developments

New York State Launches Sexual Harassment Hotline

In March 2022, New York Gov. Kathy Hochul signed into law an amendment to the New York State Human Rights Law, N.Y. Exec. Law § 295, which took effect on July 14, 2022, requiring the New York State Division of Human Rights (NYSDHR) to establish a statewide, toll-free, confidential hotline that individuals with complaints of workplace sexual harassment can call for counsel and assistance. NYSDHR launched the hotline on July 19, 2022, and employees in New York can now call 1-800-HARASS-3 during regular business hours to be connected with an attorney experienced in sexual harassment matters for *pro bono* legal counseling.

Additionally, the new law requires the NYSDHR to disseminate information about the hotline, including by "working with the department of labor to ensure that information on the hotline is included in any materials employers must post or provide to employees regarding sexual harassment." Though additional guidance may be forthcoming, New York employers should update their sexual harassment postings and policies to include information about the new hotline.

Greater Pay Transparency May Be on the Horizon in New York

New York may be the next state to expand pay transparency rules to require the disclosure of compensation or compensation ranges in internal and external job postings, joining states such as Colorado and, most recently, California. On June 1, 2022, the New York State Legislature passed Senate Bill S9427A, which if signed into law by Gov. Hochul, would take effect 270 days thereafter and amend the New York Labor Law to require all advertisements for jobs, promotions or transfer opportunities that can or will be performed in New York (even if only in part) to disclose the compensation or the compensation range for the applicable job, along with a job description (if one exists). The bill defines compensation range as the minimum and maximum annual salary or hourly wage rate that the employer believes, in good faith, to be accurate for the applicable job at the time of the advertisement. The advertisement must disclose whether the job pays only commissions.

In addition to these disclosure requirements, the bill includes record-keeping requirements and anti-retaliation obligations for employers. Specifically, employers must maintain, at a minimum, job descriptions and compensation histories for all jobs, promotions and transfer opportunities. Employers are prohibited from refusing to interview, hire, promote, employ or otherwise retaliating against an applicant or current employee who exercises any rights under the bill. Failure to comply with any of the requirements of the bill would result in a civil penalty.

If enacted, the law would apply to all employers with four or more employees, along with any recruiters or agents connecting applicants with employers, but would not apply to firms that provide temporary help. While additional guidance is expected if the bill is signed into law, the bill explicitly states that it shall not be "construed or interpreted to supersede or preempt any provisions of local law, rules, or regulations." New York City's law requiring employers to include salary information in job postings for positions in New York City is set to take effect on November 1, 2022. Accordingly, employers in New York City should be prepared to comply with both the New York State and New York City laws once the rules are effective.

New York City Law Will Restrict Use of Automated Employment Decision Tools

Effective January 1, 2023, using an "automated employment decision tool" to screen a candidate or employee for an employment decision will be illegal for employers under New York City law, unless the employer:

- conducted a "bias audit" of the tool no more than one year prior to the use of the tool;
- publicly posted on its website a dated summary of the results of the most recent "bias audit";
- provided each New York City employee or candidate with a 10-day advance written notice that states that the tool will be used in connection with assessing or evaluating the employee or candidate, describes the job qualifications and characteristics that the tool will use in its assessment and indicates that the candidate is permitted to request an alternative selection process or accommodation; and
- provides notice of the type of data collected for the tool, the source of the data and the employer's data retention policy, either on the business's website or within 30 days of a written request.

The law defines "automated employment decision tool" broadly to include any computational process derived from machine learning, statistical modeling, data analytics or artificial intelligence that issues simplified output, including a score, classification or recommendation that is used to substantially assist or replace discretionary decision-making for employment decisions.

Employers who violate the law will be subject to civil penalties of up to $500 for the first violation and each additional violation on the same day, and between $500 and $1,500 for each subsequent violation (with each day during which a tool is used in violation of the law generating a separate violation, and any failure to provide a required notice producing a separate violation). Candidates and employees can file a private right of action for violations of the law, and the New York City Corporation Counsel office may also initiate enforcement actions under the law.

California Arbitration Agreements Return to the Spotlight: Ninth Circuit To Grant Rehearing in *Bonta*

California Assembly Bill 51 (AB 51) bars employers from requiring employees to agree to mandatory arbitration of violations of the California Fair Employment and Housing Act and the California Labor Code as a condition of employment, continued employment or the receipt of any employment-related benefit. Although AB 51 was signed into law by Gov. Gavin Newsom on October 10, 2019, and was set to take effect on January 1, 2020, enforcement of AB 51 has been enjoined for almost three years.

On August 22, 2022, a majority of a panel of the U.S. Court of Appeals for the Ninth Circuit voted *sua sponte* to grant rehearing in *Chamber of Commerce of the United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021) (*Bonta*), the U.S. Chamber of Commerce-led challenge to AB 51 on the basis that AB 51 is preempted by the Federal Arbitration Act. Notably, the majority also voted to withdraw its 2-1 decision partially upholding AB 51. The same majority had previously deferred consideration of the U.S. Chamber of Commerce's petition for a rehearing *en banc* pending the Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (*Viking*).

The unexpected decision to grant rehearing comes approximately two months after the *Viking* decision, which had been subject to a petition for rehearing. On August 22, 2022, the Supreme Court declined to rehear the dispute in *Viking*, leaving intact its prior 8-1 decision allowing contractual waivers of the right to bring representative claims under California's Labor Code Private Attorneys General Act of 2004.

Though uncertainty about the enforcement of arbitration agreements with employees is likely to persist until a new decision is issued, the Ninth Circuit panel majority's decision to grant rehearing in *Bonta* and to withdraw its prior decision, in particular, may signal that the panel will address questions left unresolved by its prior decision.

California Public Companies Not Required To Fill Board Seats With Members of 'Underrepresented Communities' or Women

In an April 1, 2022, opinion, the Los Angeles County Superior Court in *Crest v. Padilla*, No. 20 STCV 37513, held that California Corporations Code § 301.3 violates the equal protection clause of the California Constitution. California Corporations Code section 301.3 requires one to three female directors (depending on board size) to have a seat on the boards of directors of California-based public companies. Because the law requires corporations to use "suspect categories" (race, gender identity and sexual orientation) in the selection of their board members and to have a certain number of directors from those categories (thereby necessarily excluding people of other races, orientations and identities from those board seats), the state needed to show that the law was justified by a compelling and specific state interest, and that the law was narrowly tailored to address that interest. The court found that neither of these standards was satisfied. First, no compelling interest was shown because the state's claims of discrimination were general in nature rather than identifying a "specific arena" (*e.g.*, a particular industry or region) in which discrimination occurred. Further, the state did not present convincing evidence of discrimination because it did not demonstrate "a disparity between the demographic

makeup of the qualified talent pool and those who hold positions in the targeted arena." Second, even if the state had shown a compelling state interest in remediating past discrimination, the court found that the law was not narrowly tailored to reaching that goal because the legislature had not considered or attempted other intermediate and race-neutral measures, such as requiring companies to report the demographics of board members.

On May 13, 2022, the Los Angeles County Superior Court in *Crest v. Padilla*, Case No. 19STCV27561, held that California Corporations Code § 301.4 also violates the equal protection clause of the California Constitution. California Corporations Code section 301.4 requires one to three directors (depending on board size) from an "underrepresented community" (defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native or who self-identifies as gay, lesbian, bisexual or transgender") to have a board seat on the boards of directors of California-based public companies. With the court finding the law presumptively unconstitutional, the burden once again shifted to the state to prove that the law was supported by a compelling state interest, necessary and narrowly tailored to accomplish its goals. The court was unpersuaded by the state's argument that the law furthered a compelling state interest by increasing gender diversity on boards, determining that the state provided insufficient evidence to show a link between gender diversity and the various benefits (*e.g.*, improved corporate governance) the state believed would result from this diversity. The state also failed to identify any specific discrimination to be remedied. Like it did in the April 1, 2022, decision, the court also held that, even if the state had shown a compelling state interest, the law was not narrowly tailored because the legislature had not considered gender-neutral alternatives.

The California secretary of state recently filed an appeal of the decision relating to Corporations Code section 301.4 and has stated she will appeal the decision relating to Corporations Code section 301.3.

Chicago Passes Ordinance Regarding Sexual Harassment in the Workplace

The Chicago City Council passed an ordinance that took effect on July 1, 2022, and expands workplace sexual harassment prevention protections for employees. In passing the ordinance, the City of Chicago became the first municipality to require that employers annually provide at least one hour of bystander sexual harassment prevention trainings to its workforce. This bystander training is in addition to the sexual harassment prevention training already mandated under the Illinois Human Rights Act and is intended to equip employees with "safe and positive actions that may be carried out by a person or a group of people to prevent harm or intervene where there is a risk or perceived risk of sexual harassment to another."

The ordinance applies to all employers and requires that they:

- maintain a written policy prohibiting sexual harassment that, among other things, expressly states that retaliation for reporting sexual harassment is illegal in Chicago;
- provide each new hire, within the first calendar week of employment, a copy of the employer's written sexual harassment policy in the employee's primary language;
- conspicuously display at least one English-version and one Spanish-version of the Chicago Commission on Human Relations' poster regarding the prohibitions on sexual harassment (copies of which are available on the commission's website);
- provide at least one hour of bystander prevention training for all employees annually, with the first training to be provided by June 30, 2023; and
- maintain a record of the written policy, trainings and all other documents demonstrating that the employer is in compliance with the ordinance.

Failure to maintain these records creates a presumption, rebuttable by clear and convincing evidence, that the employer violated its obligations under the ordinance to prevent sexual harassment. The Chicago Commission on Human Relations enforces the ordinance, and penalties for violating the ordinance can be significant, with a violation of the written policy, posting or training requirements resulting in fines ranging from $500 to $1,000 per day for each offense. Moreover, an employer who engages in sexual harassment or who fails to take reasonable corrective measures after becoming aware of sexual harassment by a nonemployee or nonmanagerial employee may be subject to a fine between $5,000 and $10,000 for each offense.

Employers that are covered under the ordinance should review their employee handbooks and practices to ensure those meet the new requirements. The Chicago Commission on Human Relations maintains model policies and trainings, among other resources, to help employers ensure they are compliant.

Colorado's New Restrictive Covenant Statute Takes Effect

On August 10, 2022, Colorado's Uniform Restrictive Employment Agreements Act (the UREA Act) took effect, imposing additional restrictions on employers' use of noncompete and customer nonsolicitation covenants. The UREA Act provides that noncompete covenants are permissible only if they are: (i) for the protection of trade secrets, (ii) entered into with an employee whose total compensation meets or exceeds Colorado's highly compensated worker (HCW) threshold (currently set at

$101,250 per year) and (iii) no broader than necessary to protect the employer's trade secrets. Similarly, customer nonsolicitation covenants are enforceable only if they are: (i) entered into with an employee whose total compensation is at least 60% of the HCW threshold and (ii) no broader than necessary to protect the employer's trade secrets. The UREA Act also describes covenants that the legislation does not seek to prohibit, including reasonable confidentiality provisions, provisions permitting an employer to recover job training expenses from an employee and restrictive covenants that accompany the sale of a business.

Additionally, the UREA Act imposes certain procedural requirements when an employer seeks to put restrictive covenants in place. For example, a prospective employee must be provided with the terms of the covenant before he or she accepts the offer of employment and a current employee must receive 14 days advance notice of the terms of the covenant before it takes effect, which notice must be signed by the employee. The UREA Act requires disputes regarding restrictive covenants to be adjudicated in Colorado courts and under Colorado law, unless the employee did not reside or work in Colorado at the time of separation from employment. Employers who enter into or present to an employee or prospective employee as a term of employment, or seek to enforce, any covenant that is void under the UREA Act will be liable for actual damages as well as a penalty of $5,000 per employee harmed by the conduct. The law allows an employee to recover reasonable costs and attorneys' fees in any private action. The UREA Act will not apply retroactively to restrictive covenants that were entered into prior to August 10, 2022.

DC Noncompete Ban Relaxed by Amendment

On July 12, 2022, the District of Columbia Council passed the Non-Compete Clarification Amendment Act of 2022 (2022 NCA Amendment), scaling back the almost total ban on the use of noncompete covenants provided for under the Ban on Non-Compete Agreements Amendment Act of 2020 (2020 NCA Act) passed in December 2020. Due to widespread criticism, the 2020 NCA Act's applicability date was delayed numerous times. Unless blocked by Congress, the 2020 NCA Act, as revised by the 2022 NCA Amendment, will take effect October 1, 2022.

The 2022 NCA Amendment permits employers to enter into noncompete agreements with highly compensated employees (HCEs) whose total compensation is or is reasonably expected to be at least $150,000 per year and medical specialists who are expected to earn at least $250,000 per year (with figures to be adjusted annually based on the consumer price index). To be valid and enforceable, a noncompete agreement between an employer and an HCE or a medical specialist must specify (i) the functional scope of the competitive restriction, including what services, roles, industry or competing entities the employee is restricted from performing work in or on behalf of; (ii) the geographic limitations of the work restriction; and (iii) the term, which may not exceed 365 calendar days from the date the HCE (730 calendar days from the date the medical specialist) separates from employment with the employer. In addition, the noncompete provision must be provided to the employee (i) in writing and (ii) either 14 days before the individual commences employment or, if the individual is already employed, 14 days before the employee must execute the agreement. Employers who violate the 2020 NCA Act may be subject to fines between $350 and $1,000 per violation. The law provides that employers found to have retaliated against employees for refusing to comply with an unlawful noncompete provision will be fined no less than $1,000.

The 2022 NCA Amendment also clarifies that employers are permitted to, among other things, prohibit an employee from (i) using and disclosing confidential and proprietary information during and after employment; and (ii) "moonlighting" when the employer reasonably believes such activity will result in the disclosure or use of confidential information, create a conflict of interest, constitute a "conflict of commitment" if the employee is employed by a higher education institution or impair the employer's ability to comply with federal or district laws or another contract.

Maine Law Restricts Use of Employee Nondisclosure Agreements

Effective August 8, 2022, Maine's An Act Concerning Nondisclosure Agreements in Employment prohibits employers from requiring current or prospective employees to sign agreements preventing them from disclosing or discussing discrimination, including harassment, occurring between employees or between an employer and an employee. The law prohibits such restrictions in preemployment and employment agreements with prospective employees and employees. The law also prohibits such restrictions in settlement, separation and severance agreements, unless the agreement is entered into at the prospective, current or former employee's request. The law requires that (i) any settlement, separation or severance agreement that includes any nondisclosure provision must clearly state that the individual retains the right to provide testimony or evidence to, file claims with or make reports to any federal or state agency that enforces employment or discrimination laws, including, but not limited to, the Maine Human Rights Commission and the Department of Labor; and (ii) the individual must be given 21 days to consider the nondisclosure terms and conditions and at least seven days following the execution of the agreement to revoke it (with the agreement taking effect only after the revocation period has expired).

A number of states, including New York, already have passed laws limiting the use of employee nondisclosure agreements. Employers should carefully review their use of nondisclosure provisions to ensure that their practices comply with applicable laws.

Louisiana and Massachusetts Enact CROWN Acts

In summer 2022, the governors of Louisiana and Massachusetts each signed separate Creating a Respectful and Open World for Natural Hair Acts, colloquially referred to as CROWN Acts. The CROWN Acts expand race discrimination protections in the workplace by prohibiting discrimination on the basis of hair texture, length or natural hairstyles and seek to eliminate adverse employment actions based on stereotypes related to an individual's natural hairstyle.

Louisiana

On August 1, 2022, Louisiana's CROWN Act, signed by Gov. John Bel Edwards, took effect. The act amends the definition of unlawful discrimination in employment under the Louisiana Employment Discrimination Law to expressly include discrimination based on a person's "natural, protective, or cultural hairstyle," which is defined to include, without limitation, "afros, dreadlocks, twists, locs, braids, cornrow braids, Bantu knots, curls, and hair styled to protect hair texture or for cultural significance."

Massachusetts

On July 26, 2022, Massachusetts Gov. Charlie Baker signed the CROWN Act into law, which will take effect on October 24, 2022. The law amends the definition of race in the Massachusetts Fair Employment Practices Act, among other statutes, to include "traits historically associated with race, including, but not limited to, hair texture, hair type, hair length and protective hairstyles." "Protective hairstyle" is defined in the act to include, without limitation, "braids, locks, twists, Bantu knots, hair coverings and other formations."

Considerations for Employers

With the passing of these two laws (and others across the country over the last several years), employers should take the opportunity, if they have not already, to review their handbooks and policies and update their equal employment opportunity, nondiscrimination, dress code, appearance and other policies as needed. Employers should also consider providing training to all managers, supervisors and employees to prevent adverse employment decisions from being made or other discriminatory actions based on an employee's or applicant's hairstyle.

DC Enacts Law Shielding Marijuana Users From Adverse Employment Action

On July 13, 2022, Washington, D.C. Mayor Muriel Bowser signed the Cannabis Employment Protections Amendment Act of 2022 (CEPA Act). Although the CEPA Act must still undergo a congressional review period before it becomes law, the new law would mean the District of Columbia would follow several other jurisdictions in protecting current and prospective employees from adverse employment action because of their off-duty cannabis use. The CEPA Act is far-reaching and would apply to almost all D.C. employers (including public employers), employees and prospective employees (including unpaid interns). However, it excludes employers who must prohibit cannabis use to comply with federal law or because of a federal contract or funding agreement, and employees in "safety-sensitive" positions. If the CEPA Act takes effect, employers will have 60 days to notify their employees of certain information, including their new rights under the legislation and the protocols for any testing for alcohol or drugs that the employer performs. Employers will also have to provide this information to each new hire, and to all employees annually. Importantly, the CEPA Act does not protect the general use or possession of cannabis in the workplace, while performing work or during working hours.

International Spotlight

France

New French Inflation Relief Legislation

On August 17, 2022, the French government published two bills forming part of an inflation relief package aimed at shielding the country against energy price spikes and rising inflation. The first bill (*Loi n° 2022-1158 du 16 août 2022 portant mesures d'urgence pour la protection du pouvoir d'achat*), adopted on August 3, 2022, aims to protect consumers, household living standards and energy sovereignty. The second bill (*Loi n° 2022-1157 du 16 août 2022 de finances rectificative pour 2022*), adopted on August 4, 2022, allows modification of France's annual budget to finance new measures, appropriating €44 billion for new expenditures in 2022. Both bills include several significant provisions relevant to employment laws.

One effect of the bills is that the "Macron bonus" has been replaced by a "value sharing bonus" (*prime de partage de la valeur*), which companies may now implement each year. This measure allows companies to pay employees a yearly bonus, exempt from social security contributions, thereby supporting employees' purchasing power. The threshold applicable for the exemption of social security contributions on the bonus has also been increased.

In addition, until December 31, 2022, employees can withdraw up to €10,000 from their employee savings plan (with the exception of collective retirement savings plans) to purchase goods or services. This withdrawal amount is exempt from income tax and social security contributions.

Additional employment-related inflation-relief measures relate to working time. Employees for whom working time is calculated in hours over a period exceeding one week may now give up part or all of their rest days (or half rest days) accrued from January 1, 2022, to December 31, 2025 (subject to employer approval) in exchange for compensation of such half or full days at an increased wage rate and subject to the same favorable tax and social security regime applicable to overtime hours. The law also increases the tax exemption threshold for compensation of overtime hours worked as of January 1, 2022, from €5,000 to €7,500 per year, and the related employer rate for social security contributions is lowered in the form of a flat rate deduction for companies employing between 20 and 249 employees.

Finally, the inflation relief package introduces provisions intended to expand the implementation of voluntary profit-sharing schemes among small- and medium-sized companies; this includes, in particular, the ability for companies employing between 11 to 49 employees to unilaterally implement a voluntary profit-sharing plan where there is no employee representation or where negotiations with employee representatives have failed. Additionally, the law extends the maximum duration of a voluntary profit-sharing agreement from three to five years, which agreement may be renewed automatically, several times, if neither party requests its renegotiation upon expiry (subject to the agreement providing for automatic renewal).

Germany

Minimum Wage: Prior and Future Increases

As of July 1, 2022, the statutory minimum wage increased to €10,45 (gross) per hour. A further increase to €12 per hour will become effective as of October 1, 2022.

Noncompliance with the minimum wage requirement may be sanctioned with fines of up to €500,000. In addition, companies that violate the requirement may be excluded from public orders, meaning they will not receive contracts from state-owned companies or authorities and cannot participate in tenders for government projects.

COVID-19 and Salary Requirements

In its decision on August 10, 2022 (5 AZR 154/22), the German Federal Labor Court held that employers that require employees located in COVID-19 risk areas with more restrictive COVID-19 measures to work in the office must pay an employee's salary for the period during which an employee, because of the measures, is not permitted to enter the workplace. Employees working from home are not impacted by this decision.

United Kingdom

UK Government Publishes New Guidance on Employment Status

The U.K. government recently published new guidance for HR advisers on worker status. The guide is intended to clarify the rights and protections to which employees are entitled, including pay, leave and working conditions. According to government ministers, the new guidance brings together worker status case law in one place, allowing businesses and workers to access information and improve their understanding of the concept of worker status (described below), enabling informed discussions and helping prevent employers from attempting to exploit the system.

Under English law, employment law defines three main categories of individuals: an employee, a worker and an independent contractor. This categorization is typically referred to as an individual's "worker status" and determines, among other things, the employment rights to which the individual is entitled. The determination of this categorization depends on several factors, which are not always clear-cut, leading to complex litigation, particularly in recent years. With the rise of the "gig economy" and the emergence of myriad different models of working, the concept of "worker status" has become increasingly disputed. The newly published guide is intended to help clarify worker status under employment law.

Despite this initiative to clarify the worker status framework under English employment law, in response to its 2018 public consultation on employment status, the U.K. government has confirmed that it will not be reforming the U.K.'s separate tax rules with respect to worker status. Under English tax law, a similar "worker status" concept exists that determines the tax implications of an individual's working arrangement. The tax regime has only two categories of working individuals (employees and self-employed individuals), and the criteria for determining the worker status of each is different from the criteria used in an employment law context. Practitioners and businesses widely acknowledge that the two worker status frameworks (and the interaction between them) are difficult and confusing to navigate, and have suggested that legislative reform and alignment between employment and tax law would help clarify worker status. However, for now, the U.K. government maintains that "the benefits of creating a new framework for employment status are currently outweighed by the risk associated with legislative reform. While such reform could help bring clarity in the long term, it might create cost and uncertainty for businesses in the short term, at a time where they are focusing on recovering from the pandemic."

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