Employment Flash

Skadden

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'Speak Out Act' Becomes Law

The #metoo movement continues to impact employers. The Speak Out Act, which became effective on December 7, 2022, makes pre-dispute nondisclosure and non-disparagement provisions relating to sexual assault and sexual harassment claims unenforceable. While employees have been (and will continue to be) able to raise such concerns with regulators, such as the Equal Employment Opportunity Commission, despite having signed agreements containing nondisclosure and/or non-disparagement provisions, the Speak Out Act reflects a bipartisan effort to address sexual assault and sexual harassment in the workplace.

The Speak Out Act defines a nondisclosure clause as a provision in a contract or agreement that requires the parties "not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement." A non-disparagement clause is defined as a provision in a contract or agreement that requires one or more parties "not to make a negative statement about another party that relates to the contract, agreement, claim, or case." State or local law that is at least as protective of the right of an individual to speak freely under the Speak Out Act will continue to be enforceable.

The Speak Out Act applies with respect to a claim filed following its enactment. While the Speak Out Act does not apply once a dispute has arisen, state laws may limit or impose procedural requirements to obtain nondisclosure or non-disparagement protection.

DOL Proposes New Independent Contractor Rule

On October 11, 2022, the U.S. Department of Labor (the DOL) released a new proposed rule that, if finalized, would update the test for determining whether a worker is an employee under the Fair Labor Standards Act or an independent contractor. The proposed rule, a reversion to the rule as it existed prior to the current version, sets out a non-exhaustive, six-factor test used to determine whether a worker is economically dependent on an employer for work. The six factors are: (i) opportunity for profit or loss depending on managerial skill, (ii) investment by the worker and the employer, (iii) degree of permanence of the work relationship, (iv) nature and degree of control, (v) whether work performed is an integral part of the employer's business, and (vi) skill

and initiative required. These factors are to be considered under the totality of the circumstances. The proposed rule reflects the Biden administration's increased focus on employee/independent contractor classification, and a return to a "totality of the circumstances" analysis; it comes after the DOL had published a rule on May 6, 2021, which was later blocked by a federal court, seeking to withdraw the Trump administration's independent contractor rule, which had a narrower focus (emphasizing the first two factors noted above) than the DOL's published rule.

Proposal Suggests Virtual I-9 Verification May Be Here To Stay

Earlier this year, the U.S. Department of Homeland Security (the DHS) and U.S. Immigration and Customs Enforcement (ICE) announced a new proposed rule, "Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9)," that would allow employers, in their discretion, to decide whether to examine documents showing proof of eligibility to work in the U.S. during the employment onboarding process physically (*i.e.*, in person) or remotely (*i.e.*, through a virtual connection).

The Immigration and Nationality Act currently requires I-9 verification to be done in the physical presence of the employer. Virtual verification became a priority for DHS and ICE during the COVID-19 pandemic, when it became impractical for employers to physically examine documents of new employees. In March 2020, at the onset of the pandemic, DHS and ICE adopted a temporary virtual I-9 option, which was extended several times over the past two years, most recently in October 2022. This most recent extension expires on July 31, 2023.

NLRB Declares CBA Expiration Does Not End Dues Provisions

On September 30, 2022, the National Labor Relations Board (the NLRB) in *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center and Local Joint Executive Board of Las Vegas* (*Valley II*), on remand from the U.S. Court of Appeals for the Ninth Circuit, held that employers cannot unilaterally cease dues checkoff after the expiration of a collective bargaining agreement (CBA) that contains a dues-checkoff provision, thereby overruling its earlier decision in the same case (*Valley I*).

A dues-checkoff provision is one that requires an employer to automatically deduct union dues from a unionized employee's paycheck and send them to the applicable union. Dues-checkoff provisions are commonly negotiated for and found in CBAs. In *Valley I*, decided in 2019, the NLRB held the employer was permitted to stop the automatic withdrawals and remittances on the expiration of the CBA. This approach had been the longstanding practice of employers since the NLRB's 1962 decision in *Bethlehem Steel*. However, in the 2015 decision of *Lincoln Lutheran of Racine*, the NLRB held that checkoff provisions were mandatory subjects of bargaining and thus, absent negotiation with the union, an employer could not unilaterally cease remitting dues, even after a CBA expired. In *Valley II*, the NLRB returned to *Lincoln Lutheran of Racine* and explained that when a CBA expires, employers are required under Section 8(a)(5) of the National Labor Relations Act (NLRA) to maintain the status quo and are prohibited from making unilateral changes to any terms and conditions of employment that are mandatory subjects of bargaining, noting that the NLRB had never persuasively explained in prior decisions why dues checkoff should be an exception to this rule. The decision in *Valley II* will be applied retroactively in all pending cases.

NLRB Proposes 'Fair Choice and Employee Voice' Rule

On November 3, 2022, the NLRB proposed a rule that would roll back a 2020 ruling that weakened union protections against decertification by changing course on three historical doctrines: (i) the blocking charge policy, (ii) the voluntary-recognition bar and (iii) Section 8(f) of the NLRA agreements, applicable to workers in the construction industry.

By way of background, the blocking charge policy doctrine provided that the NLRB must delay processing elections to decertify an incumbent union while the NLRB was investigating an unfair labor practice charge, whereas the 2020 rule, in most cases, expedited the process for processing elections to decertify, even when the union filed an unfair labor practice charge.

The voluntary-recognition bar blocked petitions to decertify a union if:

- the employer voluntarily recognized a union, and
- a labor contract was reached within 45 days of recognition.

The 2020 rule pushed back on the voluntary-recognition bar by providing that the bar to decertification applied only if:

- the NLRB was notified of recognition, and
- the employer posted a notice providing workers the right to file for decertification within 45 days of recognition.

Though Section 8(f) case law provided a six-month window to challenge union recognition and language in a collective bargaining agreement that the employer recognized the union based on a card majority as sufficient proof of lawful recognition, the 2020 rule reversed aspects of this precedent, providing that union recognition in the construction industry could be challenged after the six-month window ended and that the above language in a collective bargaining agreement was not sufficient proof of majority support.

In what the NLRB called the "Fair Choice and Employee Voice" rule, it proposed a return to the pre-2020 status quo with respect to these three doctrines. The NLRB pointed to several findings supporting its proposal. First, that the pre-2020 blocking charge policy rule creates an atmosphere without coercion to hold decertification elections; second, since 2020, the voluntary-recognition-rule change resulted in no challenges to certification in practice, indicating to the NLRB that voluntary recognition reflects employee free choice for the most part; and third, that the NLRB fears that the 2020 rule changes to Section 8(f) created unnecessary burdens on unions to demonstrate majority support indefinitely. The NLRB explained that, together, the proposed changes "will better protect workers' ability to make a free choice regarding union representation, promote stability in labor relations, and more effectively encourage collective bargaining."

DOJ Expands Guidance on Employee Communication Policies

On September 15, 2022, the U.S. Department of Justice (the DOJ) released a memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" (the Memorandum), which, among other things, provides additional guidance to all employers (not just those in the financial sector) regarding the management of personal devices (*e.g.*, personal smartphones, tablets and laptops) and employee communication platforms (*e.g.*, messaging applications), as it relates to the prevention and investigation of corporate crime.

In the Memorandum, the DOJ explains that although an effective compliance program does not constitute a defense to prosecution of corporate misconduct, it can have a significant impact on the terms of a corporation's potential resolution with the DOJ. One area of the corporation's compliance program that the DOJ identifies as being relevant and significant is its policies and procedures with respect to employees' use of personal devices and third-party applications to conduct business.

While the Memorandum indicates that additional guidance will be forthcoming, it provides, as a general rule, that a corporation with a robust compliance program will: (i) have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, (ii) provide clear training to employees about such policies, and (iii) enforce such policies when violations are identified. Additionally, when assessing whether a corporation should receive cooperation credit (that is, credit given to a corporation by the DOJ for cooperating in its investigation), the DOJ will consider whether the corporation implemented policies to ensure that the corporation is able to collect and provide to the government all nonprivileged responsive documents relevant to the investigation, including communications and data from employees' personal devices and any third-party applications to the extent these devices and applications were used for business purposes.

Fourth Circuit Holds Gender Dysphoria Covered by the ADA

In a 2-1 decision issued on August 16, 2022, the U.S. Court of Appeals for the Fourth Circuit held in *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022) that gender dysphoria qualifies as a "disability" under the Americans with Disabilities Act (the ADA). This decision is the first by an appellate court to apply the ADA's protections to those with gender dysphoria, described by the plaintiff employee as discomfort or distress caused by a discrepancy between one's gender identity and sex assigned at birth. When the ADA was passed in 1990, "gender identity disorders not resulting from physical impairments" were explicitly excluded from the ADA's protection; whether this exclusion also included gender dysphoria was a question of first impression for the Fourth Circuit and the federal appellate courts.

Reversing the district court's decision to dismiss the plaintiff employee's case, the Fourth Circuit held that nothing in the ADA, at the time of its enactment or now, compels the conclusion that gender dysphoria constitutes a gender identity disorder (as that term was understood at the time of the ADA's enactment) that would exclude it from the ADA's protections. In reaching its decision, the court pointed to the ADA's broad definition of "disability" ("a physical or mental impairment that substantially limits one or more major life activities"); the 2008 amendment to the legislation that instructs courts to construe that definition in favor of broad coverage of individuals, to the maximum extent permitted by the ADA's terms; and the fact that, in this particular case, the plaintiff employee had been undergoing hormone therapy for many years to help alleviate her gender dysphoria, which was sufficient to raise a reasonable inference that her gender dysphoria resulted from a physical impairment.

On October 7, 2022, the court denied the appellee's petition for rehearing *en banc*.

New Window Into New York City Salaries

Starting November 1, 2022, employers advertising jobs in New York City must include a good faith salary range for every job, promotion and transfer opportunity advertised. The pay transparency law, an amendment to New York City's Human Rights Law (the NYCHRL), was originally to take effect in May 2022, before being delayed until November 1, 2022. A "good faith" salary range is one that an employer honestly believes, at the time it is listing the job advertisement, that it is willing to pay to a successful applicant. Employers must make sure to include both a minimum

and maximum salary for each job advertised. If the salary does not have a range, the employer may list the same salary as both the minimum and maximum figure. There is no penalty for paying a successful applicant more than the posted range, which may occur, for example, when the successful applicant has more experience than the employer originally intended for the role.

Employers with four or more employees, including owners and independent contractors, and job advertisements searching for full or part-time employees, domestic workers, independent contractors, interns and any other category of worker protected by the NYCHRL are all covered. Failure to comply with the new salary disclosure requirement could result in a civil penalty of up to $125,000 per violation, which can be increased up to $250,000 if the New York City Commission on Human Rights or the Law Enforcement Bureau determines that the employer's noncompliance was a willful or malicious act. New York City is operating anonymous tip lines for job-seekers or current employees to report violations of the law.

New Year, New Rules: What's To Come in January 2023

Below is a selection of new legislation and amendments that will be effective as of January 1, 2023:

- **Increases in the Minimum Wage for Federal Contractors.** On April 27, 2021, President Biden signed Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors." The minimum wage rate that generally must be paid to workers performing work on or in connection with covered contracts will increase from $15.00 to $16.20 per hour, while the required minimum wage that generally must be paid to tipped employees performing work on or in connection with covered contracts will increase from $10.50 to $13.75 per hour.
- **New York Expands Family Paid Leave Act To Include Sibling Care.** On November 1, 2021, New York State Gov. Kathy Hochul signed Senate Bill 2928A, expanding New York State's Paid Family Leave legislation to allow for caring of an employee's siblings. Employees will be able to receive paid leave to care for a biological sibling, adopted sibling, half-sibling or stepsibling with a serious health condition.
- **Use of Automated Employment Decision Tools Restricted in New York City.** On November 10, 2022, the New York City Council passed Local Law Int. No. 1894-A to amend the City's Administrative Code. The law regulates automated employment decision tools (sometimes called artificial intelligence tools) by prohibiting employers or employment agencies from using these tools to screen candidates or employees for employment decisions unless such tools have been subject to a bias audit within one year of using the tools, information about the audit is publicly available and notices have been provided to job candidates and employees.
- **New California Privacy Legislation and Expansion of Existing Legislation.** On November 3, 2020, Californians voted in favor of adding new privacy protections by approving Proposition 24, the California Privacy Rights Act (the CPRA), which amended the California Consumer Privacy Act of 2018 (the CCPA). When the CPRA comes into effect, all of its requirements in respect of handling consumer personal information will apply to employee personal information, as well as any existing requirements under the CCPA to which California employers have to date been exempt. The CPRA will expand the privacy and information security obligations of most employers doing business in California and require changes to existing policies, procedures and practices for handling employees' personal information.
- **California Paid Sick Leave and CFRA Expand To Allow Leave To Care for Non-Relatives.** On September 29, 2022, California Gov. Gavin Newsom signed Assembly Bill 1041, expanding the definition of "family member" under the California Family Rights Act (CFRA) and California's Healthy Workplaces Healthy Families Act (HWHFA) to include a "designated person." Employees will now be able to identify a designated person for whom they want to use leave when they request unpaid (CFRA) or paid (HWHFA) leave.
- **California Pay Range Disclosure Law Creates Additional Pay Transparency Requirements.** On September 27, 2022, California Gov. Newsom signed Senate Bill 1162 (SB 1162), also known as the Pay Transparency for Pay Equity Act. Currently, California law requires private employers with 100 or more employees that are required to file annual Employer Information Reports (EEO-1) with the Equal Employment Opportunity Commission (the EEOC) to submit annual pay data reports to California's Civil Rights Department (the CRD). SB 1162 expands employers' obligations by requiring all private employers with 100 or more employees to submit pay data reports to the CRD, regardless of whether they are required to submit EEO-1 reports to the EEOC. Employers with more than 15 employees must disclose salary ranges on all job postings.
- **Illinois CROWN Act Amends the Definition of Race Under State Human Rights Law.** On July 1, 2022, Illinois Gov. J. B. Pritzker signed Senate Bill 3616, also known as the Create a Respectful and Open Workplace for Natural Hair Act (the CROWN Act), amending the Illinois Human Rights Act. The Illinois Human Rights Act prohibits employers from engaging in discrimination based on numerous protected characteristics, including race. The CROWN Act expands the definition of "race" to include traits associated with race, including but not limited to hair texture and protective hairstyles such as braids, locks and twists.
- **Illinois Expands Bereavement Leave.** On June 9, 2022, Illinois Gov. Pritzker signed Senate Bill 3120, known as the Family

Bereavement Act, which amends the Child Bereavement Leave Act that provides up to two weeks of unpaid leave following the death of a child, to cover additional family members and the reasons for which an employee may take a leave of absence. Employers will be required to provide unpaid leave to employees, with respect to the death of a covered family member, to attend funerals, make necessary arrangements and/or grieve. Additionally, an employer must provide unpaid leaves of absence because of a miscarriage, an unsuccessful round of intrauterine insemination or an assisted reproductive technology procedure, a failed adoption match or surrogacy, stillbirth or a diagnosis that impacts pregnancy or fertility.

- **Illinois Amends One Day Rest in Seven Act by Increasing Potential Civil Penalties for Violations.** On May 13, 2022, Illinois Gov. Pritzker signed Senate Bill 3146, amending the Illinois One Day Rest in Seven Act (the ODRISA). The amendments add additional meal period, day of rest and notice requirements, in addition to significantly increasing the potential fines. An employer that violates any of the provisions of the ODRISA is guilty of a civil offense and subject to a civil penalty of up to $500 per offense.
- **Oregon Amends Workplace Fairness Act To Further Restrict Agreements Resolving Discrimination Claims.** On March 24, 2022, Oregon Gov. Kate Brown signed Senate Bill 1586, amending Oregon's Workplace Fairness Act (the OWFA) and imposing additional restrictions on settlements of discrimination and harassment claims. Among other things, the OWFA will prohibit employers (but not employees) from requesting confidentiality about the amount or existence of a settlement of discrimination and harassment claims. Employees may recover a civil penalty of up to $5,000 for violations of the OWFA.

International Spotlight

France

'Barème Macron' Found To Violate the European Social Charter

On September 26, 2022, the European Committee of Social Rights, tasked with monitoring compliance with the European Social Charter, published its decision, rendered on March 23, 2022, holding that the "Barème Macron" violates the European Social Charter. The Barème Macron is a grid that sets the minimum and maximum amount of damages a former employee can recover in cases of unfair dismissal based on the employee's length of service and the size of the employer. The cap is set at 20 months of gross salary for employees with 29 or more years of service. Despite the French Supreme Court, French Council of State and French Constitutional Council all having upheld the validity of the Barème Macron, certain employment tribunals and courts of appeal have refused to apply it since its introduction in 2017.

Eventually, two French national trade unions referred the question of the Barème Macron's validity to the European Committee of Social Rights. The trade unions argued that it violated Article 24 of the European Social Charter, which provides the right to protection in cases of termination of employment. In its March 23, 2022, decision published on September 26, 2022, the European Committee of Social Rights confirmed its agreement with the trade unions' position. It found that the ceilings set by the grid are not sufficiently high to compensate for the damages suffered by an individual whose employment is terminated, nor to dissuade an employer from improperly terminating employment, and that a former employee's right to adequate compensation was not guaranteed by the grid given the narrow discretion allowed to the courts when working within its confines.

Although decisions of the European Committee of Social Rights are not directly enforceable within the French legal system, it is likely that certain employment tribunals will use this decision to continue to refuse to apply the grid. This decision may also result in legislative reform.

New Whistleblower Protections Take Effect

A new French law (*loi n° 2022-401*) aimed at protecting whistleblowers came into effect on September 1, 2022. This legislation was subsequently supplemented on October 5, 2022, with a decree (*décret n° 2022-1284*) that sets out reporting procedures for whistleblowers. As a result of this new law, companies employing 50 or more employees for at least two consecutive years are required to implement a formal internal procedure for collecting and processing tips. In addition, whistleblowers are now provided with a choice between reporting a tip internally or externally, unlike the previous legislative scheme, which required that an internal report be made first. In addition, a whistleblower can publicly disclose a tip (for instance, to the media) if no appropriate measures were taken after a report was made to an external authority, in the case of serious and imminent danger, or if external reporting creates a risk of reprisal or does not allow for an effective remedy.

Germany

More Generous Unemployment Benefits To Come on January 1, 2023

A basic jobseeker's allowance (known as "unemployment benefit II" or, colloquially, "Hartz IV") has, for almost two decades, been paid by the German Federal Employment Agency to individuals in Germany who are unemployed and unable to ensure their subsistence, taking into account any income or assets they may have. The basic benefit is currently €432 per month. Among other requirements, before receiving the benefit, individuals must have made use of their savings, including amounts that were saved for retirement, except for a portion that is "exempt" from use.

Individuals who receive the benefit must accept any reasonable employment opportunity.

Significant reforms to Hartz IV (including a new name, "Buergergeld," meaning "civic money") have been approved by the government. Under these reforms, the basic benefit will increase to €502 per month for a single household plus €432 for an unemployed spouse and between €285 and €420 per child (depending on age). For each individual, €30,000 EUR of savings are exempt from use. The law implementing these reforms is scheduled to become effective on January 1, 2023.

United Kingdom

Future of EU Law in the UK To Be Decided

Following the United Kingdom's withdrawal from the European Union (Brexit) on January 31, 2020, the "Retained EU Law (Revocation and Reform) Bill 2022-23" was introduced in the U.K. government's House of Commons, on September 22, 2022. This bill, if enacted into law, will make significant changes to the current status, operation and content of EU law that was retained in the U.K. since Brexit. At a high level, the bill would repeal all EU law that was retained on the "Sunset Date" (which is currently set for December 31, 2023, but could be extended), unless the U.K. government expressly restates such law (or amended versions) as U.K. domestic law.

From an employment law perspective, among other changes, this may result in the revocation of or significant amendment to:

- the Working Time Regulations 1998 that govern the rules relating to workers' working hours, breaks and holidays;
- the Transfer of Undertakings (Protection of Employment) Regulations 2006 that govern the automatic transfer of employees to a new employer or service provider upon the acquisition of an undertaking or the transfer of a service to which they are assigned, and the protection of their terms and conditions upon such transfer; and
- other rules relating to agency workers, fixed-term employees and part-time workers.

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