Employment Flash

Skadden

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Worker Classification: DOL Issues Final Rule and FTC Commissioner Sets His Sights on Combatting Misclassification

On January 10, 2024, the Department of Labor (DOL) issued its final rule on the classification of workers as employees or independent contractors under the Fair Labor Standards Act, rescinding and replacing the final rule from 2021.

The 2024 rule returns to a "totality of the circumstances" analysis to determine whether a worker is economically dependent on an employer by considering six factors, which are non-exclusive:

1. Opportunity for profit or loss depending on managerial skill.
2. Investment by the worker and the employer.
3. Degree of permanence of the work relationship.
4. Nature and degree of control.
5. Whether work performed is an integral part of the employer's business.
6. Skill and initiative required.

Unlike the 2021 rule, the 2024 rule does not consider any one factor to carry more weight than another and allows for the consideration of other relevant factors. The 2024 rule went into effect on March 11, 2024.

Federal Trade Commissioner Alvaro M. Bedoya is also focusing on worker classification, addressing the subject at the *Global Competition Review: Law Leaders Global Summit 2024* on February 2. In his remarks, Commissioner Bedoya proposed that the Federal

Trade Commission (FTC) be involved in combating misclassification of workers as independent contractors. Specifically, he argued that misclassification is a form of unfair competition in violation of Section 5 of the FTC Act and therefore within the purview of the FTC's authority.

The proposed expansion of the FTC's authority into worker classification is a further example of the FTC's increasing interest in matters at the intersection of employment and competition law, as was seen last year when the FTC issued a joint Memorandum of Understanding with the National Labor Relations Board (NLRB) that allowed the FTC and NLRB to share information, conduct cross-training for staff and partner on investigative efforts in order to assist the agencies in promoting fair competition and advance workers' rights. This joint Memorandum of Understanding was discussed in greater detail in the September 2022 issue of the *Employment Flash*.

SOX Whistleblowers Not Required To Show Retaliatory Intent To Prove Violation of Whistleblower Protection Provisions

On February 8, 2024, the U.S. Supreme Court unanimously held in *Murray v. UBS Securities, LLC* that an employee need not prove an employer's "retaliatory intent" in order to establish that the employer violated the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX), which prohibits employers from taking adverse employment action against employees in retaliation for engaging in activity protected by the legislation.

Trevor Murray filed a whistleblower action in district court alleging that UBS terminated his employment in retaliation for reporting that individuals on the UBS trading desk were engaging in unethical and illegal conduct. The jury found in favor of Mr. Murray, UBS appealed and the Second Circuit held that to be successful, a claim for retaliation must provide evidence of the employer's intent to retaliate.

The Supreme Court disagreed, noting that the plain language of SOX includes no such requirement; instead, if a plaintiff establishes that protected activity was a contributing factor in the adverse employment action, the plaintiff has established a prima facie case. A plaintiff need not prove why an adverse action was taken against him, only that it happened, and that his protected activity was a contributing factor in the employer's decision to take that action.

Once an employee establishes a prima facie case, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected behavior.

NLRB Joint Employer Rule Stayed Then Vacated by Federal Judge

On February 24, 2024, Judge J. Campbell Barker of the U.S. District Court for the Eastern District of Texas issued an order to stay the effective date of the NLRB new joint employer rule for two weeks until March 11, 2024 — the second time the effective date of the rule was delayed. Then, on March 8, 2024, Judge Barker vacated the rule.

The new rule, described in our November 2023 *Employment Flash*, provided that two or more entities would be considered joint employers of a group of employees if each entity had an employment relationship with the employees, and if the entities shared or co-determined one or more of the employees' essential terms and conditions of employment.

With respect to the latter, the rule provided an exhaustive list of the seven essential terms and conditions of employment to be considered in determining joint employer status. Had the rule taken effect, it would have rescinded and replaced the 2020 rule, which requires a higher threshold for the finding of joint employer status — namely, the existence of "substantial direct and immediate control" over essential terms and conditions of employment. Now, with Judge Barker's March 8 decision, the 2020 rule remains in place.

NLRB Chair Lauren McFerran called the decision to vacate the rule a "disappointing setback," but "not the last word on [the NLRB's] efforts to return [its] joint-employer standard to the common law principles that have been endorsed by other courts." The NLRB, according to Chair McFerran, is actively considering its next steps in this case.

New Private Right of Action for NYC Earned Safe and Sick Time Act Violations

On January 20, 2024, New York City enacted Int. 0563-2022, a law that allows employees who have allegedly experienced a violation of their rights under New York City's Earned Safe and Sick Time Act (ESSTA) to commence a civil action in any court

of competent jurisdiction. Under the ESSTA, employees have the right to use safe and sick leave for the care and treatment of themselves or a family member and to seek legal and social services assistance or take other safety measures if the employee or a family member has been the victim of an act or threat of domestic violence or unwanted sexual contact, stalking or human trafficking.

Prior to the enactment of this law, the sole enforcement mechanism for alleged violations of the ESSTA was for employees to file a complaint with the city Department of Consumer and Worker Protection (DCWP). Now, employees alleging a violation of their rights under the ESSTA will have two years from the date they knew, or should have known, of the alleged violation to commence a civil action or file a complaint with the DCWP. Employees who file a complaint with the DCWP are not barred from bringing a civil action for the same alleged violation, and filing a complaint with the DCWP is not a prerequisite for bringing a civil action.

The new law allows employees to seek injunctive and declaratory relief, attorneys' fees and costs and other relief that the court deems appropriate, in addition to compensatory damages. The new law also provides that penalties will be imposed on the employer on a per-employee and per-instance basis.

New York Limits Employers' Ability To Access Employees' Social Media Accounts

As of March 12, 2024, employers in New York State are restricted in their ability to access the private social media accounts of their employees and applicants for employment. Specifically, the new law, signed by Gov. Kathy Hochul on September 14, 2023, prohibits employers from requesting, requiring or coercing any employee or applicant to:

1. Disclose any authentication information (such as a username or password) for accessing a personal account through an electronic communications device.
2. Access the employee's or applicant's personal account in the presence of the employer.
3. Reproduce photographs, video or other information contained within a personal account.

Employers are also prohibited from discharging, disciplining or otherwise penalizing an employee or applicant for refusing to disclose such protected information. However, employers may still view, access or utilize information about an employee or applicant that is accessible without any required log-in information in the public domain. Similarly, employers may access or utilize information that is voluntarily shared by an employee, client or third party.

Under the new law, "employer" is defined broadly to include:

1. A person or entity engaged in a business, industry, profession, trade or other enterprise in the state.
2. The state of New York and any political subdivision or civil division of the state (*e.g.*, county, city, town).
3. A school district or government entity operating a public school, college or university.
4. A public improvement or special district.
5. A public authority, commission or public benefit corporation
6. Any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state.

The law does not, however, apply to any law enforcement agency, fire department or department of corrections and community supervision.

A "personal account" means an account or profile on an electronic medium where users can create, share and view user-generated content (such as uploading or downloading videos or photographs, blogs, video blogs, podcasts, instant messages or internet website profiles or locations) that is used by an employee or applicant exclusively for personal purposes.

The law does not prohibit employers from requiring employees to provide login information to company accounts used for business purposes or seeking access to personal accounts if necessary to comply with the requirements of federal, state or local law.

The law permits employers to access electronic communication devices that the employer pays for when the employer's payment for the device was conditioned upon the employer retaining the right to access the device and the employee was given prior notice and explicitly agreed to such conditions. However, employers may not access any personal accounts on the device. An "electronic communications device" means any device that uses electronic signals to create, transmit and receive information, such as computers and telephones.

New York now joins a growing number of states, including California, Delaware, Illinois, Louisiana, Michigan, Maryland, Montana, New Hampshire, New Jersey and Vermont, that have enacted similar laws protecting employees' privacy in respect of personal social media accounts.

State Ban on Non-Competes Vetoed by New York Governor but New Legislation May Be Coming

On December 22, 2023, Gov. Hochul vetoed Senate Bill S3100A, a law that was passed by the New York legislature in June 2023 that would have instituted a ban on post-employment non-competition agreements, following unsuccessful negotiations between legislative leaders and Gov. Hochul to reach a compromise to limit the law's scope.

While Gov. Hochul noted in her veto memo that she supports limits on non-competition agreements for middle-class and low-wage workers in order to protect them from unfair practices that would limit their ability to earn a living, she criticized the "one-size-fits-all" nature of the law passed in June, saying that the law, as written, did not adequately protect companies' legitimate business interests in New York's highly competitive economic climate.

Gov. Hochul previously indicated her support for non-competition legislation that would apply to workers earning less than $250,000, a suggestion that follows the trend in numerous states (including Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Washington and Virginia, as well as the District of Columbia) that statutorily prohibit non-competition agreements unless an employee is classified as exempt under the Fair Labor Standards Act and applicable state law or earns more than a statutory minimum salary.

Senator Sean Ryan, who sponsored Senate Bill S3100A, has indicated that legislation related to non-competition agreements will be reintroduced in 2024 so New York employers should continue to monitor legal developments in this area.

California AB 51 Permanently Enjoined

California Assembly Bill 51 (AB 51), the law that prohibits employers from imposing mandatory arbitration agreements as a condition of employment, has been permanently enjoined by a California federal district court in *Chamber of Commerce of the USA v. Becerra*.

AB 51 prohibits employers from requiring employees to sign, as a condition of employment or employment-related benefits, arbitration agreements related to disputes arising under the California Fair Employment and Housing Act or California Labor Code. When AB 51 took effect in 2020, a California federal district court granted the U.S. Chamber of Commerce's request for a preliminary injunction, enjoining the enforcement of AB 51 with respect to arbitration agreements governed by the Federal Arbitration Act (FAA) (*i.e.*, all arbitration agreements between employees and employers other than those covering transportation employees). The State of California appealed the preliminary injunction to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit initially issued a split opinion holding that the FAA did not completely preempt AB 51. Following a petition for rehearing, however, the appellate court withdrew that decision and addressed the issue again, concluding that the FAA preempted AB 51 in its entirety, thereby affirming the district court's grant of a preliminary injunction.

In support of its decision, the Ninth Circuit emphasized Supreme Court and other federal jurisprudence holding that state laws that impede the formation of arbitration agreements governed by the FAA are preempted by that legislation. The Ninth Circuit also held that the provisions of AB 51 preempted by the FAA are not severable, and thus that AB 51 could not remain intact even if those provisions were removed from the law.

Upon remand, the State of California and the U.S. Chamber of Commerce stipulated to a permanent injunction of AB 51 and dismissal of the case.

As a result, AB 51 no longer stands as an impediment for employers who wish to require arbitration agreements as a condition of employment in California, so long as the agreement is governed by the FAA.

Trial Courts May Not Strike PAGA Claims on Manageability Grounds

On January 18, 2024, in *Estrada v. Royalty Carpet Mills, Inc.*, the California Supreme Court addressed the split between appellate courts of the Second and Fourth Districts regarding whether trial courts have the authority to strike a claim under the Private Attorneys General Act (PAGA) on manageability grounds. The court held that, although trial courts may use a multitude of "tools" to effectively manage PAGA claims, striking claims because of manageability issues is not one of them.

In *Estrada*, Jorge Estrada, and 12 other plaintiffs brought suit against Royalty Carpet Mills Inc. for violations of the California Labor Code, including various wage and hour claims, and for PAGA civil penalties, as part of a class and PAGA action. The trial court decertified the class on grounds that individualized issues predominated the matter and rendered a class action

unmanageable. The court also struck the PAGA claim on grounds that it was unmanageable. The Fourth District Court of Appeal reversed this decision and held that manageability is not a valid basis on which a trial court can dismiss a PAGA claim.

The defendant requested review by the California Supreme Court, which agreed that trial courts do not have the authority to strike PAGA claims on grounds of manageability, although the court did explain that trial courts may use other tools such as limiting types of admissible evidence or using representative testimony to ensure that PAGA claims are tried effectively. The court did not address at what point a PAGA claim becomes too complex or burdensome for court adjudication.

California CRD Unveils New Pay Data Reporting Guidance

On February 1, 2024, the California Civil Rights Department (CRD) issued new guidance to covered employers regarding annual pay data reporting submissions, which are due this year by May 8, 2024. Changes to the requirements from prior years include:

- **Remote worker reporting:** Reports must now include information pertaining to "remote workers," who are defined as both payroll employees and labor contractors (*e.g.*, staffing agency) employees "who are entirely remote, teleworking, or home-based, and have no expectation to regularly report in person to a physical establishment to perform work duties." Reports must include: (1) the number of employees who do not work remotely, (2) the number of remote employees located within California, and (3) the number of remote employees located outside of California.
- **Demographic data for labor contractors required:** Employers are no longer permitted to include "unknown" for the race, ethnicity or sex of labor contractor employees. The preferred method for obtaining such information is for labor contractor employees to self-identify. If a contractor employee does not self-identify, the employer must nevertheless make the required selection by using (in the following order): current employment-related records, other reliable records or information, or observer perception.
- **No grace period:** Unlike last year, there is no indication that the CRD will accept or grant any pay reporting submission deferral requests.

As in previous years, reports must be filed online through the CRD portal (no other method is permitted).

This year, CRD will publish aggregate pay data results from the 2022 reporting year and advises employers to review these results. CRD has the authority to seek an order requiring a non-compliant employer to submit its pay data report and may also seek civil penalties of $100 per employee for the first violation and $200 per employee for subsequent violations.

New California Requirements for Workplace Prevention Plans Take Effect July 1, 2024

On September 20, 2023, Gov. Gavin Newsom signed Senate Bill 553 (SB 553), amending the California Labor Code to enhance the requirements of the illness and injury prevention program standards set by the California Division of Occupational Safety and Health (Cal/OSHA) board.

With limited exceptions (*e.g.* for certain public entity employers, employees teleworking from a location of their choice and "not under the control of the employer," or for work sites not "accessible to the public" with fewer than 10 employees present "at any given time"), California employers must:

1. Develop and implement a written workplace violence prevention plan.
2. Conduct initial and yearly trainings for employees regarding the plan.
3. Maintain records of workplace violence hazard identification, evaluation and correction records, training records, a violent incident log, as well as workplace violence incident investigations records.

If an employer fails to meet the requirements of SB 553, Cal/OSHA may issue a notice or citation, describing the violation and providing the employer with a specific period of time to rectify the violation. If the violation is not rectified, Cal/OSHA may issue a penalty, which, depending on the nature of the violation, may be as high as $25,000 for a violation classified as "serious" or $158,727 for violations classified as "repeated" or "willful."

Employers must comply with all of the requirements of SB 553, including ensuring that employees are properly trained in workplace violence prevention, by July 1, 2024, to avoid any civil penalties.

Delaware Supreme Court Holds That Forfeiture-for-Competition Provisions in Partnership Agreements Are Not Subject to a Reasonableness Review

On January 29, 2024, in *Cantor Fitzgerald, L.P. v. Ainslie*, the Delaware Supreme Court unanimously reversed a decision of the Delaware Court of Chancery, which found a forfeiture-for-competition provision in a limited partnership agreement to be an unreasonable and unenforceable restraint on trade.

The Court of Chancery had considered whether to evaluate the forfeiture-for-competition provision for reasonableness (the standard of review for restrictive covenants) or apply the "employee choice" doctrine (which presumes that a departing employee has made an informed choice between forfeiting a benefit on the one hand and refraining from competition and retaining the benefit on the other, and therefore gives deference to the parties' written agreement). The Court of Chancery likened the forfeiture-for-competition provision to a non-competition covenant because it restrained trade and so the court applied the reasonableness standard. It also likened the provision to a liquidated damages clause, which, it noted, are disfavored in Delaware and do not receive contractual deference from the courts.

In reversing, the Delaware Supreme Court held that forfeiture-for-competition provisions in limited partnership agreements are not to be reviewed under a reasonableness standard, citing the Delaware Revised Limited Partnership Act and that legislation's emphasis on the principle of freedom of contract in partnership agreements. The Supreme Court also held that forfeiture-for-competition provisions are distinct from liquidated damages clauses since the former serve as conditions precedent to a contractual obligation, whereas the latter serve as remedies for breach of contract.

While this decision demonstrates that Delaware courts will enforce forfeiture-for-competition provisions in partnership agreements as agreed to between sophisticated parties, the ruling does not change the law governing noncompetition covenants, which are still subject to review under the reasonableness standard. A more detailed summary of the case can be found in our January 21, 2024, client alert "Ruling: Forfeiture-for-Competition Provisions in Delaware Partnership Agreements Are Not Subject to a Reasonableness Review."

DC Employers To Gear Up For New Pay Transparency Law Requirements

Effective June 30, 2024, employers in the District of Columbia will be required to disclose salary and hourly pay ranges for open job positions under D.C.'s recently enacted Wage Transparency Omnibus Amendment Act of 2023 (the WTOAA), signed by Mayor Muriel Bowser on January 12, 2024.

Specifically, employers will be required to provide "the minimum and maximum projected salary or hourly pay in all job listings and position descriptions advertised." The pay range must include "the lowest to the highest salary or hourly pay that the employer in good faith believes at the time of posting it would pay" for the open position. These disclosures must be included in external job postings, as well as in internal job announcements relating to transfer or promotional opportunities. Notably, the WTOAA does not define "job listings" or "position descriptions," and additional guidance on these terms is anticipated.

The WTOAA also establishes protections for employees related to discussions about compensation, and requires disclosure of certain benefits information. For example, the WTOAA prohibits an employer from screening applicants based on wage history or seeking wage history from an applicant's prior employer.

In addition, an employer is prohibited from retaliating against an employee who discusses "compensation," which is defined under the WTOAA to include all forms of monetary and non-monetary benefits an employer provides or promises to provide employees in exchange for services. (This expands upon already existing protections afforded to employees under D.C.'s Wage Transparency Act).

Finally, employers must disclose the availability of health care benefits to an applicant prior to their first job interview, although such information is not required to be included in the job posting itself.

There is no private right of action under the WTOAA, but non-compliant employers may be subject to penalties of $1,000 for the first violation, $5,000 for the second violation, and $20,000 for each subsequent violation. Once it comes into force, the WTOAA will apply to all private employers with at least one employee in D.C. The WTOAA does not address whether its requirements apply to remote positions.

International Spotlight

European Union

Under EU Law, Employers Must Generally Seek To Accommodate Employees Who Have Become Permanently Incapable of Doing Their Job

In a recent decision (Case C-631/22), the European Court of Justice (ECJ) held that a provision allowing an employer to terminate employment as a result of an employee's permanent incapacity to perform his role due to a workplace accident was incompatible with the law of the European Union (EU). In reaching its decision, the ECJ relied on EU Council Directive 2000/78 (establishing a general framework for equal treatment in employment and occupation), Article 21 of the EU Charter of Fundamental Rights (which contains a general prohibition against discrimination) and the United Nations Convention on the Rights of Persons with Disabilities (Convention) (which all EU member states have signed and ratified).

Under the Convention, "discrimination on the basis of disability" is defined to include the denial of reasonable accommodation. Reasonable accommodation includes an employer's obligation to take appropriate measures to enable individuals with disabilities to gain access to employment, pursue a profession, advance in their career and participate in workplace education and training. Consequently, in cases where an employee has become permanently unable to do their job, an employer is generally obliged to transfer the employee to a different role, rather than terminating employment, where: (1) a different role is available, (2) the employee has the necessary competence, ability and availability for the new role, and (3) the transfer would not impose a disproportionate burden on the employer.

Whether a transfer would place a disproportionate burden on an employer will depend on a variety of factors, including the size of the employer and its financial resources, the cost to the employer and the availability of public funds or other support for the employee.

France

New Legislation Expands Profit-Sharing for Employees

Effective December 1, 2023, Law No. 2023-1107 facilitates and expands the implementation of employee profit-sharing plans within French companies. Among its most notable measures, companies with fewer than 50 employees (*i.e.*, those who are not legally required to set up a mandatory profit-sharing plan) may now voluntarily introduce such a plan with a calculation formula that is less favorable to employees than the statutory formula applicable to companies with 50 or more employees.

In addition, as of January 1, 2025, companies that employ between 11 and 49 employees will be required to establish at least one profit-sharing mechanism if the company has a net taxable profit of at least 1% of its revenue for three consecutive fiscal years. This profit-sharing mechanism may take the form of any of the following:

- **A mandatory profit-sharing plan** that provides for a bonus calculated based on a formula set by the French Labor Code and which is exempt from social security and tax obligations.
- **A voluntary profit-sharing plan** that provides for a bonus, exempt from social security and tax obligations, calculated based on a formula determined by the employer.
- **A savings plan**, *i.e.*, a collective scheme, such as a retirement savings plan, that allows employees to invest their savings with favorable social security and tax treatment.
- **A value-sharing bonus** that provides for a bonus exempt from social security and tax obligations under certain circumstances.

Finally, the new legislation introduces a further obligation on companies with 50 or more employees to negotiate (before June 30, 2024 in the case of companies that already have a profit-sharing mechanism in place) with trade union representatives for a supplementary profit-sharing payment or a new profit-sharing mechanism in order to share any "exceptional increase in profits" made by the company with its employees. How an "exceptional increase in profits" is to be defined is a matter for negotiation between the employer and the trade union representatives, taking into account certain criteria set out by the law.

Germany

Lying About Eligibility To Receive a Covid-19 Vaccine Constituted a Breach of an Employee's Implied Obligations to His Employer

According to a decision of the Federal Labor Court (2 AZR 55/23), an employer had grounds to dismiss a health care worker who, under Section 20a of the Infection Protection Act was required to show proof of vaccination against COVID-19 to his employer, falsely claimed a medical examination had found that he could not be vaccinated against the disease. The court found the employee's action to be a material breach of his implied obligations under his contract of employment such that a dismissal was justified.

United Kingdom

Employer Unable To Rely on Broad Non-Compete in Investment Agreement Where Investment Was 'Intricately Connected' to Contract of Employment With Narrower Covenant

In its January 25, 2024, decision in *Sparta Global Ltd v Hayes*, the High Court of England and Wales decided against granting an injunction to an employer seeking to enforce a 12-month non-compete restriction against a former employee in his capacity as a shareholder, where there was a shorter restriction in his employment agreement. The court reasoned that the investment was "intricately connected" to his contract of employment.

Ben Hayes was subject to two sets of restrictive covenants. His employment contract included a six-month non-compete, and there was a 12-month non-compete in an investment agreement that he accepted when he was awarded shares in the employer company shortly after his employment commenced. The length and scope of the non-compete in the investment agreement were broader than those in Hayes's employment agreement. When Hayes intended to join a competitor in a role that would breach the broader scope of the non-compete in the investment agreement, his employer sought an interim injunction to stop him from taking the position.

The court noted that while Hayes had signed a deed of adherence at the outset of the relationship, he had not seen the investment agreement, despite his claim that he had repeatedly requested a copy, and there was no meaningful negotiation of the restrictive covenants in it.

While the court found that his 0.35% holding in the company could be worth at least several hundred thousand pounds, its preliminary view was that the investment agreement would more likely than not be considered as "akin to a contract of employment and intricately connected" to Hayes' employment due to the circumstances in which he entered into the deed of adherence. The court therefore applied the test for an employment restriction.

The fact that the employer only sought a six-month restriction in the employment contract was persuasive in determining that the 12-month non-compete restriction exceeded the minimum protection reasonably necessary to protect Sparta Global's confidential and commercially sensitive information. Sparta Global would instead need to rely on the six-month restriction in Hayes' employment agreement.

This decision highlights the importance of assessing whether equity documents are genuinely distinct from an individual's employment and can offer separate, enhanced protection. Employers should also be aware of proposals by the U.K. Government to limit the length of non-compete restrictions in employment agreements in the U.K. which, if implemented, will limit the protection of an employment non-compete to three months. See our December 2023 article "Non-Compete Clauses: Proposed Reforms on Both Sides of the Pond."

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