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Employer Checklist to Navigate 2018

This year, companies doing business in the US will confront a host of new or amended federal, state and local employment laws.

We've prepared an easy-to-use checklist to help you keep track of the most significant labor and employment developments taking effect in 2018. While we've distilled the changes into action-oriented bullet points, you can click the text for more detailed information.

We look forward to working with you in 2018.

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US Nationwide Action Items

Federal Discrimination, Disability Accommodation and Harassment

- ☐ Conduct a meaningful review of the Company's anti-harassment policy and practices
- ☐ Ensure all termination decisions are 100% certain before notifying employees — rescinded notices may trigger liability
- ☐ Review current policies and practices with respect to the prevention of LGBT discrimination and ensure managers are appropriately trained
- ☐ Train and remind HR managers to work individually with employees with disabilities to provide them with the necessary and reasonable accommodations that will allow disabled employees to do their jobs
- ☐ Pay close attention to employee complaints involving broader policies and practices within the workplace
- ☐ Don't wait to act until hostile behavior in the workplace becomes pervasive — one single incident can trigger Title VII protections
- ☐ In Illinois, Indiana and Wisconsin, employers may have more flexibility to deny requests for long-term medical leave beyond FMLA entitlements
- ☐ Consider updating all national non-discrimination and non-harassment policies to account for protection against sexual orientation and gender identity discrimination

Federal Wage & Hour

- ☐ Re-evaluate any policies providing compensation for post-shift security checks
- ☐ Build in time to for legal review of Company automatic meal period policies
- ☐ Review policies concerning "tipped wages"

Federal Class / Collective Trends

- ☐ Review FMLA policies to ensure they are compliant on their face
- ☐ Consider removing class action waivers from arbitration agreements (or making them voluntary)
- ☐ In motion practice in federal court, challenge plaintiff's standing at every opportunity
- ☐ Don't assume class action settlements will be rubber-stamped by courts

Federal Labor

- ☐ Be cautious before terminating an employee for disloyalty, expect the NLRB to require employers to meet a high burden before an employee will lose the protection of the NLRA
- ☐ Train managers and HR staff to start with the presumption that vulgar Facebook complaints and other employee posts about work may be protected activity
- ☐ Continue to comply with Weingarten rights for unionized employees to avoid violating the NLRA
- ☐ With the new Republican-led NLRB, consider a more aggressive approach with new matters before the Board in 2018
- ☐ Note that the Republican-led NLRB is showing signs of increasing employer flexibility and discretion

Impact of the Trump Administration

- ☐ Audit workforce to ensure proper classification of employees and independent contractors under the FLSA

- ☐ Take advantage of the "pause" of the EEO-1 pay equity rule to conduct a dry run pay audit under the privilege of legal counsel
- ☐ For now, follow the current rules for overtime exemptions
- ☐ Work with HR to redesign executive pay-for-performance programs which no longer need to be structured to ensure tax deductibility
- ☐ Notify employees of potential impact of tax reform on their personal tax liability and their need to review their tax withholding amounts

Immigration + Mobility

- ☐ Prepare for the DACA phase-out
- ☐ Develop an escalation protocol to support employees affected by President Trump's travel ban
- ☐ Be aware of greater scrutiny by all government agencies that can be involved in the immigration process (US Department of Homeland Security, US Department of State, US Department of Labor, US Immigration and Customs Enforcement, and US Customs and Border Protection)
- ☐ Prepare affected employees and their family members in advance of USCIS adjustment of status interviews
- ☐ Note that Customs and Border Protection (CBP) are increasingly searching phones or computers, of anyone entering the US; CBP is able to request passwords to unlock devices

ERISA

- ☐ Review and analyze current health insurance contracts to determine whether it makes sense to join an Association Health Plan
- ☐ Make reasonable efforts to locate missing retirement plan participants and be sure to make required minimum distributions
- ☐ Review all self-funded ERISA-regulated welfare plans to remove any language required under California insurance law or regulations

Nationwide Trends

- ☐ Audit existing PTO and sick leave policies in these jurisdictions and align any US-wide policy with the most generous sick leave law in the country
- ☐ Pause before terminating an employee who claims to use marijuana for medical purposes
- ☐ Review employment applications (both hard copy and electronic) and hiring processes to ensure compliance with new Ban-the-Box laws
- ☐ In "No Ask" jurisdictions, update employment applications (both hard copy and electronic) and hiring processes to ensure compliance
- ☐ Revisit employee handbooks and family leave policies and update family leave language to address any changes to applicable laws

California Action Items

California Discrimination, Disability Accommodation and Harassment

- ☐ Update policies, application forms, candidate questionnaires and other materials to delete inquiries regarding criminal history before a conditional offer of employment is made
- ☐ Delete all inquires requesting previous salary history on employment applications; train all involved in the hiring process on the impact of the new law (including any agents of the employer)
- ☐ Train managers and supervisors on new transgender protections and display the new poster
- ☐ Audit the Company's anti-harassment program to ensure it contains all the elements articulated by the DFEH
- ☐ Ensure employees and supervisors are receiving effective and consistent sexual harassment, discrimination and sensitivity training
- ☐ Consider removing progressive discipline policies from any handbooks and policies and instead administering disciplinary actions on a case-by-case basis
- ☐ Follow the notice requirements under the CA WARN Act even for furloughs

California Wage & Hour

- ☐ Ensure compliance with the new minimum wage in California ($11 in 2018) (and remember some cities and counties have ordinances providing for higher minimums)
- ☐ Consider including an "opt out" provision in arbitration agreements
- ☐ Include net amount of commissions earned against advances on employee paychecks
- ☐ Ensure that paystubs accurately list the name of the legal entity which is the direct employer
- ☐ Conduct an IC misclassification audit
- ☐ Check for footprint in any CA jurisdictions with new predictive scheduling requirements

New Laws in California Effective in 2018

- ☐ Work with immigration lawyers to develop clear guidelines and processes for handling immigration raids and requests for documents
- ☐ Employers with 20–49 employees in a 75-mile radius must now provide parental leave
- ☐ Update anti-sexual harassment training to include new mandatory education of harassment based on gender identity, gender expression and sexual orientation
- ☐ Consider conducting privileged classification audits to prevent misclassifications of employees as independent contractors
- ☐ When confronted with Labor Commissioner investigations, consider retaining employment counsel right away
- ☐ Update employment applications and train those involved in hiring and recruiting
- ☐ Conduct a privileged review of all of the various policies, procedures, and other documents related to the screening process for compliance with the new statewide Ban-the-Box law

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Impact Rating
HIGH

☐ Conduct a meaningful review of the Company's anti-harassment policy and practices

What has changed?

According to EEOC statistics, during fiscal year 2016 more than 13,000 administrative charges alleged sex-based harassment. As the #metoo phenomenon spreads like wildfire, the flood gates are open for more sex-based harassment claims in 2018.

Employers risk enormous legal and reputational risks if they turn a blind eye to this pervasive issue. In today's climate, the best business practice is to be extremely proactive in rooting out bad actors and building a healthy corporate culture based on mutual respect and dignity, and establishing clear guidelines.

Recommended Actions

Review the existing anti-harassment policy and audit the effectiveness of complaint reporting mechanisms and anti-retaliation precautions. Consider the following:

1. Is the policy compliant with current law?
2. Does it address off-duty sexual conduct?
3. Does it truly encourage and empower employees to come forward without fear of reprisal?
4. Are there any procedural hurdles that would discourage lodging a complaint? Instead, are employees resorting to social media?
5. Is there a robust investigation procedure?
6. Are there known "secrets" about inappropriate sexual conduct such that more reporting channels are necessary?
7. Is the company diligent in training employees regularly and across all levels of the organization?
8. Is there "buy-in" from senior leadership and the C-suite?
9. Has that endorsement been effectively communicated to all employees?
10. Consider conducting a privileged audit with the assistance of counsel.

Impact Rating
MEDIUM

Ensure all termination decisions are 100% certain before notifying employees — rescinded notices may trigger liability

What has changed?

In August 2017, the Second Circuit concluded that a rescinded notice of termination may constitute an adverse employment action for purposes of Title VII and the Family and Medical Leave Act (FMLA). In doing so, the Second Circuit relied on Supreme Court precedent that held a cause of action accrues for statute of limitations purposes on the date the termination decision is made and communicated to the employee. By analogy, the Second Circuit reasoned that a notice of termination qualifies as an adverse employment action, and a subsequent rescission of the termination decision does not impact its status as such.

The court went on to observe that the rescission decision primarily goes to damages and mitigation. Specifically, courts should assess whether an employee's right to back pay is tolled upon the employee's receipt and unreasonable rejection of a good faith reinstatement offer from the employer.

Recommended Actions

- This broadens the universe of potential adverse employment actions under Title VII and the FMLA in Second Circuit (which encompasses federal district courts in Connecticut, New York, and Vermont), but we can expect plaintiffs' attorneys to cite this decision regardless of jurisdiction.
- Keep this decision in mind when terminating employees and ensure they have reached a final decision and obtained all required approvals before notifying the employee.

Impact Rating
MEDIUM

Review current policies and practices with respect to the prevention of LGBT discrimination and ensure managers are appropriately trained

What has changed?

LGBT issues have increasingly become a priority for the EEOC. In its most recent Strategic Enforcement Plan, the EEOC found that ensuring anti-discrimination protection for LGBT people would remain one of its priorities through 2021. The EEOC's FY2016 annual report showed that the EEOC resolved 1,649 LGBT-based sex discrimination charges and recovered $4.4 million for LGBT individuals in FY2016, marking the third straight year each number has increased.

Recommended Actions

- Review current policies and practices with respect to the prevention of LGBT discrimination and ensure managers are appropriately trained.
- Nominations for key EEOC positions still await Senate confirmation, and LGBT issues may receive different treatment from the EEOC going forward under new leadership. However, what this impact will be is still an open question. Keep this decision in mind when terminating employees and ensure they have reached a final decision and obtained all required approvals before notifying the employee.

Impact Rating
MEDIUM

Train and remind HR managers to work individually with employees with disabilities to provide them with the necessary and reasonable accommodations that will allow disabled employees to do their jobs

What has changed?

In FY2017, the EEOC filed 184 merits lawsuits, more than double the number of suits filed in FY2016. Nearly 41% of the total actions filed were based on disability discrimination.

In its most recent Strategic Enforcement Plan, the EEOC included among its priorities qualification standards and inflexible leave policies that discriminate against individuals with disabilities.

One matter in 2017 highlights the potential liabilities associated with disability discrimination cases. Earlier this year, an international shipping company agreed to pay $2 million to resolve a nationwide disability discrimination lawsuit. The company also agreed to update its policies on reasonable accommodation, improve its implementation of those policies, and conduct training for those who administer the company's disability accommodation processes.

Recommended Actions

- Expect the EEOC to continue to focus on disability claims.
- Make certain to work individually with employees with disabilities to provide them with the necessary and reasonable accommodations that will allow them to do their jobs.
- For example, multiple-month leave policies alone do not guarantee compliance with the Americans with Disabilities Act ("ADA"). Such policies must also include the flexibility to work with employees with disabilities who may simply require a reasonable accommodation to return to work.

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Impact Rating
MEDIUM

Pay close attention to employee complaints involving broader policies and practices within the workplace

What has changed?

Recently, systemic issues have been a focus of the EEOC. This year the EEOC reiterated that tackling systemic issues is central to the mission of the agency.

Systemic discrimination is a discriminatory pattern, practice or policy that has a broad impact on an industry, company or geographic area.

By the end of FY2017, the percentage of systemic cases on the EEOC's active docket increased to 24.8%. Among the systemic cases resolved in FY2017, there were several lawsuits involving recruitment and hiring practices that resulted in significant settlements and outcomes. For example, a national restaurant chain will pay $12 million to settle an age discrimination lawsuit in which the EEOC alleged applicants were denied front-of-the-house positions because of their age. In addition, a sporting equipment and apparel retailer will pay $10.5 million to settle a hiring discrimination and retaliation lawsuit in which the EEOC alleged the company failed to hire black and Hispanic applicants into retail jobs and retaliated against those who opposed discriminatory practices.

Recommended Actions

- Continue to pay careful attention to the EEOC's systemic efforts, and understand that the EEOC may seek to identify potential systemic cases from individual EEOC charges.
- With this, employers should pay close attention to employee complaints involving broader policies and practices within the workplace.
- Employers should also review their recruitment and hiring practices to ensure compliance with equal employment opportunity laws.

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Impact Rating
MEDIUM

Don't wait to act until hostile behavior in the workplace becomes pervasive — one single incident can trigger Title VII protections

What has changed?

In April 2017, the Second Circuit ruled in *Daniel v. T&M Protection Resources LLC* that a single utterance of a racial slur can trigger protections against workplace harassment under Title VII of the Civil Rights Act of 1964.

The Court stopped short of finding that the single racial slur used by a supervisor to refer to an employee (a 34 year-old gay black man) triggered Title VII in this instance. But it ruled that the district court was incorrect to hold that this was not possible. In reaching its decision, the Court found that the district court had improperly applied its prior precedent finding that one overtly hostile racial remark was not sufficient to state a claim for harassment under Title VII.

The Second Circuit clarified that its prior holding found that whether a single remark can trigger liability under Title VII depends on the particular facts at issue. In *Daniel*, the Second Circuit panel concluded that the employee at issue had in fact suffered a hostile work environment over his 15-month employment with the company. The plaintiff had alleged 20 separate incidents of harassment, including two that the panel considered to be severe. In addition to the use of the racial slur, the employee alleged that his supervisor brushed his genitalia against the employee's buttock in a manner that he considered threatening.

Noteworthy, the Equal Employment Opportunity Commission filed an amicus brief supporting the employee's claim that a single use of a racial slur could trigger employment protections under Title VII if such conduct is severe based on the evidence presented. With this, it is likely that the EEOC will continue to take this position on a nation-wide basis, especially in jurisdictions where the controlling law is unsettled.

Recommended Actions

- Train managers and supervisors to prevent and respond to workplace harassment or discrimination immediately.
- Train managers and supervisors on the potential consequences of discriminatory comments and conduct, even in situations where it is believed to be a single, isolated comment.
- Review and implement reporting and investigation procedures to appropriately respond to incidents of alleged workplace harassment.

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Impact Rating
MEDIUM

In Illinois, Indiana and Wisconsin, employers may have more flexibility to deny requests for long-term medical leave beyond FMLA entitlements

What has changed?

In September 2017, in *Severson v. Heartland Woodcraft Inc.*, the Seventh Circuit held that the ADA does not require employers to provide additional unpaid leave as an accommodation to employees who have expended their FMLA leave.

This decision is contrary to the EEOC's general position that granting additional, long-term unpaid leave to employees may be a reasonable accommodation under the ADA. The Seventh Circuit did note that providing employees with a brief period of unpaid leave to deal with a medical condition could be a reasonable accommodation in some circumstances, for instance when someone with arthritis or lupus may be able to do a given job even if, for brief periods, the inflammation is so painful that the person must stay home.

Recommended Actions

- Continue to engage in the interactive process with employees to determine what, if any, accommodations may be reasonable under the ADA.
- Be aware that in Illinois, Indiana, and Wisconsin, employers may not be required to grant requests for long-term medical leave beyond FMLA entitlement as an accommodation to employees under the ADA.
- Be aware that the EEOC will likely continue to advance its position both within and outside of the Seventh Circuit, and find that additional medical leave may be a reasonable accommodation even after FMLA leave is exhausted if the leave is for a definite and time-limited duration, requested in advance, and likely to enable the employee to perform his or her essential job functions when the employee returns to work.
- Review all leave policies to ensure full compliance with applicable laws, including state and local laws, which may provide paid or unpaid leave to employees in qualifying circumstances beyond the FMLA.

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Impact Rating
HIGH

☐ Consider updating all national non-discrimination and non-harassment policies to account for protection against sexual orientation and gender identity discrimination

What has changed?

In April 2017, the Seventh Circuit became the first federal circuit to explicitly rule that sexual orientation is covered by Title VII of the Civil Rights Act of 1964 in *Hively v. Ivy Tech Community College*. In so doing, the Seventh Circuit created a split with every other federal appellate court that has addressed the issue.

Historically, courts have found that Title VII — which bars discrimination based on race, gender, national origin, religion, and other factors — cannot be used to challenge sexual orientation bias. In reaching its decision in *Hively*, the Seventh Circuit examined Supreme Court precedent such as *Obergefell v. Hodges* (holding same-sex couples have the right to marry), as well as *Price Waterhouse v. Hopkins* (holding that discrimination based on sexual stereotypes falls under Title VII's protections). The Seventh Circuit's decision also follows the EEOC's 2015 decision in *Baldwin v. Foxx*, which held that sexual orientation discrimination is "necessarily" sex discrimination.

Recommended Actions

- Review all non-discrimination and non-harassment policies to account for potential sexual orientation and gender identity coverage, and train managers accordingly.
- Watch out for new claims. Employees within the Seventh Circuit in Illinois, Indiana and Wisconsin may now bring Title VII sexual orientation claims against employers. In addition, other jurisdictions may soon choose to adopt the Seventh Circuit's ruling and fall in line with the EEOC's position.
- Consider the impact on expatriate employee populations. Title VII expressly provides for extraterritorial application so it is important to account for any implications for U.S. citizens living overseas, particularly in countries where homosexuality is or may become illegal.

Impact Rating
HIGH

Re-evaluate any policies providing compensation for post-shift security checks

What has changed?

In 2014, the Supreme Court unanimously held that time spent by Amazon warehouse workers completing security checks at the end of a workday was not compensable. This case reversed the Ninth Circuit's determination that the time spent was not "integral and dispensable" to the worker's job-related duties under the Fair Labor Standards Act (FLSA).

Without regard for the high court's ruling, plaintiffs amended their complaint to assert claims under laws of Nevada and Arizona, where the Amazon warehouses were located. In this second round of litigation, however, the District Court again found for Amazon. Arizona and Nevada both interpret their respective wage and hour laws consistent with the FLSA.

Recommended Actions

- Review the applicable state's wage and hour laws to determine their compliance with the FLSA. If state laws are consistent with the federal provisions, employers will likely continue to benefit from the Supreme Court's ruling.

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Impact Rating
MEDIUM

Build in time to for legal review of Company automatic meal period policies

What has changed?

In 2017, courts saw an uptick in FLSA lawsuits based on automatically deducted meal periods. On August 9, 2017, a nurse filed a collective action lawsuit against St. Luke's Health System Corp. and various affiliates, claiming that they failed to pay nurses for work performed during meal breaks. Specifically, the nurse alleged that St. Luke's automatically deducts 30 minutes from each shift for meal periods, assuming that its nurses are able to find a 30-minute block of time to eat. The nurse further claimed that, in reality, nurses remain on duty when attempting to eat, and that their meal periods are frequently interrupted.

Under the FLSA and its regulations, employers do not have to pay for "bona fide meal periods," which are "ordinarily 30 minutes or more." For a meal period to not be compensable, "the employee must be completely relieved from duty for the purposes of eating regular meals." Further, an "employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating."

Although courts have held that automatic meal period deduction policies do not violate the FLSA by themselves, employers may face challenges in defending such a policy in an FLSA lawsuit. Further, the potential damages for violating the FLSA's meal period requirements can be steep, particularly when dealing with employees who frequently work overtime hours (like nurses).

Recommended Actions

- To avoid a costly collective action lawsuit, employers should review their meal period policies and, if necessary, implement changes or improvements.
- Employers with automatic meal period policies should clearly communicate to employees procedures for reporting uncompensated work time, including meal breaks. Evidence that an employee failed to follow such procedures can aid defense of any subsequent claims.
- Train managers and employees regarding the legal requirements of adequate meal periods. Managers should know not to contact their subordinates during meal periods, and to report any violations of company meal period policy.
- A handful of states (e.g. California, Oregon and Washington) have their own specific requirements for meal and rest breaks that are broader than the FLSA's requirements. Multi-jurisdictional employers will need to either implement a universal policy that is compliant with the most strict applicable law, or have separate policies for specific locations with more strict requirements.

Impact Rating
MEDIUM

Review policies concerning "tipped wages"

What has changed?

In 1988, the DOL issued guidance under which employers could not pay restaurant employees a tipped wage (which could be as low as $2.13 per hour under federal law), if employees spent more than 20% of their time on "sidework" (non-tip generating duties such as cleaning tables or preparing food). This was known as the 80/20 Rule.

In *Marsh v. J. Alexander's LLC*, the Ninth Circuit concluded that 80/20 Rule was contrary to the FLSA and not entitled to deference. The Court held that an employee can be paid a tipped wage as long as the employee "customarily and regularly receives at least $30 a month in tips."

The Eighth Circuit (in *Fast v. Applebee's Int'l, Inc.*) had previously deferred to the DOL's interpretation, so the matter may well be taken up by the U.S. Supreme Court to resolve the circuit split.

Recommended Actions

- Employers in the restaurant industry should evaluate the impact of the decision on how they classify and pay their employees.
- Employers should be mindful that the Ninth Circuit's holding conflicts with the Eighth Circuit's earlier holding, so different rules may apply depending on where employees are situated.

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Impact Rating
MEDIUM

Review FMLA policies to ensure they are compliant on their face

What has changed?

Courts are becoming more receptive to certifying Rule 23 class actions for FMLA claims, which historically have been pursued as single plaintiff claims or "opt-in" collective actions similar to FLSA procedures.

On April 26, 2017, in *Carrel v. MedPro Group, Inc.*, the Northern District of Indiana certified a class of employees based on a single plaintiff's FMLA claim. The claim alleged that an employer's PTO policy violated the FMLA. Specifically, the approved class was broadly defined to include all current or former employees who took FMLA leave and whose allotment of PTO was adversely affected by taking FMLA leave.

Recommended Actions

- A Rule 23 class action presents a much greater liability risk to employers in comparison to a single plaintiff case or a collective action case where plaintiffs must affirmatively opt-in. Accordingly, employers should review their FMLA (and related) policies to make sure they are compliant with the FMLA.
- In light of an increasing number of state and local governments requiring paid sick leave, be mindful of FMLA requirements when implementing new PTO policies.
- The DOL website includes several resources for employers regarding FMLA requirements, including an Employer's Guide and a FAQ. Review those resources and/or speak with an attorney with expertise in the FMLA to ensure its policies and procedures are FMLA-compliant.

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Impact Rating
HIGH

☐ Consider removing class action waivers from arbitration agreements (or making them voluntary)

What has changed?

On October 2, 2017, the Supreme Court held oral argument on the issue of whether arbitration agreements that include class action waivers are legally enforceable under the National Labor Relations Act (NLRA). The National Labor Relations Board (NLRB) previously held in its 2012 *D.R. Horton* decision that class action waivers in arbitration agreements illegally interfere with employees' rights to engage in concerted activity under the NLRA. Since the NLRB's decision, a circuit split has developed on the issue. The Seventh and Ninth Circuits have held that arbitration agreements with class waivers are not enforceable, while the Second, Fifth and Eighth Circuits have held that such agreements are, in fact, enforceable. Earlier this year, the Supreme Court granted certiorari.

The Supreme Court appears divided on the issue. Based on the questions posed during oral argument, it is thought that Justices Breyer, Kagan, Sotomayor, and Ginsburg support the NLRB's position. Conversely, the questions and comments from Justices Roberts, Alito and Kennedy indicate that they may favor the enforceability of class waivers. Justices Gorsuch and Thomas did not ask any questions during oral argument, but based on their history, it is believed they too favor enforcement of class action waivers.

It is unknown when the Supreme Court will issue its opinion, but with the divided Court, there is likely to be at least one dissent and/or concurrence. This could, in turn, delay the Court's ultimate release date of its decision.

Recommended Actions

Because the Supreme Court's decision is expected within the next few months, to the extent possible, consider:

- Waiting to revise or adopt arbitration agreements containing class action waivers until the viability of such clauses is resolved by the Supreme Court; and
- Developing alternative action plans to be able to quickly amend existing and future employee arbitration agreements depending on the Court's ultimate ruling.

Of course, until the Supreme Court issues its opinion, the positions of the NLRB and the various courts remain intact. This means that both the NLRB and the courts within the Seventh and Ninth Circuits would likely hold that arbitration agreements with class action waivers are unenforceable.

- Employers who do not want to risk such a ruling while waiting for the Supreme Court's decision should consider removing class action waivers from arbitration agreements with new and existing employees, or making such agreements voluntary.

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Impact Rating
MEDIUM

In motion practice in federal court, challenge plaintiff's standing at every opportunity

What has changed?

In May 2016, the Supreme Court analyzed the standing requirement of Article III of the US Constitution in *Spokeo Inc. v. Robins*. Plaintiff alleged that Spokeo Inc. had violated the Fair Credit Reporting Act (FCRA) by preparing and posting on its website a consumer report that contained inaccurate information about him. The Supreme Court held that plaintiff could "not satisfy the demands of Article III by alleging a bare procedural violation [of the FCRA]" because a "violation of one of the FCRA's procedural requirements may result in no harm." Instead, the Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." Without a concrete injury, the plaintiff lacked standing to pursue the statutory violation in federal court. Accordingly, the Court remanded the case to the Ninth Circuit to determine whether any intangible injury incurred by the plaintiff was concrete.

In August 2017, the Ninth Circuit again rejected *Spokeo's* argument that the Plaintiff's allegations of harm were too speculative to establish a concrete injury. The Ninth Circuit took a broad view of what constitutes a concrete injury and opined that "the inaccuracies alleged in this case do not strike us as the sort of 'mere technical violation[s]' which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with FCRA."

The Supreme Court's *Spokeo* decision set off a wave of motion practice challenging whether plaintiffs have standing to pursue their statutory claims. These challenges are often made in class action litigation involving various federal and state statutes. There have been hundreds of decisions nationwide interpreting and applying *Spokeo*. The results of these decisions vary based on the forum, statutes, claims and facts of each case.

Recommended Actions

- Although the case law interpreting Article III's standing requirement post-*Spokeo* is still being developed, companies should immediately analyze whether standing exists in cases involving intangible injuries that arise from a statutory violation.
- Standing can be challenged in early dispositive motions; similarly standing can be challenged when opposing motions for class certification. Even if the named plaintiff can point to a concrete injury, that does not necessarily mean that others can do so as well.

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Impact Rating
MEDIUM

Don't assume class action settlements will be rubber-stamped by courts

What has changed?

Historically, courts approve the vast majority of class action settlement agreements. Unless the agreement is one-sided or contains an obviously unreasonable provision, the parties generally assume their agreement will be approved. But three recent decisions illustrate the heightened scrutiny faced by such agreements:

1. A New York federal judge rejected a proposed $19.1 million settlement between TGI Friday's and a putative class of 28,000 of its tipped employees. The court had concerns with the agreement's confidentiality provisions and its broad release. Although the putative class action only raised wage-and-hour claims, the agreement included a general release that covered claims not raised in the litigation. As a result, the court refused to approve the proposed settlement unless the parties revised the agreement.
2. Similarly, a Colorado federal judge rejected a proposed settlement in a putative overtime class action brought by call center employees. The court stated that both sides "should be ashamed of themselves" for proposing a settlement in which the plaintiffs' lawyers would receive three times more than what the employees would receive.
3. Finally, the Seventh Circuit overturned a district court's approval of a class action settlement brought by Subway sandwich purchasers for consumer fraud. There, the parties reached a settlement for injunctive relief and agreed that class counsel would receive $520,000 in fees and each named plaintiff would receive a $500 incentive award. The Seventh Circuit found that the settlement was "worthless" and that "[n]o class action settlement that yields zero benefits for the class should be approved."

Recommended Actions

- Companies settling class action lawsuits should not assume courts will "rubber stamp" the parties' agreement.
- Instead, familiarize yourself with the applicable court's prior decisions on requests to approve class action settlements.
    - Many courts, for example, will reject any settlement that appears to "buy off" the named plaintiffs or plaintiffs' counsel at the expense of the class.
    - Many also scrutinize broad confidentiality provisions, general releases, and agreements that allow unclaimed funds to revert back to the defendant.

Class settlements that contain these types of provisions likely will face scrutiny by objectors, the district court and the appellate court. Accordingly, employers seeking to resolve a class action lawsuit should consider the potential downsides of including provisions that may result in the agreement being challenged and even rejected.

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Impact Rating
MEDIUM

Be cautious before terminating an employee for disloyalty, expect the NLRB to require employers to meet a high burden before an employee will lose the protection of the NLRA

What has changed?

A circuit split developed recently regarding employers' ability to terminate employees for disloyalty. The Supreme Court has held that employees can lose protection under the NLRA when disparaging their employer's products (as opposed to the terms and conditions of the workplace) to the public. However, the NLRB had issued several decisions making it much more difficult for employers to justify disciplining disloyal employees during labor disputes.

For instance, in July, the Eight Circuit overturned a NLRB decision in favor of employees of a Jimmy John's franchisee who were fired based on their disloyalty.

- Specifically, while protesting a paid sick leave policy, the employees placed posters in the stores and in nearby public locations that suggested customers' sandwiches were being made by sick employees. The Eighth Circuit held that the standard used by the NLRB had impermissibly overruled the Supreme Court decision allowing employers to terminate disloyal employees. As such, it held that the employer could terminate the employees for their conduct.
- The Eighth Circuit recognized that its decision directly conflicted with the D.C. Circuit, which in 2016 had upheld the NLRB's standard for disloyalty. Given the circuit split, the Supreme Court may again be faced with determining the correct standard for terminating disloyal employees.

Recommended Actions

- Before terminating an employee for disloyalty, carefully review the content of the employee's statements and whether they were made to the public. Employers should anticipate that well-coached employees will always link such comments to a labor dispute in some fashion.
- Determine the applicable standard for disciplining disloyal employees, which can change depending on the applicable jurisdiction. Employers in the Eighth Circuit may have greater freedom to discipline disloyal employees than employers in other circuits.
- It remains to be seen whether a Republican-controlled NLRB will use a more employer-friendly standard for disloyalty. Until the NLRB indicates otherwise, employers should expect the NLRB to require employers to meet a high burden before an employee will lose the protection of the NLRA.

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Impact Rating
MEDIUM

Train managers and HR staff to start with the presumption that vulgar Facebook complaints and other employee posts about work may be protected activity

What has changed?

The NLRB has expanded the scope of activity that is protected under Section 7 of the NLRA. Workers have traditionally been protected when expressing concerns over terms and conditions of employment for themselves and other workers. Depending on the overall context, varying levels of expletives and aggressive behavior have been protected in the past. The Board has also found social media activity protected.

In recent years, the Board has been more willing to find profanity to be protected if tied to otherwise protected Section 7 conduct. In April, the Second Circuit allowed the Board's expansive approach to stand.

In *NLRB v. Pier Sixty*, the Second Circuit affirmed the Board's holding protecting the following extremely profane Facebook post: "Bob is such a NASTY MOTHER F*CKER don't know how to talk to people!!!!!! F*ck his mother and his entire f*cking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"

Recommended Actions

- A newly staffed NLRB will likely trend in the other direction — more in favor of employer rights to terminate employees for extreme profanity.
- Train managers and HR staff to start with the presumption that Facebook complaints and other employee posts about work may be protected. Only in the case of threats of violence, discrimination or harassment, or truly extreme profanity or vulgarity will it be absolutely safe to take disciplinary action.

Baker McKenzie.

Impact Rating
LOW

Continue to comply with *Weingarten* rights for unionized employees to avoid violating the NLRA

What has changed?

In August 2017, the D.C. Court of Appeals quashed the NLRB's unprecedented application of *Weingarten* rights to voluntary meetings. *Midwest Division-MMC, LLC, d/b/a/ Menorah Medical Center v. NLRB*.

In *Midwest Division-MMC*, the Board found that denial of an employee's request for representation at a voluntary meeting violated the NLRA because employees have a right to representation where there is a reasonable belief that the employee will be disciplined, *regardless of whether the employees' attendance is compulsory or voluntary*. This was an overt expansion of employees' *Weingarten* rights, which only apply to a unionized employee's right to representation at a *mandatory meeting* in which an employer requires them to answer potentially incriminating questions that may result in disciplinary action.

The D.C. Circuit unanimously reversed the NLRB's decision and held that an employee's *Weingarten* rights are infringed only when an employer *compels* an employee's attendance at an interview that might reasonably be expected to lead to discipline, and denies his or her request for union representation. Here, since the employer clearly conveyed that attendance at the peer review meeting was *voluntary* (and even allowed employees to submit a written statement as an alternative to attending), the right to union representation under *Weingarten* was not triggered.

Recommended Actions

- Take note that absent compulsory attendance, the right to union representation recognized in *Weingarten* may not arise.
- Continue to comply with *Weingarten* rights (as they currently stand) for unionized employees to avoid violating the NLRA.
- Watch for changes in the Board's agenda under the Trump administration, which are likely to be more employer-friendly.

Baker McKenzie.

Impact Rating
MEDIUM

With the new Republican-led NLRB, consider a more aggressive approach with new matters before the Board in 2018

What has changed?

The NLRB recently filled two of its seats with new members Marvin Kaplan and William Emanual. Both new members are Republican, and with their confirmation, the NLRB has a Republican majority for the first time in ten years. In addition, Republican Peter Robb recently replaced Democrat Richard Griffin as the NLRB's General Counsel.

With the new NLRB members and General Counsel, a rollback of a number of union-friendly decisions is expected. Over the past few years, the Democratic-led NLRB has decided several controversial issues, including broader joint employment liability, the appropriateness of small "micro-units" of employees, and the enforceability of class action waivers.

Recommended Actions

- Closely monitor the decisions coming out of the new Republican-led NLRB. Although it could be some time for the appropriate case to make it to the Board for decision, it is believed that a number of the more union-friendly decisions issued during the previous administration will be rolled back or overturned.
- Employers may also want to take a more aggressive approach with new matters before the NLRB. With the overall transition of the Board to a more company-sided majority, employers could have a greater likelihood of success in defending against unfair labor practices and other matters.

Baker McKenzie.

Impact Rating
HIGH

Note that the Republican-led NLRB is showing signs of increasing employer flexibility and discretion

What has changed?

The Board:

1. Returned to a standard returning to broader employer rights to make unilateral changes without providing a union notice and an opportunity to bargain
2. Eliminated the "micro-unit" bargaining unit standard that constricted employers' ability to expand proposed bargaining units to include other employees who share a community of interest with those of the proposed unit
3. Reversed the standard for joint employment liability (formerly the *Browning-Ferris analysis*)
4. Reversed the standard for evaluating work rules for impact on protected concerted activity (formerly the *Lutheran Heritage* analysis)

Recommended Actions

- The return to previous standards of unilateral change analysis will allow employers more discretion in changing terms of employment consistent with past practice.
- Note that elimination of the "micro-unit" standard of bargaining unit appropriateness substantially reduces a union's ability to cherry pick favorable groups of employees to win elections.
- With the reversal of the joint employer analysis, employers will have less labor risk (bargaining obligations and strikes) when engaging third parties like staffing companies, temporary workers, or co-located workers.
- As a result of the "new" work rule analysis, employers will be less likely to face scrutiny of employee handbook provisions. Employers now have broader discretion to implement and enforce handbook provisions relating to civility in the workplace and workplace safety (i.e., no cell phone/camera policies, social media).

Baker McKenzie.

Impact Rating
LOW

Audit workforce to ensure proper classification of employees and independent contractors under the FLSA

What has changed?

On June 7, 2017, US Secretary of Labor Alexander Acosta announced in a press release that the DOL withdrew two of its recent administrator's interpretations:

1. 2015 Guidance focused on the misclassification of employees as independent contractors under the FLSA, indicating that the DOL would be more closely scrutinizing independent contractor classifications.
2. 2016 Guidance examining joint employment relationships under the FLSA.

Both interpretations were widely considered to be an attempt by the DOL to expand the coverage and enforcement of the FLSA. The withdrawal of the guidance documents likely indicates a shift in enforcement focus of the DOL under the Trump administration.

Although Secretary Acosta's press release stated that the withdrawal of the administrator's interpretations "does not change employer's legal responsibilities," the removal of the two interpretations could be a signal that the DOL will relax its enforcement efforts of independent contractor misclassification and revert back to its previous approach to joint employer liability.

As of this writing, the DOL has not implemented new guidance. As such, it appears the DOL simply withdrew its previous guidance and will not be issuing new guidance. Nevertheless, the withdrawal appears to confirm prior statements that the Trump administration would roll back several employment-related changes implemented under the Obama administration.

Recommended Actions

- Audit your company's workforce to ensure proper classification of employees and independent contractors under the FLSA.
- Analyze potential joint employer relationships and review and revise, as necessary, any worker staffing agreements.
- Monitor whether other government agencies will follow suit — such as the NLRB, which adopted its own broad joint employer standard in its 2015 decision, *Browning-Ferris Industries of California, Inc.*
- The Wage and Hour Division of the DOL offers resources for employers regarding independent contractors and joint employment, including a fact sheet and a field operations handbook.

Baker McKenzie.

Impact Rating
MEDIUM

☐ Take advantage of the "pause" of the EEO-1 pay equity rule to conduct a dry run pay audit under the privilege of legal counsel

What has changed?

On August 29, 2017, the Office of Management and Budget (OMB) stayed the pending EEO-1 compensation data reporting rule implemented by the EEOC in 2016.

The rule, also known as the "pay equity" rule, would have required employers with 100 or more employees (as well as federal contractors with 50 or more employees) to collect and report on comprehensive employee pay data in their annual EEO-1 reports. Covered employers already must submit an annual EEO-1 report tracking their employees' race/ethnicity and sex; that requirement will not change, and employers should plan to submit such data by March 31, 2018.

So what's next for the compensation data rule? The OMB has asked the EEOC to submit a new information package for the EEO-1 form for their review. To date, it is unclear if the EEOC has done so, consequently the fate of the compensation data rule remains unknown.

Recommended Actions

- Follow the status quo. Employers are no longer obligated to provide compensation data as part of their annual EEO-1 reports. In fact, employers can use the new EEO-1 form and simply leave the compensation data information blank.
- Keep your compensation data handy — just in case. Although the compensation data rule is not expected to be revived anytime soon, employers are encouraged to keep their compensation data records nearby just in case the requirement is reinstated.
- If covered, continue to file an EEO-1 report tracking employees' race/ethnicity and sex. The deadline to file your EEO-1 form is March 31, 2018.

Baker McKenzie.

Impact Rating
LOW

For now, follow the current rules for overtime exemptions

What has changed?

Previously, in late 2016, a Texas federal court entered a nationwide preliminary injunction against the DOL amendments to the FLSA regulations on overtime, which were due to go into effect in December 2016. The DOL published the rules in May of last year following President Obama's announced intention to "modernize and streamline" the rules, which were last updated in 2004. The revised rules were as follows:

- *Increase to Minimum Salary for White Collar Exemptions*: the minimum salary required to qualify for the white collar exemptions was set to $913 per week or $47,476 annually (currently $455 per week or $23,660 annually).
- *Increase to Minimum Salary for Highly Compensated Employee Exemption*: the total annual compensation needed to exempt highly compensated employees was increased to $134,004 annually (currently $100,000 annually).
- *Automatic Updates*: the minimum salary and compensation levels for the aforementioned exemptions would be automatically updated (increasing every three years starting January 1, 2020).

The changes to the overtime rules had been stayed since the court granted the preliminary injunction in November 2016. But on August 31, 2017, the same court granted a motion for summary judgment filed by several business groups and invalidated the Obama DOL's revised rule. According to the court, the DOL's "significant increase" in the salary requirement for the white collar exemptions "would essentially make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level." As a result, the court found the revised rule ignored Congress's intent and went "too far." It similarly determined that the revised rule's automatic increases to the salary minimum was unlawful.

On October 30, 2017, the DOL filed a notice of appeal with the Fifth Circuit. This does not mean, however, that the Trump administration is in favor of the revised overtime rules. Rather, this allows the current administration to revise the rules (likely by making a more modest increase to the salary threshold). The DOL filed a motion to hold the appeal in abeyance while it undertakes further rulemaking to determine what the salary level should be, particularly after its review of public comments regarding the same.

Recommended Actions

- Adhere to the current rules for overtime exemptions. For now, employees making $455 per week and whose primary duty satisfies one of the white collar exemptions may be classified as exempt.
- Watch for updates from the DOL, which is currently reviewing submissions following a request for public input on whether updating the 2004 salary level for inflation would be appropriate, and whether a test for exemption that relies solely on the duties performed by an employee without regard for the amount of the employee's salary would be preferable to the current salary test. Of

note, Secretary of Labor Alexander Acosta has indicated that the $47,476 threshold is too high, and that a more reasonable annualized threshold would be between $30,000 and $35,000.

— Monitor potential changes to state and local overtime laws, in addition to the FLSA. The Texas federal court's ruling has no impact on these laws, and some states already have salary levels that are higher than the FLSA's levels (e.g., California and New York).

Baker McKenzie.

Impact Rating
HIGH

- **Work with HR to redesign executive pay-for-performance programs which no longer need to be structured to ensure tax deductibility**
- **Notify employees of potential impact of tax reform on their personal tax liability and their need to review their tax withholding amounts**

What has changed?

On December 20, 2017, the Tax Cuts and Jobs Act was passed by both the Senate and the House, and President Donald Trump signed the Act into law on December 22, 2017.

From a Compensation & Benefits perspective, among other things, the approved bill includes:

- Significant changes to Code Section 162(m);
- A new tax deferral regime for options and RSUs granted by private companies;
- Elimination of exclusion for fewer than expected employer-provided fringe benefits; and
- Increased disallowance of compensation-related deductions under Code Section 274.

The majority of the Act is effective as of January 1, 2018.

Recommended Actions

The passage of the Act will require:

1. Updates to tax withholding rates on employee compensation
2. Reconsideration of design of executive performance-based compensation programs in view of elimination of deduction for certain performance-based pay
3. Review of employer-provided fringe benefits, which may no longer be tax deductible, and
4. HR education on non-deductibility of settlements or other payments related to sexual harassment or sexual abuse if subject to a nondisclosure agreement.

Baker McKenzie.

Impact Rating
HIGH

Prepare for the DACA phase-out

What has changed?

On September 5, 2017, the Justice Department announced the gradual-phase out of the Deferred Actions for Childhood Arrivals (DACA) Program. DACA protected from deportation those who entered the US illegally as children or overstayed their valid visas. DACA beneficiaries could also apply for the right to work in the US. An estimated 800,000 undocumented immigrants benefited from DACA.

US Citizenship and Immigration Services ("USCIS") stopped accepting new DACA applications on September 5, 2017. DACA beneficiaries also can no longer apply for permission to travel outside of the US.

DACA beneficiaries with employment authorization documents (EADs) that expired before March 5, 2018 had to submit their renewal applications by October 5, 2017. Current DACA based EADs will remain valid until they expire. Absent legislative action or court intervention, all DACA beneficiaries will lose protection from deportation and work authorization in 2020.

Recommended Actions

- Establish a mechanism to monitor and alert Human Resources of employment authorization expiration dates.
- Develop a standard communication to remind employees of employment reverification requirements at least 90 days before the date reverification is required.
- Foster an open dialogue to address employee concerns as they relate to the rescission of DACA or other immigration-related Executive Orders in a manner that does not violate company policy.
- Identify escalation protocols for anyone who has questions and concerns to speak with internal global mobility or immigration teams in conjunction with corporate immigration counsel.
- Conduct an audit of Employment Eligibility Verification Forms (Form I-9) for the entire workforce to ensure compliance.

Baker McKenzie.

Impact Rating
HIGH

Develop an escalation protocol to support employees affected by President Trump's travel ban

What has changed?

On January 27, 2017, President Trump issued an Executive Order ("EO") banning foreign nationals from Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen from entering the United States. That weekend, the so called "travel ban" caused widespread confusion at international airports and reportedly resulted in valid visa and green card holders being barred from boarding flights into the United States.

On March 6, 2017, President Trump issued a revised EO with an effective date of March 16, 2017 that repealed the January 27, 2017 EO. The updated EO does not include Iraq, but does include Syria, Iran, Libya, Somalia, Sudan and Yemen. It does not apply to lawful permanent residents or foreign nationals with valid visas. It also contains provisions for potential waivers of the travel ban if a foreign national demonstrates undue hardship.

On September 24, 2017, President Trump issued a Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats. Known as "Travel Ban 3.0," it includes restrictions on travel for nationals of Chad, Iran, Libya, Syria, Yemen and Somalia.

On December 4, 2017, the U.S. Supreme Court allowed the third version of the travel ban to take effect. As of the date of this writing, country-specific travel restrictions apply to foreign nationals holding passports from the following six countries: Chad, Iran, Libya, Somalia, Syria, and Yemen. In addition, nationals of Iraq are subject to extra screening measures. The restrictions were implemented fully as of December 8, 2017. The Supreme Court ruling did not affect the entry restrictions against nationals of North Korea and Venezuela that were already in place.

The travel restriction may be waived if a foreign national can demonstrate undue hardship, that the foreign national's entry into the United States would not pose a threat to national security or public safety of the US and that the foreign national's entry would be in the national interest.

Recommended Actions

- Communicate with employees to identify individuals who are from these countries and who may be traveling to and from the US.
- Develop an escalation protocol to support impacted employees. Communicating that protocol to your larger employee population may help to allay fears during this period of uncertainty.

Baker McKenzie.

Impact Rating
HIGH

Be aware of greater scrutiny by all government agencies that can be involved in the immigration process (US Department of Homeland Security, US Department of State, US Department of Labor, US Immigration and Customs Enforcement, and US Customs and Border Protection)

What has changed?

On April 18, 2017, President Trump signed the Buy American Hire American Executive Order that outlined a multiagency approach by the Departments of State, Labor and Homeland Security to create higher wages and employment rates for US workers and to protect their economic interests by rigorously enforcing and administering immigration laws.

Part of the Administration's aim is to specifically target perceived abuses of the H-1B visa program. The agencies were tasked to suggest reforms to ensure that H-1Bs visas are given to the most skilled and highest paid workers and not used as a means to undercut the US workforce. As a result, USCIS has issued more requests for evidence in cases where the position offered is at the lowest wage level under the Department of Labor's prevailing wage guidelines. USCIS has also increased its focus on placement of H-1B workers at third party worksites.

Also, as a result of the Buy American, Hire American EO, in October of 2017, USCIS rescinded two policy memorandums that instructed adjudicating officers to grant deference to previously approved nonimmigrant visa petitions.

Recommended Actions

- Be aware of greater scrutiny by all government agencies that can be involved in the immigration process (US Department of Homeland Security, US Department of State, US Department of Labor, US Immigration and Customs Enforcement, and US Customs and Border Protection).
- For nonimmigrant visa extensions, be prepared for additional requests for evidence based on USCIS' de novo review of such petitions. Prior approval is no indicator of continued extensions of nonimmigrant status.

Baker McKenzie.

Impact Rating
HIGH

Prepare affected employees and their family members in advance of USCIS adjustment of status interviews

What has changed?

On August 28, 2017, USCIS announced that it will begin to phase-in interviews of foreign nationals applying for permanent residence in the United States based on an employer sponsored petition.

Beginning October 2, 2017, all employment-based adjustment of status applicants are required to appear for an in-person interview at a USCIS Field Office. Previously, USCIS interviewed employment-based adjustment of status applicants only in cases where the applicant had a criminal history or prior immigration violations. This new USCIS policy will apply only to adjustment of status applications filed on or after March 6, 2017.

Recommended Actions

- Prepare affected employees and their family members in advance of adjustment of status interviews.
- Consider attorney representation at interviews particularly in the early months of the roll-out of the interview requirement for employment-based applicants.

Baker McKenzie.

Impact Rating
MEDIUM

Note that Customs and Border Protection (CBP) are increasingly searching phones or computers, of anyone entering the US; CBP is able to request passwords to unlock devices

What has changed?

While there have been no policy changes or new regulations related to electronic searches by Customs and Border Protection (CBP), anecdotal reports suggest that CBP is increasingly searching the private electronic devices, such as phones or computer, of anyone entering the US. CBP can ask for passwords to unlock devices. The consequences for failure to comply with CBP's request will differ depending on a traveler's status:

- **US citizens**, could be temporarily detained or otherwise delayed by CBP, but cannot be denied entry into the US.
- **Green Card holders**, may be temporarily detained or otherwise delayed by CBP, but ultimately cannot be denied entry into the US for failure to comply.
- **Foreign nationals**, can be denied entry into the US and do not have a right to counsel during inspection.

In any case, CBP may seize and retain devices for further inspection.

Recommended Actions

- Review current company resources and protocol for business travelers when e-device border search issues arise.

Baker McKenzie.

Impact Rating
HIGH

☐ Review and analyze current health insurance contracts to determine whether it makes sense to join an Association Health Plan

What has changed?

President Trump's October 12, 2017 Executive Order allows employer associations as well as individuals to bypass many of the requirements under the Affordable Care Act such as its mandate that each insurance plan provide essential health benefits. These new Association Health Plans (AHP) will be allowed to negotiate health plan coverage with out-of-state insurance carriers. AHPs will not purchase insurance from exchanges under the Affordable Care Act but will instead negotiate directly with insurance carriers.

The Trump administration reportedly has prepared an executive order that would effectively gut Obamacare's requirement that most Americans have health insurance — but is holding off on it to see if the repeal of that mandate will be included in the new Republican tax reform bill.

The purported executive order would make it administration policy to not collect tax penalties from people who fail to have health coverage during the year, according to a November 6, 2017 report in the *Washington Examiner*.

Recommended Actions

- The DOL is to issue proposed regulations on or before December 13, 2017 to expand access to health coverage by allowing more employers to form AHPs. By January 13, 2018, the Departments of Treasury, Health and Human Services, and Labor are to issue guidelines "to increase the usability of Health Reimbursement Accounts ("HRAs"), to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage." October 12, 2017 Executive Order.
- Review and analyze current health insurance contracts to determine whether it makes sense to join an Association Health Plan.

Baker McKenzie.

Impact Rating
HIGH

Make reasonable efforts to locate missing retirement plan participants and be sure to make required minimum distributions

What has changed?

A new enforcement priority has emerged in IRS audits. The IRS says it will penalize plan sponsors for failing to make retirement plan distributions to missing participants or failing to make timely required minimum distributions. Internal Revenue Code section 401(a)(9) requires a retirement plan to begin distributions to a participant on or before April 1 of the calendar year following the calendar year in which the participant turns 70½.

Recommended Actions

- A retirement plan must take reasonable efforts to locate missing participants to avoid having a qualification failure. Failing to make required minimum distributions is also a potential qualification failure.
- The October 19, 2017 IRS Memo provides that if each of the following steps is satisfied, the IRS will not challenge on audit a failure to comply with the required minimum distribution rules:
    1. The plan has searched its records, those of related plans, and publicly-available records or directories for alternative contact information.
    2. The plan used any of the following search methods:
        a. A commercial locator service;
        b. A credit reporting agency; or
        c. A proprietary internet search tool for locating individuals.
    3. The plan attempted to contact the missing participant via United States Postal Service certified mail to the missing participant's last known mailing address.

Baker McKenzie.

Impact Rating
HIGH

Review all self-funded ERISA-regulated welfare plans to remove any language required under California insurance law or regulations

What has changed?

Employers who sponsor self-funded ERISA-regulated welfare plans, such as medical, dental, life insurance or disability plans are free to ignore California insurance laws and regulations in designing and operating those plans.

In *Williby v. Aetna Life Ins. Co.*, the Court explained, "[t]he result is a simple, bright-line rule: 'If a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it."

Recommended Actions

- Review all self-funded ERISA-regulated welfare plans to remove any language required under California insurance law or regulations.

Baker McKenzie.

Impact Rating
HIGH

☐ Audit existing PTO and sick leave policies in these jurisdictions and align any US-wide policy with the most generous sick leave law in the country

What has changed?

The paid sick leave trend continued to gain momentum during 2017, with the following states, cities or municipalities enacting mandatory paid leave laws:

- Arizona (effective July 1, 2017)
- Berkeley, CA (effective October 1, 2017)
- Chicago, IL (effective July 1, 2017)
- Cook County, IL (effective July 1, 2017)
- Minneapolis, MN (effective July 1, 2017)
- Rhode Island (effective July 1, 2018)
- Santa Monica, CA (effective January 1, 2017)
- Spokane, WA (effective January 1, 2017)
- St. Paul, MN (effective July 1, 2017)
- Vermont (effective January 1, 2017)
- Washington (effective January 1, 2018)

Remember, the devil is in the details when it comes to paid sick leave regulations.

* On the Horizon *

Interestingly, in an effort to promote workplace flexibility and streamline employer paid leave obligations nationwide, Representative Mimi Walters (R-CA) House introduced the *Workflex in the 21st Century Act* (HR 4219). This bill would create a voluntary program whereby employers that choose to offer their employees a minimum number of compensable leave days per year and institute a flexible work arrangement would be exempt from the current patchwork of local and state paid leave laws. This legislation could clarify and simplify compliance burdens on employers across the nation. Watch this space.

Recommended Actions

- Stay current and monitor legislation in the paid sick leave arena as bills continue to be introduced at the state and local level (there are currently paid sick leave laws pending in North Carolina, Maine, Maryland, Michigan, Minnesota and Pennsylvania).
- Employers should revisit and revise their blanket sick leave policies and adopt specific policies targeted at employee populations in cities/states where paid sick leave is mandatory.

- Track the progress of the *Workflex in the 21st Century Act*. Under the law, employers would be exempt from state paid leave law requirements, but since the bill only reaches employees eligible for employer-provided benefits, employers would still have to comply with state and local leave laws for employees ineligible for the company's benefits.

Baker McKenzie.

Impact Rating
MEDIUM

Pause before terminating an employee who claims to use marijuana for medical purposes

What has changed?

Under federal law, marijuana remains an illegal drug under the Controlled Substances Act. However, a growing number of states have passed or are considering passing laws permitting the use of marijuana for medical purposes (and in some states, for recreational purposes).

As of November 1, 2017, 31 states and D.C. have legalized marijuana for medical use. A number of these jurisdictions have specific employment protections for medical marijuana users. To date, courts have generally upheld employers' rights to terminate employees for testing positive for marijuana. However, in July 2017, the Massachusetts Supreme Court held that an employee may pursue a disability discrimination claim under Massachusetts law for failing to accommodate the use of medical marijuana.

Recommended Actions

- Monitor developments in each jurisdiction in which you have operations.
- When an employee claims to use marijuana for medical purposes, employers with a zero tolerance policy should analyze the risks of terminating such an employee. In some jurisdictions, like Massachusetts, an employer may have to go through the interactive process to determine if the employee can be reasonably accommodated.
- Federal contractors are responsible for complying with the Drug Free Workplace Act. These obligations trump state law.

Baker McKenzie.

Impact Rating
MEDIUM

☐ Review employment applications (both hard copy and electronic) and hiring processes to ensure compliance with new Ban-the-Box laws

What has changed?

This year more states and municipalities enacted so-called Ban-the-Box legislation, which prohibits private employers from inquiring into an applicant's criminal history information on an initial employment application.

These states include:

- Connecticut (effective January 1, 2017)
- California (effective July 1, 2017)
- Vermont (effective July 1, 2017)

Recommended Actions

- Employers should stay current on and monitor Ban-the-Box legislation as bills continue to be introduced at the federal, state and local level.
- Employers should assess where they do business, review and, if necessary, change their employment applications (both hard copy and electronic) and their hiring processes to ensure compliance with any applicable Ban-the-Box laws.
- Employers should also review and, if necessary, revise background check policies to ensure compliance with Ban-the-Box laws.

Baker McKenzie.

Impact Rating
HIGH

In "No Ask" jurisdictions, update employment applications (both hard copy and electronic) and hiring processes to ensure compliance

What has changed?

The following cities and states have adopted or plan to implement laws restricting employers from asking job candidates about salary histories:

- **Puerto Rico** (Effective March 2017)
  - Prohibits employers from inquiring about an applicant's salary history, unless the applicant volunteered such information. Employers may, however, inquire or confirm salary history if salary was already negotiated with the applicant in the screening or interview process, and if compensation was already set forth in an offer letter to the applicant.
  - The law also forbids employers from prohibiting discussions about salaries among employees or applicants, with certain exceptions for managers or human resources personnel.
- **Oregon** (Effective October 2017)
  - Prohibits employers from screening applicants based on salary history or inquiring about an applicant's salary history, either from the applicant or from his or her current or former employer. Employers also cannot rely on salary history in setting compensation, except if an employer is determining pay for current employees in the context of a transfer or hiring to a new position.
  - Additionally, employers cannot confirm salary history before an offer of employment is made, even if the applicant voluntarily discloses the information. Employers can, however, confirm prior salary after the employer makes an offer that includes compensation, as long as the applicant gives his or her prior authorization.
- **New York City** (Effective October 2017)
  - Prohibits employers from inquiring about an applicant's salary history during all stages of the interview process, either from the applicant directly, by inquiring with the applicant's current or former employer, or by searching public records. If an employer already knows an applicant's salary history, the law prohibits the employer from relying on that information in determining the applicant's compensation.
  - An employer may, however, permissibly discuss an applicant's salary expectations without inquiring about his or her salary history. Moreover if an applicant voluntarily and without prompting discloses his or her salary history to the employer, the employer may then consider salary history in determining that applicant's salary and may also verify the applicant's salary history with his or her current or former employer. The law does not apply to applicants for promotion or internal transfer.

- **Delaware** (Effective December 2017)
    - Prohibits employers from screening applicants based on their salary history or inquiring about an applicant's salary history, either from the applicant or his or her current or former employer.
    - Employers may discuss and negotiate compensation with applicants, as long as disclosure of salary history is neither requested nor required. An employer may also request and obtain salary history after an offer of employment that includes compensation has been made, but only if the inquiry is for the sole purpose of confirming the applicant's salary history. The law does not prohibit voluntary discussions of past salary history.
- **California** (Effective January 1, 2018)
    - Prohibits employers from relying on an applicant's prior salary history as a factor in determining whether to offer employment or what salary to offer the applicant. Employers also cannot directly or indirectly inquire about an applicant's salary history. Further, an employer must, upon reasonable request, provide an applicant with the pay scale assigned to the position to which she applied.
- **San Francisco** (Effective July 1, 2018)
    - Prohibits employers from relying on an applicant's salary history in determining whether to make a job offer or setting a salary for that job offer. Employers are also prohibited from asking about an applicant's current or prior salary history and from releasing a current or former employee's salary history without written authorization (unless disclosure is required by law or the information is publicly available or part of a collective bargaining agreement).
    - An employer may consider a job applicant's salary history if it is disclosed voluntarily and without prompting by the applicant. Employers may also discuss an applicant's salary expectations during the application process.
- **Massachusetts** (Effective July 1, 2018)
    - Prohibits employers from inquiring about an applicant's salary history before making an offer of employment, unless the applicant has voluntarily disclosed such information. An employer may, however, confirm prior salary history if the applicant has voluntarily disclosed such information to the employer during the interview process, or if the employer has made an offer to the applicant that includes compensation.
    - The law also forbids employers from prohibiting discussions about salaries among employees or applicants.
- **Philadelphia** (Currently stayed due to pending litigation)
    - Prohibits employers from inquiring about an applicant's salary history or requiring an applicant to disclose his or her salary history as a condition of employment or as a condition of the applicant getting a job interview. The law also prohibits employers from relying on salary information received from an applicant's current or former employer to determine the

applicant's salary at any stage in the employment process, unless the applicant voluntarily disclosed his or her salary history.

Recommended Actions

Employers in jurisdictions with "no ask" salary laws should:

- Review and revise their employment applications to remove requests for salary history
- Modify employment applications, screening and interview procedures to eliminate questions about salary history
- Train HR professionals (or other individuals involved in hiring or personnel management) about permissible compensation questions to ask during an interview, and how to respond if an applicant requests pay scale information or voluntarily discloses his or her current or former salary
- Produce pay scale information to applicants upon reasonable request, if required for compliance with applicable law
- Consult with any third parties, such as recruitment agencies or recruiters, that participate in the hiring process to make sure those organizations or individuals are complying with applicable law

Baker McKenzie.

Impact Rating
HIGH

☐ Revisit employee handbooks and family leave policies and update family leave language to address any changes to applicable laws

What has changed?

New York, California, and Washington, D.C. are the latest jurisdictions to enact or strengthen existing paid leave laws, and many other jurisdictions proposed paid family leave legislation this year.

1. In New York, the new Paid Family Leave Law takes effect on January 1, 2018. Under the law, all employers must provide eligible employees with up to 12 weeks of paid leave a year for an employee to bond with a new child, care for a seriously ill family member, or address certain issues arising from a family member's military service. Such leave cannot be used for the employee's own illness or medical condition. To qualify for such leave, employees must be employed for 26 consecutive weeks (or 175 days, for employees who work less than 20 hours per week).

   The law will be implemented in phases beginning January 1, at which time employees are entitled to just 8 of the 12 weeks of paid leave at 50% pay (subject to certain caps). By January 2020, the amount of leave and salary will increase to 12 weeks' leave at 67% pay (subject to certain caps). Funding will be provided by a weekly payroll tax for employees. Employees are entitled to job protection and health insurance coverage while on leave, though they may be required to pay their health care contributions.

2. Employees in California have been covered by the Paid Family Leave Act since 2004. However, starting on January 1, 2018, employees will receive between 60%-70% of their salary while on eligible paid leave, depending on their income level. The total amount of leave remains at six weeks per year.

   In San Francisco, new parents who are employed by covered employers (i.e., 35 or more employees as of July 1, 2017 or 20 or more employees as of January 1, 2018) are entitled to six weeks of fully paid leave. Covered employers must pay the difference between what is required under the California Paid Family Leave Law and the employee's full pay. Note that the employee thresholds under the ordinance refer to total employees, as opposed to employees working exclusively in San Francisco city limits.

3. Finally, on April 7, 2017, the D.C. Universal Paid Leave Amendment Act of 2016 took effect in Washington, D.C. Under the Act, private employers must provide employees with up to eight weeks' paid leave, to be used as follows:

   a. up to 8 weeks' paid leave to care for a new child;

   b. up to 6 weeks to care for a sick family member; and

   c. up to 2 weeks for the employee's personal illness.

   The program is funded by a new employer payroll tax, set to take effect July 1, 2019. Employees will be eligible to begin using paid leave on July 1, 2020. Note, however, that the Washington D.C. Council has introduced several amendments to the Act since April 2017, so there is a chance that the Act may not be rolled out in its current form.

The jurisdictions above are just the tip of the iceberg. Lawmakers in more than 20 other jurisdictions, including Colorado, Illinois, Massachusetts, and Vermont, proposed paid family leave legislation in 2017, so the paid leave trend likely will continue to be a hot topic in 2018 and beyond.

Recommended Actions

- Revisit employee handbooks and family leave policies and update family leave language to address any changes to applicable laws.
- Employers with workforces in more than one U.S. jurisdiction can implement a uniform paid family leave policy, as long as it is sufficiently generous to meet the requirements of all state and local laws.

Baker McKenzie.

Impact Rating
HIGH

Update policies, application forms, candidate questionnaires and other materials to delete inquiries regarding criminal history before a conditional offer of employment is made

What has changed?

As of January 1, 2018, all employers in California with 5 or more employees will be prohibited from asking an applicant to disclose information about past criminal convictions before the applicant receives a conditional employment offer.

Once a conditional offer of employment has been made, an employer cannot deny an applicant a position solely or in part due to conviction history until the employer conducts an individualized assessment of the impact of the conviction on the position offered. If the company decides to withdraw an employment offer due to criminal history, it must notify the applicant of its preliminary decision in writing. The company is not required to explain the reasoning behind its decision, but must provide a copy of the employee's conviction history report and allow the applicant to respond within 5 business days before making a final decision. Once the employer makes a final decision to withdraw an employment offer based on conviction history, it must notify the applicant in writing and include in its notice information about how to challenge the employer's decision and/or file a complaint with the DFEH.

Multiple cities in California, including San Francisco and Los Angeles, have adopted their own laws prohibiting pre-offer criminal history inquiries. These laws are substantially similar to the new statewide ban on such questions subject to certain specificities.

Recommended Actions

- Train any representative involved in the recruiting and hiring process regarding the requirements and restrictions under the new law.
- Update policies, application forms, candidate questionnaires and other materials to delete inquiries regarding criminal history before a conditional offer of employment is made.
- Update offer letters to include express language stating that the offer is contingent on the candidate passing a background check.
- Prepare template notices for applicants if the company needs to rescind offers of employment and an internal protocol/guidelines on how to conduct an individualized assessment if the criminal background check comes back positive.

Baker McKenzie.

Impact Rating
HIGH

Delete all inquires requesting previous salary history on employment applications; train all involved in the hiring process on the impact of the new law (including any agents of the employer)

What has changed?

As of January 1, 2018, California employers and their agents will no longer be able to ask job applicants about prior salary history. The new law is designed to help narrow the gender pay gap by: (1) prohibiting an employer or its agent from asking for (and then relying upon) the salary history information as a factor in determining whether to offer employment to an applicant or using it to set compensation, and (2) requiring employers, upon reasonable request, to provide the pay scale for a position to an applicant for employment.

If not prompted, nothing in the law prohibits an applicant from voluntarily disclosing salary history information to a prospective employer, and the employer may consider and rely upon such voluntarily provided information in determining the applicant's salary. However, it is important to note that if an applicant does voluntarily disclose past salary history, an employer cannot rely on prior salary alone to justify any disparity in compensation under Labor Code Section 1197.5.

Recommended Actions

- Draft new policies to distribute to representatives in the recruiting and hiring process which make it clear that questions about prior salary history should not be asked.
- Evaluate current positions and job descriptions, and revise position classifications as necessary to include pay ranges so that the position pay scale is available upon request by applicants. This may require breaking up broad categories of job titles, i.e. Software Engineer, to Software Engineer, I, II, III, etc. and setting up appropriate pay ranges for each position.
- Do not rely on voluntary disclosures of salary history to set the salary of a new hire. In setting salary for a new employee, review the salaries of those holding comparable positions. Any salary differential must be based upon a seniority system, merit system, system that measures earnings by quantity or quality of production, or other bona fide factor other than sex, such as education, training, or experience.

Baker McKenzie.

Impact Rating
HIGH

☐ Train managers and supervisors on new transgender protections and display the new poster

What has changed?

California law requires employers with 50 or more employees to provide at least 2 hours of sexual harassment training to supervisors every two years. SB 396 requires those employers to also include training on harassment based on gender identity, gender expression, and sexual orientation. Further, employers will be required to display a poster regarding transgender rights.

DFEH has approved new regulations expanding FEHA to protect employees who identify as transgender or who are transitioning.

The new regulations prohibit employers from asking sex-related information of applicants and employees, including any attempt to confirm sex, gender, gender identity or gender expression unless the employer or other covered entity meets its burden of proving a Bona Fide Occupational Qualification (BFOQ) defense. Personal privacy considerations may justify a BFOQ only where: (1) the job requires the employee to observe individuals in a state of nudity or conduct body searches; (2) it would be offensive to social standards to have an individual of a different sex present; and (3) it would be detrimental to mental or physical welfare to have individuals observed or searched by someone of a different sex.

Employers can use an employee's sex assigned at birth or legal name if necessary to meet a legally-mandated obligation. The regulations state, however, that employers must permit employees to perform jobs that correspond to an employee's gender identity or gender expression, regardless of the employee's sex at birth.

Additionally, employees must be permitted to use the restroom or locker room that corresponds to the employee's gender identity or expression.

Employers must also honor employees' request to be identified by a certain pronoun (e.g., he, she, they) and allow employees to dress in a manner consistent with their gender expression or gender identity.

Recommended Actions

- Review the Regulations Regarding Transgender Identity and Expression.
- Include training on harassment based on gender identity, gender expression, and sexual orientation.
- Implement policy for transitioning and transgender employees.
- Identify any single stall restroom as "unisex," "all-gender" or "gender neutral."
- Display the new poster regarding transgender rights.

Impact Rating
MEDIUM

☐ Audit the Company's anti-harassment program to ensure it contains all the elements articulated by the DFEH

What has changed?

FEHA requires employers to take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace. In 2016, FEHA promulgated regulations setting forth the required elements of a compliant prevention and correction program. In May 2017, the DFEH issued a Workplace Harassment Guide for California Employers (Guide) to clarify further employers' obligations under these regulations.

The Guide provides a checklist of what an effective anti-harassment training program should include and recommends best practices for conducting fair investigations into harassment complaints, making credibility determinations, and taking remedial steps.

Recommended Actions

- Review the Guide here.
- Audit the Company's anti-harassment program to ensure it contains all the elements articulated by the DFEH.
- Review and, if necessary, update the Company's internal investigation guidelines and protocol to ensure they are consistent with practices recommended by the DFEH in the new Guide and provide training to appropriate personnel.

Impact Rating
MEDIUM

Ensure employees and supervisors are receiving effective and consistent sexual harassment, discrimination and sensitivity training

What has changed?

On June 15, 2017, the DFEH issued its annual report for 2016, providing an overview of key civil rights enforcement changes, accomplishments and priorities.

- In 2016, DFEH received 23,510 complaints, of which 86% alleged employment discrimination (an increase of 3,000 from 2015). Almost 75% complaints resulted in a DFEH investigation or a possibility of a private lawsuit.
- The most commonly cited reasons for discrimination were disability and race/color. The most commonly cited reason for hate violence was sex.
- The highest number of complaints came from people living in Los Angeles County, followed by Orange County, San Bernardino County and Sacramento County, which is broadly consistent with the state's population demographics.
- DFEH filed a complaint in civil court and litigated 31 cases. It settled a total of 1,036 cases for a total of $11,575,151 in monetary recovery. Most settlements also included "affirmative relief" in the form of injunctions, training and monitoring, and changes in policies that increase fair employment or housing opportunities, or that decrease the likelihood of future discrimination or hate violence.

In 2016, DFEH continued to focus on transgender rights, sexual harassment, discrimination and hate crimes and issued new regulations and guidelines covering these topics.

Recommended Actions

- Ensure employees and supervisors are receiving effective and consistent sexual harassment, discrimination and sensitivity training.
- Review the Consideration of Criminal History in Employment Decisions Regulations and update your hiring policies, practices and interviewer trainings accordingly.
- Review the Regulations Regarding Transgender Identity and Expression and update company facilities, policies, practices and employment documentation accordingly.
- Refer to the DFEH's sample Request for Reasonable Accommodation package as a starting point for handling disability accommodation requests from employees.

Baker McKenzie.

Impact Rating
MEDIUM

Consider removing progressive discipline policies from any handbooks and policies and instead administering disciplinary actions on a case-by-case basis

What has changed?

On April 24, 2017, in *Oakes v. Barnes & Noble College Booksellers LLC*, the California Court of Appeals reversed a lower court decision and allowed plaintiff to proceed with a wrongful termination action against her former employer, Barnes & Noble, under an implied contract theory.

The court held that Oakes presented a triable issue of material fact as to whether she was an "at-will" employee such that Barnes & Noble could terminate her without notice and without following its progressive discipline policy, as articulated in the employee handbook.

The court's decision was based in part on plaintiff demonstrating that Barnes & Noble had a progressive discipline policy in its handbook, she has herself been instructed to use a progressive discipline before terminating employees, and testimony from other company supervisors who indicated that they are not aware of any other instance where employees have been terminated without the progressive discipline being followed. The court noted that although language in the employee handbook and other company documents supported Barnes & Noble's position that Oakes was an at-will employee, there was also evidence supporting the existence of an unwritten policy of always using progressive discipline before an employee is discharged. The appellate court therefore reversed the trial court's dismissal of the wrongful termination claim, and remanded for a trial to determine both the precise terms of the parties' employment relationship and whether Barnes & Noble violated those terms.

Recommended Actions

- Review handbooks and other policies to ensure they have provisions clearly outlining the "at-will" nature of the employment relationship and provide that the handbook is not a contract of employment.
- Consider removing progressive discipline policies from any handbooks and policies and instead administering disciplinary actions on a case-by-case basis.
- Provide training to supervisors regarding no making verbal commitments of continued employment to employees which may undermine the at-will nature of the employment relationship.

Baker McKenzie.

Impact Rating
MEDIUM

Follow the notice requirements under the CA WARN Act even for furloughs

What has changed?

In *Int'l Brotherhood of Boilermakers etc. v. NASSCO etc.*, a California court considered whether the California WARN Act requires notice when a group of employees were placed on furlough and ordered not to return to work for four to five weeks. The Court found that the employer had a duty to provide statutory notice under the California WARN statute, even though the layoffs were not permanent and were for less than six months.

Recommended Actions

- If the company is considering layoffs or furloughs, consider the notice requirements under California's version of the WARN Act.

Impact Rating
HIGH

Ensure compliance with the new minimum wage in California ($11 in 2018) (and remember some cities and counties have ordinances providing for higher minimums)

What has changed?

For employers with at least 26 employees, the state minimum wage is $10.50 as of January 2017, and will increase as follows:

- $11 per hour from January 1, 2018;
- $12 per hour from January 1, 2019;
- $13 per hour from January 1, 2020;
- $14 per hour from January 1, 2021; and
- $15 per hour from January 1, 2022 (California Labor Code §1182.12).

Note that there are local ordinances with higher minimum wages (e.g., $13 in San Francisco).

Recommended Actions

- Ensure the company is compliant with the new minimum wage in California ($11 in 2018) (and remember that some cities and counties have ordinances providing for higher minimums)

Baker McKenzie.

Impact Rating
MEDIUM

Consider including an "opt out" provision in arbitration agreements

What has changed?

California courts continue to push back against the US Supreme Court's pro-arbitration philosophy in increasingly creative ways. Some noteworthy examples from 2017 are listed below:

- California courts continue to crack down on "take-it-or-leave it" employee arbitration agreements. Most recently, a California Court of Appeals held that an arbitration clause presented to an employee in a "take-it-or-leave it manner" was unconscionable and therefore entirely void.
- The California Supreme Court held that an arbitration agreement that could be construed to waive the right to public injunctive relief is contrary to public policy and therefore unenforceable under state law. This creates another potential conflict with the Federal Arbitration Act and US Supreme Court precedent.

Recommended Actions

- Arbitration law in California is constantly in flux, and California courts continue to be unwilling to rewrite non-compliant arbitration agreements, so employers should make a habit of regularly reviewing and updating their arbitration agreements. In addition, arbitration agreements should contain severability clauses and provide that they are enforceable only to the extent permitted by applicable law to account for future changes.
- To avoid "take-it-or-leave-it" issues, employers might consider including an "opt out" provision in their employee arbitration agreements, giving employees a certain amount of time to "opt out" of the arbitration clause without penalty or retaliation.
- Employers should review their arbitration agreements to ensure they cannot be read to waive unwaivable claims, such as the right to seek public injunctive relief (e.g., under Unfair Competition Law or the Consumer Legal Remedies Law).

Impact Rating
HIGH

Include net amount of commissions earned against advances on employee paychecks

What has changed?

Many employers have a practice of showing commission advances on paystubs, and not later showing the net amount of commission earned against those advances on subsequent paystubs. In *Macy's*, the San Bernardino Superior Court approved a settlement on the basis that this practice violated California Labor Code Section 226(a), which requires an employee's paystub to provide accurate information about earned wages. The California Supreme Court has denied review.

These claims can be litigated as class actions by the plaintiffs' bar under the California Private Attorney Generals Act (PAGA), so employers should be particularly vigilant.

Recommended Actions

- Commission advances listed on paystubs should be clearly denoted as commission advances, and not as earned commissions.
- Net earned commissions (advances adjusted against commissions actually earned) should be shown on paystubs to comply with California Labor Code Section 226(a).
- Earned commissions should be shown on the paystubs for the period in which they are "earned" to comply with the requirements of California Labor Code Section 226(a)(6) which requires employers to list the inclusive dates for the period for which the employee is paid.

Impact Rating
HIGH

Ensure that paystubs accurately list the name of the legal entity which is the direct employer

What has changed?

In *Smith et al. v. Wal-Mart Stores Inc. et al.*, plaintiff sued Walmart under PAGA for violating California Labor Code Section 226 by not listing the legal name of her employer correctly on paystubs. Walmart provided pay stubs with "Walmart" or "Wal-Mart" listed as the employer, instead of "Wal-Mart Associates Inc." The paystubs were accurate in all other respects.

The case settled for $1.6 million.

Recommended Actions

- Employers should ensure that paystubs accurately list the name of the legal entity which is the direct employer, and are also accurate in all other respects.

Baker McKenzie.

Impact Rating
HIGH

Conduct an IC misclassification audit

What has changed?

In *Dynamex Operations West, Inc., v. Superior Court*, the California Supreme Court is slated to review a Court of Appeal decision to decide which test should be used to decide whether someone is an employee or an independent contractor.

The common law test which is currently used is based on the degree of control exercised over the person, and how much a person economically depends on the company.

The Court of Appeal held that a wider definition of "employ" should be used, which would mean to "to engage, suffer or permit to work." The US and California Chamber of Commerce have said that use of this definition would amount to a virtual elimination of IC status in California, since persons currently considered ICs would be classified as employees under this definition. This is because almost every IC is "permitted to perform work" by the engaging party, and would therefore become an employee under the test adopted by the Court of Appeal.

California penalties for "willful" misclassification violations range from $5,000 to $15,000 per violation. In addition, employers can be liable for federal tax penalties (ranging from 1.5% to 3% of wages) for unintentionally failing to withhold federal income tax, and be liable for back pay, California tax penalties on back payroll taxes (10% penalty), social security, unemployment insurance and other retrospective employee entitlements. Failure to withhold and pay payroll taxes can also result in a misdemeanor charge, and the employer can be fined up to $1,000 or sentenced to jail for up to 1 year, or both.

Recommended Actions

- Employers should reconsider their worker classification practices if the California Supreme Court decides to adopt the broader test for defining "employment." Many employers who are part of the "gig economy" rely heavily on ICs as opposed to employees.
- Employers should consider and plan for the potential impact of ICs being reclassified as employees. This is because almost every IC is "permitted to perform work" by the engaging party, and would therefore become an employee if the test adopted by the Court of Appeal is upheld by the California Supreme Court.

Baker McKenzie.

Impact Rating
MEDIUM

☐ Check for footprint in any CA jurisdictions with new predictive scheduling requirements

What has changed?

San Jose and Emeryville joined San Francisco (which has had an ordinance since 2015) in passing fair scheduling laws for minimum wage workers. These laws require covered employers (large retail establishments for SF, retail establishments and fast food restaurants for Emeryville, and all employers with 36 or more employees subject to business license tax or with a place of business within the city for San Jose) in general to do one or more of the following:

- Provide a good-faith estimate of the employee's anticipated work schedule (SF and Emeryville);
- Provide employees the right to request input with respect to their work schedule (Emeryville);
- Provide employees the right to rest between work shifts (Emeryville);
- Provide employees advance notice of the work schedule (SF and Emeryville);
- Provide employees the right to decline employer-requested changes to the posted work schedule (Emeryville);
- Compensate for schedule changes (if the employee agrees to accept such changes), (SF and Emeryville); and/or
- Offer available work hours to existing employees before hiring externally (SF, Emeryville, and San Jose).

Recommended Actions

- Consider whether your business is covered by these laws, and take steps to comply if it is.
- Notify employees of their rights as required by law if you are a covered employer.
- Covered employers should gather data on scheduling to be able to provide predictable schedules to employees.

Baker McKenzie.

Impact Rating
HIGH

Work with immigration lawyers to develop clear guidelines and processes for handling immigration raids and requests for documents

What has changed?

Assembly Bill 450 was enacted in response to the Trump administrator's aggressive stance on illegal immigration. Effective January 1, 2018, California employers:

- Are prohibited from voluntarily allowing an immigration enforcement agent to enter any nonpublic areas of their worksites without a judicial warrant.
- Are prohibited from voluntarily allowing immigration enforcement agents to access their employment records without a subpoena, court order, or, in the case of I-9 Employment Eligibility Verification forms, a Notice of Inspection.
- Must notify employees via workplace posting of Federal I-9 compliance inspections and their results within 72 hours of receipt of the relevant immigration agency notice.
- Cannot re-verify the employment eligibility of current employees except as provided by 8 USC §1324(b).

Penalties range from $2,000 to $10,000 per violation.

Recommended Actions

- Employers should work with their immigration lawyers to develop clear guidelines for handling immigration raids and requests for documents. The guidelines should include hypotheticals for when requests for access should be denied, and when they must be granted in accordance with federal law.
- Managers, front desk employees and others who may be in a position to allow visitors onto company premises should be notified of and receive training on these guidelines.
- Prepare forms to comply with the new immigration enforcement related notice requirements.

Baker McKenzie.

Impact Rating
HIGH

Employers with 20–49 employees in a 75-mile radius must now provide parental leave

What has changed?

Effective January 1, 2018,

SB 63 (Parental Leave Act for Small Employers): SB 63 extends many of the protections of the California Family Rights Act (CFRA) and Family Medical Rights Act (FMLA) to employers with 20 or more employees within a 75 mile radius for leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. The law applies to employees with more than 12 months of services with an employer and at least 1250 hours of service during the previous 12 month period. The law does not apply to employers with 50 or more employees which are covered under the CFRA and FMLA. SB 63 mirrors many of the other protections that exist under the CFRA and FMLA.

Recommended Actions

- Small employers must implement new leave policies and practices
- Covered employers must:
  - Provide up to 12 weeks of job-protected unpaid parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement
  - Maintain and pay for coverage under a group health plan for an employee who takes this leave, on the same terms and conditions as for employees who are actively at work

Baker McKenzie.

Impact Rating
MEDIUM

Update anti-sexual harassment training to include new mandatory education of harassment based on gender identity, gender expression and sexual orientation

What has changed?

Effective January 1, 2018,

SB 396 (Sexual Harassment Training): SB 396 requires that, as part of the existing required sexual harassment training, employers with 50 or more employees address harassment on the basis of gender identity, gender expression, and sexual orientation. SB 396 also requires employers to post in a prominent and assessable location a poster released by the Department of Fair Employment and Housing in January 2017 (Transgender Rights in the Workplace).

Recommended Actions

- Include training and education of harassment based on gender identity, gender expression and sexual orientation (and include practical examples)
- Display the new poster developed by the DFEH regarding transgender rights in a prominent and accessible location in the workplace.

Baker McKenzie.

Impact Rating
HIGH

Consider conducting privileged classification audits to prevent misclassifications of employees as independent contractors

What has changed?

Effective January 1, 2018,

AB 1701 **(Joint Liability for Contractors and Subcontractors)**: AB 1701 holds general contractors and subcontractors jointly liable for unpaid wages, including fringe benefits.

Recommended Actions

- Given the increased risks posed by the new law, general contractors should consider conducting privileged classification audits to prevent misclassifications of employees as independent contractors

Baker McKenzie.

Impact Rating
HIGH

When confronted with Labor Commissioner investigations, consider retaining employment counsel right away

What has changed?

Effective January 1, 2018,

SB 306 **(Expanded Authority of California Labor Commissioner)**: SB 306 changes the framework that the California Labor Commissioner operates under to enforce a retaliation and whistleblower claims filed by employees.

SB 306 grants the Labor Commissioner broad injunctive relief powers. For both discrimination and retaliation complaints, the Labor Commissioner may seek a preliminary injunction during an investigation if the Labor Commissioner has "reasonable cause" to believe a violation has occurred. (This is creates a more permissive injunction standard than a court would ordinarily apply to a private action in which a plaintiff seeks preliminary injunctive relief.)

In addition, the Labor Commissioner can now launch investigations at its own initiative even if no complaint has been filed and seek temporary or permanent injunctive relief from a court before it completes its investigation. The Labor Commissioner no longer has to enforce the determination in a court action. It can now fine the employer for the alleged violation thus placing the burden on the employer to challenge the citation through an administrative hearing and then in court.

Recommended Actions

- Given the enhanced authority of the Labor Commissioner and risks presented, when confront Labor Commissioner investigations or an employee-initiated whistleblower claim after January 1, 2018, retain employment counsel.
- If an employee engages in protected activity that falls within the Labor Commissioner's jurisdiction, carefully document the lawful reason for any adverse action and, where appropriate, seek advice from employment counsel before taking the adverse action. Doing so will increase the employer's chances of persuading the Labor Commissioner and a court that no "reasonable cause" exists to support an injunction pending an investigation because the adverse action was taken for reasons unrelated to any alleged protected activity.

Baker McKenzie.

Impact Rating
HIGH

Update employment applications and train those involved in hiring and recruiting

What has changed?

Effective January 1, 2018,

AB 168 (Salary History): AB 168 prohibits employers (and their agents) from relying on the salary history information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant. This bill also prohibits employers from seeking salary history information about an applicant for employment and would require an employer, upon reasonable request, to provide the pay scale for a position to an applicant for employment. This said, if an applicant voluntarily discloses salary history information, employers are not prohibited from considering or relying on that voluntarily disclosed salary history information in determining salary.

Recommended Actions

- Delete all request for prior salary information from employment applications (and instruct agents of employers to do the same)
- Prepare to provide pay scale information upon request
- Train all professionals involved in recruiting on the new law

Baker McKenzie.

Impact Rating
HIGH

☐ Conduct a privileged review of all of the various policies, procedures, and other documents related to the screening process for compliance with the new statewide Ban-the-Box law

What has changed?

Effective January 1, 2018,

AB 1008 (Ban-the-Box): AB 1008 makes it unlawful under the Fair Employment and Housing Act (FEHA) for most employers with five or more employees to:

- Include on any application for employment any question that seeks the disclosure of an applicant's conviction history;
- Inquire into or consider the conviction history of an applicant before the applicant receives a conditional offer of employment; and
- Consider, distribute, or disseminate information about any of the following while conducting a criminal history background check in connection with any application for employment: (1) an arrest that did not result in a conviction, subject to the exceptions in Labor Code § 432.7(a)(1) and (f); (2) referral to or participation in a pretrial or post-trial diversion program; and (3) convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law.

Under AB 1008, consideration of an applicant's criminal history will be permissible only after the employer has made a conditional offer of employment. Once that offer has been made and the criminal history obtained, AB 1008 further provides that the employer cannot deny an applicant a position *solely or in part because of conviction history* until the employer performs an individualized assessment.

Recommended Actions

- Conduct a privileged review of all of the various policies, procedures, and other documents related to the screening process (e.g., job applications, offer letters, guidelines for recruiters, etc.).
- Update all documents related to federal and California fair credit reporting act compliance, including background check authorization and disclosure forms and "adverse action" notifications