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US Employment & Compensation Law Digest

2018/2019

2018 has been, without a doubt, another extraordinary year for US employers. The #MeToo movement has had a tremendous impact on the workplace — from resulting in a significant increase in harassment and retaliation claims, to prompting several new laws aimed at training and awareness, and sparking a national dialogue about what is and is not appropriate at work.

In addition, the thorny issue of how to manage contractor classifications in the gig economy continued to evolve this year. Likewise, new DOJ enforcement activity is heightening concerns about no-poaching agreements and other antitrust activity. And, employers will confront a host of new laws in 2019 on topics ranging from sick leave, lactation accommodation, salary history inquiries and much more.

For US companies operating globally, the challenges don't stop there. A plethora of new laws have swept the globe that will affect companies managing international workforces on issues like gender pay equity; alternative workforce arrangements like contracting, labor leasing and outsourcing; and cross-border investigations and whistleblower hotlines. The global transactions market remained remarkably robust in 2018 despite all the macro uncertainty. There are still real threats to free trade and investment flows and there remains potential for a much more serious outbreak of protectionism and isolation. It is incumbent on businesses to do all that they can to guard against that risk and be prepared for inevitable business change.

Baker McKenzie's US Labor and Employment team looks forward to helping you bridge the gap between aspiration and achievement in 2019.

Susan Eandi
US Labor and Employment Chair
Baker McKenzie

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2019 LEGISLATIVE UPDATE

(CALIFORNIA, ILLINOIS, NEW YORK AND TEXAS)

State lawmakers across the US passed a number of workplace-related bills this year and many require employers to act now and affirmatively take action within their organization. For each new law, we identify what sort of change is required.

Handbooks / Policies / Postings | **Training** | **Documents / Agreements** | **Audits / Processes / Investigations** | **Commercial Agreements**

(Because the list below does not cover every possible applicable federal, state, and local law, we encourage you to reach out to your Baker McKenzie employment lawyer to discuss which local, state, and/or federal laws apply to your organization in 2019.)

California

Before reaching the end of his final term as California's governor, Governor Jerry Brown signed dozens of new bills on many employment topics. Here are some of the most notable laws and ordinances that will affect most private employers starting January 1, 2019 and beyond.

- **Clarification of Existing Lactation Accommodation Requirements**

  AB 1976 amends existing lactation accommodation provisions to require employers to make reasonable efforts to provide an employee with a location "other than a bathroom" to express breast milk for the employee's infant child in private. While the law encourages employers to provide a permanent lactation location, it permits an employer unable to provide a permanent lactation location because of operational, financial, or space limitations, to use a temporary lactation location that meets specified conditions, including that the temporary lactation location is private, free from intrusion and used only for lactation purposes while an employee expresses milk.

- **Employers Can Ask Applicants About Salary Expectations**

  AB 2282 clarifies the Fair Pay Act, which was enacted to prohibit employers from asking job applicants for "salary history information" as of January 1, 2018. The Fair Pay Act also requires employers, upon reasonable request, to provide the pay scale

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for a position to an applicant applying for employment. AB 2282 provides further clarification by defining "applicant" as an individual seeking employment with the employer, as opposed to a current employee. "Reasonable request" is defined as a request made after an applicant has completed an initial interview with the employer and "pay scale" is defined as a salary or hourly wage range and does not include bonuses or equity ranges. Employers are also permitted to ask an applicant for his or her salary expectations for the position being applied for, and can make a compensation decision based on an employee's current salary as long as any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system or a merit system.

- **Expanded Definition of Persons Liable for Sexual Harassment Claims**

SB 224 amends California Civil Code section 51.9 to impose liability for sexual harassment claims to a defendant who "holds himself or herself out as being able to help another establish a business, service or professional relationship with the defendant or a third party." The law includes an investor, elected official, lobbyist, director, and producer among those listed persons who may be liable for sexual harassment. The law also eliminates the element that a plaintiff prove there was an inability to easily terminate the relationship.

- **Waivers of Rights to Testify**

AB 3109 provides that any contract or settlement agreement entered into on or after January 1, 2019 that waives a party's right to testify in an administrative, legislative, or judicial proceeding about the alleged criminal conduct or sexual harassment committed by the other contracting party, or the agents or employees of the other contracting party, is void and unenforceable. The law applies to testimony required or requested by a court order, subpoena, or written request from an administrative agency or the legislature.

- **Expanded Liability for Harassment Claims Under the FEHA**

With certain exceptions, SB 1300 prohibits an employer from requiring an employee to execute a release of a claim or right under the Fair Employment and Housing Act, a non-disparagement agreement, or other document that denies the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment, in exchange for a raise or bonus, or as a

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condition of employment or continued employment. The law provides that such an agreement or document is contrary to public policy and unenforceable. In addition, the law expands liability for employers beyond sexual harassment to any type of unlawful harassment by non-employees where the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. Finally, SB 1300 includes statements of intent that hostile work environment cases are "rarely" appropriate for disposition on summary judgment and that a single incident of harassing conduct can create a triable issue of fact regarding a hostile work environment claim.

- **Most California Employers are Required to Provide Sexual Harassment Training**

  SB 1343 requires employers with five or more employees, including temporary or seasonal employees, to provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every two years thereafter. The law also requires the California Department of Fair Employment and Housing to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace and to post the training courses on the Department's website for employers to use to satisfy the requirements.

- **Confidentiality Provisions Prohibited in Certain Settlement Agreements**

  SB 820 prohibits confidentiality provisions in settlement agreements that prevent the disclosure of information related to certain claims of sexual assault, sexual harassment, or discrimination or retaliation based on sex, that are filed in a civil or administrative action. The law prohibits the inclusion of a provision in a settlement agreement that prevents the disclosure of factual information relating to such claims and voids as a matter of law any such provisions entered into on or after January 1, 2019. The law makes an exception for a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if the provision is included in the settlement agreement at the request of the claimant and a government agency or public official is not a party to the agreement.

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- **Complaints of Sexual Harassment are Privileged Communications**

AB 2770 provides that employees who report sexual harassment to their employer are not liable for any resulting injury to the alleged harasser's reputation, so long as the communication is made based on credible evidence and without malice. The law also states that communications between employers and anyone with an interest in a sexual harassment complaint, such as victims and witnesses, are not liable for any resulting damage to the alleged harasser's reputation, as long as the communication is made without malice. In addition, former employers are not liable for any resulting injury to a former employee's reputation if, in response to inquiries from prospective employers, the former employer indicates that they would not rehire the former employee based on a determination that the former employee engaged in sexual harassment, so long as the statement is made without malice.

- **Female Directors Required on Public Corporations' Board of Directors By 2019**

SB 826 requires publicly held domestic or foreign corporations whose principal executive offices, according to the corporation's SEC 10-K form, are located in California to have at least one female on its board of directors by the end of 2019. In addition, by the end of 2021, at least 2 female directors are required if the corporation has 5 directors, and at least 3 female directors are required if the corporation has 6 or more directors. The Secretary of State must publish various reports on its Internet Web site documenting the number of corporations in compliance with these provisions, among other things. The Secretary of State also may impose fines for violation of the law.

- **Employers Can Only Inquire About "Particular Convictions"**

California Labor Code Section 432.7 previously permitted employers to inquire about an applicant's criminal history where federal or state law required such an inquiry. SB 1412 narrows this exception to allow employers to inquire about criminal history only when the employer is required by law to ask about a "particular conviction" or when an employer is prohibited by law from hiring someone with a "particular conviction." The law defines "particular conviction" as "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses."

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- **Employers Must Make Copies of Requested Wage Records**

  Labor Code section 226 provides that, upon receipt of an oral or written request, California employers must provide current or former employees with the opportunity to review their payroll records within 21 calendar days of receipt of the request. SB 1252 amends Labor Code section 226 to provide that employees also have a right to receive a copy of the records.

- **New Protections Against National Origin Discrimination**

  While the Fair Employment and Housing Act already prohibits discrimination and harassment based on national origin, the new regulations broaden the definition of "national origin." Originally defined to encompass "the individual's or ancestors' actual or perceived *place of birth or geographic origin, national origin group or ethnicity*," the new regulations expand that definition to include an individual's or ancestors' actual or perceived:

  - Physical, cultural, or linguistic characteristics associated with a national origin group;
  - Marriage to or association with persons of a national origin group;
  - Tribal affiliation;
  - Membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
  - Attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
  - Name that is associated with a national origin group.

  The new regulations also define what constitutes national origin discrimination to include:

  - Language restriction policies, including English-only policies, unless the restriction can be justified by business necessity and is narrowly tailored to further that business interest;
  - Discrimination based on an applicant's or employee's accent, unless the employer can show the accent materially interferes with the applicant's or employee's ability to perform the job;
  - Discrimination based on English proficiency, unless the employer can show that the proficiency requirement is justified by business necessity;

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- Height and weight requirements (as such may have a disparate impact based on national origin), unless the requirement can be justified by business necessity and the purpose of the requirement cannot be met by less discriminatory means;
- Recruitment, or assignment of positions/facilities/geographical area, based on national origin; and
- Inquiring into an applicant's or employee's immigration status, or discriminating against an applicant or employee based on immigration status, unless required to do so under federal immigration law.

Illinois

- **New Expense Reimbursement Requirement for All "Necessary Expenditures and Losses" Incurred Within the Scope of Employment**

The Illinois Wage Payment and Collection Act was amended in and effective as of August 2018 to specifically include an expense and loss reimbursement requirement. The amendment includes several limitations and protections for employers — among them:

- The employer must "authorize or require" the expense;
- The request for reimbursement must be submitted within 30 calendar days after incurring the expense; and
- The request must be supported by documentation (if documentation is nonexistent, missing, or lost the employee is permitted to submit a signed statement attesting to the expense).

In a nod towards employers, the amendment provides that if the employer has an established written expense reimbursement policy, employees who fail to comply with the policy forfeit the right to reimbursement. Some questions remain open on what counts as a "necessary expenditure." For example, will employers have to reimburse employees for electronics under Bring Your Own Device (BYOD) policies? Are employers now responsible for reimbursing employees who telecommute? And the amendment provides that "losses" are not reimbursable if the loss is due to the employee's own negligence, normal wear, or theft. Determining whether there was a qualifying loss may also prove difficult.

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- **Paid Break Time for Nursing Moms**

The Illinois Nursing Mothers in the Workplace Act was amended in and effective as of August 2018 to require Illinois employers to provide paid break time to nursing mothers "as needed" to express milk during work hours. Prior to the amendment, nursing mothers could utilize existing paid breaks to express breast milk, but any additional time could be unpaid. The change in the law allows a nursing mother to take paid breaks whenever, and for however long she needs for lactation purposes. This requirement covers the first year following the birth of a child. In addition, employers remain obligated to provide a private location, other than a bathroom stall, for mothers to express milk. The law provides a limited exception if an employer can prove that providing paid breaks would create an "undue hardship" under the Illinois Human Rights Act. To claim this exemption, employers must prove that providing reasonable paid break time to nursing mothers as needed would be prohibitively expensive or disruptive.

- **Additional Job Protection for Military Service Members**

Beginning January 1, 2019, all Illinois employers will be covered by the Illinois Service Member Employment and Reemployment Rights Act (ISERRA), which protects the rights of Illinois employees serving in the Military. ISERRA clarifies and consolidates several existing job-related laws and protections afforded to service members.

ISERRA is modeled after the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). However, the Illinois statute provides the following additional protections:

- Expanded definition of "military service" to include service in a federally recognized auxiliary of the US Armed Forces when performing official support duties as a result of an emergency, service covered by the Illinois State Guard Act, and times where service members are absent from employment for medical treatment related to a condition sustained during active service;
- A service member absent on military leave must be credited with the average of their performance evaluations received over the three years preceding the leave, but in no case can that credited average be less than the rating the service member received on the most recent evaluation preceding their leave;
- Both a private right of action for individual employees and enforcement authority to the Illinois Attorney General is provided;

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- The position of "ISERRA Advocate" exists to assist service members and employers with questions and clarifications about the protections under the statute; and
- Employers must post notice to employees of rights under ISERRA.

- **Procedural Changes to the Illinois Human Rights Act**

The 2018 amendments to the Illinois Human Rights Act (IHRA) allow employees more time and leeway to file discrimination claims with the Department of Human Rights. As a result, employers may experience an increase in claims.

- The time period for discrimination charges to be filed with the Department will increase from 180 days to 300 days, mirroring federal requirements.
- Now complainants may opt out of the Department's investigative process bypassing the administrative agency to bring suit in state court. The new procedure allows complainants to receive notice of a right to sue. Employers must be copied on the notice and complainants must sue within 60 days of receiving the notice.
- Employers must post new notices with specific information about employees' rights to be free from sexual harassment. The notice is available on the Department's website.

New York

New York State

- **Hourly Minimum Wage Increases on January 1, 2019**
  - New York City (NYC)
    - 11+ employees: $15.00
    - 10 or fewer employees: $13.50
  - Nassau, Suffolk and Westchester Counties: $12.00
  - Rest of State: $11.10
- **Minimum Exempt Salary Increases on December 31, 2018**
  - NYC:
    - 11+ employees: $1,125 per week ($58,500 per year)
    - 10 or fewer employees: $1,012.50 per week ($52,650 per year)
  - Nassau, Suffolk and Westchester Counties: $900 per week ($46,800 per year)
  - Rest of State: $832 per week ($43,264 per year)

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- **New Paid Family Leave Law**

On January 1, 2018, the first phase of the NYS Paid Family Leave Law took effect. The law is being phased in on a rolling basis and will eventually provide for 12 weeks of paid leave per 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. Currently leave is funded at 50% pay for 8 weeks, subject to certain caps. Effective January 1, 2019, this will increase to 55% pay for 10 weeks. To fund the leave, the maximum annual employee contribution will increase from $85.28 to $107.64.

- **Sexual Harassment: Required Policies and Training**

Effective October 9, 2018, employers must: (i) implement a sexual harassment policy that meets or exceeds certain minimum standards, or use the NYS Model Policy; (ii) make a complaint form available for employees to report sexual harassment; and (iii) implement and annually conduct an interactive sexual harassment training that meets or exceeds the standards embodied in the NYS training requirements, or use the model training (handout, presentation, case studies). The deadline to conduct the first training was extended to October 9, 2019.

- **Confidentiality Provisions Prohibited in Certain Settlement Agreements**

Effective July 11, 2018, using non-disclosure provisions in settlement agreements related to claims of sexual harassment is prohibited, unless confidentiality is the complainant's preference. If so, such preference must be memorialized in writing and signed by all parties, after the complainant has had 21 days to consider the provision. Once signed, the complainant has 7 days to revoke the agreement, before it becomes effective. Employers should review and update their settlement agreements to carve out such claims, or, if such claims will be retained notwithstanding the potential reputational consequences, to include language regarding time to consider and revoke.

New York City

- **Sexual Harassment Training**

  By April 1, 2019, NYC employers with 15+ employees have 1 year to comply with the requirement to implement annual sexual harassment trainings for all employees. The first training must take place by April 1, 2020. The NYC Human Rights

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Commission will develop an online training that satisfies this requirement. This training is expected to be aligned with the NYS requirement, so employers can use a single training module to meet both requirements.

- **Reasonable Accommodation Dialogue**

Effective October 15, 2018, NYC employers must engage in a "cooperative dialogue" with employees who need or request a reasonable accommodation for religion, disability, pregnancy, childbirth or a related condition, or for needs as a victim of domestic violence, sex offenses or stalking. The dialogue must address certain topics, such as the employee's accommodation needs, potential accommodations and alternatives, and any difficulties the potential accommodations may pose for the employer. Employers must state their final determination in writing.

- **Anti-Sexual Harassment Posting**

Effective September 6, 2018, NYC employers must display an anti-sexual harassment rights and responsibilities poster in both English and Spanish and distribute factsheets to each new hire. Employers had to distribute a Notice of Employee Rights to current employees by June 4, 2018. Going forward, the notice must be distributed to all new hires.

- **Paid Sick Time Expanded**

Effective May 5, 2018, NYC employers must allow their employees to use paid sick time for "safe time" reasons when the employee or a family member is a victim of an act or threat of domestic violence, stalking, unwanted physical contact or human trafficking. Employers should update their sick leave or multipurpose PTO policies to address these purposes.

- **Lactation Accommodation**

Effective March 18, 2019, employers must provide lactation rooms to accommodate employees needing to express breast milk. These rooms must be sanitary places, other than a restroom, where employees can express breast milk shielded from view and free from intrusion; and must include an electrical outlet, chair, and surface on which to place a breast pump and other personal items; and in reasonable proximity to running water and employees' work areas.

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Texas

- **San Antonio and Austin Pass Paid Sick Leave Ordinances**

  In 2018, San Antonio and Austin both passed paid sick leave ordinances. In their current state, both ordinances require employers to provide employees with one hour of paid sick leave for every 30 hours worked to use for the employee's own mental or physical illness or injury; that of a family member; to seek medical attention, relocation, or services; or for medical, mental, or preventive care.

  - The Austin Paid Sick Leave Ordinance was set to become effective on October 1, 2018. However, on August 17, 2018, the Texas Court of Appeals (Third District) temporarily enjoined the ordinance pending the interlocutory appeal of the trial court's denial of a temporary injunction. On November 16, 2018, the appeals court ruled that the ordinance was unconstitutional and preempted by state law. Texas state law bars cities from regulating wages, and because paid sick leave requires employers to pay employees for hours not actually worked, the court held it interfered with the Texas Minimum Wage Act.

  - Barring any similar court actions, the San Antonio ordinance is scheduled to take effect on August 1, 2019. Under its terms, San Antonio employers with 5 or fewer employees have a two-year grace period to comply ending August 1, 2021. While no lawsuit has been filed yet challenging the San Antonio ordinance, given the recent holding in the Texas Third Court of Appeals, a similar lawsuit could be filed in short order.

  At the time of this publication, there has not yet been an appeal to the Texas Supreme Court seeking review of the decision regarding the Austin ordinance issued by the Texas Third Court of Appeals. Notwithstanding, we predict further litigation regarding the Austin ordinance and potential challenges to the San Antonio ordinance. The Texas Legislature is expected to consider bills in its next session (Summer 2019) that would prohibit local municipalities from passing paid sick leave ordinances. So, while San Antonio businesses should be prepared to move forward and provide employees with paid sick leave as currently required under the ordinance, companies in San Antonio should closely monitor the issue. For now apparently, there is no requirement for Austin employers to provide paid sick leave under its local ordinance.

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SIGNIFICANT US SUPREME COURT DECISIONS

US Supreme Court Holds Employment Arbitration Agreements With Class Action Waivers Are Enforceable

On May 21, 2018, the US Supreme Court issued its highly anticipated *Epic Systems Corp. v. Lewis* decision, holding that class action waivers in arbitration agreements are fully enforceable. With the opinion, the Supreme Court resolved a circuit court split in favor of class and collective action waivers. Employers may now require workers to arbitrate claims on an individual rather than group basis.

While the Supreme Court had previously upheld class action waivers in the context of consumer arbitration agreements in its *AT&T Mobility v. Concepcion* decision, in 2012, the National Labor Relations Board (NLRB) took the opposite tack in the employment context with its *D.R. Horton* decision. In *D.R. Horton*, the NLRB held that class action waivers in the employment context improperly interfered with employees' rights to engage in concerted activity under Section 7 of the NLRA. Under *D.R. Horton*, the NLRB held that employment arbitration agreements containing class action waivers were unenforceable, notwithstanding the strong Congressional preference for arbitration under the Federal Arbitration Act (FAA). After the NLRB's 2012 decision, a split emerged among the US circuit courts of appeals.

In *Epic Systems*, the Supreme Court rejected the position that arbitration agreements containing class action waivers are not enforceable. The Supreme Court wrote that through the FAA, "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." The Court also held that the FAA's "savings clause," which states that arbitration agreements are "enforceable save upon such grounds as exist at law or in equity for the revocation of any contract," requires no different result.

Since *Epic Systems* was issued, several courts have applied its ruling and required various types of employment claims to be arbitrated, including wage and hour claims under the FLSA.

Employer Takeaways

It is now clear that arbitration agreements with class action waivers are enforceable throughout the entire US. Companies with existing arbitration agreements with class action waivers can feel confident that the agreements are enforceable, notwithstanding any state law contractual challenges such as duress or unconscionability.

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Companies that previously implemented agreements on a limited jurisdictional basis may now expand their use of agreements on a nationwide basis. Companies without arbitration agreements and class action waiver should implement new agreements with their employees. In drafting the agreements, companies should craft the various procedural terms to fit their business and workforce. Among other provisions, companies should address arbitrability, discovery, summary judgment and appeals.

Read more HERE.

IMPACT RATING: **HIGH**

US Supreme Court Narrows Definition Of "Whistleblower" Under Dodd-Frank

On February 21, 2018, the Court narrowed the definition of the term "whistleblower" under the Dodd-Frank Act.

- The Court found that to be a covered "whistleblower," an employee must report concerns about their employer's conduct to the Securities and Exchange Commission.
- An employee who reports such concerns only internally is not entitled to protection under Dodd-Frank.
- The opinion does not impact whistleblower protection under the Sarbanes-Oxley Act, which still applies to employees who report issues only internally.

Employer Takeaways

Employees may now bypass reporting complaints internally and go directly to the SEC to ensure protection as a whistleblower. This may result in companies being precluded from handling and resolving potential concerns internally before the SEC gets involved.

Read more HERE.

IMPACT RATING: **MEDIUM**

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ANTI-COMPETITION UPDATES

(DOJ/FTC, CALIFORNIA AND MASSACHUSETTS)

US Federal Antitrust Agencies Bring First Enforcement Actions Since the Issuance of Antitrust Guidance for HR Professionals

The Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) jointly enforce US antitrust laws. On October 20, 2016 the FTC and DOJ jointly issued the Antitrust Guidance for Human Resources Professionals to assist HR professionals and others involved in hiring and compensation decisions to prevent antitrust violations and report potentially unlawful activity to the DOJ.

In 2018, the DOJ brought its first enforcement action for no-poaching agreements and the FTC brought its first wage-fixing enforcement action following the agencies' issuances of the antitrust guidance. Because of the agencies' increasing focus on prosecuting anti-competition agreements, employers should be diligent in ensuring they comply with antitrust laws.

Background

Agreements between companies to fix salaries or benefits of employees, either at a specific level or within a range (*i.e.*, wage-fixing agreements), and agreements between companies not to cold call, solicit, recruit, or hire each others' employees (*i.e.*, no-poaching agreements) can constitute unlawful antitrust violations under US law as they may restrict competition among companies. While the DOJ and FTC have historically investigated and challenged these anti-competitive agreements as violations of federal antitrust law, they were usually addressed through civil enforcement actions prior to the joint issuance of the Antitrust Guidance for HR Professionals ("Antitrust Guidance"). For example, in 2010, the DOJ filed civil lawsuits against several technology companies that entered into no-poaching agreements with competitors, which ended by entering into settlements preventing the companies from contracting with employees.

However, the agencies signaled a more aggressive stance in issuing the Antitrust Guidance by expressly stating their intent to criminally investigate and prosecute naked wage-fixing or no-poaching agreements, whether entered into directly or through a third-party intermediary, that are unrelated or unnecessary to a larger legitimate collaboration between the employers. For the first time, the agencies threatened criminal, felony charges against companies, HR professionals and hiring managers. In a criminal Sherman Act case, a company may be subject to fine of up to $100 million, while individual HR professions may be subject to fines of up to $1 million and up to 10 years of imprisonment. Accordingly, being a party to a criminal investigation by the antitrust agencies can have monumental reputational and monetary repercussions.

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- **The DOJ Brings First Enforcement Action for A No-Poaching Agreement Since the Issuance of the Antitrust Guidance**

Since issuing the Antitrust Guidance, the DOJ has continued to publicly acknowledge that active criminal investigations involving no-poaching agreements are underway. On January 19, 2018, Antitrust Division Assistant AG confirmed that the DOJ intended to announce its first criminal prosecutions for no-poaching agreements in violation of the Sherman Act since the policy was announced in October 2016. He warned that if such activity "has not been stopped and continued from the time when the DOJ's [new anti-poaching] policy was made" in October 2016, "we'll treat that [conduct] as criminal." Similarly, at a healthcare conference in May 2018, the Deputy Assistant AG noted the DOJ's plans to bring criminal cases to redress antitrust violations in the healthcare industry for no-poaching agreements.

In line with these announcements, the DOJ declared its first civil enforcement action on April 3, 2018 by filing a complaint in federal court in Washington, DC against "two of the world's largest rail equipment suppliers" for allegedly engaging in illegal no-poaching agreements with each other and a third rail equipment supplier. Although the DOJ had warned of criminal prosecution, the agency instead instituted a civil enforcement action in this case solely "because the United States uncovered and began investigating the agreements, and the defendants terminated them, before the United States had announced its intent to proceed criminally against such agreements." According to court filings by the DOJ, it was only "[a]s a matter of prosecutorial discretion" that the DOJ will "pursue No-Poach Agreements entered into and terminated before" October 2016 "through civil actions for equitable relief." While the DOJ chose not to pursue criminal penalties in this specific case, the agency appears prepared to do so where a no-poach agreement is entered into after October 2016. Companies should be extra vigilant in ensuring their agreements entered into after October 2016 do not have the effect of unlawfully hindering competition.

- **The FTC Brings First Enforcement Action for Wage-Fixing Agreement Since the Issuance of the Antitrust Guidance**

On July 31, 2018, the FTC announced a proposed settlement with a therapist staffing services company, its owner, and the former owner of a competing staffing

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company accused of colluding with other competitors on reduced pay rates for physical therapists. According to the complaint, the two owners had agreed to lower their therapist pay rates to the same level and also invited other competitors to lower their rates to keep therapists from switching to staffing companies that paid more.

Notably, this was the first enforcement action by the FTC regarding a wage-fixing agreement since issuing the Antitrust Guidance. The proposed consent order prohibited the therapist staffing company from colluding with competitors on compensation paid to employees or independent contractors. The parties were also barred from contracting with any person to lower, fix, maintain, or stabilize the compensation they or the other person pays in competing with each other for therapists, employees, and independent contractors. The parties were further barred from exchanging information with competitors related to compensation of employees and independent contractors. As indicated by the FTC's enforcement action, the antitrust agencies are continuing to pay close attention to wage-fixing agreements.

Employer Takeaways

1. Conduct compliance training for HR professionals and other individuals involved in hiring and recruiting to identify and avoid any potential wage-fixing or no-poaching agreements.
2. Review any agreements that may restrict the hiring of employees from competitors to ensure they do not violate antitrust laws.
3. Only obtain industry reports or compensation studies from neutral third-party survey companies that aggregate historical data from multiple companies and regions.
4. In a deal or transaction context, companies making competitive acquisitions should instruct those involved in the deal that compensation information sharing and limited no-poach agreements should only occur to the extent the employees are substantially tied to the value of the target.
5. Other documents shared during due diligence or for integration purposes should have compensation and benefits information redacted (e.g., employment agreements, bonuses, etc.), or be aggregated by department, division, or facility.

IMPACT RATING: **HIGH**

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Restrictive Covenants in California - What's New?

California courts mostly take a no prisoners approach to Business and Professions Code section 16600, the statute prohibiting illegal restraints on trade. Courts broadly interpret Section 16600, which states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void," to invalidate most post-employment non-competes and customer non-solicits, including covenants preventing former employees or their new employers from "hiring" employees of a former employer (so-called "no hire agreements"). But Section 16600 does not bar all post-employment covenants–just those that "restrain" trade.

1. Employee Non-solicits

For the last thirty-three years, California courts have been willing to enforce post-employment restrictions on employee solicitation. Such provisions typically prohibit former employees from actively soliciting (but not from actually hiring) the current employees of their former employers. See *Loral Corp. v. Moyes*.

In *Loral*, the Sixth Appellate District of the California Court of Appeal concluded that employee non-solicits do not create actionable restraints on trade under Section 16600 because the employees "restrained" remain free to contact their former employer's employees for reasons unrelated to solicitation, or to hire them if they sought employment independently. In November, *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, a different district of the California Court of Appeal declared that it "doubt[ed] the continuing viability" of *Loral* following the California Supreme Court's 2008 *Edwards*' decision. Several commentators have since interpreted *AMN Healthcare* to mean that post-employment employee non-solicits are no longer viable in California. But just as the report of Mark Twain's death was famously exaggerated, perhaps too are the reports of *AMN Healthcare's* impact on employee non-solicits.

While *AMN Healthcare* undoubtedly looked askance at *Loral*, the Fourth Appellate District did not ultimately abrogate employee non-solicits. Instead, the court found that regardless of whether *Loral* survived *Edwards*, *Loral* was distinguishable on its facts. The plaintiff employer in *AMN Healthcare* sought to apply its employee non-solicits to employees whose very job it was to recruit and place temporary medical professionals in medical facilities throughout the country. The employee non-solicit therefore was a "de facto" customer non-solicit and non-compete, and as applied,

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it prevented the employees in question from doing their jobs (from "engaging in their chosen profession"). This distinction is crucial. While a typical employee does not solicit other employees as part of his or her primary job function, a recruiter certainly does.

Those who rushed to pronounce the end of employee non-solicits may not have considered that *Edwards* was issued 10 years ago. Since then, California courts have consistently upheld properly drafted employee non-solicitation covenants, notwithstanding *Edwards*. These courts recognize that *Edwards* analyzed customer non-solicitation covenants and not employee non-solicits, and therefore never reached the issue addressed in *Loral*.

2. Negotiating A Forum Selection Clause Or Choice of Law Provision With A Represented Employee

The enforceability of non-compete agreements depends primarily on state law. With California's aversion to post-termination non-competes, employers have often queried whether they can escape California law and courts by choosing a non-California choice of law and forum. This approach historically has always been an uphill battle, resulting in a proverbial race to the courthouse with no guaranteed outcome, but California Labor Code Section 925 appears to offer a new take on this old strategy.

Under California Labor Code Section 925 (effective January 1, 2017), an employer cannot require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision with a foreign choice of law or forum unless the employee is individually represented by counsel in negotiating the terms of the agreement. Put differently, Section 925 seemingly empowers employers to include forum selection clauses and/or choice of law provisions in contracts with California employees when an employee is individually represented by counsel during negotiation of the contract. It is plausible that employers can use choice of law and choice of forum provisions with represented employees to contract around California's laws against non-competes.

Though no California state court has substantively opined on this issue in a published opinion yet, a recent case out of Delaware (*Nuvasive, Inc. v. Miles*) illustrates how this approach might work as a legal strategy. Essentially, a Delaware court enforced a Delaware choice of law provision in an employment agreement

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between a Delaware corporation doing business in California and a California resident working in California. In its analysis, the court reasoned that the California legislature intentionally included a pertinent carve-out in Section 925 balancing the state's interest in enforcement of its labor law with the additional interest in freedom of contract.

Read more HERE.

Employer Takeaways

1. **Employee Non-solicits**

   Consider what the company gains from employee non-solicits–are the provisions included as boilerplate that may serve only to increase litigation risk? Or, do they substantially protect against raiding, loss of investment in employees, or other material assets?

   Stay tuned, as only time (and litigation) will tell, as California courts continue to address the enforceability of employee non-solicitation covenants under differing factual scenarios.

   If your business involves soliciting employees, recruiting or similar work, consider whether your standard employee non-solicits require amendment, given *AMN Healthcare*.

2. **Using Labor Code Section 925**

   In the past, California employees have tried to avoid outcomes like the one in *Nuvasive* by either requesting that the California court enjoin the foreign litigation or seeking declaratory judgement in a California court. To date, such efforts have been unsuccessful because (1) California courts are generally reluctant to enjoin litigants from pursuing claims or defenses in foreign courts, even where California public policies are at stake, and (2) California district courts exercising diversity jurisdiction have been willing to remove cases to foreign courts based on the foreign choice of forum and law.

   So, while there may be hope on the horizon for California employers looking for a way to obtain an effective post-termination non-compete, the exceptions are narrow, fact-specific and practically limited to those former employees represented

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by counsel. But for high-level employees represented by counsel, particularly in the M&A context, California law may actually provide a new approach to the dilemma of viable post-termination non-competes.

IMPACT RATING: **HIGH**

Massachusetts's New Non-Compete Law

In August 2018, Massachusetts enacted its Noncompetition Agreement Act (Act). (effective October 1, 2018). It applies to both employees and independent contractors, limits the enforceability of non-competes and codifies express requirements non-compete covenants must meet to be effective.

The Act generally imposes a blanket ban on non-compete agreements unless specific requirements are met. The agreement must be in writing, specifically state that the employee has the right to consult an attorney before signing, and must be signed by both the employer and the employee. The agreement must also include a garden leave clause or other mutually agreed consideration in lieu of garden leave. If an employer chooses paid garden leave, this clause requires the employer pay the employee at least 50% of the employee's highest salary within the last 2 years of employment. Employers opting to rely on "other mutually agreed upon consideration" must carefully review the adequacy of the alternative consideration.

Notification Requirements

Employers must provide advance notice if they intend to ask an employee sign a non-compete. The timing requirements hinge upon **when** the employee is asked to sign the agreement:

- If before employment begins, the employer must provide the employee a copy of the agreement before making a formal offer of employment, or 10 days before the employee starts, whichever comes first.
- If during employment, employer must provide notice of the agreement not less than 10 business days before the effective date.

Duration and Scope:

The non-compete must be limited in duration and scope. It is only enforceable if the

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restriction terminates 1 year or less post-employment, unless the employee breaches his or her fiduciary duty or steals the employer's property, in which case the non-compete can extend for up to 2 years. It also be restricted to regions where the employee provided services or had a material presence or influence within the last 2 years of employment, and limited to the specific services the employee provided.

Other Notable Restrictions

- Non-competes with "non-exempt" employees (as defined under the FLSA) are prohibited.
- Non-competes will be enforced regardless of the circumstances of an employee's termination, such as those who are terminated without cause or laid off.
- Blue-penciling is allowed at the discretion of the court.
- Disputes related to the non-compete must be adjudicated in the county where the employee works or resides.

The Act does not apply to customer or employee non-solicits or agreements made in connection with the sale of a business.

Employer Takeaways

Given that a federal solution for non-compete reform appears unlikely, state laws have effectively become a "patchwork quilt" of various reform efforts. Employers must stay abreast of new developments as they come into effect, as ongoing legislative developments continue to indicate that non-competes are a high priority for state legislatures nationwide.

Employers should not abandon all hope when considering restrictive covenants. Well-crafted restrictions are still enforceable in many states, but work closely with counsel to fashion a national (and global) strategy for navigating the fast changing legal landscape.

IMPACT RATING: **HIGH**

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ARBITRATION AGREEMENTS

WHERE ARE WE NOW?

Employment Arbitration Agreements With Class Action Waivers Are Enforceable

The US Supreme Court issued a highly anticipated decision on May 21, 2018 in *Epic Systems Corp. v. Lewis*, holding that class action waivers in arbitration agreements are fully enforceable, notwithstanding the right to engage in concerted activity under the National Labor Relations Act (NLRA). With a 5-4 opinion authored by Justice Neil Gorsuch, an ideologically divided Supreme Court resolved a circuit court split in favor of class and collective action waivers, allowing employers to require workers to arbitrate claims on an individual rather than group basis.

Although employers now have a tool to effectively eliminate most employment class actions through arbitration agreements, several other important nuances remain to be considered before rolling out an arbitration program. But the Supreme Court's decision is nevertheless a clear win for employers seeking to avoid the expense and disruption of class litigation.

Read more HERE.

Employer Takeaways

For employers looking to take advantage of the benefits of individual arbitration, there are several drafting nuances to consider before rolling out or updating existing arbitration agreements.

1. Employers who continue to use arbitration agreements that are silent on class or collective arbitration should consider including an express class waiver in their agreements. Notwithstanding the Supreme Court's statement that "the parties' mere silence on the issue of class-action arbitration" does not signify assent, agreements that do not explicitly state that class or collective proceedings are impermissible leave the issue open to differing judicial interpretation, and may cause what many consider the worst of all worlds—claims being subject to class-wide arbitration. To remove any doubt, consider including an explicit class action waiver.

2. Arbitration agreements should specifically state that a court, and not an arbitrator, will determine whether it permits the possibility of class arbitration. Absent contractual language that assigns this question to the court or the arbitrator, the presumption of "who decides" varies by jurisdiction. The majority of federal courts

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(including the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits) have determined this is presumptively a gateway issue for the courts. However, California Supreme Court held that it is presumptively an issue for the arbitrator to decide, and other courts have not yet spoken on this issue. To remove any ambiguity and the risk of differing judicial interpretation, arbitration agreements should expressly address the issue.

IMPACT RATING: **HIGH**

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CALIFORNIA WAGE AND HOUR UPDATES

Take A Break To Remember Your Meal And Rest Period Obligations

Under California law, non-exempt employees are entitled to one 30-minute unpaid, uninterrupted off-duty meal break no later than the end of their 5th hour of work. If employees work over 10 hours, they must be provided a second 30-minute unpaid meal period. Similarly, employees must also receive 10-minute rest periods for each 4-hour period worked or major fraction thereof. (Rest periods must be paid as time worked).

While courts have confirmed that employers are not required to "police" or monitor whether employees are taking timely meal and rest periods per company policy, paying close attention to employees' time records to identify and check-in with any employees who are taking late meal or rest breaks, or missing these breaks altogether, including paying meal or rest period premiums when required, is the most proactive way to ensure compliance and preclude litigation.

If your workforce is unionized, your CBA may exempt you from liability under the Labor Code for meal and rest period claims if the agreement provides that the parties must resolve such disputes as outlined in the CBA.

Read more HERE.

Employer Takeaways

Take the following steps to mitigate any potential liability under California's meal and rest break laws:

- Adopt meal and rest period policies in employment agreements or employee handbooks that are compliant on their face to avoid class claims;
- Instruct employees to immediately report any instance in which they are prevented from taking a timely break to managers;
- Train managers responsible for enforcing your break policies;
- Collect signed acknowledgments from employees that state the employees have read and understand all policies in the handbook or agreement;
- Provide trainings that explicitly address the policies outlined in your handbook as part of the onboarding process;

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- Insert language in any third-party agreements that explicitly imposes a duty on the third-party to comply with applicable, state, and local laws; and
- Review CBAs to ensure the agreement overrides the relevant California state laws.

IMPACT RATING: **HIGH**

Individuals In California May Be Personally Liable For Civil Penalties Resulting From Wage And Hour Violations

In September, the California Court of Appeal held that an individual (*i.e.*, an owner, director, officer, or managing agent of a corporate employer) can be found personally liable for civil penalties resulting from the employer's failure to comply with California's overtime pay and minimum wage laws with no showing that the individual misused or abused the corporate laws for a wrongful or inequitable purpose.

Employer Takeaways

Under *Atempa v. Pedrazzani*, an employer's failure to pay overtime or minimum wages subjects not only the corporation to costly liability for statutory overtime pay and minimum wage violations, but also the corporation's individual owners, officers, and agents. Such individuals may be held personally liable regardless of the identity or business structure of the employer. Equitable considerations are also irrelevant under *Pedrazzani*. Individual owners, officers, or agents, particularly those of small, locally-owned businesses alleged to have violated overtime pay and minimum wage laws, may have to satisfy the corporation's debt with their personal assets.

IMPACT RATING: **MEDIUM**

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INDEPENDENT CONTRACTORS AND THE GIG ECONOMY

(CALIFORNIA AND NEW YORK)

California Delivers A Blow To The Use Of Independent Contractors

On February 8, 2018, in what is believed to be the first time a gig economy case has been fully decided on the merits, a California federal judge ruled that a GrubHub delivery driver was properly classified as an independent contractor. The court used the multifactor *Borello* test to analyze whether the driver was an independent contractor, or a misclassified employee.

This case was swiftly rendered moot by the California Supreme Court's April 30, 2018 decision in the now infamous *Dynamex Operations West Inc. v. The Superior Court of Los Angeles County* case. This decision upended the gig economy by replacing the multifactor *Borello* test for independent contractor misclassification, with the rigid ABC Test. (Read more HERE.)

Under the *Dynamex* approach:

- There is a **presumption that the worker is an employee**. The burden is on the **hiring entity** to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage.
- To meet this burden, the hiring entity must establish **each** of the three factors embodied in the ABC Test:

    A. That the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

    B. That the worker performs work that is outside the usual course of the hiring entity's business; and

    C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Failure to satisfy **any one of the three parts** means that the worker will be treated as an employee for purposes of the wage order. Besides liability for meal and rest break penalties, overtime, minimum wage, waiting time penalties and more, California imposes substantial civil penalties between **$5,000 and $25,000 per violation** on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors.

In October, the California Court of Appeal clarified that the ABC test applies only to claims arising under the California wage orders and not to other issues such as

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determining employee status for workers' compensation, wrongful termination, waiting time penalties, overtime, unfair competition and indemnity claims under the Labor Code. *Garcia v. Border Transportation Group.*

Employer Takeaways

Companies with independent contractors in California have several options for mitigating increased misclassification risks following *Dynamex*, depending on their risk tolerance and industry practices. Consider:

- Reclassifying independent contractors as employees. Benefits include cutting off liability going forward and avoiding increased penalties for "willful" misclassification. Drawbacks include admitting liability, the inability to obtain a release of claims for past non-payment of wages, potentially attracting attention from the federal and state tax authorities, and competitive disadvantage if misclassification is prevalent in the company's industry.

- Alternatively, retain independent contractors, but take steps to mitigate exposure. For example, employers can limit class action exposure by including arbitration agreements with class action waivers in all independent contractor agreements, based on model provisions that have been upheld by federal courts in the Ninth Circuit or California state courts. However, collective actions can still be brought through the Private Attorneys General Act (known as PAGA), because the California Supreme Court takes the position that PAGA claims are for the public benefit, and cannot be subject to arbitration. In addition, employers can limit overall exposure and the risk of claims by developing an independent contractor management strategy that addresses all three prongs of the ABC Test. At a high-level, this entails reducing actual and apparent direction and control, treating independent contractors as self-employed business people or freelancers (not employees), and distinguishing between the functions performed by independent contractors and the company's "core business."

Don't forget to consider how to classify independent contractors in other states. Workers performing the same functions should be classified consistently internally. Inconsistent classification (*e.g.*, across states) carries a high risk of successful misclassification claims.

IMPACT RATING: **HIGH**

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New York Delivers Good News For Independent Contractors, But Risks Remain

Unlike California, New York courts still use a multi-factor, flexible test to determine whether an individual is an independent contractor or employee. *In Matter of Vega*, New York's Third Department ruled that a Postmates delivery courier was not an employee of Postmates for unemployment purposes, overturning a decision by the Unemployment Insurance Appeals Board.

Under New York law, the lack of incidental control over the results produced – without further evidence of control over the means employed to achieve the results – will not constitute substantial evidence of an employer-employee relationship. Rather, there must be an "indicia of supervision, direction and control" in order to establish an employer-employee relationship.

The New York appellate court determined that no employment relationship existed where the individuals:

- Were not required to report to a supervisor;
- Retained "unfettered discretion" as to whether they logged on to Postmates' platform and actually worked;
- Were free to work as much or as little as they want;
- Had no set schedule, nor minimum or maximum time / number of deliveries requirement;
- Could accept, reject, or ignore a delivery request without penalty;
- Had the freedom to simultaneously work for other companies, including Postmates' direct competitors; and
- Could choose the mode of transportation used to perform the delivery.

See HERE for more.

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Employer Takeaways

New York's analysis is more flexible and holistic than California's ABC test. Under New York law, a company can exercise "incidental control" over independent contractors without creating an employment relationship, provided it does not control the "results" of the independent contractor's engagement, or the means used to achieve those results.

Given that contracting arrangements remain a hotbed for litigation, despite rulings like this one, companies are well-advised to proactively audit worker independent contractor classifications, review independent contractor agreements, and take steps to mitigate potential exposure, including reclassifying workers and redefining roles as needed.

IMPACT RATING: **HIGH**

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DATA PRIVACY

(CALIFORNIA, GDPR AND INDIA)

New California Privacy Law Creates Data Processing Requirements for CA Employers (Effective January 1, 2020)

As of **January 1, 2020**, companies around the world must comply with additional regulations related to processing of personal data of California employees. Under the CA Consumer Privacy Act of 2018 (CCPA), covered employers must observe restrictions on data monetization business models; accommodate rights to access, deletion, and porting of personal data; and issue or update privacy notices to provide detailed disclosures about data handling practices. The CCPA applies to all CA residents, which includes CA residents who are employees.

Covered Employers

Companies around the world must comply with the CCPA if they receive personal data from California residents (including employees) and if they—or their parent company or a subsidiary—exceed one of three thresholds:

- Annual gross revenues of $25 million;
- Collection for commercial purposes of the personal information of 50,000 or more California residents, households, or devices annually; or
- 50% or more annual revenue from selling California residents' personal information.

Key Compliance Requirements

- Employees can ask employers to disclose the categories and specific pieces of information collected, and once a request is verified, this information must be provided free of charge. Since personal information is broadly defined, and would cover most HR records, employees could potentially request confidential performance reviews or internal company correspondence relating to them.
- Employees must be informed at or before the point of collection about the categories of personal information collected and the purposes for which they will be used. No additional categories of information can be collected without prior notice.
- Employees can also ask for their personal information to be deleted, though an employer may retain the information if it is necessary, among other grounds, for performance of the employment contract or if it is required for solely internal uses aligned with the expectations of the employee.
- Employees must also be informed if their personal information is sold or disclosed to third parties for a "business purpose." This covers disclosures of employee

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- information to payroll vendors, benefits providers, and other service providers. Regarding service providers, employers should be careful to contract only with such service providers that expressly forbid any sale or unauthorized use of the employee information save for specified processing purposes by the service providers. Otherwise, the employer could itself be construed as selling employee information, which triggers additional compliance requirements.
- Employees may opt out of the sale of their personal information, subject to the very broad and somewhat counterintuitive definitions of "sale." For example, if an employer uses a free or freemium cloud service subject to standard terms and conditions that allow the service provider to commercialize information received, this could qualify as a "sale." Employees enjoy broad anti-discrimination rights, and an employer cannot retaliate or discriminate against them for seeking to exercise any rights under the CCPA.
- Employees must be informed about their access, information, and anti-discrimination rights regarding the collection, use, and sale of their personal information by way of a privacy policy. Employees also cannot be asked to contractually waive any rights provided by the CCPA, and any such contract is void against public policy.

Penalties:

- The CCPA allows the California Attorney General to bring a civil action for violations of the Act. Companies that commit intentional violations are subject to penalties of up to $7,500 per violation. If a company commits an unintentional violation and fails to cure it within 30 days of receiving notice, it is liable for up to $2,500 per violation.

Read more HERE.

Employer Takeaways

Start work right away to assess the CCPA's impact on your business, systems and data handling practices. A year and a half is not much time, as anyone who has been working on EU GDPR compliance knows.

1. Prepare data maps, inventories, or other records of all personal information pertaining to California residents (including employees), households, and devices, as well as information sources, storage locations, usage, and recipients; add newly required disclosures to privacy policies; prepare for data access, deletion, and portability requests, and with opt-out requests with respect to data sharing.

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2. Update employee privacy policies or notices with newly required information, including a description of California residents' rights under the CCPA.
3. Put in place written agreements with any service providers receiving employee personal information.
4. Provide designated methods for employees submitting data access requests, including, at a minimum, a toll-free telephone number.
5. Fund and implement new systems, training, and processes to comply with the new requirements, including to verify the identity and authorization of persons who make requests for data access, deletion, or portability; respond to requests for data access, deletion, and portability within 45 days; and avoid requesting opt-in consent for 12 months after a California resident opts out, per Cal. Civ. Code § 1798.135(a).
6. Monitor legislative developments, as the California Legislature is working on corrections and improvements to the hastily passed CCPA and aligning the myriad of existing California privacy laws. Also, Congress may revive plans for federal privacy legislation that may preempt California laws partially or completely.

IMPACT RATING: **HIGH**

GDPR Goes Into Effect and Guidance on Compliance Begins to Emerge from Data Processing Authorities

Arguably the biggest change in the data processing landscape for employers in decades, the European General Data Processing Regulations (GDPR) went into effect on May 25, 2018 and now serves as an omnibus regulation applying to all EU/EEA related data processing. Data collection and flow analyses have been conducted; data processing agreements put in place; and of course, updated privacy policies distributed. However, this does not mean that employers can now forget about the GDPR.

The GDPR is not one deadline. Instead, it and its corollary legislation is the new normal, with ongoing compliance obligations. If you have employees in Europe and EEA (Norway, Iceland, Lichtenstein) or Switzerland, you must continue to ensure the privacy of your workers is incorporated into all data handling and employee monitoring. The way the GDPR defines personal data is exceptionally broad. It includes "any information relating to an identified or identifiable" EU employee. This could include a host of information that is commonly collected and maintained by employers, including, contact information, salary and benefits, badge data, photos, and video and surveillance footage, among other things.

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The GDPR also allows EU member states to supplement it with their own national legislation and compliance guidance, and the first of this guidance is now emerging. For example:

The German data processing authorities have released guidance on how employee whistleblower hotline data processing should be handled, and mandated anonymous reporting as the default reporting mode. The European Data Protection Board (EDPB) has also released guidance on when data processing impact assessments (DPIAs) must be conducted.

Find Baker McKenzie's Interactive Global Data Protection Report HERE.

Read "The New Normal For Employee Privacy Expectations After GDPR" HERE.

Employer Takeaways

Employers must continue to consider the data processing implications of the GDPR:

- During the hiring process with applicant / candidate tracking systems;
- Before conducting background checks (as they are restricted under the GDPR);
- Before implementing global ethics or compliance hotlines for employees;
- Before implementing Acceptable Use Policies, IT and Security Polices, or Bring Your Own Device Policies; and
- When developing any marketing initiatives, voluntary testing or surveys involving employees.

Employers must also implement and maintain:

- Local law compliant record retention policies and schedules for employee records;
- Records of processing for HR processes;
- DPIAs for certain "high risk" HR activities;
- Training programs for data handlers including HR and IT professionals;
- Procedures for "Data Subject Access Requests" including from candidates, current and former workers;
- A brief and easy to access incident response plan to be used if a security breach occurs or data loss, distributed to all employees; and
- Compliance programs that consider opportunities for cross compliance with other data processing regulations such as the California Consumer Privacy Act.

IMPACT RATING: **HIGH**

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India Enacting Data Protection Legislation Similar to the GDPR

In July 2018, India announced a new comprehensive draft of the Personal Data Protection Act (Act). The draft Act, applies to companies worldwide, includes requirements that are comparable to those contained in the EU General Data Protection Regulation, and adds a broad data residency requirement similar to the one Russia introduced in 2015. It is likely to be enacted and go into force in 2019. The substantive compliance provisions will go into effect 18 months after it is enacted, providing a lead in time during which a Data Protection Authority will provide compliance and enforcement guidelines.

Read more HERE.

Employer Takeaways

- Integrate compliance measures and task lists with existing efforts to address requirements of the Act, the EU GDPR, the California Consumer Privacy Act of 2018 and other global data protection, privacy and security laws holistically.
- Prepare data maps, inventories, or other records of all personal data covered by the Act to assess what personal data in the company's control is covered, add newly required information to privacy policies, and prepare for data access, correction, and portability requests from employees.
- Consider how to comply with some of the Act's substantive requirements such as those relating to data subject rights, data residency and mechanisms for cross-border data transfers.
- Monitor legislative developments and implementation guidance to be provided by the Data Protection Authority under the Act.

IMPACT RATING: **MEDIUM**

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DEPARTMENT OF LABOR UPDATES

DOL Eliminates "80/20" Tip Credit Rule

The Department of Labor's newly issued opinion letter provides good news for employers who use tipped workers. On November 8th, the DOL reversed its previous "80/20" guidance on use of the tip credit. The tip credit permits employers to pay employees in tip-based positions, such as bartenders and waiters, a lower hourly wage than the federally mandated minimum wage (with the thought that earned tips will make up the difference). Under the previous "80/20" rule, employers were barred from paying the lower cash wage to tipped employees who spent over 20% of their time performing non-tip generating duties such as setting tables or cutting lemons.

The previous "80/20" rule saddled employers with the unworkable burden of continually monitoring and accounting for how tipped employees spent their time. The rule sparked copious litigation about whether tipped employees' non-tip generating duties accounted for 20% of the employees' time. Recognizing the confusion and inconsistent application of the former rule, the DOL's new guidance seeks to protect workers while enabling "employers to determine up front whether their actions are in compliance."

In the opinion letter, the DOL discards the "80/20" rule and clarifies that it does not "intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed." However, the rejection of these limits is conditioned on the duties being "performed contemporaneously with" or "for a reasonable time before or after" the employee's direct service or tip-generating duties.

Employer Takeaways

Even though the opinion letter eliminates the "80/20" rule, it maintains the dual jobs categorization, which applies where an employee takes on two positions, one a traditionally tipped role and the other a non-tipped role. Employers should still be mindful as employees engaged in dual jobs may have the full minimum wage for time spent on the non-tipped job.

It remains to be seen how this new guidance will be applied, but eliminating the "80/20" rule relieves employers of the taxing burden of monitoring and accounting for tipped employees tip and non-tip generating time.

IMPACT RATING: **MEDIUM**

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The DOL Creates A New Compliance Office And Publishes Six New Opinion Letters

The DOL demonstrated a renewed effort to assist employers in understanding their obligations under federal law by way of creating a new Office of Compliance Initiatives and by publishing six new opinion letters.

The new Office of Compliance Initiatives will be tasked with:

- Facilitating and encouraging a culture that promotes compliance assistance within the Department;
- Providing employers and workers with access to high-quality, up-to-date information about their obligations and rights under federal labor laws and regulations;
- Assisting enforcement agencies in developing new strategies to use data for more impactful compliance and enforcement strategies; and
- Enhancing outreach to stakeholders for the Department's enforcement agencies.

The DOL's new opinion letters address:

1. **Volunteer Status**: Non-profit organization Graders may be reclassified as volunteers rather than employees, and non-profits need not pay Grader's fees.
2. **Retail / Service Section 7(i) Exemption**: Business-to-business sales may be considered "retail" for the purposes of the Section 7(i) exemption from overtime.
3. **No Fault Attendance Policies**: Suspending the roll off of points during an FMLA leave under a no-fault employee attendance policy does not violate the FMLA.
4. **Organ Donors under the FMLA**: Organ donation surgery can qualify as a "serious health condition." Organ donors may use FMLA leave for post-operative treatment.
5. **Participation in Wellness Activities**: Voluntarily participating in wellness activities, such as benefits fairs or biometric screenings, on-site or during working hours is not compensable time, as these activities are for the benefit of the employee rather than the employer.
6. **Movie Theater Exemption**: Food service employees who are "functionally integrated" with a movie theater's operations are exempt from overtime requirements.

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Employer Takeaways

The decision to resume issuing opinion letters is a welcome development as it supplies employers with additional direction on previously unresolved legal issues. Watch for more DOL opinion letters as they are issued to ensure future compliance.

IMPACT RATING: **MEDIUM**

New "Primary Beneficiary Test" for Unpaid Interns

On January 5, 2018, the US Department of Labor instituted a new test for determining whether interns and students working for "for-profit" employers are entitled to minimum wages and overtime pay under the Fair Labor Standards Act. Employers must pay employees for their work, but sometimes, interns may not actually be employees under the FLSA, and therefore, can be unpaid. The DOL now utilizes the "primary beneficiary test" to determine if the intern is the primary beneficiary of the relationship. If so, the intern will not be considered an employee under the FLSA and can be unpaid. However, if the company is the primary beneficiary, the intern will be considered an employee and subject to the FLSA and its minimum wage and overtime requirements.

The "primary beneficiary test" considers seven factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

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6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The DOL describes the test a "flexible test," with no single factor being determinative. The DOL's previous test was more strict and required each factor to be present for the intern to qualify as unpaid.

Employer Takeaways

The new "primary beneficiary test" should provide employers with more flexibility to have unpaid interns when the intern is the primary beneficiary of the internship.

Companies interested in administrating unpaid internship programs should take a fresh look at the program and the new primary beneficiary test's seven factors and make sure that the intern, and not the company, is the primary beneficiary of the relationship.

If the company is the primary beneficiary, interns should be treated as employees and paid accordingly under the FLSA.

IMPACT RATING: **MEDIUM**

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DIVERSITY AND INCLUSION

(AGENCY REPORTING, #METOO, SALARY HISTORY AND BOARD QUOTAS)

ANNUAL REPORTING FROM THE EEOC AND THE DFEH

EEOC's Enforcement and Recoveries Rise in FY 2018

The US Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.

In its Performance and Accountability Report for fiscal year (FY) 2018, the agency highlighted an uptick in enforcement actions and recoveries. The agency filed 199 merits lawsuits (up from 184 filed in FY 2017), including 117 suits on behalf of individuals, 45 nonsystemic suits with multiple victims and 37 systemic suits (a category that continues to rise from 30 in 2017 and just 18 in 2016). The EEOC labels a case "systemic" if it "has a broad impact on an industry, company or geographic area." The climbing number of systemic lawsuits is noteworthy as it indicates that the EEOC is not backing down on its agenda of aggressively litigating "bet-the-company" cases.

Recoveries also rose over the prior year, with the EEOC receiving $505 million for victims of discrimination (FY 2017 brought in $484 million). Relief obtained through mediation, conciliation and settlement declined slightly, down from $355.6 million in FY 2017 to $354 million in FY 2018. The agency also made progress on its backlog, reducing its pending inventory to 49,607 charges, a decrease of 19.5 percent from FY 2017. The EEOC noted a significant increase in inquiries (a jump of 30 percent), crediting the launch of an online inquiry and appointment system, as well as the agency's outreach, estimating that it touched more than 398,650 workers, employers and advocacy groups in FY 2018 at approximately 3,900 events.

The agency also highlighted its efforts with regard to the #MeToo movement, noting that it filed 66 harassment lawsuits in FY 2017, including 41 that included allegations of sexual harassment—a 50 percent growth in the number of suits over FY 2017. Charges filed with the EEOC alleging sexual harassment jumped more than 12 percent over the prior fiscal year, and the agency recovered almost $70 million for the victims of sexual harassment in FY 2018, up from $47.5 million in FY 2017. The agency undoubtedly turned up the heat on investigations and litigation in this area and it almost certainly will continue to accelerate in 2019.

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DFEH Reports Age Discrimination and Retaliation Claims Are On the Rise

In August, the California Department of Fair Employment and Housing issued its 2017 Annual Report detailing its complaint and litigation trends.

For FY 2017, the DFEH received nearly **25,000** administrative complaints and inquiries. This is a 5% jump from 2016 and 2015 (which had roughly the same number) and substantially more than the 19,000 filed in 2014. Approximately 19,000 complaints resulted in formal charges filed with the DFEH. About one-half of complaints, or 12,872, requested an immediate right to sue, thereby bypassing any investigation or vetting by the DFEH before involving the courts.

The number of age discrimination and retaliation complaints made in 2017 is striking. Almost 20% of employment complaints in 2017 were for age discrimination (up from 11% in 2016). The largest portion of charges requesting a right-to-sue asserted age discrimination and retaliation—totaling 30% of the bases alleged. Disability was the next most commonly asserted basis in 2017; charges asserting disability exceeded the number of ancestry, religion, national origin, marital status, color, and sexual orientation discrimination charges combined.

The DFEH saw a 22% increase in investigations to 6,160 in 2017. Only 888 of these complaints settled, or 14%, which is a 7% drop from 2016. The remaining 5,000 plus charges, may have carried over into 2018, been withdrawn by the claimant, resolved through private negotiation, dismissed by the DFEH, or consolidated with an overlapping charge.

Settlement revenues spiked: the agency netted 12% more in 2017, bringing in approximately $13 million to the state. The 2017 data suggests that the cost to settle a complaint increases as the matter moves through the DFEH's review process. Involving counsel early and focusing on early resolution is recommended.

The DFEH launched initiatives to make it easier to file a civil rights complaint in California. The centerpiece of the effort is a new case filing and management system, called Cal Civil Rights System, which allows employees to file a complaint and trigger a state-led investigation process using an online platform. The DFEH also developed and distributed a workplace harassment guide as part of the work of its Sexual Harassment Prevention Task Force and provided immediate, on-demand telephonic interpretation to all staff in over 240 languages.

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#METOO'S IMPACT ON EMPLOYERS

California Passes Extensive Laws to Combat Workplace Harassment

Following a year of the #MeToo and #TimesUp movements, California responded by passing several laws that are poised to make the state a leader on combatting workplace harassment. Six of the biggest changes are summarized below:

1. **Employers with five or more employees must provide anti-sexual harassment prevention training to ALL California employees.**

SB 1343 amends Section 12950 of the California Government Code to dramatically expand requirements relating to harassment prevention training. Training is mandated for all employers with five or more employees—including seasonal and temporary employees—by January 1, 2020. Within six months of assuming their positions (and once every two years thereafter), all supervisors must receive at least two hours of training, and all non-supervisory employees must receive at least one hour.

The new law also directs the DFEH to develop online training courses on the prevention of sexual harassment in the workplace. The DFEH must provide the online courses on its website, and is further required to provide the courses in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean and any other language spoken by a "substantial number of non-English-speaking people." Employers may use the DFEH training courses or create their own.

2. **No more confidentiality clauses in settlements relating to sexual harassment, sex discrimination and retaliation claims.**

Beginning January 1, 2019, any provision in a settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action is void as a matter of law. The law does not appear to apply to clauses used in settlements occurring in the pre-litigation phase (that is, prior to filing an administrative charge or judicial complaint). SB 820 allows for provisions that shield the identity of the claimant, including all facts that could lead to the discovery of his or her identity. Importantly, it also allows the parties to make confidential the amount

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paid in settlement of a claim.

3. **Expanded definition of harassment under the FEHA and other changes to how claims of sexual harassment are proven in court.**

Beginning January 1, 2019, SB 1300 significantly expands liability under the FEHA. Chief amongst several changes, SB 1300 expands an employer's potential FEHA liability for acts of nonemployees to all forms of unlawful harassment (removing the "sexual" limitation).

4. **Waivers to testify are banned.**

Beginning January 1, 2019, SB 3109 renders void and unenforceable any provision in a contract or settlement agreement that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or administrative or legislative request) regarding criminal conduct or sexual harassment by the other contracting party, or the other party's agents or employees.

5. **Talent agencies must provide sexual harassment education.**

AB 2338 requires talent agencies to provide adult artists, parents or legal guardians of minors aged 14-17, and age-eligible minors, educational materials on sexual harassment prevention, retaliation, and reporting resources within 90 days of retention. For adult model artists only, the talent agency will also be required to provide materials on nutrition and eating disorders. Talent agencies will also have to retain records showing that those educational materials were provided for three years.

6. **Sexual harassment education for in-home support services is required.**

AB 3082 requires the Department of Social Services to develop or identify standard educational material about sexual harassment and the prevention thereof to be made available to IHSS providers and recipients.

Read more HERE.

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Employer Takeaways

Besides reviewing personnel policies and handbooks for compliance with these updates, California employers should make their strong stance against workplace harassment known by:

1. Establishing a multichannel complaint process that allows employees to bring complaints to management and HR, not to just one individual;
2. Ensuring prompt, thorough and fair review of any credible complaints;
3. Training employees to recognize, respond to, and report harassment; and
4. Maintaining and retaining training records.

IMPACT RATING: **HIGH**

New York Employers Subject to New Policy And Training Requirements To Combat Sexual Harassment In The Workplace

Both the state of New York and New York City passed some of the country's most stringent workplace sexual harassment laws as outlined below.

New York State (NYS)

Effective October 9, 2018, all NYS employers must adopt a written sexual harassment prevention policy and implement annual sexual harassment prevention training for employees.

Under NYS's new law, employers must implement the state's model sexual harassment prevention policy, or create their own sexual harassment prevention policy that meets or exceeds certain minimum standards. NYS employers' sexual harassment policies must:

- Provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- Include information about the federal and state statutory provisions about sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- Provide a complaint form for employees to report sexual harassment and include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

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- Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

NYS employers must also conduct interactive sexual harassment prevention training annually, either using the state's model training materials or another program that meets the training requirements.

Training must:

- Be interactive and include examples of conduct that would constitute unlawful sexual harassment;
- Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- Provide information about the federal and state statutory provisions about sexual harassment and remedies available to victims of sexual harassment;
- Contain information about employees' rights of redress and all available forums for adjudicating complaints; and
- Include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

New York City (NYC)

NYC also passed groundbreaking legislation that will require most private employers to provide sexual harassment training every year. Private employers with 15 or more employees must conduct annual anti-sexual harassment training for all employees starting April 1, 2019.

The training must be interactive and cover these topics:

- An explanation of sexual harassment as a form of unlawful discrimination under city, state, and federal law;
- A description and examples of sexual harassment;

- The employer's internal complaint process for sexual harassment claims;
- The complaint process available through the NYC Commission on Human Rights, the NYS Division of Human Rights, and the EEOC, including contact information;
- The prohibition of retaliation and examples of retaliation; and
- Information concerning bystander intervention, including how to engage in bystander intervention.

Training must be provided to new employees within 90 days of hire, unless the employee received training at another employer within the same training cycle, and once per cycle to all employees otherwise.

And effective as of September 6, 2018, NYC employers now must display a new anti-sexual harassment rights and responsibilities poster (in English and Spanish), and distribute a Fact Sheet on sexual harassment to new hires.

Employer Takeaways

Because of NYS's new law, employers should update their existing harassment policy to meet the new legal requirements. Employers should also arrange for their harassment training to be updated to address the new content requirements of the NYS law. Ensure that internal policies address the process for receiving and investigating sexual harassment complaints, consistent with state guidance. These procedures should be incorporated into training programs as well. Employees must be trained before October 9, 2019, and every year thereafter.

Employers in NYC should implement a training program that also meets the future requirements under NYC law, effective April 1, 2019.

IMPACT RATING: **HIGH**

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SALARY HISTORY BANS AND BOARD QUOTAS

Salary History Bans Sweep the Country

In the past several years, many state and local governments have made pay equity a priority, passing wage-gap initiatives like salary history bans. Such bans generally prohibit employers from inquiring about an applicant's prior wages or benefits during the pre-employment process or considering that information when making interview, hiring, or compensation decisions.

- **California**: Effective January 1, 2018, California prohibits employers from asking applicants about their salary history. Labor Code Section 432.3 now prohibits employers from relying on the salary history of an "applicant" as a factor in determining whether to offer the applicant employment or what salary to offer the applicant, except in specified circumstances. Section 432.3 also prohibits employers (and their agents) from seeking salary history information orally or in writing, including information about compensation and benefits. Finally, Section 432.3 requires employers, upon "reasonable request," to provide the "pay scale" for a position to an applicant applying for that position.

  "Pay scale" means a salary or hourly wage range, and not other forms of compensation such as equity or bonus compensation.

  "Reasonable request" means a request made after an applicant has completed an initial interview with the employer. Employers need not provide pay scale information to applicants until after they have completed their first interview.

  "Applicant" or "applicant for employment" means an individual seeking employment with the employer and is not currently employed with that employer in any capacity or position. The legislation therefore clarifies that the salary history ban and pay scale requirements do not apply to internal applicants or transfers.

  Employers may ask an applicant his or her "salary expectation" for the position applied for. However, employers must still avoid inquiries that might be construed as pressuring an applicant to disclose salary history.
- **Connecticut**: Effective January 1, 2019, employers are prohibited from inquiring (or directing a third party to inquire) about an applicant's wage and salary history.
- **Delaware**: Effective December 14, 2017, Delaware employers and their agents cannot screen applicants based on their compensation histories, and are prohibited from seeking an applicant's compensation history.
- **Hawaii**: Effective January 1, 2019, employers cannot inquire about an applicant's salary history or rely on salary history to determine an applicant's salary, benefits,

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or other compensation.

- **Massachusetts**: Effective July 1, 2018, it is unlawful for employers to seek an applicant's wage or salary history before making an offer of employment.
- **New York City**: Effective October 31, 2017, employers are prohibited from asking about an applicant's salary history.
- **Oregon**: Beginning October 6, 2017, employers are prohibited from seeking an applicant or employee's salary history.
- **Philadelphia, Pennsylvania**: Philadelphia's Wage Equity Ordinance (which prohibits employers from inquiring about an applicant's wage history or conditioning consideration for an interview or employment on disclosure of that information) was scheduled to take effect in May 2017. Implementation was delayed pending a legal challenge; litigation is still ongoing.
- **Vermont**: Effective July 1, 2018, employers are prohibited from inquiring about, seeking, requiring, or screening for interview purposes based on information about an applicant's current or past compensation.
- **Puerto Rico**: Effective March 8, 2017, employers are prohibited from requesting an applicant's salary history from the applicant or their former employer.

Employer Takeaways

Based on where the company has a headcount, a "Salary History Inquiry Policy" is recommended. (Depending on the details of the applicable state statute or local ordinance, "salary" should be defined with some particularity.)

The policy should clearly apply to all human resources, talent acquisition, and recruiting personnel, line managers, and other individuals involved in or responsible for any stage of the screening, recruitment, hiring, or pre-employment process.

Implementing a salary history ban requires clear communication and retraining to change old habits. All individuals (including third parties) involved in any stage of hiring must be notified and trained on the applicable ban(s) and the related company "Salary History Inquiry Policy."

It is crucial that the policy apply not only to company employees but also to any third parties involved in or responsible for screening applicants, recruiting, etc.

IMPACT RATING: **HIGH**

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California Becomes First State To Mandate Female Board of Directors

On August 30, 2018, the California State Senate approved a bill (SB 826) to require corporations with shares listed on "a major United States stock exchange" and incorporated or headquartered (as disclosed on the corporation's annual report on Form 10-K) in California to include a certain number of female directors on the board, with the number determined by board size.

On September 30, 2018, Governor Jerry Brown signed the bill into law. The new law requires that by the end of:

- 2019, such covered corporations have a minimum of one female director on the board.
- 2021, such covered corporations have a minimum number of:
    - Two female directors if the corporation has five directors; and
    - Three female directors if the corporation has six or more directors.

Failure to comply with this mandate will result in civil penalties, ranging between $100,000 and $300,000. The law also requires that the California Secretary of State publish various reports on its website documenting, among other things, the number of corporations in compliance with these provisions. It also authorizes the Secretary of State to impose fines for violations.

Employer Takeaways

Notably, California is advancing a trend started in Australia and a number of European countries in recognizing the importance of gender-balanced corporate boards. (Read more HERE.)

While California's law has not yet been challenged in court, some suggest that reliance on a strict gender-based quota may render the law vulnerable to constitutional attack under the federal and/or state Equal Protection Clause(s).

Setting aside the mandate, it's increasingly common for investors, big and small, to use their influence to press corporate boards to diversify. To develop your company's compliance strategy, we recommend working with your Baker McKenzie employment lawyer.

IMPACT RATING: **HIGH**

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EMPLOYEE COMPENSATION AND BENEFITS

Act By December 31st to Qualify for New Employer Credit for Paid Family and Medical Leave

On September 24, 2018, the IRS issued Notice 2018-71 (Notice) on the temporary employer tax credit introduced by the Tax Cuts and Jobs Act for wages paid to Qualifying Employees while on covered family or medical leave under new Section 45S of the Internal Revenue Code (Code).

Where the requirements of the Notice are met, the new credit may be claimed during tax years 2018 and 2019 for paid family and medical leave provided to employees whose prior year compensation was at or below a certain amount ($72,000 for 2018). Eligible employers who establish qualifying paid leave programs or amend existing programs by December 31, 2018, may claim the credit, retroactive to the beginning of the employer's 2018 tax year for paid leave provided during the year under the program.

Employer Takeaways

Employers that already provide paid leave for an FMLA purpose should consider adopting or amending their written policy to meet the requirements of the Notice by December 31, 2018, which will enable them to claim the credit for any qualifying leave provided since January 1, 2018 (and in 2019).

Employers that do not currently provide paid FMLA leave should consider whether the temporary credit under section 45S provides sufficient tax incentive for them to adopt a FMLA leave policy.

IMPACT RATING: **HIGH**

Significant Changes to IRC Section 162(m)

As a result of the Tax Cuts and Jobs Act's amendments to Internal Revenue Code Section 162(m) in December 2017:

- Many non-US issuers who are listed in the US and other companies that were previously not subject to Section 162(m) (such as companies with publicly traded debt) became subject to a deduction disallowance for compensation in excess of $1 million paid to their top executive officers ("covered employees"); and
- There is no longer an exception to the covered employee deduction disallowance for "qualified performance-based compensation."

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Employer Takeaways

Companies subject to Section 162(m) should:

- Keep an inventory of executive compensation arrangements in effect on November 2, 2017 which may be grandfathered under the pre-Tax Cuts and Jobs Act rules and avoid any material modification of such arrangements;
- Develop protocols to identify a new, ever-expanding list of 162(m) covered employees; and
- Consider whether to adopt more flexible, discretionary executive compensation arrangements following the elimination of the performance-based compensation exception – subject to shareholder/proxy advisor considerations.

Read more HERE, HERE, and HERE.

IMPACT RATING: **HIGH**

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ERISA AND THE ACA

Is Obamacare Over?

Not yet. On December 14, 2018, Judge Reed O'Connor, a federal district court judge in Forth Worth, Texas, ruled that the Affordable Care Act (ACA), which requires individual taxpayers to purchase health plans coverage containing minimum essential benefits or pay a tax penalty, is unconstitutional and invalid. The new ruling poses a significant threat to the ACA which contains popular and sweeping health insurance reforms. If it is affirmed on appeal, it could end the Obamacare requirement that health plans prohibit pre-existing condition exclusions as well as other minimum essential health benefit requirements.

Judge O'Connor ruled that the individual mandate contained in the ACA is essential to and inseparable from the other provisions of the ACA. But Judge O'Connor also denied plaintiffs' request for a nationwide injunction. Because federal courts are courts of limited jurisdiction, his decision is technically only binding in the Northern District of Texas. Accordingly, the ACA remains in effect in all 50 states pending the outcome of any appeal.

The Back Story

In December 2017, Congress passed a new tax law that lowered the Affordable Care Act's individual mandate tax to zero.

On February 26, 2018, eighteen Republican states attorney generals and two governors filed a lawsuit in Fort Worth, Texas challenging the constitutionality of the individual mandate under the ACA because it will generate no tax revenue beginning in 2019. Plaintiffs argued that because the individual mandate generates no revenue it does not operate as a tax. They contend that because the individual mandate "tax" was the foundation for the constitutionality of the ACA, without it, the rest of the ACA is invalid.

The US Department of Justice argues that some —but not all —of the ACA should be struck down. The primary defenders of the ACA are Democratic state attorneys general from sixteen states and D.C., who were allowed to intervene in a case. The intervenors argue that the individual mandate remains constitutional, and even if it is not, it can be legally separated from the rest of the ACA.

On September 5, 2018, oral argument was taken on whether Texas should issue an injunction striking down the law. (Judge O'Conner, the presiding judge, is an appointee

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of President George W. Bush.) Texas argued that an injunction is necessary to preserve its sovereignty and relieve the burden on its residents forced to purchase insurance coverage. The State of California argued that temporarily blocking or ending the ACA would cause more harm to millions of people insured under it. In particular, California highlighted that 135 million people enjoy protection from pre-existing condition exclusions under the ACA. The DOJ argued that parts of the ACA could and should be saved. It also stated that an immediate injunction was unnecessary and would throw the US healthcare system into chaos.

Notably, O'Connor already ruled against Obamacare earlier this year, albeit on narrower grounds. In March, he ruled that an ACA tax on medical providers, but paid by the states pursuant to a HHS regulation, is unconstitutional.

Employer Takeaways

The ruling has no immediate impact on healthcare coverage for Americans. However, depending on what happens with an appeal (which could take months or even years), the impact on employers may be significant:

1. Insurance companies could deny coverage or charge higher premiums to older people or to people with pre-existing conditions;
2. Young people would no longer be guaranteed the right to stay on their parents' plans until they turn 26 years of age;
3. People would no longer be guaranteed access to essential health benefits, such as prescription drug coverage, maternity care, mental health, and other critical services; and
4. Health plans could once again implement lifetime and annual limits on how much money they would pay each year for individual and family medical coverage.

IMPACT RATING: **HIGH**

ERISA and the Gig Economy

On April 30, 2018, the California Supreme Court issued a ruling that will have a big impact on California's gig economy. In *Dynamex*, the Court ruled that in deciding whether a worker is an employee or an independent contractor, the employer must begin by presuming that the worker is a common law employee.

Although *Dynamex* is limited to classifying workers under California's wage orders, its practical effect will be much broader. Employers commonly use one definition of

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employee for wages, hours and working conditions, including employee benefit plan eligibility. Contingent workers typically agree to work without company-sponsored employee benefits in exchange for higher pay or more flexibility in their work schedules.

The impact of the *Dynamex* decision on employee benefit plans subject to the Employee Retirement Income Security Act of 1974 is an open question. The answer will turn on the language found in each plan.

Read more HERE.

Employer Takeaways

In the wake of *Dynamex*, many plans adopted protective language stating that plan eligibility will not be extended retroactively to individuals initially retained as independent contractors even if a court or other administrative agency later determines they are employees.

For example, many ERISA plans have some form of the following exclusionary language stating:

"The following Employees are automatically excluded from eligibility to participate in the Plan:

Any individual who is a signatory to a contract, letter of agreement, or other document that acknowledges his or her status as an independent contractor or leased employee not entitled to benefits under the Plan or any individual who is not otherwise classified by the Employer as a common law employee, even if such independent contractor or other individual is later determined by a court or administrative agency to be a common law employee."

Proceed with caution. Many ERISA-regulated arrangements are ignored until it is too late — when someone sues.

IMPACT RATING: **HIGH**

401(k) Class Action Lawsuits Are Back!

A recent study published by the Center for Retirement Research at Boston College (BC Report) indicates 401(k) class action litigation is again on the upswing. The last big

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surge in 401(k) plan litigation followed the subprime mortgage crisis recession in 2008. Those 401(k) plan class action lawsuits alleged employers acted imprudently by allowing company stock to be a 401(k) plan investment option. The BC Report indicates 107 401(k) class action lawsuits were filed in 2008 and that for the current year there were 107 new 401(k) plan class action lawsuits.

Most of the new 401(k) class action lawsuits target "excessive fees" charged to participants by investment funds and service providers. On February 3, 2012, the Department of Labor published final regulations requiring extensive fee disclosures for retirement plans. Now that service provider fees are visible, it has become much easier for potential plaintiffs to decide whether those fees are "excessive." Another factor fueling an interest in 401(k) plan governance is the fact that there is now over $5.3 trillion in assets held by those plans.

The "excessive fee" 401(k) lawsuits primarily target two things: (1) inappropriate investment choices and (2) charging too much for those investment choices. A third common claim is that the 401(k) plan's recordkeeping fees are too high.

Employer Takeaways

Full electronic disclosure and full monitoring of participants' use of electronic documents can defeat these excessive fee claims.

For example, in *Sulyma v. Intel Corp. Inv. Policy Comm.*, the plaintiff claimed that he was not made fully aware of the risks, fees and expenses associated with hedge funds and private equity investments. Plaintiff also claimed that Intel failed to disclose that the retirement plan's target date and global diversified fund underperformed compared to peer investment funds. It was alleged the participants "suffered hundreds of millions of dollars in losses during the six years preceding the filing of the complaint."

The employer moved for summary judgment arguing that the electronic disclosure of documents and the records showing Mr. Sulyma's use of the electronic disclosures barred his claim under ERISA's 3-year statute of limitations. The district court ruled that Mr. Sulyma actually knew of the underlying facts constituting his claim over three years before he filed his lawsuit and dismissed his lawsuit.

IMPACT RATING: **HIGH**

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GLOBAL EQUITY SERVICES

Global Equity Services
Annual Equity Awards Filings Chart[1]

Baker McKenzie's Global Equity Services team design, implement, and maintain global equity-based compensation plans for multinational issuers that maximize tax benefits while satisfying local securities, labor, exchange controls and data privacy laws in applicable jurisdictions. Our expertise includes drafting plan and grant documents, advising on the benefits of adopting locally qualified plans, preparing country-specific tax and securities filings, tailoring employee communications, and providing overall project management.

The chart below contains general information regarding filing deadlines for equity awards.

DECEMBER 2018

COUNTRY	TYPE OF REPORT	TYPE OF AWARDS COVERED	DEADLINE
Australia	**ESS Statements**	All equity awards - July 1, 2018 to June 30, 2019	July 14 (July 15, 2019) * (Statement to Employee)
	ESS Report		August 14 (Report to ATO)
Belgium	**Securities Report**	Awards subject to EU Prospectus Directive where a prospectus was filed in or passported to Belgium	As soon as possible following the expiry of the applicable EU prospectus
China	**SAFE Outbound Quota Renewal**	ESPP, cash exercise options	December 31
	Shanghai SAFE Annual Re-Registration	All equity awards	December 31
	SAFE Quarterly Report	All equity awards	Within 3 business days of the end of each calendar quarter
France	**Individual Tax Statements** (Employee / French Tax Office)	French-qualified stock options and restricted stock units	March 1
India	**Exchange Control Report**	All equity awards for which funds are remitted outside of India for purchase / acquisition of shares (e.g., ESPP, cash exercise options) for April 1, 2018 to March 31, 2019	As soon as possible after March 31 (no specific deadline but advisable)
Ireland	**Tax Report – Electronic Form RSS1**	Options / ESPP	March 31 (March 29, 2019) *
Italy	**CONSOB Securities Report**	If awards subject to EU Prospectus Directive where a prospectus was filed in or passported to Italy	January 31

1. This chart is for general information only as it should not be relied on as legal advice. The filings and other reports contained herein are specific to equity awards and do not necessarily include general annual payroll reports or filings (even if they may also need to include income from equity awards). Unless otherwise noted, the reports cover calendar year 2018 equity grants and/or taxable events, as applicable.

* For all countries, we have reflected the statutory deadline for the filings. However, if the usual due date falls on a weekend, we have included the accelerated or extended deadline for 2019 in parentheses.

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COUNTRY	TYPE OF REPORT	TYPE OF AWARDS COVERED	DEADLINE
Japan	**Tax Report – Form 9(3)**	All equity and cash incentive awards	March 31 (April 1, 2019) *
Malaysia	**Appendix C Tax Report – BT / MSSP / 2012**	Option and SSAR exercises, ESPP purchases, RSU vesting	February 28
New Zealand	**Notice to Financial Markets Authority**	Any awards made in reliance on small offering exemption	Within one month of end of company's fiscal year
Philippines	**Securities Report**[2]	Options / RSUs / ESPP / SSAR for which a 10.2 exemption obtained	January 10
Poland	**Securities Report**	ESPP if offer to 150+ employees (even if under employee share plan exemption)	14 days after the allotment of securities under the offering (i.e., 14 days after the purchase of shares under the ESPP)
Portugal	**Tax Report (on Form 19)**	All equity awards	June 30 (report to tax authorities)
	Equity Awards Registry	All equity awards (if local entity bears costs of awards)	January 20 (copy of registry to employees)
Saudi Arabia	**Securities Post-Offer Report**	All equity awards (for offers notified before April 1, 2018)	Within 10 days after the end of the effective period of notification
	Quarterly Report (effective April 1, 2018)	All equity awards	As soon as possible after quarter end
Singapore	**Confirmation Report**	All equity awards that qualify under the ERI Scheme (Note that this scheme expired effective January 1, 2014)	January 31 (to employees)
	Tax Report[3]	All equity awards	March 1
	Tax Deferral Application Form (employer to complete Part 2)	All equity awards that qualify under the QEEBR Scheme	April 15
South Africa	**Section 97 Securities Lodgment** (Form CoR 46.2)	All equity awards	Within 60 business days of end of company's fiscal year

2. Report may also include information related to newly eligible employees if such information has not previously been disclosed.

3. Report on Appendix 8B to Form IR8A or if employer is under the Auto-Inclusion Scheme ("AIS"), employer should submit the information it would normally include in this report directly to the tax authorities electronically. If employer is not under the AIS, the Appendix B (together with the Return of Employee's Remuneration) should be provided to the employees.

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COUNTRY	TYPE OF REPORT	TYPE OF AWARDS COVERED	DEADLINE
Switzerland	**Tax Report**	All equity awards	After year-end
Taiwan	**Non-Withholding Statement**	Options / ESPP (RS / RSUs if company is not withholding)	January 31 (to tax authorities) February 10 (February 11, 2019) * (to employees)
	Withholding Statement	RS / RSUs for companies that are withholding	Same deadlines as above
Thailand	**Securities Report**	Stock options (or RSUs / SSARs if the cost of the shares is recorded on the employer's books as an employee expense)	January 15
		ESPP	Within 15 days of the end of the offering period
United Kingdom	**Share Scheme Returns** • All reports completed online • Templates for the various scheme types (e.g., CSOP, EMI, SAYE, and SIP) available on HMRC's website for purposes of attaching data to online report • Non-tax advantaged share schemes are reported using the "other employment related securities" template	All equity awards - April 6, 2018 to April 5, 2019	July 6
	Registration		One-time registration of plans required to obtain unique reference number to be able to submit the Share Scheme Return
United States	**ISO / ESPP Tax Report**	Incentive stock options (Form 3921) and purchase rights under an employee stock purchase plan under a 423 plan (Form 3922)	January 31 (to employees) February 28 (paper) or March 31 (April 1, 2019) * (electronic) (to IRS)
Vietnam	**Exchange Control Quarterly Report**	All equity awards under a stock plan registered with the State Bank of Vietnam	Within 20 calendar days of the end of each calendar quarter

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IMMIGRATION AND MOBILITY

(I-9 AUDITS, DACA AND H-1B CHANGES)

Dramatic Increase in I-9 Audits

Homeland Security Investigation (HSI), which is the investigative agency within US Immigration and Customs Enforcement, announced in July of 2018 that it had served I-9 audit notices to more than 5,200 employers since January of 2018 as part of a two-phase nationwide worksite enforcement operation. Specifically, in the week of July 16 HSI served 2,738 Notices of Inspection and made 32 arrests. The actions taken during this one week more than doubled the total number of audits issued in the prior fiscal year, which was 1,360.

I-9 audits continue to occur at a higher than usual volume, given the overall increased scrutiny on foreign workers across the board.

Employer Takeaways

1. Develop and disseminate a game plan for when the government knocks on your door. The short deadline to produce documents necessitates immediate action.
2. Connect with those tasked with I-9 completion and retention to know the company's internal I-9 procedures: Who verifies and prepares Form I-9? Where are the I-9s kept? Does the company have an I-9 policy?
3. Consider regular training on I-9 compliance to bring newer employees up to speed and keep in-house expertise current.

IMPACT RATING: **HIGH**

USCIS Seeks To Implement Significant Change To H-1B Cap Process For Employers

On December 3, 2018, the USCIS published for comment a proposed final rule that, if implemented, will dramatically change the H-1B Cap Process for US employers.

Here are the two main changes included in the proposed rule:

1. **Submission of online preregistration requests**. Employers would first submit an online preregistration request to the USCIS for each beneficiary for whom it will file an H-1B Petition. If more registrations are submitted than H-1B visas available (85,000 per fiscal year), the USCIS will run a randomized lottery to determine which registrations are selected to file an H-1B Petition. Petitioners will then be provided a 60-day filing window to submit the H-1B Petition; the timing of the window may vary as the USCIS seeks to stagger its review of H-1B Cap Petitions.

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* Note that the online request does not require the filing of the Labor Condition Application but does require basic information about the position (employer name, EIN and mailing address, information regarding employer's authorized representative and the beneficiary, and Form G-28).

2. **Change in order of review**. 20,000 H-1B visas are allocated annually to those holding a US Master's Degree (or higher), while 65,000 H-1B visas are allocated for all qualified beneficiaries. Under current procedure, the Advanced Degree lottery is run first and the 65,000 visa lottery second. The proposed rule seeks to reverse this order such that the Advanced Degree lottery would occur second.

The public now has 30 days to comment on the proposed role, followed by a review and response period from the USCIS. It is possible that the USCIS will complete the notice and comment period prior to the FY 2020 H-1B cap period (i.e., petitions filed in 2019). The proposed rule includes a severance provision that would allow the change in the order of review of petitions to be finalized without the inclusion of the preregistration system.

Employer Takeaways

The proposed rule would dramatically change the way that companies consider how and when to file H-1B Cap Petitions, and how potential beneficiaries are selected. Here are the key takeaways employers should be aware of:

- Employers would be required to submit an online request for each beneficiary; only one request can be made per beneficiary by an employer.
- The USCIS will notify petitioners of the opening and closing of the preregistration window; it is likely the window will occur during the two weeks leading up to April 1 of each year.
- Once the lottery is run, petitioners will be notified of whether any of its registrations have been selected and include a 60-day window during which the H-1B Petition must be submitted.
- The filing window will likely be staggered, e.g., some employers may receive April 1 to May 31, while other registrations could be provided a filing window of May 1 to June 30.
- Employers cannot substitute beneficiaries once a registration has been selected.

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- Employers must attest, within the registration system, that the petitioner intends to employ the beneficiary consistent with the registration. While the employer is not required to submit the H-1B Petition on behalf of the selected beneficiary, the USCIS will closely monitor potential abuse of the preregistration program (i.e., flooding of registrations by petitioners) and potentially coordinate with other government agencies to seek action against employers they deem to have abused the system.
- Unselected registrations will be kept as backups in the event petitions are not submitted for selected registrations. The USCIS may also reopen the preregistration period if required.
- The USCIS will run the Advanced Degree lottery second in an attempt to maximize the number of selected registrations for beneficiary's with advanced degrees.

IMPACT RATING: **HIGH**

Change in Unlawful Presence Criteria for F, J, and M Nonimmigrants

On May 11, 2018, US Citizenship and Immigration Services (USCIS) posted a policy memorandum changing how the agency calculates unlawful presence for students and exchange visitors in F, J, and M nonimmigrant status. The final Policy Memorandum was issued on August 9th.

The Memorandum specifies that unlawful presence begins to accrue for F, J, and M Nonimmigrants after any of the following occurs:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

For individuals in these visa categories who meet one of these four criteria, and the activity specified above occurred prior to August 9, 2018, the individual began to accrue

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unlawful presence on August 9, 2018. Individuals in these visa categories who meet one of these four criteria and the activity specified above occurred on or after August 9, 2018, the individual would begin to accrue unlawful presence on the date of the disqualifying event.

If an individual accrues over 180 days but less than a year of unlawful presence they are barred from entry into the US for three years. If an individual accrues a year or more of unlawful presence they are barred from entry into the US for ten years. In addition, if an individual has more than one year of unlawful presence in the US in the aggregate and reenters unlawfully, they are permanently barred from entry into the US.

Employer Takeaways

Ensure that all students on all forms of OPT and CPT are following all the rules and requirements for their status. Maintain communication between the foreign national and their designated school official to make sure that the foreign national is in compliance with their F-1 status.

Be aware that if an F-1 previously violated their status they may not know they did so, and might not be made aware until they receive an adverse decision on a subsequent immigration petition or application. Communication between employers and their F-1 employees or prospective employees is crucial so issues can be identified ahead of time and measures can be taken to address any immigration related issues.

IMPACT RATING: **HIGH**

Deferred Action for Childhood Arrivals (DACA) Program Update

Due to federal court orders on January 9, 2018 and February 13, 2018, US Citizenship and Immigration Services (USCIS) resumed accepting requests for extensions of DACA benefits as of February 14, 2018. 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.

The court orders did not extend to initial requests for DACA, so only individuals who previously held deferred action under DACA are eligible for extensions.

USCIS has stated that they will not accept applications for advanced parole from DACA beneficiaries, so individuals who are eligible for extensions will only be able to receive extensions of their deferred action under DACA and employment authorization.

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Employer Takeaways

- Continued communication between employees who are DACA beneficiaries is important to address employee concerns in relation to DACA as well as other immigration-related Executive Orders. Be mindful of company policies during these discussions so policies are not violated.
- Develop a standard communication to remind employees of employment reverification requirements at least 90 days before the date reverification is required.
- 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.

IMPACT RATING: **MEDIUM**

New Notice to Appear Policy Memorandum

On June 28, 2018, USCIS issued a new Notice to Appear (NTA) policy memorandum expanding USCIS' practice of issuing NTAs directly after denials of certain forms. Thus far, USCIS has taken a gradual approach to the implementation of this memo.

Beginning on October 1, 2018, NTAs may be issued on denied status-impacting applications including I-485, Application to Register Permanent Residence or Adjust Status, and Form I-539, Application to Extend/Change Nonimmigrant Status. Beginning on November 19, 2018, USCIS expanded the implementation of this policy to other categories.

According to the policy memorandum, the policy affects the following categories of cases:

- Cases where fraud or misrepresentation is substantiated, and/or cases where there is evidence the individual abused any program related to receiving public benefits. USCIS will issue an NTA in these cases, even if the case is denied for reasons other than fraud.
- Criminal cases where an individual is charged with (or convicted of) a criminal offense, or committed acts that are chargeable as a criminal offense, even if the criminal conduct was not the basis for the denial or the ground of removability. USCIS will, where circumstances warrant, refer cases to ICE without issuing an NTA or adjudicating an immigration benefits.
- Cases where USCIS denied a Form N-400, Application for Naturalization, on good moral character grounds because of a criminal offense.

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- Cases where an individual will be unlawfully present in the US when USCIS denies the petition or application.

At this time, employment-based petitions are not affected by this policy memorandum. However, individuals who file I-485 and I-539 petitions who hold an underlying employment based status and fall under the categories listed above, could still be affected.

Employer Takeaways

Continued communication between employees is important to address employee concerns in relation to policy changes such as this. Open lines of dialogue are critical because it is much easier to advise and address issues at the outset of an immigration filing than after a petition or application has been filed.

Be especially mindful of any issues that might arise during adjustment of status proceedings, and ensure to the best of your ability that all negative information relating to the petition or application is known ahead of time.

It is even more important to continue extending an individual's underlying non-immigrant status while pursuing permanent residence, if it is permitted under the law. This ensures that if there is an adverse outcome, the individual would still have an underlying non-immigrant status to rely upon.

Due to the sensitive nature of the criteria for issuance of NTAs it is equally important to be mindful of company policies during these discussions so policies are not violated.

IMPACT RATING: **MEDIUM**

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LABOR RELATIONS

Employers Must Respond To Weingarten Rights Expansion

The recent decision in *Circus Circus Casinos Inc.* this past summer is a stark reminder that the Obama era, at least at the NLRB, is not over.

Circus Circus imposes an additional administrative step before employers managing union-represented workforces can conduct an investigatory interview during the disciplinary process. Employees' "Weingarten rights" have been expanded such that employers may not proceed with an investigatory interview until a union representative can be identified and obtained. In the past the employee only had the right to have an opportunity to obtain a representative and if unable to do so had to proceed in the representative's absence. Thus, *Circus Circus* has upended Weingarten rights as known for the last forty plus years.

Employer Takeaways

Employers conducting interviews of employees suspected of misconduct are well-served to err on the side of caution and extend union representation whenever the employee mentions: his/her union, his/her steward, or a witness as any one of these comments may probably trigger Weingarten rights under the panel majority's opinion.

More importantly, employers must appreciate and respond to the NLRB's shift in the burden of contacting and obtaining a union representative to attend the interview. Now that burden is the employer's if or whenever the employee appears at an interview without a representative. Without acknowledging it has done so, the panel majority in *Circus Circus* overruled nearly 40 years of precedent.

IMPACT RATING: **HIGH**

The NLRB Issues Guidance To Clarify Its Handbook Rules

Recent guidance issued by the General Counsel for the NLRB is a continuing testament to the NLRB's impact on basic workplace rules. On June 6, 2018, the GC issued a 20-page Memorandum to the NLRB Regional Offices titled "Guidance on Handbook Rules Post-Boeing."

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Under *Boeing*, workplace rules are grouped into three categories:

1. Rules that are generally lawful to maintain.
2. Rules warranting individualized scrutiny.
3. Rules that are presumed unlawful to maintain.

The Memorandum offers additional clarity to NLRB Regional Offices evaluating claims of improper employment policies brought against employer workplace rules under *Boeing*. It articulates the types of work rules expected to fall under each category:

- Category 1 Rules — generally presumed lawful because, when interpreted, they do not prohibit or interfere with an employee's NLRA rights, or the potential adverse impact is outweighed by business justifications (*e.g.*, requiring authorization to speak for the company).
- Category 2 Rules — warrant individualized scrutiny because of their potential adverse impact on NLRA rights (*e.g.*, broad conflict-of-interest rules that do not specifically target fraud and self-enrichment). The legality of such rules is evaluated on a case-by-case basis.
- Category 3 Rules — generally presumed unlawful because their potential to interfere with the exercise of protected rights outweighs possible justifications (*e.g.*, rules prohibiting employees from disclosing salaries or the contents of employment contracts).

Employer Takeaways

Following *Boeing*, the NLRB's Memorandum provides further guidance regarding a way forward for employers adopting generalized work rules and provisions in handbooks. Practically, under this guidance, it will generally be less difficult for an employer to discipline or terminate an employee for having compromised an employer's legitimate business interests.

However, this guidance does not allow employers to take such actions carte blanche. Employers are encouraged to consult legal counsel before terminating employees based on social media posts or workplace behavior. Employers should also review their handbooks and work rules in light of the specific examples mentioned in the Memorandum.

IMPACT RATING: **MEDIUM**

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Agreeing To Mediation May Be Binding When Expressly Agreed To By The Parties To A CBA

Mediation is often embraced as an alternative method of dispute resolution for its perceived advantages over traditional lawsuits. Many labor unions and employers frequently choose mediation as an alternative to arbitration.

Embracing mediation as a way to avoid litigation is not a sure-fire solution, however, as one employer recently learned. In a typical collective bargaining agreement, disputes may be sent to mediation if both parties agree to do so. In some agreements, the mediator's decision is binding rather than just advisory.

In *Unite Here Local 30 v. Volume Services, Inc.*, the Court considered whether, having agreed to binding mediation, the union could unilaterally declare the mediation non-binding and, when dissatisfied with the result, demand arbitration. Answer: no.

The Court examined the language of the CBA and determined that it expressly provided that when selected by the parties, mediation was binding. The Court further determined that the CBA did not give either party the right to declare its binding mediation process was in fact non-binding. Invoking the well-known principle that parole evidence cannot be used to vary the unambiguous terms of a written contract, the Court held that the union did not have the right to repudiate mediation and arbitrate its grievance.

Employer Takeaways

Unite Here Local 30 illustrates how procedures to avoid litigation are only as good as the integrity of the parties to the agreement. This decision also demonstrates that, sometimes, the paper an agreement is written on may be ironclad even if not litigation-proof.

Employers who adopt dispute resolution processes must be prepared to live with the consequences because a second chance is unlikely.

IMPACT RATING: **MEDIUM**

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NLRB Proposes A More Employer-Friendly Joint Employer Standard

In February of this year, the NLRB attempted to overturn the Obama-era *Browning-Ferris* joint employer standard through case law. That was a dead end so in September the Board sought to return to the pre-2015 standard through rulemaking.

Under the Board's current iteration of the joint employer standard, a company does not have to exercise direct control over workers to be liable as a joint employer. Instead, any company who indirectly controls another business's workers, or even simply reserves the right to do so, may be deemed a joint employer. Under this overly broad standard, in some cases, companies may be obliged to collectively bargain with the workers of another company's employees, or held liable for another company's unfair labor practices.

The Board's new proposed rule narrows a company's liability as a joint employer to only those occasions in which it "possess[es] and actually exercise[s] substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." Requiring "direct and immediate" control returns the legal standard to the pre-*Browning Ferris* days that are more friendly to franchises, businesses that rely on outsourcing labor, companies using staffing agencies, etc.

Employer Takeaways

The proposed rule is a welcome development because, if successful, it means fewer companies will be at risk for joint employer liability. It is important to note, however, that the proposed rule applies only to labor-related decisions. Courts evaluating joint employer status for other non-labor reasons would still be free to apply their own legal tests.

(On a related note, in November, in the Second Circuit, the Southern District of New York ruled that Domino's Pizza Franchising LLC, a franchisor, did not exert enough control over its franchisee to warrant joint employer status. This meant Domino's did not have to face claims brought under the Fair Labor Standards Act and the New York Labor Law by current and former employees of a Domino's franchisee.
Read more HERE.)

IMPACT RATING: **MEDIUM**

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GLOBAL TRENDS

(GENDER PAY, #METOO, BUSINESS CHANGE AND MODERN WORKFORCE)

GENDER PAY EQUITY ON THE WORLD STAGE

2019 Predictions

Gender equality in the workplace continues to be top of mind for multinational employers. The gender pay gap relates to the average difference in pay between men and women. Pay equity or equal pay relates to the question of whether men and women are paid equally for equal work. Many organizations have a gender pay gap; this is typically influenced by a variety of issues, but particularly the lack of women at senior levels of the organization.

Many countries outside the US have gender pay gap audit requirements, posting or other obligations (such as Australia, Canada, Germany and the UK). The requirements vary greatly per country and multinational employers should place special care in understanding current requirements, best practices and upcoming legislation and guidance published by local governments in each country. For a full picture though, a company will want to examine which of the existing D&I policies and recruiting practices have shifted the needle, which have not and why, by country and on a global level as well.

You can stay up to date on trends and new legislation by regularly consulting our Gender Pay Hub.

Employer To-Dos

1. Conduct privileged audits to determine whether pay disparities exist, and prospectively determine justifications for wage disparities.

   Be mindful of data privacy regulations if/when transferring personal information.

2. If your company is expanding into new countries, seek legal advice about gender pay / pay equity requirements.

3. Properly train managers who make compensation decisions about the impact of different initial salary offers, raises and bonuses.

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#METOO GOES GLOBAL

2019 Predictions

The #MeToo movement is not confined to the US. Although the pure legal risks to companies can vary around the world, many companies are now much more sensitive to workplace harassment and the reputational risks which can follow. Companies have been addressing this by being more willing to take such complaints seriously, and taking swift action when the complaints are found to be credible. In parallel, many companies are working to strengthen their diversity and inclusion programs in order to attract and retain talent and to reduce harassment in the workplace.

As employees become more aware of their rights, question cultural norms and speak out about misconduct, there has been a sharp rise in sexual and gender-based harassment and discrimination claims in the workplace. For example, in Australia, in 2018, one in three workers said that they had been sexually harassed at work over the last five years, compared with one in five from a 2012 survey and one in ten in 2003, according to the Australian Human Rights Commission national survey.

In response to an increase of formal and informal claims many countries are taking action to increase protections of women against sexual harassment in the workplace. Recent legal developments include the following:

- **Korea**: On January 29, 2018, a female prosecutor of workplace sexual harassment cases participated in a televised interview, which brought public attention to workplace sexual harassment issues. After the interview, there were at least 3 workplace sexual harassment claims that made headlines, and a new sexual harassment law was implemented. Under the law, any person can report to an employer the occurrence of sexual harassment in the workplace. Once a report is received, the employer is obligated to conduct an investigation and take necessary measures to protect the victim, such as changing the victim's place of work or placing the victim on paid leave. Any employer that fails to meet these obligations may be required to pay an administrative fine of up to KRW 5 million (approximately $4,400). An employer cannot retaliate against the victim or person who reported the incident, and violations carry a criminal fine of up to KRW 30 million (approximately $26,500). Separately, recent court judgments have awarded victims of workplace harassment considerably higher monetary damages than in the past.

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- **China**: On September 5, 2018, the National People's Congress of the People's Republic of China publicized a new draft of Several Sections of the Civil Code on its official website, seeking public comments on the draft. Article 790 of the draft provides more detailed regulations on sexual harassment protections and follows a wider and continuing trend in China to protect people from sexual harassment. Read more HERE

- **Kingdom of Saudi Arabia**: On June 8, 2018, an anti-harassment law came into effect. The law aims to protect all individuals from words, acts, implicit behavior or innuendo of a sexual nature targeting an individual's body, modesty or personal life by any means, including modern technology and communications, in accordance with Islamic Sharia law principles of mutual respect.

- **France**: Since January 1, 2018, companies with more than 50 employees must put in place a whistleblowing scheme aimed at protecting whistleblowers when they report an offense, such as sexual harassment. When an offense is reported, a company is obligated to carry out an internal investigation. Provided the reported facts appear to be serious on their face, failure to carry out such an investigation can expose the recipient of the report to a 1 year prison sentence and fines of up to EUR 15,000 (approximately $17,000). Read more HERE.

Employer To-Dos

1. Get buy-in and engagement from senior leadership. In order to promote a harassment-free environment, employees need to know and feel confident that they can speak up without fear of retaliation. A strong, public commitment from management can go a long way to reinforcing that message.
2. Review and update the company's anti-harassment policies. Although specific laws will vary from country to country, most companies can set forth broad global anti-harassment policies which can be supplemented or adapted for the specific requirements of local jurisdictions.
3. Conduct regular sexual harassment prevention training for all employees, preferably in person. Having an outside trainer partnering with a senior manager in HR, legal or compliance departments reinforces that the company takes the training seriously, and can increase the opportunity to spot and prevent harassment before it gets out of hand.
4. Take complaints seriously, and conduct an immediate, thorough and impartial investigation into credible allegations of harassment.

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5. Take prompt remedial action(s) against the alleged harasser where appropriate, including separating the alleged harasser from the complainant, keeping in mind local law standards for termination and data privacy requirements.
6. Develop and maintain compliant information technology systems, and match data privacy policies, to preserve the company's ability to monitor company IT devices and systems and to conduct internal investigations in response to harassment complaints.

PREPARING FOR AND MANAGING GLOBAL BUSINESS CHANGE

2019 Predictions

Many global companies will continue to restructure their operations in the quest for a more efficient workforce and to save costs. In some instances, the need for consolidation and reorganization stems from selling off unprofitable business units in favor of merging with higher performing ones.

Also, while the global transactions market remained remarkably robust in 2018, there are still real threats to free trade and investment flows and there remains potential for a much more serious outbreak of protectionism and isolation. As such, it is incumbent upon businesses to try to guard against that risk by taking proactive measures to increase flexibility and stay nimble.

(Read our Global Transactions Forecast 2019 HERE)

Cost-Cutting Measures and Flexible Compensation Strategies

If the company is facing bleak economic prospects, it may be tempting to consider a number of cost-cutting measures (e.g., reduce working schedules, force unpaid time off or vacation, temporarily shut down certain operations, or implement pay cuts, etc.). Outside the US, whether each of these initiatives can be implemented and the difficulty of implementation varies by jurisdiction.

The following matters should be considered in advance of any unilateral actions:

1. **Assess the source of the entitlement which the company seeks to change <u>and</u> how the entitlement was originally granted to the employees in a particular jurisdiction (e.g., promised in the employment agreement, policy, work rules,**

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etc.). For certain entitlements, the company may not be able to implement the change at all (e.g., a wage freeze may not be possible under the applicable CBA).

2. **Outside the US, employers generally need to obtain employee consent to proposed changes to terms and conditions of employment**. In some jurisdictions, a valid economic justification is also required. The company will need to prepare appropriate documentation and think through the economic justification before approaching the workforce.
3. **In addition to employee consent, there may be a particular legal process that must be followed before the change can be validly implemented**. The process often involves a notice and consultation procedure either with the employees or their representatives (e.g., unions, works councils). Identify any employee representative bodies and consider the company's obligations vis-à-vis each one based on the proposed measures.
4. **Consider whether government approval and/or notice is required**.
5. **Any communications to employees regarding proposed changes should be carefully drafted so that they do not apply US norms outside the US since many concepts do not translate**. Communications should generally use anticipatory and preparatory language to avoid giving the premature impression that the decision will be conclusively carried out potentially in violation of certain legal requirements. Translations may be required in some countries.
6. **Assuming the change can be rolled out, determine how to properly document the change (e.g., by way of a formal employment agreement amendment, side letter, amendment to work rules or policies, etc.) so that it is legally valid**.

Redundancies / Terminations

If the company is not able to successfully cut costs either by divesting its business to a third party or by implementing other cost-cutting measures, it may consider carrying out redundancies. For jurisdictions outside the US, it is essential to prepare in advance and consider the following items before any employee communications launch:

1. **Rationale for the Terminations**: If the impacted employees are based outside the US, the company should consider whether its rationale for the redundancies rises to the level of legally required cause under local law to justify a unilateral termination or whether the company will need to offer an ex-gratia separation payment to incentivize employees to leave mutually. Many jurisdictions have amended their termination laws in recent years, and certain countries that previously did not require just cause (e.g., Singapore) now hold employers to a higher standard. Once

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the rationale is identified, determine whether a unilateral or mutual termination process is the most efficient and legally sound way of proceeding. This will impact the overall termination process and timeline.

2. **Protected Employees and Section Process**: In order to identify which employees will be made redundant, consider whether any employees are protected from termination under local law (e.g., employees on leave, union members, etc.) and whether any special "social selection criteria" must be applied in selecting employees for the termination. A number of jurisdictions require employers to consider specific selection criteria such as seniority, age, number of dependents, and disability, before selecting impacted employees. Often, if the selection criteria are not applied, impacted employees may challenge their termination in court and seek reinstatement and/or damages.
3. **Searching for Alternative Employment**: Under applicable local law, the company may be required to consider alternatives to terminations such as searching for alternative available positions that the employee is capable of performing either within the employing entity or the group. Any such efforts should be carefully documented.
4. **Mass Redundancy Triggers**: Confirm that the proposed redundancies will not trigger local mass dismissal laws (analogous to the US's WARN Act) such that additional government and/or employee notice and consultation obligations are triggered. For example, the company may be required to negotiate a social plan with a works council.
5. **Planning the Termination Process**: Once the company has determined which employees should be selected for a termination and whether to pursue a unilateral or mutual termination strategy, map out the termination process taking into account any notice and consultation obligations. In some countries (e.g., UK and Australia), employers are required to follow due process in notifying the impacted employees and provide the employees with an opportunity to respond to the proposal and set forth ideas regarding ways in which the redundancy may be avoided. As such, set time aside for meetings with employees and / or their representatives. As part of this process, the company may also need to notify unions or works councils that represent the impacted employees.
6. **Calculating Entitlements**: Calculate the employees' statutory and contractual notice, and severance entitlements. Determine whether the notice period can be paid out or whether the employee will continue working or be placed on garden leave. Consider when the company wants to cut off access to its electronic systems and whether the desired approach is legally permissible.
7. **Executing Documents**: If the company will be soliciting a mutual separation agreement and a release, consider the ex-gratia payment it is willing to offer. The amount often turns on the strength of the company's justification, the employee's individual circumstances and market practices.

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Employer To-Dos

Implementing cost-cutting measures and redundancies outside the US generally requires carefully planning and evaluation of local legal requirements.

Since these laws are rapidly changing in many jurisdictions, we recommend reaching out to your Baker McKenzie lawyer to confirm that there are no new developments which may impact the procedural processes, notice requirements or costs in the particular jurisdiction.

Be sure to leave sufficient time to map out the anticipated cost-cutting measures, process for implementation, and any documentation that will need to be prepared to validly implement the change.

MODERN WORKFORCE

2019 Predictions

The nature of work in an increasingly globalized world is perpetually changing due to the rise of contingent workers, increased demand for flexible working schedules, and changing skill requirements and talent pools. Like it or not, this "modern workforce" is here to stay. A 2018 study by Deloitte identified approximately 77 million formally recognized freelancers in Europe, India, and the United States alone.

Embracing the modern workforce offers global businesses various benefits not realized by the traditional employer-employee relationship. The modern workforce allows businesses to capitalize on increased flexibility, reduced costs, fewer administrative burdens, and swift access to high-level talent. However, as alternative work arrangements become more common, so too do the challenges of managing this workforce. Businesses must confront risk factors such as employee misclassification and related litigation, modern slavery, and equal pay for equal work for fixed-term employees / contingent employees. In some countries, misclassification alone can result in severe fines, including criminal liability of board members. In fact, in some regions, such as Latin America, the rise of the modern workforce has lead to greater regulation of outsourcing.

One of the key concerns facing modern businesses as a result of the rise of the modern workforce includes the risk of co-employment, or joint employer liability. Joint

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employer liability arises when two or more businesses exercise some level of control over the work or working conditions of employees. The increasing use of alternative workforce arrangements with independent contractors, sourcing firms, and other third-parties exposes businesses utilizing such services to the risk it may be deemed to be the employer of the contingent workers as well. If subject to joint employer liability, a business may also be held liable for the third party's employment law violations.

While joint-employer liability is certainly a hot topic in the US, it is not unique to the US. Different countries across the world are adapting to such concerns in distinct ways. A few recent examples are outlined below:

- **Australia**: Australia recently enacted the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 to protect against the exploitation of the contingent workforce. The Amendment imposes liability on a franchisor if it knew or could reasonably be expected to have known that its franchisee would breach employment laws, or that a violation "of the same or a similar character" was likely to occur. The framework for determining whether joint liability exists hinges on the degree of influence or control over the franchisee's activities. Liability, however, may not attach if a business takes "reasonable steps" to prevent a franchisee's breach of Australia workplace laws.

- **Canada**: Ontario recently made it easier to establish that a business is a "related employer" under the Employment Standards Act, 2000. Separate legal entities may be considered one employer if a company and its third party service provider manage related business activities. Under the new legislation, workers may file ESA complaints against the company, the third party service provider, or both. This legislation may also broaden the Ministry of Labour's jurisdiction to inspect companies and engage directly with companies regarding enforcement initiatives under the ESA. British Colombia has also joined the chorus in Canada. Recent decisions from the British Colombia Human Rights Tribunal demonstrate that companies that exercise control over their contingent workforce may be liable for human rights breaches committed by the contingent workforce.

- **Mexico**: The Mexican Federal Labor Law may impose joint liability on two or more companies for labor and social security obligations owed to an employee, including statutory severance. As in the US, in Mexico such risks are further exacerbated when a business exercises strict control and supervision over its contingent workforce. Where a contingent worker files a labor claim against the business, or both the business and the third party service provider, claims typically allege that

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the business benefited from the worker's services. In an effort to alleviate this risk, all employment documentation vis-à-vis the contingent workers should refer only to the service provider.

- **United Kingdom**: The UK continues to grapple with defining the employment status of those working in the gig economy. Employers in the UK face repeated litigation over the status of contingent workers, focused principally on employee misclassification. Misclassification stands at the forefront because workers not classified as employees have minimal employment rights. As a result, contingent workers often do not benefit from statutory entitlements including statutory holiday pay and protection against unfair dismissal. The UK misclassification analysis also focuses on the amount of control a company exercises over its contingent workforce. If the company exercises a high degree of control over the activities performed by an individual, that individual may be erroneously classified as a contingent worker and the company may be liable for certain statutory workplace rights. Despite the attention this topic has drawn in the UK, however, substantial legislative reform and change for such workers have been slow to come.

Employer To-Dos

While integrating the modern workforce into a company's business strategy may be commercially attractive, businesses should be wary of the risks posed by relying on the gig economy to bolster their workforce.

- Mitigate potential claims at the onset through audits and risk management techniques.

- Our attorneys can conduct global compliance audits to advise and provide support to address the risks arising across multiple functional areas, such as employment, remuneration, benefits, mobility, data privacy, tax, and protection of confidential information/trade secrets. Our audit service also enables us to give practical advice before a joint employer or misclassification claim is alleged.

- Additionally, we offer compliance counseling to help your company stay abreast of recent developments in this space.

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